

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

F.A. 225 of 2000

With

**CAN 1 of 1997 (Old CAN 2525 of 1997)
CAN 2 of 1998 (Old CAN 4967 of 1998)
CAN 3 of 2000 (Old CAN 6409 of 2000)
CAN 4 of 2005 (Old CAN 1738 of 2005)
CAN 5 of 2005 (Old CAN 1739 of 2005)
CAN 6 of 2011 (Old CAN 1665 of 2011)
CAN 8 of 2014 (Old CAN 11983 of 2014)**

With

F.M.A. 68 of 2001

With

**CAN 1 of 1997 (Old CAN 2011 of 1997)
CAN 2 of 2013 (Old CAN 6752 of 2013)
CAN 3 of 2014 (Old CAN 11984 of 2014)**

Govinda Krishna Gupta & Others

Vs.

Siba Pada Das & Others

For the Appellants : Mr. Haradhan Banerjee, Adv.
Ms. Somali Mukhopadhyay, Adv.
Ms. S. Das, Adv.

For the Respondents : Mr. Saptansu Basu, Adv.
Mr. Gopal Pahari, Adv.
Ms. Piyali Kulari, Adv.
Ms. Mandeep Kaur, Adv.

Heard on : 18.02.2025

Judgment on : 25.04.2025

Md. Shabbar Rashidi, J.

1. The appeals at the behest of the plaintiffs/defendants is directed against a common Judgment and Decree dated December 13, 1996 passed by learned Judge, VIIth Bench, City Civil Court, Calcutta in Title Suit No. 1691 of 1975 and Misc. Judicial Case No. 370 of 1980.
2. By the impugned Judgment and Decree, learned trial Court dismissed the Title Suit No. 1691 of 1975 as well as Misc. Judicial Case No. 370 of 1980.
3. The facts giving rise to the present lis are, in a nutshell, that the suit premises being 11A and 11B, Bow Street, Calcutta, consisting of a partly three storied partly four storied building containing big gates, yard, boundary wall and 30 numbers of big and small rooms situated over an area admeasuring 6 Cottas of land, were owned by the plaintiff. The building contained two distinct wings, the western

bloc and eastern bloc connected by a common stair case. The western portion of the suit building at 11A and 11B, Bow Street, Calcutta, comprising of 20 big and small rooms is the subject matter of the present proceeding.

4. It was the case of the plaintiffs that the western portion of the suit premises was the subject matter of a mortgage in the form of a registered sale deed dated September 20, 1972 together with separate agreement for reconveyance of the suit premises upon payment of the entire consideration money along with interest at the rate of 10 % per annum thereon, to be paid within 3 years from the date of the sale deed. The plaintiffs had come up with a case that the aforesaid transaction of sale was effected without any consideration actually paid taking advantage of the physical condition of the plaintiff and upon practice of fraud upon such plaintiffs. Therefore, according to the plaintiff, the transaction of sale effected by the sale deed dated September 20, 1972 was null and void and also vitiated by fraud as no consideration money was passed.
5. The plaintiff also pleaded that defendant no. 1 was newly recruited advocate and used to reside in tenanted premises at Hidaram Banerjee Lane with his wife i.e. defendant no. 2. The said accommodation was not at all sufficient for the couple.

6. It is further case of the plaintiff that defendant no. 3 had a small ancestral building at the crossing of Vivekananda Road and Central Avenue. In 1962, he was introduced with the defendant no. 3 since the plaintiff was searching for suitable house to purchase. Since thereafter, the defendant no. 3 used to visit the chamber of the plaintiff often. In early 1970 the plaintiff fell ill and developed a mental debility resulting in loss of his general ability. Taking advantage of the physical inability of the plaintiff, the defendants conspired together to play fraud upon the plaintiff.
7. It is further case of the plaintiff that the defendants in a conspiracy, brought a fake Income Tax officer to his chamber and on the pretext of hosing of a proposed income tax proceeding allegedly proposed against the plaintiff, extracted ₹3,500/- from the plaintiff. According to the plaintiff, defendant no. 1 asked for a further loan of ₹5,000/- from the plaintiff in first week of November 1970 in order to contest proceeding filed by his wife. However, the plaintiff could not advance such loan of ₹5,000/- as he himself was in need of money for the purpose of the marriage of his daughter. The defendants then proposed that if the plaintiff executes a promissory note of ₹12,500/- in the name of defendant no. 2, the defendants would arrange a loan for the plaintiff as well as the defendant from a

