

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 419 OF 1992

Chandrabai w/o Amruta Mipulwad
Age 45 years, Occu. Household & Agril.,
R/o Mukhed, Dist. Nanded.

.. **Appellant
(Ori. Defendant)**

Versus

Sitaram s/o Baba Mipulwad
Age 55 years, Occ. Agril.,
Mahankal Galli, Mukhed,
Dist. Nanded.

.. **Respondent
(Ori. Plaintiff)**

.....

Shri S.V. Warad, Advocate for the Appellant.
Shri Vivek Bhavthankar, Advocate for the Respondent.

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**CORAM : M.G. SEWLIKAR, J.
RESERVED ON: 18.12.2019
PRONOUNCED ON: 06.01.2020**

JUDGMENT :

This appeal is preferred by the original defendant against the judgment and decree passed by the learned 4th Additional District Judge, Nanded in Regular Civil Appeal No. 280 of 1987 dated 01.08.1992 reversing the judgment and decree passed by the learned C.J.J.D. Mukhed in Regular Civil Suit No.10 of 1985 dismissing the suit on 30.11.1987. Facts giving rise to this appeal are as under:

2. The respondent-Sitaram herein (the original plaintiff) filed Regular Civil Suit No.10 of 1985 alleging that he is the brother of the husband of the appellant-Chandrabai (original defendant). The respondent is the owner and was in possession of the suit land Survey No. 331/4 ad measuring 95 R situated at Mukhed. The respondent was in need of Rs.2500/- and therefore, the respondent mortgaged the suit land in favour of the appellant for Rs.2500/- and executed a mortgage deed in favour of the appellant on 08.04.1981, by registered sale-deed with a condition to get it redeemed from the appellant after the payment of Rs.2500/-. It is further alleged that on the very day of the execution of the above deed, the appellant executed a bond in favour of the respondent with a condition that on receiving the amount the appellant will release the suit land in favour of the respondent. Since the date of mortgage the appellant is in possession over the suit land as mortgagee. The respondent requested the appellant to take back the amount of Rs.2500/- and deliver back the possession of the suit land to the respondent but the appellant refused to act according to the terms of the agreement. Therefore, the respondent issued a notice to the appellant through his advocate on 07.09.1984, which was received by the appellant. The appellant refused to redeem the suit land in favour of the respondent and therefore the respondent was constrained to file this suit for recovery of possession.

3. The appellant filed her written statement at Exhibit-12 in the record of the trial Court. She has denied all the allegations of the plaintiff-respondent in toto. She has alleged that the deed executed on 08.04.1981 was not a sale with a condition of re-purchase. No bond was executed by the appellant in favour of the respondent. She has alleged that the respondent had agreed to sell the suit land to the appellant for a consideration of Rs.2500/- one month before the sale-deed dated 05.04.1981. The respondent had obtained Rs.1,000/- from the appellant on the date of agreement of sale. The appellant had delivered possession of suit land to the respondent on the date of agreement of sale. Remaining amount was to be paid at the time of sale-deed and accordingly remaining amount of Rs.1500/- was paid on 08.04.1981 and sale-deed was accordingly executed. She, therefore, prayed for the dismissal of the suit.

4. The learned trial Court framed issues at Exhibit-13 in the record of the learned trial Court. After adducing of the evidence and after hearing the parties, the learned trial Court dismissed the suit holding that the transaction was not a sale with a condition of re-purchase but it was an out and out sale. This decree of the learned C.J.J.D. Mukhed was assailed in R.C.A. No. 280 of 1987. The learned 4th Additional District Judge, Nanded

held that the transaction was a sale with a condition of re-purchase and accordingly decreed the suit. This order is impugned in this appeal.

5. Heard Shri Warad the learned counsel for the appellant and Shri Bhavthankar the learned counsel for the respondent.

6. Shri Warad submitted that in terms of Section 58(c) of the Transfer of Property Act, the transaction is an out and out sale as the condition of re-purchase is not embodied in the same document. The judgment and decree passed by the learned First Appellate Court suffers from non application of mind. As against this Shri Bhavthankar argued that the appellant had executed a bond on 08.04.1981 itself which indicates that the appellant had agreed to reconvey the property to the respondent on payment of Rs.2500/- within two years from 08.04.1981. The execution of this document clearly indicates that the transaction was a mortgage by conditional sale. He argued that the contents of the document clearly show that on return of the amount of Rs.2500/- by the respondent to the appellant, the appellant was to reconvey the suit property to the respondent and therefore the transaction in question was mortgage by conditional sale. He argued that the intention of the appellant and surrounding circumstances indicate that the transaction was a mortgage by conditional sale and not an out and out sale.

