IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.107 OF 2010

1. Bhaskar Nana Pansare,
Age: 55 years, Occ: Agriculture,
R/o. Jakhuri, Taluka Sangamner,
District: Ahmednagar

(Deceased though his Lr's)

1A. Smt. Shaila Bhaskar Pansare
Age: 65 Yrs. Occu. Household
R/o Jakhuri Post. Pimparne
Sangamner, Dist. Ahmednagar

1B. Mrs. Ujwala Bhagwat Raut
Age: 48 Yrs. Occu. Household
R/o. A-8, Lotus Court,
Near Shivrai Prathistan School
Rambhaug Colony, Poud Road,
Kothrud, Pune-38

1C. Rajendra Bhaskar Pansare
Age: 45 Yrs. Occ. Agri.
R/o. Jakhuri, Post, Pimparne
Tal. Sangamner, Dist. Ahmednagar

1D. Sandeep Bhaskar Pansare
Age:40 Yrs, Occ. Doctor
R/o. Dr. Pansare Diagnostic Centre
Flat No.1, Damodhar Heights
Near Dutta Mandir, Thergaon,
Pune-33.

…..**APPELLANTS**
(Ori. Defendants.)

VERSUS

1. Babu Bhivsen Mhaske,
Age: 47 years, Occ: Agriculture,
R/o. Jakhuri, Taluka Sangamner,
District: Ahmednagar

…..**RESPONDENT**
(Ori. Plaintiff)

Mr. A. S. Bajaj a/w Mr. A. B. Kharvsekar, Advocates for appellants
Mr. S. K. Shinde, Advocate for respondent

CORAM : ROHIT W. JOSHI, J.
RESERVED ON : 01st APRIL, 2025

JUDGMENT :-

. The present Second Appeal is filed by the original defendant against judgment and decree dated 28.09.2001 passed by the learned Civil Judge Junior Division, Sangamner in Regular Civil Suit No.561 of 1994 and judgment and decree dated 18.11.2019 passed by the learned Ad-hoc District Judge-1 at Sangamner, District, Ahmednagar dismissing Regular Civil Appeal No.150 of 2001 filed by the present appellant against the aforesaid decree passed by the learned Trial Court.

2. The appellant and respondent will be referred as defendant and plaintiff respectively hereinafter. The plaintiff had filed a suit against the defendant being Regular Civil Suit No.561 of 1994 *inter alia* contending that he was in need of loan of Rs.12,000/- and on his request the defendant agreed

to lend the said amount to him. He contends that in view of the aforesaid arrangement, he had executed a document dated 05.11.1989 in favour of the defendant *inter alia* mortgaging the suit property, which is a land admeasuring 0.20 HR, being a part of gut No.440/1 situated in village Jakhuri, Tahsil Sangamner, District Ahmednagar. He states that the document dated 05.11.1989 is a document of mortgage by conditional sale and the amount of Rs.12,000/- referred as sale consideration is in essence the loan amount advanced by defendant to the plaintiff. It is further stated that the parties had agreed that the plaintiff will repay the loan amount to the defendant within a period of 5 years and upon such repayment, the defendant will reconvey the property to the plaintiff. The plaintiff contends that from 06.11.1989 onwards, he had approached the defendant on several occasions requesting to accept repayment of loan amount and to reconvey the property to him, however, the defendant refused to oblige, as a consequence of which, the plaintiff issued legal notice to the defendant on 29.10.1994, in response to which the defendant issued a false reply and refused to reconvey the property. In that view of the matter, the suit came to be filed. The prayer in the suit is that the defendant be directed to reconvey the suit property to the plaintiff. The said suit which is filed on 14.12.1994 came to be registered as Regular Civil Suit No.561 of 1994.

3. The defendant opposed the suit by filing a written statement *inter alia* contending that the document in question was not a document of mortgage by conditional sale, but a document of sale with a condition for re-conveyance. It was contended that after 04.11.1989 i.e. the date on which period of 5 years came to an end to sale became absolute and right of plaintiff to seek re-conveyance was lost forever.

4. After framing issues, recording evidence and hearing respective arguments, the learned Trial Court held that the document in question was indeed a document of mortgage by conditional sale and not a sale deed with a clause for re-conveyance. The learned Trial Court accordingly decreed the suit *inter alia* directing the defendant to re-transfer the suit property by registered document in favour of the plaintiff on receiving a sum of Rs.12,000/- from the plaintiff. The said judgment and decree dated 28.09.2001 was challenged by the

defendant by filing First Appeal being Regular Civil Appeal No.150 of 2001. The said appeal also came to be dismissed vide judgment and decree dated 18.11.2009.

