IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 231 OF 2023

1.Shri. Dattatray Bhaurao Somwanshi,
Age 77 years, Occupation Agriculturists,

2.Shri. Pramod Dattatray Somwanshi,
Age 41 years, Occupation Agriculturists,

3.Sou. Satyabhamabai Dattatray Somwanshi, Age 70 years, Occupation Agriculturists,

Nos. 1] to 3] are residing at Sundarpur, Taluka — Niphad, District — Nashik.

.....APPELLANTS

(Orig.Defendant Nos. 1 to 3)

V/s.

Shri. Vishwanath Damodar Shinde, Age 71 years, Occupation - Agriculturists, Residing at Kathargaon, Taluka — Niphad, District — Nashik.

....RESPONDENT
(Orig.Plaintiff)

Mr. Sugandh B. Deshmukh a/w Mr. Irvin Dsouza and Mr. Vaibhav Thorve, for Appellants.

Mr. Rameshwar Gite, for Respondent.

CORAM : SANDEEP V. MARNE, J.

DATED : 11 JANUARY 2024.

JUDGMENT:

1. By this Appeal, the Appellant challenges Judgment and Order dated 22 December 2022 passed by the Ad-hoc District Judge-1, Niphad in Regular Civil Appeal No. 41 of 2017 thereby confirming the Judgment and Decree dated 18 March 2017 passed by the 2nd Joint Civil Judge Junior Division, Niphad in Regular Civil Suit No.4 of 2011.

2. Briefly stated, facts of the case are that agricultural land admeasuring 40 Ares out of Gat No.105 located at Sundarpur, Taluka-Niphad, District-Nashik (**suit property**) was owned and possessed by the Respondent/Original Plaintiff. By registered Deed executed on 14 October 1986, Plaintiff sold the suit property in favour of the Appellant/Defendant No.1. There is dispute amongst the parties about the nature of the said Deed which is titled as 'Conditional Sale-deed'. Defendant No.1 paid amount of Rs.11,000/- to the Plaintiff and possession of the suit property was handed over to Defendant No.1. The Deed however contains a covenant that in the event of Plaintiff repaying the amount of Rs.11,000/- after five years and within six years, the Defendant No.1 shall return the land to the Plaintiff. According to Plaintiff, the Deed executed on 14 October 1986 is Mortgage by way of Conditional Sale whereas according to Defendant No.1 it is a document of absolute Sale.

3. It appears that, the Plaintiff did not repay the amount of Rs.11,000/- within the time stipulated in the Deed. On 6 December 2010, Plaintiff issued notice to Defendant No.1 demanding redemption of mortgage in respect of the suit property. Defendant No.1 denied the contentions in the notice. Plaintiff instituted Regular Civil Suit No. 4 of

2011 before the Civil Judge Junior Division, Niphad on 6 January 2011 seeking redemption of mortgage and possession of the suit property. The suit was resisted by Defendant No.1 by filing Written Statement. By Judgment and Decree dated 18 March 2017, the Trial Court proceeded to decree the suit and directed Defendant No.1 to accept the amount of Rs.11,000/- and execute an Agreement of repurchase in favour of the Plaintiff by handing over possession of the suit property to Plaintiff. Defendant No.1 filed Regular Civil Appeal No. 41 of 2017 before the District Judge, Niphad challenging the decision of the Trial Court. By Judgment and Order dated 22 December 2022, the first Appellate Court has dismissed the Appeal filed by Defendant No.1. Accordingly, Defendant No.1 has filed the present Second Appeal challenging the concurrent findings of the Trial Court and the first Appellate Court.

4. Mr. Deshmukh, the learned counsel appearing for the Appellant would submit that the Trial Court and the first Appellate Court have committed gross error in assuming that the Deed dated 14 October 1986 is Mortgage by way of Conditional Sale. He would submit that both the Courts have failed to appreciate that for establishing the nature of document as mortgage, it was incumbent for the Plaintiff to establish the relationship of borrower and creditor. That the document must contain a covenant for payment of interest. That the document nowhere records that Defendant No.1 stood in capacity as creditor or Plaintiff in capacity of borrower. That there is no covenant in the document for payment of interest. That therefore the document cannot be treated as Mortgage by way of Conditional Sale. In support of his contention, Mr. Deshmukh would rely upon the judgment of the Apex

Court in ***Dharmaji Shankar Shinde***[1] and ***Vanchalabai Raghunath Ithape (Dead) by LR.***[2].

