

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.129 OF 2007

1. Ashokkumar Nandlal @ Girdharilal
Maliwal,
Age; 65 yers, Occ. Business,
R/o; Nanded, Dist. Nanded.
2. Jayprakash Nandlal @ Girdharilal
Maliwal,
Age; 55 years, Occ. Agriculture
R/o; Nanded, Dist. Nanded.
3. Subhash Nandlal @ Girdharilal
Maliwal,
Age; 48 years, Occ. Agriculture,
R/o; Nanded, Dist. Nanded.

APPELLANTS
(ORIG. PLAINTIFFS)

VERSUS

1. Jaswantsing Pyarasing Sikh,
(Since deceased, through legal
representatives). ..Deft. No. 1.
- 1A. Jasbirkaur w/o Jaswantsingh Sikh,
Age; 81 yers, Occ. Household,
- 1B. Ranjan w/o Surindersingh Sodhi,
Age; 51 years, Occ. Household,
- 1C. Pinki @ Pritam w/o Rajendrasingh Sodhi,
Age; 46 years, Occ. Household,

1A to 1C R/o; of Dargah Road,
State Bank Colony, Osmanpura,
Aurangabad.
2. Narendrakumar Shivprasadji Maliwal,
Age; 54 yeas, Occ; Agri & Business,
R/o; 'B' Wing, Flat No. 4, Shivaji Complex
Anand Nagar, Nanded, Dist. Nanded. ..Deft.No. 2.

3. Scal Investments Limited,
A Public Limited Co. Registered under
Companies Act, having office at
Neville House, J.N. Heredia Marg,
Ballard Estate, Mumbai – 400038. ..Deft.No.3.
4. The Bombay Dying & Manufacturing Co.Ltd.
Nevellie House, J.N. Heredia Marg,
Ballard Estate, Mumbai – 400 038. ..Deft.No.12.
Through it's General Manager,
(Of Properties)
5. Ambika Yog Kutir
Through its Secretary, Mahavir Society,
Shivajinagar, Nanded. ..Deft.No.26.
6. Rachana D/o Subhashchandra Kabra,
Age; 26 years, Occ; Household,
R/o; "Saakar Group", 1st Floor,
Shukla Complex, I.T.I. Corner,
Workshop Road, Nanded. ..Deft.No.31.
7. Ganesh Narayanrao Kulkarni
Age; 50 years, Occ; Service,
R/o; Balaji Complex, Near Bulbule Niwas,
Pundalikwadi, Mahavir Chowk, Nanded.
..Deft.No.35.
8. Mayadevi w/o Kishachand Rizwani,
Age; 54 years, Occ; Household,
R/o; Ganeshnagar,
C/o; Narayan Veer Bakery, Vazirabad
Nanded. ..Deft.No.43.
9. Bharatkumar V. Kabra
Age; 32 years, Occ; Business,
R/o; Saakar Group, First Floor,
Shukla Complex I.T.I. Corner Workshop
Road Nanded. ..Deft.No.56.
10. Smt. Leeladevi V. Kabra
Age; 51 years, Occ; Household,
R/o; Saakar Group, First Floor,
Shukla Complex I.T.I. Corner Workshop
Road Nanded. ..Deft.No.57.

11. Sow Madhuri w/o Ramesh Somani
Age; 57 years, Occ; Household,
Flat No. 106, Sanman Garden,
Borban Vazirabad, Nanded. ..Deft.No.60.
12. Sow. Padma w/o Asuda Hemrajani
Age; 50 years, Occ; Household,
R/o; Bhore Complex, Mahavir Chowk,
Nanded. ..Deft.No.73.
13. Mohan s/o Balaprasad Kabra
(Deceased Through L.R.s)
- 13A. Meena Mohan Kabra,
Age; 46 years, Occ; Household,
- 13B. Rahul Mohan Kabra,
Age; 24 years, Occ; Education,
- 13C. Subham Mohan Kabra
Age; 19 years, Occ; Education,
- 13A to 13C are Resident of
Flat No. 1, 1st Floor, 'D' Wing,
Sahyog Chambers, Shrinagar,
Main Road, Nanded. ..Deft.No.76.
14. Sow. Sushma w/o Dharchand Kala,
Age; 51 years, Occ; Household,
R/o; 'Sudharam' Viswa Nagar,
Nanded. ..Deft.No.77.
15. Smt. Shakuntala Manohar Jain,
Age; 50 years, Occ; Household,
R/o; Hingoli, Dist. Hingoli. ..Deft.No.78.
16. Vasant Vinod Kabra
Age; 24 years, Occ; Service,
R/o; C/o; Hindustan Paper Products,
Station Road, Mahavir Chowk,
Nanded. ..Deft.No.92.
17. Sunita Subhash Kabra,

Age; 53 years, Occ; Household,
R/o; IInd Floor, Sai Chamber,
Shrinagar, Workshop Road,
Nanded.

..Deft.No.93.

