IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 277 OF 2002

Shaikh Papamiya Chandbhai
(Since deceased)
Through his L.Rs.

1A. Shaikh Aspiya Papamiya
Age : 83 years, Occ : Housewife,
R/o At. Post. Loni Sadatpur Fata,
162/1 Sadatpur, Tq. Sangamner,
Dist. Ahmednagar.

1B. Shaikh Ayaj Papamiya
Age : 67 years, Occ : Labr,
Survey No.102/2 A1AB/3,
Sector 3/5017, Noor Mohalla,
Neharunagar, Pimpri, Pune 18.
Dist. Pune.

1C. Shaikh Mushtak Papamiya
Age : 42 years, Occ : medical Practitioner,
R/o At. Post. Loni,
Tq. Rahata, Dist. Ahmednagar.

1D. Shaikh Ikbal Papamiya
Age : 62 years, Occ : Labar,
R/o At. Post. Loni Sadatpur Fata,
162/1, Sadatpur, Tq. Sangamner,
Dist. Ahmednagar.

1E. Shaikh Anij Papamiya
Age : 58 years, Occ : Retired,
R/o At. Post. Loni Sadatpur Fata,
162/1, Sadatpur, Tq. Sangamner,
Dist. Ahmednagar.

1F. Shaikh Abdul Rahim Papamiya
Age : 56 years, Occ : Retired
R/o Ganesh Colony, Loni,
Tq. Rahata, Dist. Ahmednagar.

1G. Smt. Sayyad Parvin Mir
Age : 54 years, Occ : Housewife,
R/o Near Neharu Market,
Chitale Road, Ahmednagar,
Dist. Ahmednagar.

..APPELLANTS

-VERSUS-

1. Rupchand Nana Bhane
Age : 62 years, Occ : Agri.,
R/o village Hasanapur, Tq. Rahata,
Dist. Ahmednagar.

2. Smt. Dagubai Ramchandra Bhane
(Since deceased)
L.Rs. of respondent no.2 are already
on record as respondent nos. 8 to 13.

3. Laxman Ramchandra Bhane
(Since deceased)
Through L.Rs.

3A. Hirabai W/o Laxman Bhane
(Since deceased)
(Abated as per Registrar (Judicial)
order dated 12.01.2022.

3B. Pramod S/o Laxman Bhane
Age : 30 years, Occ : Agril.,
R/o Hasanapur (Bhanewasti),
Tq. Rahata, Dist. Ahmednagar.

4. Prakash S/o Ramchandra Bhane
(Since deceased)
Through L.Rs.

4A. Tarabai W/o Prakash Bhane
Age : 50 years, Occ : Household & Agri.,
R/o Hasanapur (Bhanewasti),
Tq. Rahata, Dist. Ahmednagar.

4B. Ravindra S/o Prakash Bhane
Age : 22 years, Occ : Agri.,
R/o Hasanapur (Bhanewasti),
Tq. Rahata, Dist. Ahmednagar.

4C. Ganesh S/o Prakash Bhane
Age : 20 years, Occ : Agri.,
R/o Hasanapur (Bhanewasti),
Tq. Rahata, Dist. Ahmednagar.

5. Balasaheb Ramchandra Bhane
(Since deceased)
Through L.Rs.

5A. Sulochana W/o Balasaheb Bhane
Age : 50 years, Occ : Household & Agri.,
R/o Hasanapur (Bhanewasti),
Tq. Rahata, Dist. Ahmednagar.

5B. Jaganath S/o Balasaheb Bhane
Age : 30 years, Occ : Agri.,
R/o Hasanapur (Bhanewasti),
Tq. Rahata, Dist. Ahmednagar.

5C. Somnath S/o Balasaheb Bhane
Age : 25 years, Occ : Agri.,
R/o Hasanapur (Bhanewasti),
Tq. Rahata, Dist. Ahmednagar.