5. Mr. Deshmukh would further submit that the Trial Court has erred in assuming that the market value of the suit property was Rs.47,000/-. Inviting my attention to the document in question, Mr. Deshmukh would submit that Rs.47,000/- is described as the value of the entire land admeasuring 96 Are in Gat No.105. That what is sold to Defendant No.1 is land admeasuring only 47 Ares. That if the value of the entire land admeasuring 96 Ares is taken as Rs.47,000/-, the value of 40 Are land would be Rs.19,500/-, which cannot be said to be substantially higher than the consideration of Rs.11,000/- paid by Defendant No.1 to Plaintiff. Mr. Deshmukh would further submit that both Trial as well as the first Appellate Court have erroneously relied upon stray admission given by Defendant No.1 in the cross-examination about payment of Rs.11,000/- towards security. He would submit that the nature of transaction is required to be ascertained from the contents of the document and not from the evidence of parties. That the document repeatedly provides that the transaction is of ‘conditional sale’ and such covenants in the agreement cannot be ignored altogether for assuming that the transaction is of ‘mortgage’. That Plaintiff failed to repay the amount of Rs.11,000/- within the agreed period and therefore the sale became absolute. He would therefore pray for setting aside the orders passed by the Trial and first Appellate Court.

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1 Dharmaji Shankar Shinde and Others Vs. Rajaram Shripad Joshi (Dead) Through LRs and Others (2019) 8 SCC 401

2 Vanchalabai Raghunath Ithape (Dead) By LR. Vs. Shankarrao Baburao Bhilare (Dead) by LRs and Others (2013) 7 SCC 173

6. *Per-contra*, Mr. Gite the learned counsel appearing for the Respondent/Original Plaintiff would submit that there is a specific covenant in the Deed dated 14 October 1986 for return of land upon repayment of the borrowed amount of Rs.11,000/-. That therefore upon plain reading of the provisions of Section 58 of the Transfer of Property Act, 1882, the document has correctly been treated as Mortgage by Conditional Sale. He would submit that every document which contains a stipulation for return of land must be treated as mortgage by conditional sale. He would submit that the mortgage value of the land admeasuring 40 Are is shown as Rs.47,000/- and the said valuation is not in respect of land admeasuring 96 Are. He would submit that the reason for execution of the document is shown as purchase of another property which leads credence to the fact that the transaction is of mortgage. Additionally, Defendant No.1 specifically admitted that the document was executed solely for the purpose of security for repayment of the amount advanced by him. He would pray for dismissal of the Appeal.

7. After having considered the submissions canvassed by the learned counsel appearing for the parties and after going through the documents placed on record and the judgments of the Trial and the first Appellate Court, the issue that arises for consideration is whether the document executed by the Plaintiff in favour of Defendant No.1 on 14 October 1986 is a 'Deed of Conditional Sale' or is it a 'Mortgage by way of Conditional Sale'. Section 58 (c) of the Transfer of Property Act deals with Mortgage by conditional sale and reads thus :

> **"Section 58. (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 such 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. Thus, when it appears to the Court that the transaction is of ostensible sale but there are various conditions present therein as provided under Section 58 (c), such document can be treated as Mortgage by conditional sale. One of the conditions prescribed in Section 58 (c) is that on payment being made, the borrower shall transfer the property to the seller under the Proviso to Section 58 (c). The conditions specified in the Section must be embodied in the document which effects the sale. In the present case, there is no dispute to the position that a specific condition is incorporated in the Deed dated 14 October 1986 about return of land on repayment of amount of Rs.11,000/-. The said condition reads thus :

> सदरचे तुम्हा पासून घोतलेले रूपये ११,०००/- हे मीती मजकुर पासुन ५ वर्षा नंतर व सहा वर्षांचे आंत आणुन देवुंन मिळकत **<u>गहाण</u>** मुक्त करून घेवु त्या वेळेस मिळकतीत पिक असल्यास पिक निघाल्यावर मिळकत **<u>गहाण</u>** मुक्त कूरून घेवु व त्यावेळेस मिळकत ही तुम्ही आमचे कबजात द्यावयाची आहे.