18. Vilas s/o Dinanathrao Vyavhare,
Age; 52 years, Occ; Agri & Business,
R/o; Chinvhgavan,
Tq. Hadgaon, Dist. Nanded. ..Deft.No.39.
19. Pratap Shridhar Deshmukh
Age; 52 years, Occ; Agri & Business,
R/o; Sarsam Tal. Hadgaon, Dist. Nanded
A/P. Parasnagar, Shelgaonkar Niwas,
Nanded. ..Deft.No.69.
20. Sham Shridhar Deshmukh,
Age; 50 yrs, Occ; Business,
R/o; Sarsam Tal. Hedgaon,
Dist. Nanded,
A/P. Parasnagar, Shelgaonkar
Niwas, Nanded. ..Deft.No.70.

..RESPONDENTS

WITH

**CROSS OBJECTION PETITION (STAMP) NO. 4445 OF 2007
IN
FIRST APPEAL NO. 129 OF 2007**

Narendrakumar s/o Shivprasadjji Maliwal,
Age; 54 years, Occ; Agril & Business,
R/o; B Wing, Flat No. 4, Shivaji Compex
Anand Nagar, Nanded.

OBJECTION PETITIONER

(Orig. Deft. No. 2
and Respondent No. 2
in First Appeal)

VERSUS

1. Ashokkumar Nandlal @ Girdharilal Maliwal,
Age; 65 years, Occ; Business,
R/o; Nanded.

2. Jayprakash Nandlal @Girdharilal Maliwal,
Age; 55 years, Occ; Agril, R/o; Nanded.
3. Subhash Nandlal @ Girdharilal Maliwal,
Age; 48 years, Occ; Agril, R/o; Nanded.
4. Jaswantsingh Pyarasingh Sikh,
(Since deceased, through legal
representatives)
 - 1A. Jasbirkaur w/o Jaswantsingh Sikh
Age; 81 years, Occ; Household,
 - 1B. Ranjan w/o Surindersingh Sodhi
Age; 51 years, Occ; Household,
 - 1C. Pinki @ Pritam w/o Ranjdnerasingh
Sodhi,
Age; 46 years, Occ; Household,

All 1-A to 1-C resident of
Dargah Road, State Bank Colony,
Osmanpura, Aurangabad.
5. Scal Investments Limited,
A Public Limited Co. Registered under
Companies Act, having office at
Neville House, J.N. Heredia Marg,
Ballard Estate, Mumbai.
6. The Bombay Dying & Manufacturing Co.Ltd.
Nevellie House, J.N. Naredia Marg,
Ballard Estate, Mumbai – 400 038.
Through it's General Manager,
(of Properties)
7. Ambika Yog Kutir
Through its Secretary, Mahavir Society,
Shivajinagar, Nanded.
8. Rachana D/o Subhashchandra Kabra,
Age; 26 years, Occ; Household,
R/o; "Saakar Group", 1st Floor,
Shukla Complex, I.T.I. Corner,
Workshop Road, Nanded.

9. Ganesh Narayanrao Kulkarni
Age; 50 years, Occ; Service,
R/o; Balaji Complex, Near Bulbule Niwas,
Pundalikwadi, Mahavir Chowk, Nanded.
10. Mayadevi w/o Kishachand Rizwani,
Age; 54 years, Occ; Service
R/o; Ganeshnagar,
C/o; Narayan Veer Bakery, Vazirabad
Nanded.
11. Bharatkumar V. Kabra
Age; 31 years, Occ; Business,
R/o; Saakar Group, First Floor,
Shukla Complex I.T.I. Corner Workshop
Road Nanded.
12. Smt. Leeladevi V. Kabra
Age; 51 years, Occ; Household,
R/o; As above.
13. Sow Madhuri w/o Ramesh Somani
Age; 57 years, Occ; Household,
Flat No. 106, Sanman Garden,
Borban Vazirabad, Nanded.
14. Sow. Padma w/o Asuda Hemrajani
Age; 50 years, Occ; Household,
R/o; Bhore Complex, Mahavir Chowk,
Nanded.
15. Mohan s/o Balaprasad Kabra
Age; 49 years, Occ; Business,
R/o; Flat No. 1, 1st Floor,
D-Wing, Sahyog Chambers,
Shrinagar, Main Road, Nanded.
16. Sow. Sushma w/o Dharchand Kala,
Age; 51 years, Occ; Household,
R/o; 'Sudharam' Viswa Nagar,
Nanded.