moneylender. In order to obtain a loan for the marriage of his daughter as well as for saving the plaintiff from the demand of ₹4,500/- made by the income tax officers, the plaintiff executed a note of ₹13,500/- in favour of defendant No. 2. The plaintiff also submitted that he was made to handover the title deed in respect of suit premises for procuring a loan from the moneylender. However, the plaintiff received the loan of ₹4,000/- whereas rest of the money was reported by Defendant nos. 1 and 2 to have been taken by defendant no. 3 in order to manage the Income Tax Officer.

8. The plaintiff also submits that in April 1971, a flat in the first floor of the western portion of the premises was vacated by the tenant and came to be possessed by the plaintiff. Defendant no. 3 persuaded the plaintiff to let the said premises out to him for the purpose of setting up of a radiological clinic. The defendants tried several times to extract money from the plaintiff on the pretext of hosing up of criminal cases where the plaintiff was a suspect. It is also the case of the plaintiff that in May 1972, the plaintiff was taken to the registration office and made to execute a mortgaged document in favour of defendant no. 2. It was the specific case of the plaintiff that the said document was kept prepared and ready before hand, the plaintiff was not allowed to go through such document nor

he was paid anything towards the consideration involved in the said deed.

9. It was further case of the plaintiff that in January 1972 the defendant no. 1 further demanded a sum of ₹40,000/- for making arrangement for the destruction of an alleged dying declaration where the plaintiff was named in a case of murder. The plaintiff accordingly, at the dictates and advice of the defendant, executed a sale deed in respect of the entire eastern portion of the premises belonging to him in favour of the son of defendant no. 3. Coupled with such deed, a two pages unregistered document was executed in favour of the plaintiff stipulating for the resale of the transferred property within 3 years on payment of the consideration money at which the sale was executed. Besides that, the plaintiff also executed two promissory notes of ₹15,000/- and ₹10,000/- respectively, on January 7, 1972 in favour of defendant no. 3. Defendant no. 3 is also alleged to have taken over the agreement for resale for obtaining signature of the wife of defendant no. 3 as a witness. No such document or the promissory notes executed by the plaintiff were ever returned by defendant no. 3 to him. The defendants also extracted money in the denomination of ₹5,000/-

and other denominations on several pretext from the plaintiff on false pleas of rinsing the alleged prosecution of the plaintiff.

10. All on a sudden service of notice from the Municipal Corporation, the plaintiff came to know that defendant No. 2 was the owner of the demised property belonging to the plaintiff. On enquiry, the defendants misbehaved with the plaintiff and threatened to oust him from the property. According to the plaintiff's case, the alleged deed of sale executed by the plaintiff on September 20, 1972 was vitiated by fraud and was of no consequence at all. It was a null and void document. The plaintiff/appellant did not receive any consideration whatsoever for the transaction.
11. The plaintiff/appellant then served a notice upon defendant No. 2, through his advocate on July 24, 1975 asking her to reconvey the suit premises in favor of the plaintiff in terms of the agreement between the parties. The notice was duly received on August 9, 1975 but the same was never responded to. On the contrary, the defendants engaged local goons and musclemen to intimidate the appellant.
12. The plaintiff/appellant then filed the Title Suit seeking a declaration that the deed of sale dated September 20, 1972 was null and void being without any valid consideration and was vitiated by fraud and

conspiracy with ancillary reliefs. The plaintiff also sought for a declaration that such document had no effect on the rights and title of the appellant over the suit premises and that the defendants were under obligation to execute necessary document for release and/or reconveyance of the suit premises in favour of the plaintiff.

