IN THE HIGH Court OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

SECOND APPEAL NO. 467 OF 1992

Anjabapu Dhondiba Sonawane
Age 47 Yrs, Occ. Agri.
R/o Ghodegaon, Tal. Newasa,
District Ahmednagar … Appellant

Versus

1. Shobha Dilipkumar Fade
Age 22 Yrs, Occ. Household

2. Mangala Jaykumar Fade
Age 26 yrs, Occ. Household

Both R/o Plastic House, Akluj,
Tal. Malshiras, Dist. Solapur. … Respondents

Mr. C. K. Shinde - Advocate for Appellant

Mr. Parag V. Barde - Advocate for Respondents.

CORAM : GAURI GODSE, J.

RESERVED ON : 23rd FEBRUARY 2023

PRONOUNCED ON : 3rd MAY 2023

JUDGMENT:

1. This Second Appeal is preferred by the original Plaintiff challenging the dismissal of the Suit by the first Appellate Court. By judgment and Decree dated 7th August 1986 passed by the learned Joint Civil Judge Junior Division Nevasa, Regular Civil Suit No. 207 of 1983

filed by the Appellant for declaration of redemption of mortgage and seeking possession of suit property was decreed. The said Decree was challenged by the Respondents by filing Regular Civil Appeal No. 357 of 1986, which was allowed by the learned 3rd Additional District Judge Ahmednagar on 7th February 1992 and the Decree passed by the trial Court was set aside, and the Suit of the present Appellant is dismissed.

2. The trial Court had decreed the Suit, and it was declared that the Suit house Grampanchayat house No. 105 at village Ghodegaon, Taluka Nevasa, District Ahmednagar ('suit property') is redeemed from the mortgage dated 6th April 1966. The learned trial Judge directed the Respondents to hand over possession of the suit property to the Appellant. The first appellate Court reversed the findings of the trial Court and dismissed the suit.

3. By order dated 25th September 1992, Second Appeal was admitted by passing the following order:

> "Admit on the point of re-conveyance and limitation.
> Mr. Patil waive notice on merit".

<u>CASE OF THE APPELLANT</u>:

4. On 27th October 1983, the Appellant filed the Suit for the redemption of the mortgage of the suit property by accepting payment of the

mortgage amount of Rs. 1000/- by the Respondents and prayed for directing the Respondents to hand over the possession of the suit property. It was contended by the Appellant that he was the owner of the suit property, and on 6th April 1966, he had mortgaged the suit property by conditional sale in favour of one Babutai Kale for a period of 7 years for an amount of Rs. 1000/-. It was contended that the period of 7 years stated in the mortgage deed was a nominal period and that the Appellant was entitled to redeem the property anytime within the period of 7 years.

5. The Respondents are the daughters of the said Babutai Kale. Hence, they being the only heirs and legal representatives of Babutai Kale, the Appellant had requested them to accept the amount of Rs. 1000/- and redeem the suit property. However, the Respondents avoided redemption and thus, on 26th September 1983, the Appellant issued notice for redemption. The said notice was replied to, and the claim of redemption was disputed. Hence the Appellant filed the said suit.

<u>CASE OF THE RESPONDENTS</u>:

6. The Respondents appeared in the suit and filed written statement, thereby denying the suit claim. It was contended by the Respondents that the transaction was not a mortgage transaction,

however, the same was by way of absolute sale. The Appellant was permitted to pay the amount of Rs. 1000/- within a period of 7 years, however, the Appellant did not repay the amount within the prescribed time. Hence, Babutai Kale became the absolute owner of the suit property on the expiry of the period of 7 years. Thereafter Babutai Kale and Respondents carried out construction in the suit property and expanded the original house. The Respondents claimed to be in possession since the year 1973 and claimed to be absolute owners of the suit property.

TRIAL COURT PROCEEDINGS:

7. The learned trial Court framed the issues with respect to the suit being within the period of limitation, the nature of the suit transaction and the nature of the mortgage. The learned trial Court also framed an issue as to whether the suit was barred by the principle of estoppel in view of the case made out by the Respondents that since the Appellant failed to repay the amount within the prescribed period of 7 years, he was estopped from claiming redemption. The trial Court held that the transaction between the parties was not of any absolute sale and that it was a mortgage by a conditional sale as defined under clause (c) of Section 58 of the Transfer of Property Act. ("TP Act").