17. Smt. Shakuntala Manohar Jain,
Age; 50 years, Occ; Household,
R/o; Hingoli, Dist. Hingoli.
18. Vasant Vinod Kabra
Age; 24 years, Occ; Service,
R/o; C/o; Hindustan Paper Products,
Station Road, Mahavir Chowk,
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19. Sunita Subhash Kabra,
Age; 53 years, Occ; Household,
R/o; IInd Floor, Sai Chamber,
Shrinagar, Workshop Road,
Nanded.
20. Vilas s/o Dinanathrao Vyavahare,
Age; 52 years, Occ; Agri & Business,
R/o; Chinvhgavan,
Tq. Hadgaon, Dist. Nanded.
21. Pratap Shridhar Deshmukh
Age; 52 years, Occ; Agri & Business,
R/o; Sarsam Tq. Hadgaon, Dist. Nanded
A/P. Parasnagar, Shelgaonkar Nivas,
Nanded.
22. Sham Shridhar Deshmukh
Age; 50 yrs, Occ; Business,
R/o; Sarsam Tal. Hadgaon,
Dist. Nanded,
A/O. Parasnagar, Shelgaonkar
Niwas, Nanded.

RESPONDENTS

(Respdt. No. 1 to 3 Org.
Plaintiffs/Appellants)
and Respdt. No. 4 to
20 Org. Respondents.

WITH

CIVIL APPLICATION NO. 2379 OF 2011

IN

FIRST APPEAL NO. 129 OF 2007

(Ganesh Narayanrao Kulkarni v. Ashokkumar Nandlal @
Girdharilal Maliwal and Ors)

WITH

CIVIL APPLICATION NO. 1324 OF 2009
IN
FIRST APPEAL NO. 129 OF 2007

WITH

CIVIL APPLICATION NO. 4609 OF 2008
IN
FIRST APPEAL NO. 129 OF 2007

WITH

CIVIL APPLICATION NO. 979 OF 2007
IN
FIRST APPEAL NO. 129 OF 2007

WITH

CIVIL APPLICATION NO. 9207 OF 2011
IN
FIRST APPEAL NO. 129 OF 2007

WITH

CIVIL APPLICATION NO. 8584 OF 2018
IN
FIRST APPEAL NO. 129 OF 2007

(Ashokkumar Nandlal @ Girdharilal Maliwal & Ors Vs
Jaswantsingh Pyarasingh Sikh and Ors)

WITH

CIVIL APPLICATION NO. 1312 OF 2009
IN
FIRST APPEAL NO. 129 OF 2007

(Narendrakumar Shivilal Maliwal v. Ashokkumar Nandlal @
Girdharilal Maliwal & Ors)

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Shri.V.J. Dixit, Senior Counsel, instructed by Mr.
S.V. Dixit, Advocate for Appellants.

Respondent No. 1A to 1C served through Paper
Publication.

Mrs. Anjali Dube (Bajpai), Advocate for Respondent No.
2.

Respondent No. 3 is served.

Mr. M.V. Deshpande, Advocate for Respondent No. 7
Mr. R.R. Karpe, Advocate for respondent Nos. 18,19 and
20.

Respondent No. 12 is dismissed.

Appeal is withdrawn as against respondent Nos. 13A to
13C

Mr. H.V. Patil, Advocate for respondent No. 15
Mr. M.M.Nerlikar, A.G.P. for respondents/State

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**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.**

DATE : 27th FEBRUARY, 2019

JUDGMENT (PER : SUNIL K. KOTWAL, J.) :

This appeal is directed by original plaintiffs against the judgment and decree of dismissal of Special Civil Suit No.51/1990 filed against the defendants. The respondents in the appeal are original defendants. Even defendant No.2 has filed Cross-Objection against the findings of the Trial Court against Issue Nos.5 and 10.

2. The facts leading to institution of this appeal are that the plaintiffs filed Suit bearing Special Civil Suit No.51/1990 for redemption of mortgage of land

Survey Nos.50, 52 and 53, situate at Vazirabad, Nanded and in the alternate, for decree for reconveyance of the suit land under the Agreement of Reconveyance dated 15th February, 1959 with the consequential relief of possession.

3. Undisputed facts between the parties are that late Balram s/o Gangaram Maliwal was the original owner of suit land and he was the grandfather of the plaintiffs and defendant No.2 – Narendrakumar. Balram had two sons namely Shivprasad and Nandlal alias Girdharilal. The plaintiffs are the sons of Nandlal, who died in the year 1987. Defendant No.2 is the son of Shivprasad. During the lifetime of Balram, out of land Survey No.39 (now Survey Nos.50, 52 and 53), admeasuring 22 Acres 8 Gunthas, situated at Vazirabad, Nanded, 18 Acres of land from northern side (suit land) was leased out to one Firoz Shah Pistonji Mehta for the purpose of running Ginning and Pressing factory. After the death of Balram, fresh agreement of lease was executed by the sons of Balram for the period of 99 years or till existence of factory on the suit land, whichever event occurs earlier, at the annual rent of Rs.900/-. Subsequently, the leasehold rights were transferred in

favour of M/s Nowsherwanji Wadia, which subsequently amalgamated with Bombay Dying. Thereafter, the said factory was run by defendant No.3. Even it is not disputed that after the partition of joint family properties in between Nandlal and his brother Shivprasad, the suit land was allotted to the share of Nandlal and he became the exclusive owner of the suit land. Even the execution of registered sale-deed by Nandlal Maliwal in favour of defendant No.1 on 22nd September, 1958 for the consideration of Rs.6000/- and subsequent transfer of the suit land by defendant No.1 in favour of defendant No.2 on 18th June, 1979, is an admitted fact in between the parties. The dispute is mainly regarding validity of the sale-deed dated 18th June, 1979, executed by defendant No.1 in favour of defendant No.2.