7. It is not disputed that on 08.04.1981 the respondent-plaintiff had executed the sale-deed Exhibit-23 in favour of the appellant for Rs.2500/-. Both the Courts i.e. the trial Court and the First Appellate Court have held that the document i.e. Kararnama Exhibit-32 by which the suit property was agreed to be reconveyed on receipt of Rs.2500/- is proved. The question is whether the transactions entered into between the appellant and the respondent is mortgage by conditional sale or an out and out sale. So far as the mortgage by conditional sale is concerned it is governed by Section 58(c) of the Transfer of Property Act. **Section 58(c)** reads as under:

“(c) Mortgage by conditional sale. - Where the mortgagor ostensibly 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 a 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.”

8. From the bare reading of the above provision, it is clear that the

condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale is that there must be an ostensible sale. It must contain a stipulation that on default of payment of mortgaged 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 of such payment being made the buyer shall transfer the property to the seller. The essential requirement for the transaction to be termed as mortgage by conditional sale is that the condition on default of payment on mortgage money on a certain date shall become absolute or on condition that on such payment being made the sale becomes void or buyer shall transfer the property to the seller and such condition must be embodied in the document itself. If the agreement does not contain such a condition, it will not be regarded as mortgage by conditional sale. If condition of reconveyance is by way of separate agreement it will not be regarded as a mortgage by conditional sale. In the case of **Chunchun Jha V/s. Ebadat Ali and Anr.** reported in **AIR 1954 SUPREME COURT 345**, it has been observed that if the sale and agreement to re-purchase are embodied in separate documents then the transaction cannot be a mortgage, whether the documents are contemporaneously executed or not. In the case of **Gauri Shankar Prasad & Ors. V/s. Brahma Nand Singh** reported in **(2008) 8 Supreme Court Cases 287**,

the Hon'ble Apex Court has held that if sale and agreement to re-purchase are embodied in separate document it cannot be a case of mortgage. This legal position has been reiterated by the Apex Court in the case of **Raj Kishore V/s. Prem Singh & Ors.** reported in **AIR 2011 SUPREME COURT 382**, the Hon'ble Supreme Court has held that the condition regarding payment of the mortgage money as a condition for the transfer of the property to the seller must be embodied in the sale-deed itself.

9. On the anvil of this legal position, it is clear that the sale-deed must contain a stipulation regarding re-purchase of the property. If the stipulation regarding re-purchase of the property on payment of the mortgage money is not embodied in the sale-deed itself, it will not be a mortgage by conditional sale. The learned trial Court was perfectly justified in holding that it was not a case of mortgage by conditional sale. The learned 4th Additional District Judge reversed the decree which was wholly unwarranted. The learned Appellate Court did not pay any attention to the proviso to Section 58(c) of the Transfer of Property Act. The observations of the learned First Appellate Court are quoted below:

“7) Advocate for the appellant submitted that, whether this transaction is of mortgage nature or not is to be gathered from the total transaction, documentary evidence and circumstantial facts and cited reference A.I.R. 1960 page 3091. Their Lordships observed that,

when agreement and the sale-deed were executed on the same day and there is a condition of reconveyance of the property by agreement, the circumstance at the time of execution of the deed shows that the transaction was intended to be mortgage transaction. In view of the above observations, I find that there was execution of the sale-deed and on the same day there was agreement of reconveyance regarding the property within stipulated time and that very fact indicate that the whole transaction was of a mortgage nature.”

10. First of all the learned Appellate Court has given incomplete citation. From the citation quoted by the learned First Appellate Court, it cannot be deciphered whether it is of the Apex Court, of this Court or of any other High Court. The learned counsel for the appellant Shri Warad and also Shri Bhavthankar submitted that the reliance placed was on **Bhaskar Waman Joshi (deceased) and Ors. V/s. Shrinarayan Rambilas Agarwal (deceased) and Ors.** reported in **AIR 1960 SUPREME COURT 310**. On careful reading of this authority, it is evident that this authority is not applicable to the facts of the case at hand. In the case of **Bhaskar Waman Joshi** cited supra there was a stipulation in the agreement itself about the condition of re-purchase. Moreover, the observations quoted by the learned 4th Additional District Judge, Nanded do not find place in the authority of the Hon'ble Supreme Court. From where the learned 4th Additional District Judge quoted these observations is difficult to understand. The learned counsel for the

respondent Shri Bhavthankar also could not point out these observations from the afore-quoted authority of **Bhaskar Waman Joshi** cited supra.

11. Thus from the above discussion it is evident that the transaction in question was not a mortgage by conditional sale but it was a sale with a condition of re-purchase. Therefore, the learned trial Court was right in dismissing the suit. The learned First Appellate Court committed gross error in reversing the decree. The appeal therefore will have to be allowed. Hence the following is order:

ORDER

- i) The Appeal is allowed.
- ii) The judgment and decree passed by the learned First Appellate Court in Regular Civil Appeal No. 280 of 1987 dated 01.08.1992 is set aside and the judgment and decree passed by the learned C.J.J.D. in Regular Civil Suit No.10 of 1985 dated 30.11.1987 is restored. No costs.

[M.G. SEWLIKAR, J.]