8. The trial Court held that the condition to repay the amount was within a period of 7 years, and to secure the amount, the document was executed. Thus, there was no transfer of ownership on the date of execution of the document. Thus, it was held that the Appellant had a right to get back the property after making the payment of the mortgage amount. The learned trial Judge thus held that the said transaction was a mortgage by a conditional sale, and the Appellant was entitled to redeem the mortgage by making the payment of the mortgage amount. Since the trial Court held that the said transaction was a mortgage by a conditional sale, the period of limitation was 30 years from the date of expiry of 7 years as described in the mortgage deed. Hence the trial Court held that the suit was within the period of limitation.

9. There was a dispute with respect to the interpretation of the clause in the mortgage document. Thus, the trial Court referred to the Marathi version of the specific word used for re-purchase as stated in the mortgage document. The learned trial Judge held that the period of 7 years was, thus, stipulated in the mortgage document for the redemption of the mortgage by making payment of the mortgage amount within a period of 7 years. The mortgage deed was dated 6th April 1966. The suit filed on 27th October 1983 within the period of 30 years from 6th April 1973 i.e. the date of expiry of the period of 7

years, was well within the limitation.

10. The learned trial Judge also examined the plea raised by the Respondents regarding the principle of estoppel. The learned trial Judge held that the Respondents had pleaded that they had carried out construction and improvised original house property, and the names of the Respondents were also entered into the revenue record as owners of the suit property. In support of the same, Respondents had also produced on record the extract of the Grampanchayat record showing the names of the Respondents entered into as owners of the suit property. Initially, the name of Babutai Kale was entered into the revenue record as well as the Grampanchayat record as the owner of the suit property and on the death of Babutai Kale names of the Respondents being her sole heirs and legal representatives, their names were entered as owners of the suit property.

11. It was contended on behalf of the Respondents that the Appellant had never raised any objection with respect to the city survey record as well as the Grampanchayat record where the name of Babutai Kale, as well as the Respondents, were entered into as owners of the suit property. Thus, it was contended that the Appellant was therefore estopped from challenging the nature of the document,

which was, in fact, an absolute sale, and there was no question of redemption of the Suit property.

12. The learned trial Judge held that the absence of taking any objection to the city survey or Grampanchayat record would not mean that the Appellant had waived off his rights for claiming ownership on the basis of the mortgage document. The Appellant was the absolute owner of the suit property, and therefore he was entitled to claim redemption of the mortgage by making payment of the mortgage amount. Undisputed entries in the revenue record and the Grampanchayat record in the name of Babutai Kale and subsequently in the name of Respondents would not mean that the Appellant was estopped from raising a plea for the redemption of the mortgage. The learned trial Judge further held that the Appellant had already deposited the mortgage amount on 17th January 1986, and hence, there was no requirement to pass preliminary decree for the redemption of the mortgage. Thus, the learned trial Court decreed the suit by passing a final decree, thereby declaring that the suit property was redeemed from the mortgage dated 6th April 1966. The Respondents were further directed to hand over possession of the suit property to the Appellant. The learned trial Judge also ordered enquiry for future mesne profits under Rule 12 of Order XX of the Code of Civil Procedure, 1908. The Respondents

were held entitled to withdraw the mortgage amount deposited by the Appellant in the Court.

FIRST APPEAL PROCEEDINGS:

13. The Respondents had preferred Regular Civil Appeal No. 357 of 1986 for challenging the Decree of the trial Court. The first Appellate Court framed points of consideration with respect to; the nature of the transaction as to whether it was a mortgage by conditional sale or sale with condition of re-purchase and whether the suit was barred by law of limitation. The first Appellate Court interpreted the contents of the suit document and held that the document stated the condition for repurchase by making payment of an amount of Rs. 1000/- within seven years from the date of the document, and if the Appellant failed to make the payment and re-purchase the property, the same document would be treated as absolute sale deed, and the purchaser would become the absolute owner. For the purpose of interpreting the clauses of the suit document, the first Appellate Court found it fit to verify the intention of the parties at the time of execution of the transaction.

14. The first Appellate Court, thus, examined the pleadings as well as the evidence on record. The first Appellate Court held that if the intention of the parties were to make the transaction a mortgage and

not an absolute sale with a condition to re-purchase, the wordings used in the document that the Appellant would make the payment and re-purchase the same would not have been one of the conditions.