4. The case of the plaintiffs, in brief, is that in fact, the execution of sale-deed by Nandlal in favour of defendant No.1 on 22nd September, 1958, was transaction of mortgage as Nandlal borrowed loan of Rs.6000/- from defendant No.1 to satisfy the money decree passed against him in Regular Civil Suit No.1212/1956. The suit land was to be reconveyed by

defendant No.1 to Nandlal after receipt of amount of Rs.12,000/- within period of eight years from the date of execution of the sale-deed. If the principal amount could not be paid within period of eight years, then Nandlal was at liberty to pay Rs.18,000/- within next eight years and get reconveyed the suit land from defendant No.1. Subsequent extension of next eight years was also granted on payment of Rs.24,000/- for execution of Reconveyance Deed. As a last chance, defendant No.1 agreed to reconvey the suit property to Nandlal till 22nd September, 1990 on repayment of total amount of Rs.30,000/-. ON the date of execution of sale-deed, defendant No.1 did not possess money lending licence and therefore, by executing subsequent unregistered agreement dated 15th February, 1959, the abovesaid condition of reconveyance was embodied in the Agreement of Reconveyance. However, till the death of Nandlal in the year 1987, he could not repay the borrowed amount and could not get reconveyance of the suit land from defendant No.1. Defendant No.1 was well aware about this transaction of mortgage. Taking advantage of the name of father of defendant No.2 in the Record of Right of suit land, he fraudulently obtained sale-deed of the suit land from defendant No.1 on 18th

June, 1979, posing himself as member of joint family of deceased Nandlal and plaintiffs. Accordingly, plaintiffs prayed for redemption of mortgage and in the alternate, decree for reconveyance of suit lands. The subsequent transactions in between defendant No.2 and remaining defendants is not relevant for decision of this appeal.

5. Defendant No.1 filed written statement (Exh-392) and halfheartedly admitted the suit claim and the transaction in between Nandlal and defendant No.1.

6. By filing written statement (Exh-287), defendant No.2 countered the suit claim by contending that the transaction dated 22nd September, 1958 in between Nandlal and defendant No.1 was the transaction of outright sale and not the transaction of mortgage by conditional sale. He has specifically denied the subsequent agreement dated 15th February, 1959 alleged to have been executed by defendant No.1 in favour of Nandlal and contended that it is sham and forged document. He contended that he validly purchased the suit land from defendant No.1 for the consideration of Rs.30,000/- under the registered sale-deed dated 18th June, 1979. He has specifically denied the allegation of collusion with defendant No.1. According to

defendant No.2, the suit is filed by the plaintiffs in collusion with defendant No.1. He has also raised objection regarding bar of limitation.

7. The learned Trial Court framed issues at Exh-1008. After considering the evidence placed on record by both the parties, the Trial Court held that the transaction dated 22nd September, 1958 in between Nandlal and defendant No.1 is not transaction of mortgage. The Trial Court also held that the plaintiffs could prove Agreement dated 15th February, 1959 as well as their readiness and willingness to perform their part of the contract. In the result, though the Trial Court held that the suit claim is within limitation, the suit was dismissed with costs. Therefore, this appeal arises.

8. Heard Shri V.J. Dixit, learned Senior Counsel for the appellants, Smt. Anjali Dube (Bajpai), learned counsel for respondent No.2 and Shri M.V. Deshpande, learned counsel for respondent No.7.

9. Shri Dixit, learned Senior Counsel for the appellants submits that as the father of the plaintiffs was in dire need of money to satisfy the money decree passed in Regular Civil Suit No.1212 of 1956, he

borrowed loan of Rs.6000/- from defendant No.1 and as a security for that loan, executed sale-deed of the suit land on 22nd September, 1958 in favour of defendant No.1. He submits that though sale-deed dated 22nd September, 1958 does not indicate that it was transaction of mortgage by conditional sale, under subsequent Agreement dated 15th February, 1959, defendant No.1 agreed to reconvey the suit land after receipt of amount of Rs.12,000/- within eight years from the date of said transaction. The learned Senior Counsel has also pointed out that under the terms of the Agreement of Reconveyance, at the interval of eight years, subsequent extension of time for reconveyance was given on payment of higher amount of Rs.12,000/-, Rs.24,000/- and at last, Rs.30,000/-. He submits that though Nandlal did not take any action for reconveyance of the suit land till his death in the year 1987, when plaintiffs came to know about the Agreement of Reconveyance dated 15th February, 1959, immediately they issued notice to defendant No.1 and demanded reconveyance of the suit land on payment of Rs.30,000/- to defendant No.1. He submits that even defendant No.1, in the reply notice (Exh-542), admitted the Agreement of Reconveyance. He submits that though in the sale-deed dated 22nd

September, 1958, the condition of reconveyance is not embodied as required under the Proviso to Section 58(c) of the Transfer of Property Act, 1882, if this sale-deed is read together with Agreement dated 15th February, 1959, it can be gathered that the true nature of the transaction was transaction of mortgage by conditional sale.