13. Pleading the similar facts, later on, the plaintiff/appellant approached the court with an application under Section 38 read with Section 37A of the Bengal Money-Lenders Act, 1940 seeking a declaration that the deed of sale dated September 20, 1972 together with the agreement executed by the defendant No. 2 was a loan transaction contemplated under the provisions of the Act of 1940. The appellant also sought for taking accounts towards the loan transaction. Such application was registered as Misc. Judicial Case No. 370 of 1980. Both the proceedings were disposed of by the impugned common judgment.
14. The proceedings so initiated by the appellant were contested by the defendants by filing written statement and written objection. The case made out by the appellant with regard to conspiracy and fraud was categorically denied by the defendants in the pleading filed on their behalf. On the contrary, the defendants came up with a case

that the appellant with an intention to obtain illegal gains implicated the defendants in false and frivolous cases.

15. It is the positive case of the defendants/respondents that the plaintiff got himself introduced to defendant No.1 at his residence at Hidaram Banerjee Lane sometimes in 1970. He also requested defendant No.1 to arrange for a loan of ₹15,000/- to meet the expenses of his daughter's marriage. Defendant No. 1 had no such money. At the request of defendant No. 1, his wife i.e. defendant No. 2 advanced a sum of ₹13,500/- as a loan to the plaintiff. As an acknowledgement, the appellant executed a promissory note for a sum of ₹13,500/- in favour of defendant No. 2 and created the mortgage by deposit of title deeds of his house property being premises No. 11 A and 11 B, Bow Street, Calcutta 12. It was further contended that the plaintiff/appellant again secured a loan of ₹20,000/- from defendant No. 2 and executed registered deed of mortgage dated May 3, 1972 for a sum of ₹33,500/- inclusive of the previous loan amount of ₹13,500/-.
16. It was further case of the defendants that in the month of January 1972, one of the flats on the ground floor in the western portion of the premises Nos. 11 A and 11 B, Bow Street, Calcutta 12 fell vacant. At that time, at the request of the plaintiff, defendant No. 2

was inducted as a tenant in the said flat at a monthly rental of ₹200/-, the tenancy commencing from the month of January 1972. It was further contended that in September 1972, the plaintiff/appellant asked for a further loan to meet up the expenses towards debts. Defendant No. 2 showed her inability to advance further loan. Thereafter, the plaintiff proposed to sell and transfer the western portion of the premises No. 11 A and 11 B, Bow Street, Calcutta 12 in favour of defendant No. 2 at a consideration of ₹44,355/-. The flat tenanted in favour of defendant No. 2, fell within the portion proposed to be transferred in her favour.

17. Such proposal of the plaintiff regarding sale and transfer of the suit premises was accepted by Defendant No. 2. The entire consideration money, less the amounts already advanced to the plaintiff on earlier two occasions amounting to ₹33,500/- together with interest thereon was paid to the plaintiff by Defendant No. 2. Upon payment of agreed consideration money, the plaintiff/appellant executed a deed of sale in respect of the suit property being premises No. 11 A and 11 B, Bow Street, Calcutta 12, favour of Defendant No. 2 which was duly registered at Calcuta Registry Office. Defendant No. 2 had been in occupation of the suit premises initially as a monthly tenant and after aforementioned purchase, as an absolute owner thereof. By

such sale, the plaintiff divested himself of his right and title in respect of the suit premises.

18. It was further contended by the defendants that the plaintiff/appellant filed a case against the defendant Nos. 1 & 2 on the allegations of robbing money and illegally compelling the plaintiff to execute a sale deed in favour of Defendant No. 2 being C Case No. 650 of 1976. The said case was, however, dismissed on contest by the Court of learned 8th Metropolitan Magistrate. Thereafter, the plaintiff also filed a complaint against the defendants seeking their prosecution for the offences punishable under Sections 420/465/467/468/471/120B of the Indian Penal Code. Such application was rejected by the court of learned 3rd Metropolitan Magistrate. The plaintiff carried a revision against such rejection but the same was also dismissed by this High Court.
19. It was further submitted by the defendants that after purchase of the suit premises from the plaintiff, Defendant No. 2 got the tenancies in the premises attorned in her favour and she also filed eviction suits against some of the tenants including the plaintiff which are pending. The defendants also contended that the plaintiff with ominous motives filed false eviction suit against a fictitious tenant namely Gurmukh Singh in respect of the premises under