15. The first Appellate Court held that the clauses of the suit document would show that the suit property was sold by the Appellant in favour of Babutai Kale, and possession was also handed over. The document was registered as a conditional sale deed, and the only option left for the Appellant was to re-purchase the suit property within a period of 7 years by making a payment of an amount of Rs. 1000/-. The document further clearly stated that if, within the period of 7 years, the amount was not repaid, the same document would be treated as the sale document, and there was no requirement to execute any separate document.

16. The first appellate Court thus held that for determining whether the suit document was a mortgage by conditional sale or sale with a condition to re-purchase, it was necessary to verify the real intention of the parties. For the purpose of determining the real intention of the parties, the first Appellate Court found it fit to apply the test of payment clause in the document. It held that when in a transaction, the loan amount paid is substantially less than the value of the

property to be mortgaged, as a security for the said loan so as to take care of future interest also, the proof of the price of the property and the mortgage amount, is required to be verified. In the present case, Court found that the Respondents had failed to prove that at the time of the transaction, the price of the suit property was more than the consideration amount. In the event the value of the property was more than the consideration amount, it would have meant that it was a mortgage document.

17. The first Appellate Court held that the Respondents had proved that the reasonable price of the suit property at the time of the transaction was only an amount of Rs. 1000/-. The first Appellate Court, therefore, held that from the documents and evidence on record, it did not appear that the transaction was a mortgage transaction. In fact, it appeared to be a transaction of sale with a condition to re-purchase the same within a particular time. It held that perusal of the document does not show that there was any relationship of debtor and creditor between the parties. The reference to the mortgage amount was also not in regard to creating a charge on the suit property. The first Appellate Court, therefore, held that from the clauses in the document, it was clear that the same was not a mortgage by a conditional sale, but it was a sale transaction with a condition to re-purchase.

18. The first Appellate Court, after referring to evidence on record, held that it was not in dispute that the possession was also delivered to the Appellants. The first Appellate Court, therefore, concluded that the nature of the document was not a mortgage document, and thus the Appellant was not entitled to a Decree of redemption.

19. The issue with respect to the suit being within the limitation, the first Appellate Court held that since the document was not a mortgage document and that it was a document of sale with a condition to re-purchase, the period of limitation of 30 years would not be applicable to the case. The first Appellate Court held that in view of the nature of the transaction held to be a sale by a condition of re-purchase, the suit claim of re-conveyance was required to be filed within a period of 3 years from the expiry of the period of 7 years as stipulated in the document for re-purchase of the suit property. Thus, the first Appellate Court held the suit to be barred by the law of limitation being filed beyond the period of 3 years. Thus, the first Appellate Court allowed the Appeal preferred by the Respondents, the Decree of redemption passed by the trial Court was set aside, and the Suit of the Appellant was dismissed.

<u>SUBMISSIONS ON BEHALF OF THE APPELLANT</u>:

20. The learned counsel for the Appellant submitted that the terms

regarding seven years of repayment and failure of payment would not render the document a sale document. In fact, the said condition would mean that it was a clog on redemption. He therefore submitted that the clause of payment within the stipulated time in the document is void and, therefore, the Appellant had the right to redeem the property within a period of 30 years. Thus, it was submitted that the suit was well within limitation. The learned counsel for the Appellant referred to the definition of mortgage as defined under Section 58 of TP Act.

21. Learned counsel thus submitted that in the agreement, there was a specific term "to redeem". The title of the document, though, said it to be a conditional sale, the same would not amount to a document of an absolute sale. The learned counsel thus submitted that in view of the definition of mortgage, the Appellant was entitled to redeem the property within 30 years from the expiry of the period of 7 years prescribed for redemption in the mortgage document.