10. Relying on the evidence of defendant No.1 Jaswantsingh, learned Senior Counsel submits that defendant No.1 has admitted the execution of Agreement of Reconveyance dated 15th February, 1959 and therefore, the learned Trial Court committed error while holding that Agreement of Reconveyance is not proved by the plaintiffs. He has pointed out that as the attesting witnesses on Agreement were not alive on the date of recording evidence, they could not be examined.

11. The learned Senior Counsel further submits that the suit claim for redemption of mortgage as well as for specific performance of Agreement of Reconveyance is well within limitation. He placed reliance on the following decisions :

- (i) ***Bhaskar Waman Joshi (deceased) and others Vs. Shrinarayan Rambilas Agarwal (deceased) and others***
AIR 1960 SC 301
- (ii) ***Chunchun Jha V. Ebadat Ali and another***
AIR 1954 SC 345
- (iii) ***P.L. Bapuswami V. N. Pattay Gounder***
AIR 1966 SC 902
- (iv) ***Bhoop Singh Vs. Ram Singh Major and others***
AIR 1996 SC 196
- (v) ***Smt. Indra Kaur and others Vs. Sheo Lal Kapoor***
(1988)2 SCC 488
- (vi) ***Patel Ravjibhai Bhulabhai (D) through L.Rs. Vs. Rahemanbhai M. Shaikh (D) through L.Rs. and others***
AIR 2016 SC 2146
- (vii) ***Mushir Mohammed Khan (Dead) By L.Rs. Vs. Sajeda Bano and others, Civil Appeal No.9 of 1988, decided by the Apex Court on 2nd March, 2000***

12. Learned counsel for respondent Nos.1 and 7 submit that Proviso to Section 58(c) of the Transfer of Property Act, 1882 mandates that the condition of reconveyance is to be embodied in the document itself, to prove that the said transaction was mortgage by conditional sale. They have pointed out that even the Agreement of Reconveyance dated 15th February, 1959 was subsequently executed by defendant No.1 after more than

four months and the said Agreement cannot be considered as contemporaneous agreement. Learned counsel for the respondents submit that the recitals of the sale-deed dated 22nd September, 1958 clearly indicate that it was the transaction of outright sale and it was not mortgage by conditional sale. According to learned counsel for the respondents, as the plaintiffs cannot prove that transaction dated 22nd September, 1958 was transaction of mortgage by conditional sale, they are not entitled to decree for redemption. They have also drawn our attention towards cross-examination of Jaswantsingh and submit that even Jaswantsingh (DW1) could not prove the execution of Agreement dated 15th February, 1959. They have also drawn our attention towards cross-examination of plaintiff Ashokkumar (PW1) and they have pointed out that this witness has no personal knowledge about execution of sale-deed dated 22nd September, 1958 or Agreement dated 15th February, 1959 as he was not present at the time of execution of these both documents.

13. Next contention of learned counsel for the respondents is that till the death of Nandlal, he did not take any action for reconveyance and even the Agreement dated 15th February, 1959 had not seen the

light. Therefore, merely by issuing notice in the year 1990, the plaintiffs cannot prove their readiness and willingness to perform their part of the contract. The objection of learned counsel for the respondents is that merely on the basis of presumption available under Section 90 of the Evidence Act, the plaintiffs cannot prove the contents of Agreement dated 15th February, 1959. The respondents pray for dismissal of the First Appeal.

14. Considering the evidence on record and the submissions advanced on behalf of both sides, following points arise for our consideration and we record our findings against these points as follows, for the reasons recorded hereunder :-

Sr. No.	Points	Findings
1	Do the plaintiffs/appellants prove that the transaction dated 22.09.1958 was the transaction of mortgage by conditional sale ?	NO
2	Do the plaintiffs/appellants prove the execution of Agreement of Reconvenyance dated 15.02.1959 ?	NO
3	Do the plaintiffs/appellants prove that they were all along ready and willing to perform their part of the Contract of Reconvenance ?	NO
4	Whether the suit claim is within limitation ?	YES
5	Whether defendant No.2 proves that Agreement dated 15.02.1959 is forged document ?	NO

6	Whether the judgment and decree passed by the Trial Court is correct and proper ?	YES
7	What order ?	First Appeal and Cross-Objection are dismissed. The parties to bear their respective costs.