occupation of Defendant No. 2 and obtained an Ex-parte decree. Following the ex-parte decree, the plaintiff also filed an execution case against the said Gurmukh Singh. However, the defendant resisted the bailiff from taking possession in execution of ex-parte decree. Not only that, the plaintiff also filed another Ejectment Suit being Ej. Suit No. 1191 of 1977 against Defendant No. 2 and obtained an ex-parte decree suppressing the service of summons. After knowing of the suit, the defendant sought for setting aside ex-parte decree which was allowed.

20. The appellant submitted, at the time of hearing that the alleged sale deed dated September 20, 1972 does not contain a statement with regard to delivery of possession of the suit property. As such, the possession was not ever delivered rendering the sale deed without any effect. Such position of non-delivery of possession of the suit property after the alleged sale was emboldened in the deposition of Tejpal Saran Gupta who was adequately cross-examined. Moreover, a collateral agreement stipulated for reconveyance of the suit property within a specified period.
21. It was also contended by the appellant that defense witness No. 1 admitted in the deposition that the plaintiff has been in possession of the suit property till June 1991 when he left the property.

According to the appellant, the condition pertaining to reconveyance was admitted in the written statement.

22. The appellant also submitted that the alleged letters of attornment were issued after the filing of the suit and therefore are not reliable. In the deposition, it was admitted that the appellant did not issue letters of attornment despite repeated requests. Later on, it was issued by an advocate on behalf of the appellant party who was never examined at the trial. It was also submitted that the contents of the letters of attornment were not proved. Signature of the appellant was not admitted on such letters. In support of such proposition, learned advocate for the appellant cited a decision reported in **(1981) 1 Supreme Court Cases 80 (Ramji Dayawala & Sons Privated Limited vs. Invest Import)**. Besides, the respondents failed to prove that they received blank papers in the name of notice regarding reconveyance of the suit property.
23. It was also contended that DW2 in her cross examination admitted that had Tejpal Saran Singh paid the money in time, she would have created a deed of reconveyance. Inspite of such admission on the part of DW2, the learned trial court came to a finding with regard to letters of attornment which was ostensibly perverse.

24. The appellant also submitted that the appellant vehemently questioned the veracity of alleged rent receipts Ext. K and K1 as manufactured documents. The respondent chose not to cross examine on such pretext which amounts to an admission. In support of such contention, learned advocate for the appellant relied upon **(2008) 11 Supreme Court Cases 505**. We failed to find any such case reported as referred. We however found a case reported as **(2008) 11 Supreme Court Cases 504 (Vishwanath Dadoba Karale v. Parisa Shantappa Upadhye)**. Learned advocate for the appellant also placed reliance upon **2019 SCC OnLine SC 468 (Atul Chandra Das vs. Rabindra Nath Bhattacharya)**.
25. The appellant also submitted that the title suit was filed within the stipulated three years fixed for reconveyance of the suit property and that an application under Section 37A of the Act of 1940 was made within 30 years as provided under the Article 61 of the Limitation Act, 1963.
26. It is also contended by learned advocate for the appellant that the judgment relied upon by the respondents reported in **(2006) 4 Supreme Court Cases 432 (Biswanath Prasad Singh vs. Rajendra Prasad & Others)** and **2023 INSC 743 (Prakash vs. G. Aradhya)** are distinguishable as the same were rendered in the

context of Section 58 of the Transfer of Property Act, 1882 and not in terms of Section 37A of the Bengal Money Lenders Act, 1940. The learned advocate for the appellant submitted that the transaction involved in the instant proceeding was a mortgage by conditional sale. The appellant has every right to redeem the mortgage in terms of Section 37A of the Bengal Money Lenders Act, 1940.