6. Bhausaheb S/o Ramchandra Bhane
Age : 39 years, Occ : Agri.,
R/o village Hasanapur,
Tq. Rahata, Dist. Ahmednagar.

7. Nanasaheb S/o Ramchandra Bhane
Age : 31 years, Occ : Agri.,
R/o Hasanapur,
Tq. Rahata, Dist. Ahmednagar.

8. Sumanbai Karbhari Dengale
Age : 32 years, Occ : Agri.,
R/o village Sadatpur, Tq. Sangamner,
Dist. Ahmednagar.

9. Kalyabai Tukaram Kote
Age : 65 years, Occ : Agri.,
R/o village Wakdi, Tq. Rahata,
Dist. Ahmednagar.

10. Lilabai Bapu Kote
Age : 68 years, Occ : Agri.,
R/o village Wakdi, Tq. Rahata,
Dist. Ahmednagar.

11. Malanbai Bhausaheb Kapse
Age : 59 years, Occ : Agri.,
R/o village Pimpalas, Tq. Kopargaon,
Dist. Ahmednagar.

12. Bedi Jalindar Vadak
Age : 61 years, Occ : Agri.,
R/o Nimgaon Jail, Tq. Sangamner,
Dist. Ahmednagar.

13. Sakharbai D/o Ramchandra Bhane
Age : 27 years,
R/o village Hasanapur, Tq. Rahata,
Dist. Ahmednagar.

14. Harichandra Nana Bhane
(Since deceased)
Through his L.Rs.

14A. Sahebrao S/o Harichandra Bhane
Age : 70 years, Occ : Business,
R/o Bhane Vasti, Hasanapur, Post-Loni,
Tq. Rahata, Dist. Ahmednagar.

14B. Bhagwat S/o Harichandra Bhane
Age : 68 years, Occ : Labour,
R/o Bhane Vasti, Hasanapur, Post-Loni,
Tq. Rahata, Dist. Ahmednagar.

14C. Dinkar S/o Harichandra Bhane
Age : 55 years, Occ : Service,
R/o Bhane Vasti, Hasanapur, Post-Loni,
Tq. Rahata, Dist. Ahmednagar.

15. Sopan Nana Bhane
Age : 65 years, Occ : Agri.,
R/o village Hasanapur, Tq. Rahata,
Dist. Ahmednagar.

..RESPONDENTS

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Advocate for appellant Nos.1-A to 1G : Mr. Mukul Kulkarni i/b Mr. Chaitanya S. Deshmukh
Mr. V.D. Sapkal, Senior Advocate i/b Mr.S.R. Sapkal a/w Mr.Atharva D. Khedkar, Mr.Yash Jadhav and Mr.Amit Gadekar, Advocate for respondents.

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CORAM : ROHIT W. JOSHI, J.

DATE : 13.03.2025

JUDGMENT :

1. The present second appeal was admitted vide order dated 25.01.2007 on the following substantial question of law :-

> "(i) Whether the deed Exhibit – 45 dated 23.11.1978 is mortgage by conditional sale or sale with condition of reconveyance ?

2. The present appeal is preferred by original defendant no.1, who has suffered two concurrent decrees in a suit filed against him by respondent no.1 herein. The other respondents are family members of respondent no.1. Respondent no.1 is hereinafter referred to as "plaintiff" and appellant is referred to as "defendant no.1".

3. The plaintiff had filed a suit for redemption of mortgage with respect to the suit property, which is an agricultural land bearing Gut No.36/1 admeasuring 1.01 HR situated at village Hasanapur,