R E A S O N S

15. **As to Point Nos.1 and 2 :**

In the suit for redemption of mortgage by conditional sale, case of the plaintiffs is that on 22nd September, 1958, father of the plaintiffs namely Nandlal Maliwal executed registered sale-deed of the suit land in favour of defendant No.1 only as security, after receiving the consideration of Rs.6000/-. It was ostensible sale with parallel agreement that on repayment of Rs.12,000/- within eight years from the date of sale, defendant No.1 would reconvey the suit land to the father of the plaintiffs. If father of the plaintiffs could not get reconveyance on payment of Rs.12,000/-, then in next eight years, he would be at liberty to pay Rs.18,000/- to defendant No.1 and get the Deed of Reconveyance of the suit land from defendant

No.1. Third chance of reconveyance was also given to the father of the plaintiffs within next eight years on payment of consideration of Rs.24,000/- to defendant No.1. In addition to this, last chance was given to father of the plaintiffs to get the reconveyance of the suit land from defendant No.1 on payment of Rs.30,000/- within next eight years. Undisputedly, on the date of execution of registered sale-deed dated 22nd September, 1958 (Exh-480), contemporaneous Agreement of Reconveyance was not executed by defendant No.1 in favour of the plaintiffs. Even such condition of reconveyance was not embodied in the sale-deed dated 22nd September, 1958. According to the plaintiffs, defendant No.1 executed separate Agreement of Reconveyance on 15th February, 1959 (Exh-540). Relying on these two documents executed on two different dates, the plaintiffs are claiming redemption of mortgage by conditional sale and in the alternate, decree for specific performance of the contract of reconveyance.

16. Mortgage by conditional sale is defined under Section 58(c) of the Transfer of Property Act, 1882, 1882 as under:-

(c) Mortgage by conditional sale. - Where the mortgagor ostensible sells the mortgaged property -

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale;

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

17. A bare glance at Section 58(c) of the Transfer of Property Act shows that the condition of reconveyance of the mortgaged property must be embodied in the document itself. In the case at hand, the condition of reconveyance is not embodied in the registered sale-deed dated 22nd September, 1958 (Exh-480). So also, the Agreement of Reconveyance dated 15th February, 1959 (Exh-540) being executed after more than four months from the date of execution of sale-deed, cannot be considered as contemporaneous document, which can be read together

with abovesaid sale-deed to hold that the true nature of transaction was mortgage by conditional sale. Though defendant No.1, in his written statement, has admitted the execution of this Agreement of Reconveyance, the said agreement is disputed by defendant No.2 contending that the plaintiffs have filed this suit in collusion with defendant No.1. Therefore, certainly burden lies on the plaintiffs to prove that on the date of execution of sale-deed dated 22nd September, 1958, there was parallel Agreement of Reconveyance in between Nandlal and defendant No.1 and subsequently, separate written Agreement of Reconveyance was executed by defendant No.1 on 15th February, 1959.

18. To prove these both material transactions, on behalf of the plaintiffs, who are the sons of original vendor Nandlal, only Ashokkumar Maliwal (PW1) stepped into witness box. Though in his examination-in-chief, Ashokkumar (PW1) deposed regarding execution of the sale-deed dated 22nd September, 1958 and execution of Agreement of Reconveyance dated 15th February, 1959, from his cross-examination, it emerges that he had no personal knowledge regarding the execution of these both material documents and he was not present even at the

time of execution of these documents. Ashokkumar (PW1) has admitted in his cross-examination that he came to know about the transactions of his father in the year 1989 and he has no personal knowledge about the transaction entered into by his father and defendant No.1. Therefore, Ashokkumar (PW1) cannot prove that on 22nd September, 1958 at the time of execution of registered sale-deed of the suit land (Exh-480) in favour of defendant No.1, there was a parallel oral agreement between Nandlal and defendant No.1 regarding reconveyance of the suit land after eight years or within further extended time on payment of the enhanced consideration as specified above.

19. As Ashokkumar (PW1) was not present even at the time of execution of Agreement of Reconveyance dated 15th February, 1959, he cannot prove execution of this document and correctness of its contents. No doubt, these both documents being thirty years, original documents, coming before the Court from proper custody can be admitted in evidence in view of presumption of genuineness of signatures of the executants and witnesses available under Section 90 of the Evidence Act. However, the contents of the documents cannot be

proved as the presumption under Section 90 of the Evidence Act is not available regarding contents of 30 years old documents. The contents of the documents are to be proved by the plaintiffs independently. Therefore, on the basis of oral evidence of Ashokkumar (PW1), the plaintiffs cannot prove the execution and contents of Agreement of Reconveyance dated 15th February, 1959.

20. No doubt, the execution and correctness of sale-deed dated 22nd September, 1958 is an admitted fact between the parties and therefore, the sale-deed (Exh-480) can be read in evidence without its formal proof. After going through the sale-deed dated 22nd September, 1958, it emerges that Nandlal sold out the suit land to defendant No.1 for the total consideration of Rs.6000/- and it was outright sale. There is no whisper of loan transaction in the recitals of entire document. Even the recitals of this document do not show the incorporation of condition of reconveyance within eight years from the date of execution of these documents. Therefore, the registered sale-deed of the suit land (Exh-480) is of no help to the plaintiffs to prove that it was transaction of mortgage by conditional sale.