22. In support of this submission, the learned counsel relied upon the decision of this Court in the case of ***Vasantrao s/o. Manoharrao Neb (since through) deceased by L.Rs. Vs. Kishnarao s/o. Shankarrao Neb & Others***[1] and in the case of ***Bhimrao Mahadu Solunke Vs. Dhondiba Sidram Solunke (died) through his legal representatives &***

1 2008(1) ALL MR 63

Others.[2]

23. Learned counsel further relied upon the findings recorded by the trial Court in paragraph 12 of the judgment of the trial Court. Learned counsel thus submitted that the trial Court had rightly interpreted the clauses of the suit document by verifying the intention of the parties. The learned counsel submitted that the findings on record would show that the transaction was never of any sale and it was a mortgage entitling the Appellant to make the payment of the mortgage amount maximum within a period of 7 years from the date of the document. Learned counsel thus submitted that the maximum period prescribed for repayment would mean that from the expiry of the period of 7 years, the Appellant had the right to offer to redeem the property any time within a period of 30 years from the expiry of the period of 7 years. Learned counsel thus submitted that the Appellant filed the suit within limitation. Since the Respondents refused to accept the mortgage amount, the Appellant had rightly filed the suit for declaration that the Appellant was entitled to redeem the property by directing the Respondents to accept the mortgage amount as offered by the Appellant. The learned counsel thus submitted that once the document is held to be a document of mortgage, the Appellant would be entitled to get the

2 2008 (1) Bom. C.R. 406

property redeemed.

24. Learned counsel submitted that the decision of this Court in the case of ***Vasantrao s/o. Manoharrao Neb****,* as well as ***Bhimrao Mahadu Solunke****,* squarely applies to the facts of the present case. Learned counsel further submitted that findings recorded by the trial Court with respect to the nature of the document by interpreting the words "to redeem" are not disturbed by the first Appellate Court. Learned counsel thus submitted that the first Appellate Court, being the last fact finding Court, ought to have recorded findings with respect to the intention of the parties by examining the pleadings as well as the evidence on record. Learned counsel for the Appellant had thus supported the Decree of the trial Court and submitted that the first Appellate Court had erred in interpreting the terms of the document to mean that it was a document of sale with a condition to re-purchase.

25. Learned counsel thus submitted that findings recorded by the first Appellate Court are contrary to the definition of mortgage as per Section 58 of the TP Act. Hence, he submitted that the decree of the trial Court be confirmed by allowing the Second Appeal on the question of law framed in the Second Appeal.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

26. Learned counsel for the Respondents submitted that there is no pleading regarding the debtor-creditor relationship as sought to be contended on behalf of the Appellant. In the written statement, there is a specific denial that there was any debtor-creditor relationship between the parties that would make the suit document a mortgage document. Learned counsel for the Respondents submitted that during the lifetime of Babutai Kale - the mother of the Respondents, there was no notice for redemption issued by the Appellant and that the notice was for the first time issued to the Respondents.

27. He submitted that after the execution of the suit document, the name of Babutai Kale was entered as owner in the revenue record as well as the Grampanchayat record. After the death of Babutai, the names of Respondents were also entered into the record as the owners of the suit property. The Appellant had never disputed the revenue entries, and thus it was clear that the Appellant had also accepted the document as a document of sale with a condition of re-purchase. Thus, once the Appellant had not availed the opportunity of making the payment and re-conveying the property in his name within the stipulated period of 7 years, pursuant to the document, Babutai Kale became the absolute owner of the suit property on the

expiry of the period of 7 years. Hence at a subsequent stage, the Appellant was not entitled to seek relief by claiming the document to be a mortgage document and claim redemption of the property.

28. The learned counsel further submitted that perusal of the document shows that at least at four different places, the document is referred to as a sale deed. A specific clause permitted the Appellant to re-purchase the property by making payment of the amount paid to the Appellant by way of consideration. A specific clause in the sale deed also further specifically provided that if the amount is not repaid within the period of 7 years, the said document itself would amount to a document of absolute ownership of Babutai Kale and no separate document was required to be executed. Learned counsel submitted that the first Appellate Court has rightly taken into consideration the important aspects of the matter for holding that the said document was a conditional sale deed with a right to re-purchase and not a mortgage document.

29. Learned counsel thus submitted that the first Appellate Court had taken into consideration the issue with respect to (i) handing over of absolute possession to the Respondents, (ii) no debtor-creditor relationship between the parties, (iii) the consideration amount being equivalent to the value of the property, (iv) no charge created on the

property, (v) no condition that the Respondents would not be entitled to create third party interest and (vi) no clause for payment of interest. Learned counsel thus submitted that all these factors taken into consideration by the first Appellate Court would show that document in question was a transaction of conditional sale with a right to re-purchase and not a document of mortgage within the meaning of Section 58 of the TP Act.