27. Per contra, learned advocate for the respondents submit that the appellant approached the respondents for a loan which was advanced by Defendant No. 2. Initially, a loan of ₹13,500/- was advanced. Thereafter, another loan of ₹20,000/- was advanced by her. When the appellant again came up for further loan, the respondent/defendant showed her inability to advance such loan. Whereupon, the appellant proposed to sell out the suit premises at a consideration of over ₹44,000/- which the defendant agreed. Accordingly, a sale of the suit property was effected by executing a registered sale deed on September 20, 1972. Such deed did not contain any stipulation for resale of the suit property. Defendant No.1 executed a separate agreement to that effect. Relying upon **(2006) 4 Supreme Court Cases 432 (Biswanath Prasad Singh vs. Rajendra Prasad & Others)** and **2023 INSC 743 (Prakash vs. G. Aradhya)**, learned advocate for the respondent submitted that the

transaction involved in the registered deed dated September 20, 1972 was an out and out sale. It was never intended to create a mortgage by conditional sale.

28. Learned advocate for the respondent further submitted that since the appellant proposed and agreed to sell out the suit property for consideration, letters of attornment were duly issued by the appellant upon the tenants informing them of the sale. The appellant and the respondent have been residing in the suit premises since prior to the sale. Not only that, the appellant/plaintiff went on to pay rent as tenant to respondent No. 2 after such sale. Such action on the part of the appellant, according to the respondents, was sufficient evidence to establish that the appellant had the sole intention of selling out the suit premises. The circumstances do not support the case that the transaction was a mortgage by conditional sale. It is at some ill advice; the appellant changed his course to contend that the transaction was not an out and out sale. For such reason, the appellant filed an application under Section 37A of the Act of 1940 after many years of filing the Title Suit.
29. It is not in dispute that the appellant secured a loan being advanced by defendant No. 2 on two occasions. The appellant, on first

occasion executed a promissory note thereafter at the time of taking second loan, a registered mortgage deed was executed. In the meantime, defendant No. 2 was inducted in a portion of the suit premises as tenant. When the appellant approached the defendant for the third time seeking further loan, the defendant showed her inability to advance such loan. The appellant party proposed to sell out the suit premises. Defendant No. 2 agreed to purchase the same at a consideration of ₹44,355/-. A sale deed was executed by the appellant in favor of defendant No. 2, upon receipt of the consideration money less the amount involved in the two earlier loans with interest thereof. According to the respondents, the aforesaid transaction was an out and out sale and this is how defendant No.2 acquired right and title in the suit premises.

30. On the other hand, the appellant alleged that he executed the sale deed in favour of defendant No. 2 on September 20, 1972. On the same day, defendant No. 1 executed an agreement in favour of appellant with a stipulation that if the appellant returns the entire consideration money paid for the sale with interest at the rate of 10% on the advanced loan, within three years from date, defendant No. 2 would be obliged to reconvey the suit premises in favour of the appellant. According to the appellant, the transaction was a

mortgage by deposit of title deeds as defined under Section 58 (c) of the Transfer of Property Act and not an out and out sale. No title in the suit premises, therefore, passed on to defendant No. 2 by dint of registered deed of ostensible sale dated September 20, 1972. The appellant retained his right to redeem the mortgaged property within the stipulated time period. The defendant actually exercised such right by serving a notice upon the defendant No.2 through his advocate on July 24, 1975 which was allegedly never responded by the defendant.

31. Section 58 of the Transfer of Property Act, 1882 defines a mortgage by conditional sale in following terms, that's to say:

“58. “Mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgagedeeds” defined

(a).....

(b).....

(c) Mortgage by conditional sale

Where the mortgagor ostensibly sells the mortgaged property

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on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

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.]

(d).....

(e).....

(f).....

(g).....”

