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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.124 OF 1995

Gulabrao Vishwas Desai,
Age about 48 years, Occupation : Agri.
Residing at Ajara, Taluka Ajara,
District Kolhapur. … Appellant
(Orig. Plaintiff)

Versus

Bhau Dhondi Desai, since deceased by
his heirs and L.R.s

1. Smt. Indubai Bhau Desai (since deceased)
by her legal heirs & representatives;

1(a) Shri Appasaheb Bhau Desai, age 67 yrs.,
1(b) Shri Shivaji Bhau Desai, age 58 yrs,
1(c) Shri Ananda Bhau Desai, age 56 yrs,
1(d) Makubai Hindurao Desai, age 62 yrs,
All resident of Sohale, Taluka Ajara,
District Kolhapur
1(e) Sau. Vandana Ganpati Desai, age 62 yrs.,
resident of Bagilinge, Tal. Chandgad,
District Kolhapur,
1(f) Shri Balkrishna Bhau Desai, age 60 yrs.,
resident of Ujlaiwadi, Tal. Karveer,
District Kolhapur.
1(g) Sau. Suvarna Chandrakant Desai, 52 yrs.
Resident of Shirsinge, Taluke Ajara,
District Kolhapur
1(h) Sau. Aruna Sandeep Desai, age 48 yrs.,
resident of Mainche (Khurd), Taluka
Bhudargad, District Kolhapur.

2. Sou. Sonabai Krushna Desai,
Adult, At & Post Balingale,
Taluka : Chandgad.

3. Sou. Anusuya Shripati Mandlik (since deceased)
by her legal heirs and representatives;
3(a) Shri Shripati Bhimrao Mandlik, age 84 yrs.
3(b) Shri Suresh Shripati Mandlik, age 55 yrs.,
3(c) Sau. Nanda Shripati Mandlik, age 53 yrs.,
3(d) Shri Dilip Shripati Mandlik, age 51 yrs.,
3(e) Shri Arun Shripati Mandlik, age 48 yrs.,
All are resident of Amroli, Taluka Chandgad,
District Kolhapur.

4. Sou. Suvarna Pandurang Desai,
Adult, At & Post Shirsingi,
Taluka Ajra.

5. Sou. Malitai Hindurao Desai,
Adult, At & Post : Sohale,
Taluka Ajra.

6. Kum. Aruna Bhau Desai,
Adult, At & Post Sohale,
Taluka Ajra.

7. Shri Appa Bhau Desai, Age 44,
At & Post Sohale, Taluka Ajra.

8. Shri Babu Bhau Desai, Age 38,
Asstt. Engineer, Public Works Department,
Zilla Parshad, Indapur, District Pune.

9. Shri Shivaji Bhau Desai, Age 34,
At & Post Sohale, Taluka Ajra.

10. Shri Anna Bhau Desai, Age 30,
At & Post Sohale, Taluka Ajra,
District Kolhapur. … Respondents

Mr. V.S.Gokhale, APP for the Applicant/Appellant.
Mr. Saurabh S. Kurade for the Respondent Nos.1 to 4.

CORAM : SMT. SADHANA S. JADHAV, J.
DATE : 9th JANUARY 2020.

ORAL JUDGMENT :

1. The appellant herein impugns the judgment and order dated 3rd August 1988 thereby upholding the judgment and order passed by the Civil Judge, Junior Division, Ajara in Reg. Civil Suit No.33 of 1982. Although there are concurrent findings, the substantial question of law in the present case is restricted to the issue framed by the appellant in Issue No.1 and Issue No.2 which reads as follows :-

> "(1) Does plaintiff prove that the suit property was mortgaged with the defendant on 27/1/68 for Rs.2,000/-?
> (2) Does he further prove that defendant refused to redeem the property?"

2 The said issues call for considering the interpretation of the document i.e. the mortgage deed which is marked at Exh.30 in the original proceedings.

3 The appellant herein has filed a suit for re-conveyance/ redemption of the mortgage on the basis of the mortgage deed dated 27th January 1969 executed between the parties before Registrar. It was a registered document. Both the Court have held that the very title of the said document is **मुदत खरेदी पत्र** which means a sale for specific period. According to the plaintiff, this was not a sale deed but a deed of mortgage executed between the parties and was covered by section 58 of the Transfer of Property Act, 1882. Section 58 reads thus :

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—

"(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage. — Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(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 mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: 1[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.]

4 Perused the original mortgage deed. It clearly indicates that in order to meet agricultural expenses the plaintiff i.e. the present appellant had borrowed a sum of Rs.2,000/- from the original defendant and it was

agreed between the parties that upon return of Rs.2,000/- after 7 years from the date of execution of the deed upto 10 years the property shall be re-conveyed in favour of the plaintiff. By the said deed, the defendant was put into possession of the said agricultural land which admeasured approximately 7 Acres along with trees and the other properties inherent in the said agricultural land and the executant would have no interest in the said land for a period of 7 years upto 10 years or till he returns the amount of Rs.2,000/-.

5 The intention of the parties was more than clear that it was a conditional sale deed/ mortgage deed. The clause of re-conveyance of the properties was specifically mentioned in the said deed and the intention of the parties at the time of execution of the said deed was more than clear.

6 The Courts below have erred in recording a finding that the very clause title of the said properties shown as **मुदत खरेदी पत्र** i.e. sale for particular period and therefore, according to both the Courts the said document at Exh.30 was in fact sale deed and not a deed of mortgage.

7 Requirements of section 58 of the Transfer of Property Act, 1882 and more particularly section 58(c) were fully incorporated in the

said deed and therefore, it was necessary for the Courts to consider the intention of the parties at the time of execution of the deed. It appears that only because, contingency clause such as default clause was not mentioned in the deed, the Courts below have held that it is a final sale deed. The very fact that the land was to be reconveyed in favour of the plaintiff upon payment of Rs.2,000/- would mean by inference that upon failure to pay the said amount between the period of 7 years to 10 years, the property would naturally devolve upon vendee i.e. the defendant.

8 It is seen that the suit was instituted in the year 1982. The deed was executed in the year 1968. The facts of the case would show that the plaintiff had specifically pleaded that he had issued notice to the defendant on 31st January 1978. The defendant had refused to reconvey the said land and had replied the said notice stating that the said deed was not a mortgage deed but a sale deed and that was the cause of action to institute the suit seeking re-conveyance of the said land which would also indicate willingness to repay Rs.2,000/-.

'Willing' as defined in Oxford dictionary is "ready, eager or prepared to do something".

9 The fact that the plaintiff issued notice seeking reconveyance on the basis of the mortgage deed would show his willingness to perform

his part as was contemplated in the mortgage deed. It would not be correct to act upon the title of the deed, it would be necessary to consider the contents of the deed, to understand the intention of the parties, at the time of executing the deed. Moreover, there is admission of the contents of the deed. Hence, just because the title reads as ‘conditional (time bound) sale deed, it cannot mean to transfer better title on the respondent.

10 The learned counsel for the appellant upon instructions submits that the appellant is ready and willing to pay Rs. 2,000/- alongwith interest at the rate of 8% from 31st January 1978 to 30th June 1982. At this stage, learned counsel for the respondent seeks a stay to the Judgment. However, taking into consideration that the suit is of the year 1982, it would not be appropriate to stay the Judgment. Hence the prayer is rejected. In view of the above, the second appeal is allowed.

(SMT. SADHANA S. JADHAV, J.)