5. In this backdrop, the present Second Appeal is filed challenging the aforesaid concurrent judgments and decrees. The present appeal came to be admitted vide order dated 25.03.2010 on the following substantial question of law:

> *"Whether the document Exhibit-32 is a mortgage with conditional sale, as held by the trial court and the First Appellate Court or it is a sale with condition of reconveyance?"*

6. In order to answer the question, it is necessary to refer to some of the relevant clauses of the document dated 05.11.1984 (Exhibit 32). The document is titled as, 'Term Sale Deed', the sale consideration is fixed at Rs.12,000/-. The purpose for execution of the document of the property is mentioned in the document itself which records that the plaintiff wanted a sum of Rs.12,000/- in order to release his Tempo. It is recorded that the suit property was transferred for a period of 5 years under term sale and possession of the property was also delivered to the defendant i.e. purchaser/mortgagee. It is then recorded that the plaintiff i.e.

vendor/mortgager was entitled to repay the amount of Rs.12,000/- to the defendant i.e. purchaser/mortgagee within a period of 5 years in order to release the suit property. The document also states that in the event, the amount of Rs.12,000/- is not repaid within a period of 5 years, as agreed, the said document will assume character of absolute sale and parties will act accordingly. Apart from this, there are two important sentences in the document viz. (i) This transaction is in the nature of a mortgage and (ii) Provision for payment of interest is not made since possession of property is delivered.

7. Learned Advocate, Mr. Anil Bajaj appearing on behalf of the appellant vehemently argues that both the Courts have misinterpreted the terms of the document at Exhibit 32. He contends that a proper interpretation of the document will clearly indicate that the document is not a mortgage by conditional sale within the meaning of Section 58(c) of the transfer of property Act, 1882, but a sale within the meaning of Section 54, coupled with right of repurchase. He contends that in view of the aforesaid, the suit filed by the plaintiff ought to have been dismissed since the sale had become

absolute after the period of 5 years stipulated by the parties for enforcement of right of reconveyance had lapsed. He contends that although, the sale had become absolute on 04.11.1989, the plaintiff filed suit seeking reconveyance in the year 1994 after the sale had become absolute. Mr. Bajaj has placed strong reliance on judgment of the Hon’ble Supreme Court in the matter of ***Dharmaji Shankar Shinde Vs. Rajaram Shripad Joshi (2019) 8 SCC 401***.

8. As against this, Mr. S. K. Shinde, learned Advocate for the respondent contends that, express terms of the document conclusively establish that the document is one of mortgage and not of sale. He contends that the clause in the document at Exhibit 32 which provides that after period of 5 years, the sale will become absolute is contrary to Section 60 of the Transfer of Property Act, 1882, in as much as it creates a clog on right of redemption and therefore, the said clause is void and unenforceable. He contends that the principle that, ‘once a mortgage always a mortgage’ is rightly applied by the learned Courts while decreeing the suit filed by the plaintiff. He placed reliance on judgment of the Hon’ble Supreme Court in the matter of ***Seth Gangadhar Vs. Shankarlal and Others,***

AIR 1958 SC 770 in support of his contention, that the right to redeem the mortgage cannot be denied by incorporating a clause that the sale shall become absolute in the event of failure to repay the loan amount within a period of 5 years.

9. Having heard the rival submissions as aforesaid, I am of the view that the document in question is a document of mortgage by conditional sale and not a sale with a rider for re-conveyance. The learned Courts have rightly interpreted the document.

10. The document in question clearly records that the property was being transferred in lieu of Rs.12,000/- in order to enable the plaintiff to release his vehicle. This establishes debtor and creditor relationship between the parties. The document itself mentions that the transaction between the parties was one of mortgage. Likewise, the document also records that possession of property was delivered to the defendant in order to enable him to enjoy the same in lieu of interest. The above stipulations regarding existence of loan and delivery of possession in order to enable the defendant to enjoy the usufruct against interest on loan amount coupled

with the express statement that the transaction was one of mortgage are sufficient in my considered opinion to hold that the transaction between the parties was a mortgage and that the document in question is a document of mortgage by conditional sale and not a sale deed coupled with right of repurchase.

11. As regards, the judgment in the matter of ***Dharmaji Shankar Shinde***, relied upon by the learned Counsel for the appellant/defendant, in the said case, the plaintiff had given a categorical admission in his cross examination that the transaction between the parties was a transaction of sale coupled with right of repurchase. The suit was dismissed by the learned Trial Court holding that the plaintiff therein had failed to establish relationship of debtor and creditor. In this backdrop, the Hon'ble Supreme Court has held that the transaction between the parties was one of sale and not of mortgage. The Hon'ble Supreme Court has expressly referred to admission of the plaintiff in his cross examination where he had admitted that the transaction was one of sale. Apart from this, the Hon'ble Supreme Court found that the finding recorded by the Trial Court that debtor-creditor relationship

do not exist between the parties was just and proper. In that view of the matter, the Hon'ble Supreme Court has held that the transaction was one of sale and not a mortgage by conditional sale.