32. Admittedly, the registered sale deed involved in the case did not contain any condition to bring the transaction into one under the purview of mortgage by conditional sale as specified in the proviso appended to Section 58 (c) of the Act of 1882.
33. In ***Bishwanath Prasad Singh*** (supra), the Hon’ble Supreme Court observed that,

“27. A bare perusal of the said provision clearly shows that a mortgage by conditional sale must be evidenced by one document whereas a sale with a condition of retransfer may be evidenced by more than one document. A sale with a condition of retransfer, is not mortgage. It is not a partial transfer. By reason of such a transfer all rights have been transferred reserving only a personal right to the purchaser (sic seller), and such a personal right would be lost, unless the same is exercised within the stipulated time.”

37. The Hon'ble Supreme Court also laid down that,

“46. Going by Section 58(c) of the Transfer of Property Act, it is clear that for an ostensible sale deed to be construed as a mortgage by conditional sale, the condition that on repayment of the consideration by the seller the buyer shall transfer the property to the seller is embodied in the document which effects or purports to effect the same. It has so been clarified by this Court also in Pandit Chunchun Jha v. Sk. Ebadat Ali [(1955) 1 SCR 174 : AIR 1954 SC 345] by stating: (SCR p. 178)

“If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not.”

Therefore, it is clear that what was involved in this case was the sale followed by a contemporaneous agreement for reconveyance of the property. Such an agreement to reconvey is an option contract and the right has to be exercised within the period of limitation provided therefor. It has also been held that in such an agreement for reconveyance, time is of the essence of the contract. The plaintiffs not having sued within time for reconveyance, it would not be open to them to seek a declaration that the transaction of sale entered into by them construed in the light of the separate agreement for reconveyance executed by the purchaser, should be declared to be a mortgage. Such a suit would also be hit by Section 91 of the Evidence Act, subject to the exceptions contained in Section 92 of that Act.”

38. Similarly, in the case of **Prakash** (supra), the Hon'ble Supreme Court laid down a distinction between a mortgage by conditional sale vis-vis a sale with a condition to repurchase envisaged in a separate document. Supreme Court held that,

“31. In terms of the Sale Deed and the Reconveyance Deed, reconsidered in the light of the enunciation of law, as referred to above, in our opinion, the same cannot be held to be a transaction of mortgage of property. Sale of property initially, was absolute. By way of execution of Reconveyance Deed, namely, on the same day, the only right given to the appellants was to repurchase the property.”

39. The Hon'ble Supreme Court in the case of **Vishwanath Dadoba Karale** (supra) laid down that,

“13. However, in Tulsi v. Chandrika Prasad [(2006) 8 SCC 322] distinguishing Bishwanath Prasad Singh [(2006) 4 SCC 432] , it was held : (SCC pp. 327-28, paras 14-17)

“14. Before we consider the stipulations contained in the deed dated 30-12-1968, it may be noticed that in terms of Section 58(c) of the Transfer of Property Act, a transaction may be held to be a mortgage with conditional sale if it is evidenced by one document. The condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale is that there must be an ostensible sale. It must

contain a condition that on default of payment of 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.

15. A distinction exists between a mortgage by way of conditional sale and a sale with condition of repurchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter the transaction does not evidence an arrangement of lending and borrowing and, thus, right to redeem is not reserved thereby.

16. The proviso appended to Section 58(c) of the Transfer of Property Act was added by Act 20 of 1929 for resolution of the conflict in decisions on the question whether the condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principal deed.

17. The transaction in this case has been evidenced by one document. Section 58(c) of the Transfer of Property Act will, therefore, apply.”

“14. Recently in Manjabai Krishna Patil v. Raghunath Revaji Patil [(2007) 12 SCC 427 : (2007) 3 Scale 331] it was held : (SCC p. 431, para 12)

“12. Proviso appended to Section 58(c) is clear and unambiguous. A legal fiction is created thereby that the transaction shall not be held to be a mortgage by conditional sale, unless a condition is embodied in the document which effects or purports to effect the sale. Where two documents are executed, the transaction in question would not amount to a mortgage by way of conditional sale. In a case of this nature, ordinarily the same would be considered to be a deed of sale coupled with an agreement of reconveyance.”