30. Learned counsel for the Respondents further submitted that Section 58 and Section 60 of the TP Act are required to be read together. In the suit document, there is no clause for the specific time period for payment, and to be precise, there is no specific “due date” mentioned in the document for payment. Learned counsel submitted that the word 'due' was inserted by way of amendment to Section 60 by the Act 20 of 1929 in place of 'payable'. Thus, learned counsel submitted that plain reading of Section 58 (c) along with Section 60 of the TP Act would show that it is necessary for a document for a mortgage by conditional sale to provide a specific due date for payment. In the present case, the stipulated period of 7 years may amount to an outer limit that was fixed for payment as there was no specific due date mentioned in the document for the purpose of repayment.

31. Learned counsel thus submitted that the first Appellate Court has also rightly taken into consideration that the stipulated period of 7 years in the suit document is a very short term which would not amount to a term required for a mortgage document. The first Appellate Court rightly interpreted the words in Marathi as specified in the document, which would show that the 7 years period was available for the Appellant to make the payment maximum within a period of 7 years for re-purchasing the property. Learned counsel, therefore, submitted that once the appellant failed to make the payment within a period of 7 years and did not avail the opportunity to re-purchase the property, in view of the specific terms of the document, Babutai Kale had become the absolute owner on expiry of the period of 7 years. Thus, the specific clauses in the agreement do not require any interpretation as sought to be submitted by the Appellant.

32. Learned counsel further submitted the facts in the decision of this Court in the case of ***Vasantrao s/o. Manoharrao Neb*** are totally different, and thus the proposition as laid down in the said decision is not applicable to the facts of the present case. He further submitted that the expiry of the term of 7 years is only for the purpose of forfeiting the right to re-purchase. Since there is no debtor-creditor relationship between the parties, the document

cannot be termed a mortgage document. Therefore, there is no question of the applicability of the principle of there being any clog on the right of redemption. Thus, there is no merit in the submission made on this aspect by the learned counsel for the Appellant. Learned counsel further submitted that since there was no specific due date mentioned in the document, therefore there was no compliance with the requirement as described under Section 60 of the TP Act. Learned counsel thus submitted that the first Appellate Court had rightly relied upon the decision of the Hon'ble Supreme Court in the case of ***Bhoju Mandal Vs. Debnath Bhagat***[3].

33. Learned counsel for the Respondents thus submitted that the first Appellate Court has rightly considered the distinction between the concept of a mortgage by a conditional sale and sale with a condition for re-purchase. Thus, it was submitted on behalf of the Respondents that the question of law as framed in the present Second Appeal with respect to re-conveyance has to be answered in favour of the Respondents as the interpretation of the document would clearly mean that the same was the document for sale with a condition to re-purchase and not a mortgage document.

34. With respect to the point of limitation, learned counsel for the Respondents submitted that the interpretation of the document

3 1963 AIR (SC) 1906

would mean that it is a document of sale with a condition to re-purchase within the period of 7 years. Once the Appellant failed to avail of the opportunity of re-purchase within the stipulated period of 7 years, the cause of action for seeking any relief would start from the expiry of the period of 7 years. Since the document cannot be termed to be a document of mortgage, there was no question of a limitation period of 30 years from the date of expiry of the period of 7 years. The suit filed beyond the period of 3 years from the expiry of the period of 7 years was clearly covered by Article 66 of the Limitation Act. Learned counsel, therefore, submitted that the question of law with respect to the suit being barred by limitation is also required to be answered in favour of the Respondents by holding that the suit is barred by limitation.

SUBMISSIONS IN REJOINDER ON BEHALF OF THE APPELLANT:

35. In response to the submissions made by the learned counsel for the Respondent, the learned counsel for the Appellant submitted that the present case is a clear case of mortgage as there is no transfer of interest and possession in favour of the Respondent. The document itself shows that there is debtor-creditor relationship between the parties, and there was an intention of creating a mortgage for taking money/loan as is seen from the terms and conditions of the suit document. Learned counsel for the Appellant

thus submitted that the Appellant had never given up the claim on the property and that he was always entitled to seek redemption of the property within the period of 30 years from the expiry of the period of 7 years. Thus, the point of re-conveyance as well as limitation, as framed in the Second Appeal, is required to be answered in favour of the Appellant. He, therefore, supported the Judgment and Decree passed by the trial Court on the point of the document being a document of mortgage and, therefore, the suit is filed within the limitation. He, therefore, submitted that the Judgment and Decree passed by the first Appellate Court deserve to be quashed and set aside and the Judgment and Decree passed by the trial Court be confirmed.

