IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.224 OF 1995
WITH CIVIL APPLICATION NO.2100 OF 1998

Asruba s/o Namdeo Kashirsagar,
Deceased through L.Rs.

1. Mohan Ashruba Kshirsagar,
Age : 30 years, Occu : Service,
R/o Charhata, Tal. & Dist. Beed,
At present R/o Pachod,
Tal. Paithan, Dist. Aurangabad.

2. Subhash Ashruba Kshirsagar,
Age : 21 years, Occu : Student,
R/o Charhata, Tal. & Dist. Beed.

3. (Deleted)

4. Rakhmabai Mohan Raut,
Age : 35 years, Occu : Household,
R/o Nalwandi, Tal & Dist. Beed.

5. Gayabai Bhagwat Landge (Dead)
through her legal heirs.

5-A. Krushna s/o Bhagwat Landge,
Age : 26 years, Occu. Worker,
R/o Pargaon, Shiras,
Tq. & Dist. Beed.

5-B. Ashabai w/o Ankush Raut,
Age : 29 years, Occu. Household,
R/o Nalwandi, Tq. & Dist. Beed.

5-C. Kanupatra w/o Kailas Kale,
Age : 27 years, Occu. Household,
R/o Rolithal, Tq. Georai,
Dist. Beed.

5-D. Seema w/o Mahadev Bankar,
Age : 24 years, Occu. Household,
R/o Devadithan, Tq. Jamkhed,
Dist. Ahmednagar. ..Appellants

Versus

1. Kisan s/o Dhondiram Kshirsagar (Dead)
through legal heirs.

1A. Dharmaraj s/o Kisan Kshirsagar,
Age : 40 years, Occu. Service,

1B. Sumanbai w/o Kisan Kshirsagar,
Age : 65 years, Occu. Household,

Both R/o Charhata, Tq. & Dist. Beed.

1C. Jayashree w/o Uddhav Shelar,
Age : 29 years, Occu. Household,
R/o Nirgudi, Tq. Patoda,
Dist. Beed.

2. (Abated)

3. Amrut s/o Dhondiram Kshirsagar,
Age 23 years, Occu : Agricultural,
R/o as above.

4. Dhondiram s/o Tukaram Kshirsagar,
Age 65 years, Occu : Agricultural,
r/o Charhata, Tq. & Dist. Beed. (Dead) ..Respondents

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Advocate for Appellants : Mrs. C.S. Deshmukh.
Advocate for Respondent Nos.1A to 1C : Mr. R.B. Deshpande.

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CORAM : S.G. MEHARE, J.

DATED : DECEMBER 11, 2023

ORAL JUDGMENT :-

1. Heard learned counsel for the appellants and learned counsel for the respondents.

2. This second appeal has been preferred against the impugned judgment and decree passed in Regular Civil Appeal No.348 of 1984 by the learned IInd Additional District Judge, Beed, dated 17.09.1994.

3. The appellants were the defendants, the respondents Nos.1 to 3 were the plaintiffs and respondent no. 4 was the defendant no. 1.

4. The brief facts of the case were that the plaintiffs had filed a suit for reconveyance and possession of the suit land survey No. 20/AA/@ of village Charatha, Tq. and District Beed, with mesne profit. The plaintiffs had a case that they were the brothers inter se, and defendant No.1 was their father. The fathers of defendant no.1 and defendant no.2 were the real brothers. They had confidence in each other. The suit land was the ancestral joint family property of plaintiffs and defendant no.1. They did not deny the execution of the sale deed by plaintiff no.1 and defendant no.1 in favour of defendant no.2 on 14.06.1971. It was a registered conditional sale deed for a nominal consideration of Rs.1,000/-. Defendant no.2 had agreed to reconvey the suit land in favour of the plaintiffs on or before 13.06.1973. The market value of the suit land was Rs.10,000/-. The sale deed was executed to secure Rs.400/- borrowed and repay Rs.1000/- with interest. The real intention of the parties was not to execute the mortgage deed, but defendant No.2 had no money

lending license, and they had confidence in him. Hence, the said conditional sale deed was executed to escape from the provisions of law opposing the public policy. Plaintiff nos.2 and 3 were minors and not parties to the sale deed. The sale deed was neither for any legal necessity nor the benefit of the estate, and it was not binding on them. Plaintiff No.1 and Defendant No. 1 several times offered Rs.1,000/- within a stipulated period, but Defendant No.2 avoided reconveying the land. They were ready and willing to repay the loan and get the reconveyance and possession of the suit land.