(emphasis and underlining supplied)

9. The above condition can be translated as under :

> "The said amount of Rs.11,000/- received from you shall be returned after five years and within six years and the land would be freed from **<u>mortgage</u>**. In the event there is a crop in the land at that time, the land would be freed from **<u>mortgage</u>** after removal of the crop and at that time, you shall put the land in our possession".
>
> *(emphasis and underlining supplied)*

10. The above stipulation twice uses the word "mortgage". From the above stipulation, the intention of the parties appear to be apparent that the transaction is that of mortgage. The parties agreed that upon return of the amount of Rs.11,000/- the land would be freed from mortgage. Thus, there is not only a specific condition incorporated in the Deed about return of the land on repayment of amount, the said stipulation makes it clear that upon return of amount of Rs.11,000/-, the land was to be freed from mortgage. In my view, therefore the conditions prescribed in Section 58 (c) are fully satisfied in the present case and the document has correctly been treated as Mortgage by conditional sale by the Trial and the first Appellate Court.

11. Mr. Deshmukh, has relied upon Judgment of the Apex Court in ***Dharmaji Shankar Shinde*** (supra). In that case, the Apex Court has held in paras-14, 15, 19, 20, 21 and 22 as under :

> "14. The question in each case is the determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of the

surrounding circumstances. If the words are plain and unambiguous then in the light of the evidence of the surrounding circumstances, they must be given their true legal effect. If there is any ambiguity in the language employed, the intention is to be ascertained from the contents of the deed and the language of the deed is to be taken into consideration to ascertain the intention of the parties. Evidence of contemporaneous conduct of the parties is to be taken into consideration as the surrounding circumstances.

15. After referring to a number of judgments and the essentials of agreement to qualify as a "mortgage by conditional sale", in Vithal *Tukaram Kadam v. Vamanrao Sawalaram Bhosale (2018) 11 SCC 172*, it was held as under: (SCC p. 178, para 14)

> "14. The essentials of an agreement to qualify as a mortgage by conditional sale can succinctly be broadly summarised. An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale. The execution of a separate agreement for reconveyance, either contemporaneously or subsequently. shall militate against the agreement being mortgage by conditional sale. There must exist a debtor and creditor relationship. The valuation of the property and the transaction value along with the duration of time for reconveyance are important considerations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner.”

19. Mention of "borrowed a sum of Rs 700" in the document is incidental. Mère incorporation of the word "borrowed" and "mortgage by conditional sale" cannot by itself establish that there is a debtor-creditor relationship. In fact, as pointed out earlier, the recitals of the document make it clear that the parties expressed their intention to put an end to the debtor-creditor relationship with respect

to the sum of Rs 700 that existed prior to the execution of Ext. P-73 and creating a relationship of vendor and vendee by transfer of the suit property for consideration of Rs 2500. As rightly observed by the trial court, in Ext. P-73, there is no mention of the rate of interest, right of foreclosure that are essential in a deed of mortgage.

20. The contention of the respondents is that in view of the mandatory provisions of the proviso to clause (c) of Section 58 of the Act, since the sale and the agreement to repurchase are embodied in the same document (Ext. P-73), the transaction is to be taken as a mortgage and the conditions enumerated in the proviso to Section 58(c) of the Transfer of Property Act have been satisfied in the present case. On behalf of the respondents, it was submitted that the existence of creditor-debtor relationship can be derived from the recital in the document "I have borrowed". As pointed out earlier, there are no recitals in the document to establish creditor-debtor relationship; nor does it contain the right of foreclosure, payment of interest, etc. which are essential requirements in a deed of mortgage.

21. As per Section 58(a) of the Transfer of Property Act, the mortgage is the transfer of an interest in specific immovable property as security for the repayment of the debt: but such interest itself is immovable property. In the case in hand, non-mention of the mortgage amount for which the interest in the immovable property was created as security, indicate that the parties have never intended to create a mortgage deed. If really the parties have intended the transaction to be a mortgage, while handing over possession of the property to Shankar Shinde for cultivation, the parties would have stated that the cultivation and enjoyment of usufructs are in lieu of the interest payable by Shripad Joshi on the amount. But that was not to be so The transfer of possession and right to cultivate the suit land could be conceived as the intention of the executant to transfer the right, title and interest in the property which are essentials in any transaction of a sale.