In the facts of that case, however, it was held that no relationship of debtor and creditor came in existence and no security was created and in fact conveyance of the title of the property by the respondent to the appellant was final and absolute.”

34. The averments made in the deed of sale executed by the appellant party neither brings the transaction into the definition either of mortgage by conditional sale or even within the meaning of sale with condition of repurchase. The document does not contain any such condition. On the contrary, a separate document appears to have been executed by defendant No.1 for and on behalf of defendant No.2, specifying a condition to reconvey the suit premises, if the appellant pays off the loan amount together with interest thereon within a period of 3 years. So far as the impugned deed is

concerned, it is plain and simple deed of sale with no condition of repurchase. There is no explanation on the part of the appellant as to what prevented him from incorporating a condition to that effect in the deed itself as required in accordance with the proviso to Section 58 (c) of Transfer of Property Act. There is absolutely no explanation as to why a separate document was prepared on the date of registration of sale deed itself incorporating a condition of repurchase.

35. In **Atul Chandra Das** (supra) the Hon'ble Supreme Court held that,

“23. In this case proceeding on the basis that there is an inconsistency between Section 58(c) of the Transfer of Property Act and Section 37-A of the State Act, in view of the assent given by the President, the matter falls under Article 254(2). Therefore, despite the inconsistency, Section 37-A of the State Act will prevail in the State.”

36. In the said case, the Supreme Court also observed that,

14. Keeping Section 58(c) side by side with Section 37-A of the State Act, the conclusion is inevitable that the State Legislature has intended to override the effect of proviso to Section 58(c) of the Transfer of Property Act by enacting Section 37-A in the State Act. Section 37-A was incorporated by way of an amendment in the State Act. Reading of Section 37-A brings out the legislative intent with unambiguous clarity and therefore the High Court was right in relying upon

Section 37-A of the State Act to find that though it was by agreement dated 7-12-1959 which is a separate document that condition to make it a mortgage was incorporated it would not make any difference. We may also notice that despite the sale deed dated 27-11-1959, the Bhattacharyas continued to be in possession of the plaint scheduled property and it has been found that they paid the taxes. It is further found that the market value of the property would not have been less than Rs 30 thousand as on the date of the alleged sale, namely, 27-11-1959.

37. However, in the case at hand, it is admitted position that the respondent/defendant No. 2 was inducted in the suit premises as tenant and was in occupation of the premises since prior to the execution and registration of the ostensible sale deed. Not only that, she got her name mutated in the revenue records of the municipality in respect of the suit premises after such purchase. Over and above, letters of attornment were issued by the appellant upon the tenants in the premises informing them of the sale of the suit premises. Although, such appellant has denied having issued such letters but at the time of cross examination, the appellant admitted his signature on such letters. No explanation is offered on the part of the appellant as to how his signature on the letters of attornment was obtained. The ratio laid down in ***Ramji Dayawal & Sons***

(supra) cannot render any to help the appellant at any stretch. The appellant i.e. the propounder of the document himself admitted his signature on the document nevertheless, no steps were taken by the appellant to refute such document. The Hon'ble Supreme Court laid down in the said case to the following effect:

“16. Incidentally it was urged by Mr Majumdar that even if the court proceeds on the assumption that the letter and the cable were received, it is not open to this Court to look into the contents of the letter and the cable because the contents are not proved as the Managing Director of the appellant Company who is supposed to have signed the letter and the cable has neither entered the witness-box nor filed his affidavit proving the contents thereof. Reliance was placed on Judah v. Isolyne Shrojibasini Bose [AIR 1945 PC 174: 1945 MWN 634: 26 PLT 279]. In that case a letter and two telegrams were tendered in evidence and it was observed that the contents of the letter and the telegram were not the evidence of the facts stated therein. The question in that case was whether the testatrix was so seriously ill as would result in impairment of her testamentary capacity. To substantiate the degree of illness, a letter and two telegrams written by a nurse were tendered in evidence. The question was whether in the absence of any independent evidence about the testamentary capacity of the testatrix the contents of the letter could be utilised to prove want of testamentary capacity. Obviously, in these circumstances the Privy Council observed that the fact that a letter and two telegrams were