5. Defendant no.2/present Appellant contested the suit and admitted the relationship between the plaintiffs and defendant no.1. Though the land was ancestral and joint family, he became the absolute owner from the date of the execution of the sale deed i.e. 14.06.1971. There was no agreement of reconveyance, but the condition was inserted in the sale deed for the convenience of the parties. He denied that the sale deed was for securing the amount of Rs.400/- and repaying Rs.1,000/- with interest. It was out and out sale, and it was never agreed to reconvey the suit land. The reasonable consideration was paid. It was not a money-lending transaction. He entered his name in the revenue record. He was enjoying the suit land peacefully and without interruption. He prayed for the dismissal of the suit.

6. The learned Court of first instance had dismissed the suit, holding that the plaintiffs had proved that defendant no.1 and plaintiff no.1 had executed a conditional registered sale deed on 14.06.1971 for consideration of Rs.1,000/-. He also held that it was agreed between defendant no.1 and plaintiff no.1 that defendant no.2 would reconvey the suit land in favour of the plaintiff before 13.06.1973. It was also held that the plaintiff's suit was not within limitation. The suit was dismissed mainly on the ground that it was barred by limitation. Against the said judgment, the original plaintiffs had preferred the appeal before the First Appellate Court. The First Appellate Court held that the plaintiffs had proved that plaintiff no.1 and defendant no.1 had executed the conditional sale deed in favour of defendant no.2. The First Appellate Court held that the document is not the conditional sale deed. It was to be reconveyed within the period of two years. The First Appellate Court also held that since it is a mortgage, the action available for the mortgage is by way of suit for redemption under Article 61 of the Limitation Act. Hence, the plaintiffs' suit was within the period of limitation. He declined the arguments of the learned counsel for defendant no.2/present Appellant that the limitation would be as provided under Article 54 of the Limitation Act. Lastly, the First Appellate Court allowed the appeal and decreed the suit.

7. Learned counsel for the appellants would submit that both Courts have erred in recording the finding about the nature of the document. This Court, on 03.02.1997, has passed the following order :

"The Second Appeal is admitted vide ground Nos. IV, V, VII and X."

8. Ground Nos. IV, V, VII and X reads thus :

> IV) The Lower Appellate Court was overwhelmed by its notion that a sale with a condition to repurchase within a stipulated period has to be a mortgage by conditional sale.
>
> V) Whether the Court below was right in holding that the transaction between the Appellant and respondent No.1 and 4 was a mortgage by conditional sale and not a sale with condition to repurchase.
>
> VII) The document itself discloses that the Respondent lost their right of redemption under which they were entitled to repurchase the property sold to the applicant within a period of two years as the property vested absolutely in the Appellant on the date of transaction.
>
> X) Whether the Court below was right in holding the suit to be within a period of limitation when the Respondent Nos.1 to 3 did not institute the suit within a prescribed period of limitation for specific performance of contract where under the Appellant was to resale the property to them within a period of two years from the date of original transaction.

9. Heard the respective counsels.

10. By consent, the substantial questions of law have been reformulated to give them the shape of substantial questions of law:

(i) Was the sale document dated 14.06.1997 a mortgage by conditional sale or a sale with a condition to repurchase?

(ii) Were the plaintiffs lost the right to repurchase the property sold to the original defendant No.2 as they failed to repay the amount agreed upon within two years of executing the sale deed?

(iii) Considering the nature of the suit, whether Article 61 or 54 of the Limitation Act would apply.