22. Moreover, as per the clauses in Ext P-73. document, the possession of the suit property was also handed over to

> Shankar Shinde, father of the appellants. Though, it is stated that the transferee, Shankar Shinde was to pay the revenue to the Government after five years, according to the appellants, ever since 1967, land revenue was paid by the father of the appellants. In his evidence, PW 1 admitted that revenue cess of the suit property has been paid by Shankar Shinde from 1967 and after his demise, by his legal heirs. Likewise, a mutation was also effected in the name of Shankar Shinde even in the year 1967. During his lifetime, father of the respondents, Shripad Joshi has not raised any objection to the mutation nor for the payment of the revenue cess by Shankar Shinde. Considering the contemporaneous conduct of the parties, it is clear that Shankar Shinde and thereafter the appellants were dealing with the suit property as if they were the owners of the land. The clause in Ext. P-73 that if the amount is not paid within a period of five years, the transaction will become a permanent sale deed and thereafter, the transferee will have the absolute right over the property are consistent with the express intention of parties making the transaction a conditional sale with option to repurchase."

12. It appears that there was a specific condition in the document in ***Dharmaji Shankar Shinde*** (supra) that on failure to repay the amount within five years, the transaction would become a permanent Sale-deed and that thereafter the transferee will have an absolute right over the property. Such condition is absent in the present case.

13. Mr. Deshmukh has relied upon Judgment of the Apex Court in ***Vanchalabai Raghunath Ithape*** (supra). In that case, the Apex Court has held in paras-11, 13 and 18 as under :

> "11. The document in question has been described as sale deed transferring the land along with the fixtures and possession was handed over to the defendant. The relevant portion of the sale deed is extracted hereinbelow:
>
> > "Thus the sale land along with the fixtures and all rights is being sold to you with all rights along with its possession. Thus you may cultivate the same.

> Henceforth I or my heirs shall not be having any right over the same and you have become the owner of the said land. Any obstruction would be removed at my cost. I have received the consideration for the same for which there is no complaint. If Rs 3000 is paid within 5 years at the end of any Falgun month at that time you should accept the said amount and return the land to me and on this condition the land is being sold to you."

> 13. From a perusal of the aforesaid provisions especially, Section 58(c), it is evidently clear that for the purpose of bringing a transaction within the meaning of "mortgage by conditional sale", the first condition is that the mortgagor ostensibly sells the mortgaged property on the condition that on such payment being made, the buyer shall transfer the property to the seller. Although there is a presumption that the transaction is a mortgage by conditional sale in cases where the whole transaction is in one document, but merely because of a term incorporated in the same document it cannot always be accepted that the transaction agreed between the parties was a mortgage transaction.

> 18. In the instant case, the alleged sale document was executed in the year 1967 transferring the suit property by way of sale subject to one stipulation/condition that on receiving the sale amount of Rs 3000 within five years the land was to be returned to the plaintiff vendor. It is also not in dispute that after transfer of the land Respondent 1-defendant came in possession and used and enjoyed the suit property as an absolute owner. It was only after 11 years that the appellant-plaintiff filed the suit alleging that the suit property was mortgaged in favour of the defendant-Respondent 1 herein with a condition to reconvey the land."

14. In ***Vanchalabai Raghunath Ithape*** (supra), the document did not make any reference to transaction of mortgage. It was a simple case of conditional sale. It is in light of the facts of that case that the Apex Court held the document in question to be that of sale and not of mortgage. In the present case, however there is repeated reference of

the transaction of Rs.11,000/- being transaction of mortgage. It has come on record that the consideration paid does not match the mortgage value of the property and Defendant No.1 himself has admitted that document is executed only as security for repayment of amount (about which discussion in detail is in latter portion of the judgment). Therefore, applying the provisions of Section 58 (c) of the Transfer of Property Act, the document has rightly been construed as mortgage by conditional sale in the present case.