CONSIDERATION OF SUBMISSIONS AND FINDINGS:

36. I have heard both parties. Considered submissions made on behalf of both parties. I have perused the record of the Second Appeal. A perusal of the suit document shows that the transaction was entered into for an amount of Rs. 1000/- paid by Babutai Kale to the Appellant, and accordingly Appellant had agreed to transfer the suit property in favour of Babutai Kale. The clause in the document clearly stipulated that the Appellant was entitled to repay the amount within a period of 7 years and get the document of re-purchase executed. A specific clause in the document also shows that on

expiry of the period of 7 years, the document itself was to be treated as a document of absolute sale, and no separate document was required to be executed. This very clause which provides that in the event the amount was not repaid within a period of 7 years, the same document had to be treated as the document of absolute sale, shows that the document is a conditional sale with a right to re-purchase. It is not the case of the Appellant that during the period of 7 years, the Appellant had made any attempt to make the payment. He had never approached Babutai Kale for the purpose of claiming any relief by making the payment within the stipulated period of 7 years. Thus even the conduct of the Appellant shows that he had also treated the document as a conditional Sale with a right to repurchase.

37. The first Appellate Court is right in holding that for a document to be treated as a mortgage, certain essential aspects are required to be dealt with. In the present case, there is nothing on record to show that there was a debtor-creditor relationship between the parties. There was nothing on record to show that the mortgage amount was less than the value of the property. There was no charge created on the property. A perusal of the document shows that there was no condition imposed on the Respondents for the purpose of protecting the nature of the property. The document also did not provide for

any clause for payment of interest on the amount that was paid to the Appellant. hus, the argument made on behalf of the Appellant that consequences of failure to make the payment would amount to a clog on redemption and therefore, the suit was within the period of limitation has no merit.

38. The Appellate Court has thus rightly considered the crucial aspects required for treating the document as a document of a mortgage. Once the document is held to be a document of conditional sale with a right to re-purchase and not a mortgage document, the crucial aspect that is required to be taken into consideration is with respect to limitation. Since the document cannot be treated as a document of mortgage, the period of limitation would start from the expiry of the period of 7 years from the date of the document. Only in case the document is treated as a mortgage, then the period of limitation of 30 years from the date of expiry of 7 years would apply. However, in the facts of the present case, the document cannot be treated as a transaction of mortgage. Thus, the suit was beyond the period of limitation for claiming the possession of the suit property.

39. The interpretation of the definition of mortgage as relied upon by the Appellant under Section 58 of the TP Act clearly shows that the nature of the suit transaction does not fit in any of the definitions of

mortgage as provided under Section 58 of the TP Act. A mortgage by conditional sale as defined under Section 58(c) of the TP Act, is a transaction where the Owner of a property ostensibly sells the property on condition that on default of payment of the mortgage-money on a certain date, the sale shall become absolute. In the present case, a perusal of the agreement shows that the terms in the agreement clearly stipulates that the Appellant will be entitled to repurchase the property by repaying the amount of Rs. 1000/- within a period of 7 years failing which the agreement itself will be treated as an absolute sale and no separate execution of document would be necessary. However, what is absent in the terms of the agreement is the “certain date” for payment. Thus, in the absence of any certain date for repayment, there is no question of invoking any right to redeem as per Section 60 of the TP Act. As per Section 60, right of mortgagor to redeem will arise after the principal money has become due. In the present case there was no amount of debt and thus there was no principal money. Thus, there was no due date for repayment. The period of 7 years for repayment is only an outer limit. Thus, it cannot be said that the suit document was a mortgage by conditional sale. The suit document clearly is a document of sale with a condition for repurchase. There was no charge created on the property. There was no additional payment to be made by the

Appellant in the event said the document was to be treated as a mortgage document. Thus, in the absence of essential ingredients for treating the document/transaction as a mortgage transaction coupled with the clauses in the document for treating the said document as a document of absolute sale in the event of non-payment of the amount within a period of 7 years, shows that document is a document of conditional sale with a right to re-purchase.