11. Learned counsel for the appellants has vehemently argued that the recitals of the documents clearly show that it was a mortgage by conditional sale. There were specific recitals that if the executant failed to repay the amount of Rs.1,000/- within two years, i.e., on or before 13.06.1973, the sale would be absolute. The plaintiff and defendant no.1 did not prove that at any time before the said date, they attempted to repay Rs.1,000/- and get the sale deed re-executed. However, after a long time of ten years, the sons filed the suit under the garb that at the time of the sale deed, they were minors, and their rights were affected. They also came up with a false defence that it was not a conveyance for legal necessity. They also did not file the suit within three years after attaining the majority. A false defence was raised that it was a money-lending transaction. But to avoid the public policy, the document in question was executed. The

document could not be interpreted on the basis of its nomenclature. The entire document needs to be read to understand the parties' intentions. The parties' conduct is also one of the factors to consider in determining the real intention of the parties to the transaction. Since there was a specific condition to repay the money within two years, the suit ought to have been filed within three years from the date of denial to re-execute the sale deed by the appellants as provided under Article 54 of the Limitation Act. The plaintiffs had no right to claim the redemption. She would rely on the case of *Vanchalabai Raghunath Ithape (Dead) by Lrs Vs. Shankarrao Baburao Bhilare (Dead) by Lrs and others, AIR 2013 SC 2924* and *Shivaji Dagadu Mahangade Vs. Aba Gopala Shinde, since deceased by his legal representatives, AIR 2016 Bombay 213*. It has been prayed that considering the recitals of the sale deed and failure to repay the amount agreed within an agreed period of time, the decree of reconveyance and possession could not be passed. The appellants became the owners of the suit land as the sale deed became absolute on the failure to repay the amount.

12. Learned counsel for the respondents would submit that the real intention of the parties was reconveyance. The oral evidence has been led to prove the real intention of the parties. The defendants have admitted that the suit lands were ancestral properties. However, the Courts did not properly appreciate the defence of legal necessity

for selling the property. The plaintiff nos.2 and 3, who were minors at the time of the sale deed in dispute, were not the party to the transaction. Their rights to have a share in the suit land have been affected. Since their interest was not protected, the sale deed was not binding upon them. He would also argue that the finding of the First Appellate Court was correct. Since it was a mortgage transaction, the suit could be preferred within thirty years as provided under Article 61 of the Indian Limitation Act. He would support the impugned judgment and decree.

13. A question involved is what is a source to ascertain whether the sale deed dated 14.06.1971 is a mortgage by conditional sale or a sale with a condition to repurchase.

14. It has been correctly argued for the defendant that the recitals of the document if created, and the conduct of the parties are relevant factors for ascertaining the intention of the parties.

15. The learned First Appellate Court has also correctly recorded the finding relying on the judgments of Privy Counsel of *Balkishan Das Vs. Legges (22 all 149 (PC)* and held that where oral evidence is not available or contradictory the Court should not depart from the written evidence of the document. The First Appellate Court also relied on the case of *Ramdhendas Vs. Ramkishandas, AIR 1946 PC 178.* He has specifically held that the document Exh-26, the document in question, cannot be construed as out and out sale but a

conditional sale deed. He also discussed Section 58 (c) of the Transfer of Property Act and held that it was a suit for redemption. Hence, the limitation for such suits would be as prescribed in Article 61 of the Limitation Act.

16. The law is well settled that the document or the evidence should be read as a whole to understand the intention of the parties. The caption or the nomenclature of the document is not determinative in understanding the intention of the parties. It appears that the nomenclature of the document (Mudati Kharedikhat) is interpreted as the sale transaction was not a mortgage by conditional sale deed, but it was a sale with a condition to repurchase.

17. Before adverting to the nature of the transaction, it would be profitable to go through the definitions and conditions of mortgages.

18. Section 58(c) of the Transfer of Property Act defines the mortgage by conditional sale, which reads thus :

> "(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 a 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.

19. The section is clear that where there is a condition embodied in the document of sale that on default of payment of mortgage money on a certain date, the sale shall become absolute and if that is so, the transaction is called a mortgage by conditional sale.