sent by itself would not prove the truth of the contents of the letter and, therefore, the contents of the letter bearing on the question of lack of testamentary capacity would not be substantive evidence. Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue. But in this case Bhikhubhai Gourishankar Joshi who filed an affidavit on behalf of the appellant has referred to the averments in the letter and the cable. He is a principal officer and constituted attorney of the appellant Company. Once the receipt of the letter and the cable are admitted or proved coupled with the fact that even after the dispute arose and before the suit was filed, in the correspondence that ensued between the parties, the respondent did not make any overt or covert reference to the arbitration agreement and utter failure of the respondent to reply to the letter and the cable controverting the averments made therein would unmistakably establish the truth of the averments made in the letter. What is the effect of averments is a different question altogether but the averments contained in the letter and the cable are satisfactorily proved.”

38. In both the decisions relied upon by the appellant, the Hon’ble Supreme Court considered and laid down significance of the market

valuation of the property involved in the transaction as an attending circumstance for determination of the nature of transaction as an absolute sale or a mortgage by conditional sale. In both the decisions, the Supreme Court found the valuation shown in the document of transaction to be abysmally lower than the current market rate of the properties involved in such transaction and on such pretext, the Supreme Court held the transaction to be a mortgage and not a sale. However, in the present case, the valuation of the suit property described in the sale deed dated September 20, 1972 is more or less in consonance with the contemporary market price of the demised property. Regard being had to the fact that the suit premises was under the occupation of several tenants including defendant No. 2, a condition which would surely tell upon the valuation of a property.

39. The evidence led at the trial also shows that the appellant himself was occupying a portion of the suit premises at the time of effecting the alleged ostensible sale and he continued to be in such occupation thereafter. After purchase and upon service of letters of attornment, the purchaser i.e. defendant No. 2 started realizing rents for the tenanted premises. Rent receipts were accordingly issued by defendant No. 2. The appellant himself paid rent to

defendant No. 2. Ext. K and K1 are such rent receipts issued on receipt of rent from the appellant. In his cross examination at the trial, the appellant, in an answer to a question if he was paying taxes for the suit property replied that the property was tax free. He however, denied his knowledge that the suit premises stood mutated in the name of defendant No. 2. He also admitted that the tenants in the suit premises were depositing rent in the joint name of appellant and defendant No. 2, with the rent controller and defendant No. 2 applied for withdrawal of such rent. No steps, in this regard appear to have been taken on behalf of the appellant.

40. Besides that, the appellant initially came up with a case that the defendants jointly cheated upon him by extracting money on the ploy of hosing legal proceedings in the nature of criminal and tax proceeding. He altogether denied having secured any loan from the respondents. He lost all criminal proceedings in this regard, initiated against the respondents, right up to this High Court. However later on, the appellant admitted securing loan from the respondent, firstly, on the strength of promissory note and thereafter by a registered mortgage deed. At the trial, the appellant gave up his case taken out in his pleadings with regard to cheating and fraud. Such

circumstances also cast a reasonable doubt on the veracity of the case made out by the pleading.

41. Therefore, in the light of discussions made hereinabove, we are of the opinion that the transaction involved in the ostensible sale deed dated September 20, 1972 was an out and out sale. The circumstances and the action subsequent to such deed do not suggest that the deed was in the nature of a mortgage by conditional sale. In such view of the facts, we find no reason to interfere with the impugned judgment and decree and the same is affirmed.
42. Consequently, the appeals being F.M.A. 68 of 2001 and F.A. 225 of 2000 are disposed of, however, without any order as to costs.
43. Since the main matter is disposed of, nothing survives. Therefore, connected application(s), if any, shall stand disposed of.
44. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis upon compliance of all formalities.

[MD. SHABBAR RASHIDI, J.]

45. I agree.

[DEBANGSU BASAK, J.]