15. On the contrary, the reliance of Mr. Gite on the judgment of the Apex Court in ***Bhimrao Ramchandra Khalate (deceased) through LRS***[3] appears to be apposite. In that case, the facts were almost similar. The Deed in that case was titled as 'Conditional Sale-deed' as is in the present case. There was a condition for reconveyance of land on return of the borrowed amount. In the above factual position, the Apex Court has held in paras-8, 9, 10, 11, 12 and 13 as under :

> 8. In view of the Judgments referred to above, now we examine the facts of present case. The deed in question is Ex. 68. The document reads as under:
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> > "I, above Executant, given in writing that I am executing this conditional sale deed in your favour in front of Sub-Registrar, Phaltan as I am taking ₹ 3,000/- (three thousand) in cash from you for my household expenses in respect of land which is in my possession owned by me and enjoyed by me absolutely on this date. The description of the land located within limits of town Khunte, Division Satara, Tq. Phaltan, irrigated by Government Canal. Its boundaries and other particulars are –
> >
> > xx xx xx
>
> The above land owned and enjoyed by me along with all materials standing on it including trees, stones, mud etc. is

[3] Bhimrao Ramchandra Khalate (deceased) through LRS Vs. Nana Dinkar Yadav (Tanpura) and another 2022 (3) Mh.L.J. 9

being handed over to you by me for your possession on the condition that you are giving back its possession to me anytime within one year from the date of this sale deed when I repay the above amount to you while re-transferring the above land to my name. In case non-payment by me of the said amount within the stipulated period, this sale deed will be taken as a permanent one and you will enjoy the possession of the land as your own. Any future disputes in respect of the said land will be dealt by me if they arise.
I sign this sale deed today on 22nd February, 1969."

9. A perusal of the aforesaid document would show that:
(i) The plaintiff has borrowed a sum of ₹ 3,000/- from the defendant for his household expenses in respect of the land which was in his possession.
(ii) The possession of land was handed over to the defendant on the condition that the possession will be given back to him within one year from the date of conditional sale deed.
(iii) The defendant is bound to retransfer the land to the plaintiff when he repays the amount of ₹ 3,000/-.
(iv) If the amount is not paid within the stipulated period, the conditional sale deed may be taken as a permanent one.

10. A complete reading of the document would show that a sum of ₹ 3,000/- was taken as a loan from the defendant for household expenses. The same was to be returned and the defendant was bound to retransfer the land. The condition that if the plaintiff is not able to pay the loan amount within one year, the document will be taken as a permanent sale deed is the contentious clause between the parties.

11. In view of the judgments mentioned above, the intention of the parties has to be seen when the document is executed. It is not in dispute that the condition of retransfer is a part of the same document (Ex. 68). Such is the inserted by an amendment in year 1929 expressed by the proviso of section 58(c) of the Act As held in Pandit Chunchun Jha, a transaction which takes the outward form of a sale but in essence the documents are of a mortgage, though it is couched in the form of a sale This Court held

that it is impossible to compare one case with another Each case must be decided on its own facts and circumstances. The document has to read as a whole and if any word is ambiguous, then to find out the intention of the parties when such document was executed.

12. Therefore, reading of the document would show that the document was executed for the reason that the plaintiff has borrowed a sum of ₹ 3,000/- for his household expenses and the defendant is bound to retransfer the land if the amount is paid within one year. The advance of loan and return thereof are part of the same document which creates a relationship of debtor and creditor. Thus, it would be covered by proviso in section 58(c) of the Act. Now, some of the later judgments of this Court interpreting the proviso in section 58(c) of the Act need to be considered.

13. This Court in *Umabai and anr. vs. Nilkanth Dhondiba Chavan (Dead) by LRs and anr., 2005(4) Mh. L.J. (S.C.) 306 = (2005) 6 SCC 243* was examining contemporaneous documents executed on 30-12-1970 whereby the plaintiff had agreed to sell the property for consideration of ₹ 45,000/-. A sale deed was executed as well. Another agreement to sale was executed between the parties on the same date where the defendants agreed to reconvey the property on receipt of ₹ 45,000/-. It was, thus, held that the benefit of section 58(c) of the Act would not be applicable to the plaintiff as the document of reconveying the property was not part of the same document. This Court held as under:

> "21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale,

> the transaction will not be regarded as a mortgage......"