20. The recitals of the sale deed were very specific that the sale was on a condition that if the executant fails to repay the amount of Rs.2,000/- within two years, i.e. on or before 13.06.1973, the sale shall become absolute. It was also a condition that the sale shall become void on such payment being made. It was also the condition that on payment of such money borrowed, defendant no.2 would transfer the property to the executant i.e., plaintiff no.1 and defendant no.1.

21. The learned Trial Court has held that the plaintiffs, particularly the executant of the sale deed in question, did not prove that they have made an attempt to repay Rs.1,000/- to defendant no.2 i.e. the present appellant.

22. There shall be an agreement between the seller and the buyer about reconveyance. The burden was on the plaintiffs to prove that they had fulfilled the conditions of the sale deed dated 14.06.1971. There was no evidence to believe that anytime before the date agreed, plaintiff no.1 and defendant no.1 had been to defendant

no.2 to repay Rs.1,000/- and asked him to reconvey the sale deed. On the contrary, it reveals that the sons filed the suit nine years after 13.06.1973.

23. A similar issue, whether the document was a mortgage by conditional sale or sale with a condition of repurchase, came up before this Court in the case of Shivaji Dagadu Mahangade (cited supra). The facts of that case were that the sale deed was executed with a specific term; if the respondent/seller failed to pay the amount within ten years, then the document, dated March 1, 1972, would be considered a sale deed. A similar defence was there that the seller went to the purchaser on many occasions to pay the money and to reconvey the property, but the seller avoided doing so. This Court has held in para 16 that reads thus :

> "16. Going by the plain language of the Deed, if the amount was not repaid by the Respondent within the stipulated period, the Deed was to be considered as an absolute sale deed and Appellant was to become owner of the property. Both the Courts have rendered the finding of fact that the amount was not paid within period of 10 years. In spite of this finding of fact, both the Courts have directed the Appellant to hand over possession to the Respondent on the basis that the mortgage had to be redeemed, which is clearly erroneous."

24. The ratio laid down in the above case is squarely applicable to the case at hand. Since the seller failed to repay the

agreed amount within the period stipulated in the document, the present appellants become the absolute owner.

25. In the absence of any evidence contrary to the conditions of the sale, it can not be believed that it was a sale with a condition to repurchase.

26. Section 60 of the Transfer of Property Act provides for the rights of mortgagors to redeem. As per the said section, at any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee; clause (c) provides that, at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute, the right conferred by this section is called a right to redeem. The right to redemption arises when the principal money secured by the mortgage has become due and may be exercised at any time thereafter, subject to the law of limitation.

27. The question was whether Article 54 or Article 61 of the Limitation Act would apply.

28. It has been argued that since a specific defence was raised that the vendor tried to repay the agreed money within two years, the defendant denied it. The vendors had to file a suit within three years of such denial, as provided in the second part of Article 54 of the Limitation Act.

29. The nature of the suit is important to ascertain the limitation applied for the suit. The plaint needs to be read as a whole to know the nature of the suit. The plaint averments are specific that the plaintiffs had a suit for the redemption of the mortgage. They never claimed a specific performance of the contract. So, considering the nature of the documents, transactions between the parties and plaint averments, it was a suit for redemption; the limitation for such a suit would be as provided under Article 61 but not under Article 54 of the Limitation Act.

30. Discussing the substantial questions of law, it has been answered that the sale transaction was a mortgage by conditional sale and not with a condition to repurchase. The plaintiffs have lost the right of redemption as they failed to repay the agreed amount within the time prescribed in the sale deed. Considering the nature of the suit, Article 61 of the Limitation Act would apply.

31. Considering the issues involved in the case and answers given to the substantial questions of law, the Court passes the following order :

ORDER

(I) The appeal is allowed.

(II) The impugned judgment passed in Regular Civil Appeal No.348 of 1984 by the learned II Additional District Judge, Beed, dated 17.09.1994, is set aside.

(III) The suit of the plaintiffs is dismissed.

(IV) No order as to costs.

(V) Civil application stands disposed of.

(S.G. MEHARE, J.)

Mujaheed//