Tq.Shrirampur, Dist.Ahmednagar. It is the case of the plaintiff that he had mortgaged the suit property with defendant no.1 in consideration of loan amount of Rs.7,000/- vide document, being mortgage by conditional sale dated 23.11.1978. The said document is at Exhibit-45 in the record of the learned trial court. The plaintiff contends that in terms of the said document dated 23.11.1978, defendant no.1 was placed in possession of the suit property. He contends that in terms of the said document, the plaintiff was entitled to redeem the mortgage by making repayment of the loan amount of Rs.7,000/- to defendant no.1 after a period of 8 years and before a period of 10 years from the date of execution of the document and upon such payment, defendant no.1 was bound to execute the deed of reconveyance with respect to the suit property in his favour and to deliver back possession of the suit property to him. The plaintiff contends that despite repeated requests, defendant no.1 avoided to reconvey the suit property, and therefore, the plaintiff had issued legal notice dated 30.11.1988. He further states that since the legal notice also did not yield the desired result, he was constrained to file the suit. The suit came to be registered as Regular Civil Suit No.335/1989.

4. On being served with the suit summons, defendant no.1 entered appearance in the matter and filed written statement contending that the document dated 23.11.1978 was not a document

of mortgage by conditional sale but, a document of out and out sale coupled with a condition for repurchase. He contended that the right to repurchase was to be exercised between a period of 8 to 10 years from the date of execution of the document i.e. between 23.11.1986 to 22.11.1988 and after completion of a period of 10 years on 22.11.1988, the right to seek reconveyance was not available to the plaintiff. Defendant No.1 contended that the plaintiff did not exercise the right to obtain reconveyance within stipulated period of 10 years, and therefore, the suit was liable to be dismissed.

5. Learned Trial Court framed issues in the matter, on which the plaintiff and defendant no.1 led evidence. The plaintiff examined himself at Exhibit-43 and the two attesting witnesses to the document dated 23.11.1978 as witnesses nos.2 and 3 and closed his evidence. As against this, defendant no.1 examined himself at Exhibit-57. It will be pertinent to note that the plaintiff had deposited amount of Rs.7,000/- before the learned Trial Court on 04.03.1991.

6. After recording the evidence, learned Trial Court heard arguments of rival parties and was pleased to pass a decree in favour of the plaintiff, thereby directing defendant no.1 to tender all documents in his custody with respect to the suit property in the court for delivering the same to the plaintiff, direction to reconvey the suit

property free from all encumbrances to the plaintiff and also to deliver peaceful vacant possession of the suit property to the plaintiff. The learned Trial Court has held that the document in question was not a out and out sale but a document of mortgage by conditional sale. The learned Trial Court has also rejected the argument that if reconveyance was not obtained within period of 10 years from the date of execution of the document, the right to redeem or to obtain reconveyance of the document would be lost.

7. Being aggrieved by the aforesaid decree, defendant no.1 filed first appeal under Section 96 of the Code of Civil Procedure, being Regular Civil Appeal No.3/1996. The learned First Appellate Court has dismissed the appeal, vide judgment and decree dated 20.03.2002. The learned First Appellate Court has also interpreted the document to be a document of mortgage by conditional sale and not an absolute sale deed.

8. Defendant no.1 has challenged the said concurrent decrees by way of filing present second appeal. As stated above, the present second appeal came to be admitted on 25.01.2007 on the substantial question of law quoted above, which relates to interpretation of the document dated 23.11.1978 at Exhibit-45.

9. Mr. Mukul Kulkarni, learned counsel for the appellant argues that the document is wrongly interpreted by the learned Courts. He contends that the document cannot be termed to be a mortgage by conditional sale only because clause of reconveyance is incorporated in the said document. His contention is that the document reflects a transaction of absolute sale coupled with right to vendor to repurchase the property. He argues that since the document provides for right to repurchase, the right will have to be exercised strictly within the time frame provided by the document. He points out that the plaintiff did not exercise the right to obtain the reconveyance within the stipulated period, as a consequence of which he lost the right to seek reconveyance permanently. Referring to the document, he contends that there is no clause in the document for payment of interest and possession of the suit property is also delivered to defendant no.1. He contends that relationship of borrower and lender is not established in the present case, and therefore, the document is a document of sale and not a mortgage. These two circumstances according to him bring the document within the definition of sale under Section 54 of the Transfer of Property Act and exclude it from the definition of mortgage by conditional sale as defined under Section 58(c) of the Transfer of Property Act. The learned Advocate has placed strong reliance on the judgment in the matter of ***Dharmaji Shankar Shinde and others Vs. Rajaram Shripad Joshi (Dead) through L.Rs. And others*** reported in

(2019) AIR (SC) 2367.