21. Even in the case of ***Bhaskar Waman Joshi (deceased) and others*** (supra), relied on by the learned Senior Counsel for the appellants, the three Judges Bench of Apex Court held that prior to the amendment, there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances.

22. Even the Larger Bench of the Supreme Court in

the case of **Chunchun Jha V. Ebadat Ali and another** (supra), held that under the proviso to Section 58(c) of the Transfer of Property Act, if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The Legislature has made a clear cut classification and excluded transactions embodied in more than one document from that category of mortgages.

23. These legal principles are reiterated by the Apex Court in the cases of **Mushir Mohammed Khan (Dead) By L.Rs.** (supra), **Patel Ravjibhai Bhulabhai (D) through L.Rs.** (supra), **P.L. Bapuswami** and **Smt. Indra Kaur and others** (supra).

24. No doubt, defendant No.1 Jaswantsingh Piyarasingh (DW1) was examined on behalf of defendant No.1. Jaswantsingh (DW1) has deposed regarding execution

of Agreement of Reconveyance (Exh-540). In examination-in-chief, Jaswantsingh (DW1) has also made it clear that the sale-deed executed by Nandlal in his favour, was nominal. However, Jaswantsingh (DW1) has changed his entire stand taken in the written statement, by deposing that it was transaction in between Nandlal and priest Babaji Harnamsingh. According to Jaswantsingh (DW1), even the sale consideration of Rs.6000/- was paid by Babaji Harnamsingh to Nandlal. The cat has come out of the bag, when Jaswantsingh (DW1) was subjected to searching cross-examination by learned counsel for defendant No.2 and other defendants. In his cross-examination, Jaswantsingh (DW1) has admitted that he cannot tell on which paper and where he signed the documents, which are filed in the present case. He also admits that on 22nd September, 1958, he obtained sale-deed of the suit land from Nandlal and since thereafter till 1979, he received the annual rent of the suit land from lessee Wadia and Bombay Dying. Even the recitals of the sale-deed (Exh-480) show that after execution of the sale-deed, the annual rent of the suit land was to be paid to defendant No.1 Jasawantsingh. Defendant No.1 Jaswantsingh was considered as absolute owner of the suit land after 22nd September, 1958. From the cross-

examination of Jaswantsingh (DW1), it becomes clear that even on 22nd September, 1958, the consideration amount of Rs.6000/- was paid to Nandlal by priest Babaji Harnamsingh. Jaswantsingh also admits that even the annual rent of the suit land received by Bombay Dying was paid by Babaji Harnamsingh. Regarding execution of Agreement of Reconveyance dated 15th February, 1959 (Exh-540), Jaswantsingh has admitted in his cross-examination that at the time of execution of Agreement dated 15th February, 1959, Babaji Harnamsingh was present and the Deed of Agreement was already prepared and it was prepared by Babaji. Even the conditions to be incorporated in the Agreement were fixed by Babaji Harnamsingh. According to Jasawantsingh, he only signed the Agreement. He also admits that he has no personal knowledge whether the amount of Rs.6000/- was paid by Babaji Harnamsingh to Nandlal as loan or handloan. From the cross-examination of Jaswantsingh (DW1), it emerges that throughout the transaction, he was only Benamidar and two transactions were only between Nandlal and Babaji Harnamsingh. According to Jaswantsingh (DW1), even the consideration amount of Rs.6000/- was to be repaid to Babaji Harnamsingh. Thus, it emerges that the evidence of Jaswantsingh (DW1) is in conflict with the

case of the plaintiffs as well as even in conflict with the written statement filed by defendant No.1. Therefore, though Jaswantsingh (DW1) was one of the best witnesses to prove the true nature of the transaction between Nandlal and defendant No.1, this witness has totally washed out the case of the plaintiffs regarding nature of the transaction as mortgage by conditional sale.

25. Even the evidence of Jaswantsingh is of no help to the plaintiffs to prove the Agreement of Reconveyance dated 15th February, 1959. Other witnesses on Agreement of Reconveyance were dead and therefore, their examination was not possible before the Trial Court. In the circumstances, there is absolutely no evidence on record to prove Agreement of Reconveyance dated 15th February, 1959 to show that after execution of registered sale-deed dated 22nd September, 1958, subsequently after four months, defendant No.1 executed separate Agreement of Reconveyance and agreed to reconvey the suit land to Nandlal on payment of higher agreed amount. Most surprising thing is that even Ashokkumar Maliwal (PW1) has admitted in his cross-examination that the transaction dated 22nd September,