16. Mr. Gite has also relied upon the judgment of the Apex Court in ***Patel Ravjibhai Bhulabhai (D) Thr. LRs***[4] in which it is held in paras-12, 13 and 14 as under :

> 12. In Vishwanath Dadoba Karale v. Parisa Shantappa Upadhya (2008) 11 SCC 504: (AIR 2008 SC 2510), the facts of the case were somewhat similar to the present case, and as is evident from paragraph 2 in said case, the Court held the deed was a mortgage by conditional sale, and upheld the decree of redemption for mortgage.
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> 13. In C.Cheriathan V. P. Narayanan Embranthiri (2009) 2 SCC 673: (AIR 2009 SC 1502, para 9), the principle relating to interpreting of document as to whether the sale is mortgage by conditional sale or sale with a condition to repurchase was discussed, and this Court held as under:
>
> > "12. A document, as is well known, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefor circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question. For the said purpose, it is essential that all parts of the deed should be read in their entirety".
>
> 14. In the case at hand the document in question (Exh. 23) contains the condition as under-
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> > "In this deed condition is that the said amount of Rs. 10,000.00 when we pay back to you within five years from today, you shall give back the said property to us with possession. And in the same

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4 Patel Ravjibhai Bhulabhai (D) Thr. LRs Vs. Rahemanbhai M. Shaikh (D) Thr. LRs. And Ors. AIR 2016 SC 2146

> manner, we shall have no right to ask back the same after expiry of the time limit."

> The above condition in Exh.23 that if the plaintiffs (respondents) make repayment of Rs.10,000/- within a period of five years, the defendants shall handover the possession of property in suit back to the plaintiffs, reflects that the actual transaction between the parties was of a loan, and the relationship was of debtor and creditor existed, as such, we are of the view that the High Court has rightly held that the deed in question Exh.23 read with Exh. 37 is a mortgage by way of conditional sale and the decree passed in favour of the plaintiffs does not require to be interfered with. Needless to say, since the possession of the land was handed over to the mortgagee, no interest was charged. It has also come on record that the defendants leased the land to third parties, after possession was given by the plaintiffs in 1960. In the circumstances, after perusal of the evidence on record, we agree with the view taken by the High Court."

17. In addition to the nature of covenants of document, there are two additional factors why the document in question has rightly been construed as Deed of Mortgage by conditional sale. Firstly, a specific admission is given by Defendant No.1 that relevant condition was incorporated in the document as a security for repayment of the amount of Rs.11,000/-. The relevant portion of the cross-examination of Defendant No.1 is as under :

> "मला सावकारी प्ररवाना असल्याशिवाय सावकारी व्यवसाय करता येत नाही याची माहिती नाही. हे म्हणणे खरे आहे की, माझ्या दिलेल्या 11,000/- रुपये इतक्या रकमेस आधार रहावा म्हणुन दस्तामध्ये मुदतीची शर्त नमुद केली आहे. हे म्हणणे खरे आहे की, पैशाला आधार रहावा म्हणुन त्या दस्ताला शर्त खरेदीखत असे संबोधण्यात आले."

The above admission on the part of Defendant No.1 leaves no iota of doubt that the document is executed essentially for the purpose of security for repayment of Rs.11,000/- advanced by Defendant No.1 to Plaintiff.

18. The second factor is the amount of consideration paid for transaction. The document itself records that the market value of the property is Rs.47,000/-. There is a dispute amongst the parties about the figure of Rs.47,000/- being applicable in respect of the entire area of 96 Ares or only in respect of the sold area of 40 Ares. There was no reason for the parties to disclose the market value of 96 Ares, which was not intended to be sold. Infact in a pure transaction of sale, no party would disclosed the market value for the purpose of comparison with the amount of consideration paid for the transaction. On the contrary, such disclosure about market value can only be made to clarify that the transaction is of mortgage and not of sale. Therefore, the very fact that the mortgage value is indicated in the transaction would again leave no matter of doubt that transaction is of mortgage and not of absolute sale. Also there was no reason for the parties to disclose market value of land admeasuring 96 Ares when only 40 Ares was to be sold. I therefore do not accept the contention of Mr. Deshmukh that Rs.47,000/- is the market value of entire land admeasuring 96 Ares. Even if the submission of Mr. Deshmukh is accepted, considering Rs.47,000/- to be the value of the entire area of 96 Ares, the market value of land admeasuring 40 Ares would still be Rs.19,500/- which is far higher than Rs.11,000/- shown to have been paid for the transaction.

19. Considering the overall conspectus of the case, I do not find any patent error in the findings recorded by the Trial Court and the first Appellate Court. No substantial question of law is involved in the Second Appeal. The Second Appeal is accordingly **rejected** without any orders as to costs.

SANDEEP V. MARNE, J.