10. Per-contra, learned Senior Advocate Mr. V.D. Sapkal for respondents contends that merely because possession is delivered to defendant no.1 would not mean that the document is not a mortgage. As regards the contention of Mr.Kulkarni that there is no covenant in the document regarding payment of interest, Mr. Sapkal points out that under the arrangement, defendant no.1 was permitted to enjoy the usufruct of the suit properties during subsistence of mortgage in lieu of interest. According to Mr.Sapkal, merely because possession is delivered and there is no covenant for payment of interest would not mean that the transaction between parties is one of sale and not of mortgage. Mr.Sapkal draws attention to the contents of the document to canvass that the contents of the document will clearly show that the transaction is one of mortgage and not a sale by any stretch of imagination. He refers to the title of the document, which reads as "*Kayam Kharedi Nasun Shart Kharedi Khatache*". English Translation of the title would mean that `*Document of Conditional Sale, Not Being an Absolute Sale*'. He then refers to the schedule of clause which records payment of Rs.7,000/-, wherein it is mentioned that Rs.1,500/- were received by the plaintiff from defendant no.1 around one month before the execution of document for expenses and thereafter a sum of Rs.5,500/- was received before the Sub-Registrar for expenditure to be incurred on

agricultural lands. He also refers to relevant clause of the document, english translation of which reads as under :-

> *"……. The above referred property is given/transferred to you under conditional sale. The main condition of this transaction is that I will be entitled to obtain reconveyance from you by making repayment of the aforesaid amount after a period of 8 years and before a period of 10 years from today. In the event, I am unable to return the amount to you then this document itself should be considered as absolute sale deed and property may be used accordingly. Thereafter, I will not be entitled to claim reconveyance of the property."*

11. Referring to the aforesaid sentences, Mr. Sapkal contends that the transaction is clearly one of mortgage and not of sale with condition of repurchase. As regards the time frame contained in the said clause, Mr.Sapkal argues that the said clause is void being a clog on the right to seek redemption and such clog is statutorily barred under Section 60 of the Transfer of Property Act. Mr.Sapkal places reliance on the judgments of the Hon'ble Supreme Court in the matters of ***Seth Ganga Dhar Vs. Shankar Lal and others*** reported in ***(1958) AIR (SC) 770***, ***Shri Shivdev Singh and another Vs. Sh. Sucha Singh and another*** reported in ***(2000) AIR (SC) 1935*** and ***Patel Ravjibhai Bhulabhai (Died) Through L.Rs. Vs. Rahemanbhai M. Shaikh (Died)***

Through L.Rs. & others reported in ***(2016) AIR (SC) 2146***.

12. I have heard the respective submissions canvassed by the learned Advocates as aforesaid. I have perused the document dated 23.11.1978 at Exhibit-45, so also the pleadings, evidence and judgments delivered by the learned Courts.

13. At the outset it needs to be mentioned that the execution of the document dated 23.11.1978 is not in dispute. The only controversy between the parties is with respect to interpretation of the document.

14. Perusal of the document indicates that it is titled as `mortgage by conditional sale not being an absolute sale'. There is a reference to amount borrowed by the plaintiff from defendant no.1 Rs.1,500/- for household expenses received a month before execution of the document and Rs.5,500/- received for expenditure on agricultural lands received on the date of execution of document. The document clearly recites that the plaintiff was entitled to refund the amount of Rs.7,000/- to defendant no.1 and to obtain reconveyance of the suit property from him. The title by itself is indicative of intention of the parties. Likewise, relationship of debtor and creditor is also established from the document itself. Apart from this, the document contains clear covenant for reconveyance of the property in favour of