12. The ratio of the said judgment cannot be applied to the facts of the present case where relationship of debtor and creditor is duly established. The judgment also is distinguishable in view of the fact that the plaintiff in the present case has not admitted that the transaction between the parties was one of sale and not of mortgage. In the present case, the document expressly recites that the transaction between parties is one of sale is a mortgage. The document also records that possession of the property was delivered only against right to receive interest. Having regard to the contents of the document and facts of the case, it needs to be stated that the clause in the document restraining right of obtaining repurchase of making repayment of the amount for a period of 5 years only will amount to a clog on the right of redemption. In this context, it will be profitable to refer to judgment in the matter of ***Seth Gangadhar*** relied upon by the learned Advocate for the respondent wherein

"7. The right of redemption, therefore, cannot be taken away. The Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for "once a mortgage always a mortgage" and therefore always redeemable. The same result also follow from section 60 of the Transfer of Property Act."

13. The Hon'ble Supreme Court has referred to judgment in the matter of Mohammad Sher Khan Vs. Seth Swami Dayal reported in AIR 1922 PC 17 and has quoted with approval the following observation from the said judgment:

"8. Under the section, once the right to redeem has arisen it cannot be taken away. The morttgagor's right to redeem must be deemed to continue even after the period of six months has expired and the attempt to confine that right to that period must fail. The term in the mortgage instrument providing that the mortgage can be redeemed only within the period of six months and not thereafter must be held to be invalid and ignored."

14. It will also be profitable to refer to judgment of the Hon'ble Supreme Court in the matter of ***Srinivasaiah Vs. H. R.***

Channabasappa (Since dead) by his legal representatives and others reported in (2017) (12) SCC 821, where a clause similar to one in the present case fell for consideration before the Hon'ble Supreme Court. The relevant clause in the said case is reproduced for ready reference:

> *"Within five years from the aforesaid date of this Conditional sale deed, I will repay the entire conditional sale price of Rs.1,500/- (Rupees one thousand five hundred) to you and get executed a sale deed from you. In the event of default, after the said period of five years mentioned in this Conditional sale deed, then together with all the privileges, easements, advantages and appurtenances whatsoever in or to the Schedule property and every part thereof belonging to or to the said Schedule property or hereinto before held, used, occupied or enjoyed or known as part and parcel thereof or appurtenant thereto shall belong to you and your legal heirs forever, free from all encumbrances, charges liens whatsoever. Myself and my legal heirs shall have no manner of right, claim interest or title whatsoever in or upon or in respect of the schedule property."*

15. While interpreting the said clause, the Hon'ble Supreme Court has held that the said clause indicated the transaction between the parties was a mortgage by conditional sale as defined under Section 58(c) of the Transfer of Property Act. The reasons for holding the document as one of mortgage by conditional sale as against sale deed with covenant for

repurchase are recorded in paragraph 22 and 23 of the judgment, which read as under:

> *"22. When we examine the nature of document in question (Exh. P-1), we are of the opinion that the document (Exh. P-1) is a mortgage with conditional sale as defined under Section 58 (c) of the T.P. Act. This we say for following reasons: first, it is not in dispute that the Plaintiff was the owner of the suit land. Second, the parties concluded the transaction in question by executing one document (Exh. P-1). Third, the document (Exh. P-1) is styled as a "Deed of Conditional sale". Fourth, it contains a condition that Defendant No. 1 will be alloweed to remain in possession of the suit property for 5 years and enjoy the fruits of the land and that during this period, the Plaintiff will be entitled to get the suit property re-conveyed in his name on paying Rs.1500/- by getting the sale deed executed in his name and obtain possession of the suit land from Defendant No.1. Fifth, the Plaintiff offered to pay Rs.1500/- to Defendant No.1 with a request to resale the land to him.*
>
> *23. In our considered opinion, the aforesaid five reasons satisfies the third condition of Section 58(c) of the T.P. Act, namely, "on condition that such payment being made, the buyer shall transfer the property to the seller". It also satisfies the tests laid down by this Court in Chunchun Jha' case (supra), namely, First, the transaction is concluded in one document; Second, the document styled as a "Deed of Conditional Sale" itself contains the condition of repurchase on offering the sale money without interest for the reason that Defendant No.1 was allowed to use the land till the money is not paid back to him by the seller (Plaintiff); and Third, parties' intention as per terms of Ex.P-1 is also*

> *supported by the evidence which was accepted by the two Courts-Trial Court and the High Court."*

16. Having regard to the contents of the document and facts of the present case, in the light of aforesaid judgments, I am of the view that the learned Courts have rightly considered the controversy in the matter in a proper perspective and have rightly decreed the suit. The question of law therefore needs to be answered in favour of the respondent/original plaintiff.

17. In view of the aforesaid the Second Appeal stands **dismissed**. The defendant shall bear the costs of the plaintiff all throughout.

(ROHIT W. JOSHI, J.)

Rushikesh/2025