1958 was not mortgage. In the circumstances, when registered sale-deed of the suit land dated 22nd September, 1958 shows that it was outright sale and when Agreement of Reconveyance (Exh-540) cannot be considered as contemporaneous agreement as part of the sale transaction and when this Agreement of Reconveyance itself is not proved by the plaintiffs, by no stretch of imagination, it can be held that the transaction dated 22nd September, 1958 was a transaction of mortgage by conditional sale. Assuming that Agreement of Reconveyance dated 15th February, 1959 is proved as its execution is admitted by defendant No.1 in his written statement and his reply notice. Even then, as the condition of reconveyance is not embodied in the original Deed of Sale (Exh-480), as mandated under Proviso to Section 58(c) of the Transfer of Property Act, as ruled by the Apex Court in **Chunchun Jha** (supra) and **Bhaskar Waman Joshi (deceased) and others** (supra), the transaction dated 22nd September, 1958 in between Nandlal and defendant No.1, cannot be treated as mortgage by conditional sale.

26. The decision in the case of **Bhoop Singh** (supra) is not relevant for considering the controversy in

between parties. In that case, the Apex Court only ruled that compromise decree is compulsorily registrable if it creates new rights.

27. In view of the above discussion, after considering the evidence on record placed by the plaintiffs/appellants, we have no hesitation to hold that the plaintiffs failed to prove that the transaction dated 22nd September, 1958 was transaction of mortgage by conditional sale and even the plaintiffs failed to prove the execution of Agreement of Reconveyance dated 15th February, 1959. We answer point Nos.1 and 2 in negative.

As to Point No.3 :

28. In this suit for redemption of mortgage, in the alternate, the plaintiffs have prayed for specific performance of Agreement of Reconveyance dated 15th February, 1959. As plaintiff failed to prove the Agreement of Reconveyance dated 15th February, 1959, the question of readiness and willingness of the plaintiffs to perform their part of the contract does not survive. Otherwise also, from the evidence of Ashokkumar (PW1), it emerges that though his father Nandlal was well aware

regarding the Agreement dated 15th February, 1959, about reconveyance of the suit land on payment of specified amount within period of eight years from the date of execution of sale-deed, till his death in the year 1987, he did not take any positive action to get the reconveyance of the suit land from defendant No.1. Even after the death of Nandlal, for the first time, the plaintiffs issued notice to defendant No.1 and demanded reconveyance of the suit land. These circumstances on record are sufficient to hold that the plaintiffs failed to prove that since 15th February, 1959 till the date of filing of the suit, they were all along ready and willing to perform their part of the contract. Accordingly, we answer point No.3 in negative.

As to Point No.4 :

29. Though defendant No.2 raised objection that the suit claim is barred by limitation, as under the Agreement of Reconveyance dated 15th February, 1959 the time limit of reconveyance within eight years from the date of execution of sale-deed was extended four times i.e. for 32 years i.e. upto 1990, the suit filed for specific performance in the year 1990 is well within

limitation under Article 54 of the Limitation Act. So also, for the same reasons, even the suit claim for redemption of mortgage filed in the year 1990 is well within limitation. The learned Trial Court rightly held that suit claim is well within limitation. We answer point No.4 in affirmative.

As to Point No.5 :

30. Though defendant No.2 contended that Agreement dated 15th February, 1959 is forged document, to substantiate this contention, no substance is placed on record. On the other hand, Jaswantsingh (DW1) has duly identified his signature on Agreement of Reconveyance. Otherwise also, under Section 90 of the Evidence Act, the signature of executant on Agreement of Reconveyance will be presumed to be genuine. In the circumstances, in absence of clinching evidence on part of defendant No.2 to rebut this presumption, by no stretch of imagination, it can be held that the Agreement of Reconveyance dated 15th February, 1959 (Exh-540) is forged document. We answer point No. 5 in negative.

As to Point Nos.6 and 7 :

31. In view of the above findings, the judgment and decree passed by the Trial Court dismissing the suit claim with costs is correct, proper and needs no interference. In view of our findings against Point Nos.4 and 5, holding the suit claim within limitation and Agreement dated 15th September, 1959 not as forged document, even the Cross-Objection filed by defendant No.2 deserves to be dismissed. Our conclusion is that the First Appeal and the Cross-Objection deserve to be dismissed. Considering the peculiar facts of the case, the parties shall bear their respective costs.

32. Accordingly, First Appeal No. 129 of 2011 and Cross-Objection (Stamp) No.4445 of 2007 are dismissed. The parties to bear their respective costs.

33. Interim relief granted by this Court in 2007 is continued for a period of four weeks from today. Respondent/defendant No.2 is entitled to withdraw the amount of costs deposited in this Court by the appellants/plaintiffs.

34. In view of dismissal of First Appeal, Civil Application Nos.2379 of 2011, 1324 of 2009, 4609 of 2008, 979 of 2007, 9207 of 2011, 8584 of 2018 and 1312 of 2009 do not survive and stand disposed of.

[SUNIL K. KOTWAL]
JUDGE

[T.V. NALAWADE]
JUDGE

npj/fa129-2007-Cross-Ob