40. The argument of the learned counsel for the Appellant that the condition in the Suit document with respect to treating the document as absolute sale in the event of failure by the Appellant to make payment within a period of 7 years would amount to clog on redemption has no merit. I have already held that the terms and conditions of the document as well as the subsequent conduct of the parties clearly show that the intention of the parties was always to execute conditional sale with a right to repurchase and not a mortgage document. The decision of this Court in the case of ***Vasant Neb*** and in the case of ***Bhimrao Solunke*** relied upon on behalf of the Appellant will not be of any assistance to the Appellant. This Court in the case of ***Vasant Neb,*** in the facts of that case has held that the question is always of the intention of the parties and the extraneous evidence can be considered only when the terms of

the document are vague. By referring to the facts of that case, this Court had held that the document clearly supported the condition which creates clog of redemption of the mortgage and thus this Court after considering the facts of the case had concluded that the document in question was a mortgage and not a conditional sale with a right of re-purchase. Similarly this Court in the case of ***Bhimrao Solunke*** also after referring to oral evidence as well as pleadings of the parties had observed that owner of the property in question was indebted at the relevant time. After considering the various facts of the case, this Court held that the parties intended to create mortgage by a conditional sale.

41. The first Appellate Court has relied upon the principles laid down by the Hon'ble Supreme Court in the case of ***Bhoju Mandal***. The principles laid down by the Hon'ble Supreme Court in the said decision squarely apply to the facts of the present case. The Hon'ble Supreme Court has held that the question, to which record the document belongs presents a real difficulty which can be only be solved by ascertaining the intent of the parties on a consideration of the contents of a document and other relevant circumstances. In the present case the aforesaid facts and circumstances as well as the conduct of the parties show that they always intended to execute a conditional sale with a right to repurchase and there was no

intention to create mortgage. Thus, the decisions relied upon by the learned counsel for the Appellant are of no assistance in the facts of the present case.

42. The decision of the Hon'ble Supreme Court in the case of ***Tulsi and others Vs. Chandrika Prasad and others***[4] relied upon by the learned counsel for the Appellant is also of no assistance to the Appellants. The Hon'ble Supreme Court in the said case has held that in the case of a mortgage by way of a conditional sale, a debt subsists and a right to redeem remains with a debtor, but in the case of sale with a condition to repurchase, the transaction does not evidence of an arrangement of lending and borrowing and thus right to redeem is not reserved thereby. In the facts of the present case, it is clear that neither there was relationship of debtor and creditor between the parties nor there was any arrangement of lending and borrowing. Thus, the argument on behalf of the Appellant that the suit document was a document of a mortgage by conditional sale has no merit.

43. Learned counsel for the Respondents is also right in submitting that if the document was to be treated as a document for a mortgage, the document did not provide any specific due date for making a re-payment. Outer limit therefore fixed for making the payment would

4 2007(1) Mh.L.J. 893

only mean that the intention of the parties was to transfer the title in favour of Babutai Kale, and only in the event, the Appellant had paid the amount within a period of 7 years, he was entitled to re-purchase the property. A specific clause in the agreement to treat the same document as a document of absolute sale also very clearly supports the interpretation made by the Respondents that the transaction is of absolute sale with a right to re-purchase and not a mortgage transaction. Once the document is held to be a document of conditional sale with a right to repurchase and not a mortgage document, the Suit will not be governed by Article 61(a) of The Limitation Act. The period of limitation will therefore be applicable as per Article 66 of the Limitation Act. Thus, the point of limitation will also have to be held in favour of the Respondents. I, therefore, find that even with respect to the question of the law of limitation, the suit filed by the Appellant is not within a period of limitation.

44. The learned first Appellate Court has rightly held that the transaction between the parties was not a mortgage transaction but a transaction of conditional sale with a right to re-purchase. The findings given by the first Appellate Court to hold that the suit was not within the period of limitation also require no interference. Thus, for the reasons stated above, there is no merit in the submissions

made on behalf of the Appellant and the question of law as framed is answered in favour of the Respondents.

45. Hence, for the reasons stated above, Second Appeal is dismissed. There will be no order as to costs.

[GAURI GODSE, J.]