the plaintiff upon refund of the amount received by the plaintiff from defendant no.1. The contents of the document read as a whole clearly establish a lender and a borrower relationship between the parties, where the borrower as in lieu of loan amount of Rs.7,000/- executed a document of conditional sale in favour of lender. The fact that the document does not contain any covenant for payment of interest and possession is also delivered to defendant no.1, should not make any difference, in as much as, the possession is delivered to defendant no.1 to enjoy the usufruct of the property in lieu of interest. The transaction between the parties is a transaction of usufruct mortgage and mode of creation of mortgage is by way of mortgage by conditional sale. The terms of the document leave no scope for otherwise interpretation.

15. In the matter of ***Seth Ganga Dhar Vs. Shankar Lal and others [(1958) AIR (SC) 770],*** the Hon'ble Supreme Court was dealing with a document of mortgage, which provided that the mortgagor will not be entitled to redeem the mortgage for a period of 85 years and further that the right of redeem mortgage would be available only for a period of six months from the date on which a period of 85 years comes to an end. It was stated in the mortgage deed that after lapse of period of six months, the mortgagor or his legal heirs will not have any claim over the mortgaged property and the document of mortgage itself will be treated to be a sale deed. The Hon'ble Supreme Court has held that

the period of 85 years during which the mortgagor could not redeem the mortgage was a reasonable condition and could not be said to be a clog on right of redemption. However, as regards the time limit of six months within which the mortgage was to be redeemed, it is said that the said period of six months created a clog on right to redemption and such a clog being illegal was completely invalid and liable to be ignored. In this context following observations are required to be extracted for ready reference :-

> *"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 follows from section 60 of the Transfer of Property Act."*

16. 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 mortgagor'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."*

17. In the matter of ***Shivdev Singh and another Vs. Sucha Singh and another (AIR 2000 SC 1935)***, the mortgagor had filed suit for possession by redemption of mortgage. The contention was raised that the mortgage was created for a period of 99 years and suit filed before the said period was liable to be dismissed on the ground that it was premature. The Hon'ble Supreme Court in the said judgment has held as under :-

> *8. ……… The mortgagor being an owner who has parted with some rights of ownership has a right to get back the mortgage deed or mortgaged property, in exercise of his right of ownership. The right of redemption recognised under the Transfer of Property Act is thus a statutory and legal right which cannot be extinguished by any agreement made at the time of*

mortgage as part of the mortgage transaction.

10. Any provision incorporated in the mortgage deed to prevent or hamper the redemption would thus be void. A mortgage cannot be made irredeemable and the right of redemption not an illusory.

..... "The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties."

18. In the matter of ***Patel Ravjibhai Bhulabhai (D) through LRs. Vs. Rahemanbhai M. Shaikh (D) through L.Rs. and others (AIR 2016 SC 216)*** , the plaintiff and defendants were at issue with respect to interpretation of document executed by and between them, whereas the plaintiff contended that the document was a mortgage by conditional sale, the defendant contended that it was a document of outright sale coupled with covenant for repurchase. The relevant clause of the document is extracted hereinbelow for ready reference :-

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

19. The said document was executed on 30.12.1960. The period of five years had thus expired on 30.12.1965. The plaintiff-mortgagor had filed suit for redemption in the year 1984. The mortgagee – defendant was placed in possession of the property, and therefore, prayer for recovery of possession was made along with prayer for redemption of mortgage. As stated above, the contention between the parties was with respect to interpretation of the document. In this context, the Hon'ble Supreme Court, while interpreting the document, has held as under :-

> *"14. ……. 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."*

20. The above judgments which are relied upon by Mr. Sapkal,

learned Senior Advocate for the respondents clearly lay down that any clause in mortgage deed, which restricts the period for enforcing right of redemption is invalid and is liable to be ignored. Such clauses are held to be creating a clog on right of redemption, which is statutorily prohibited by Section 60 of the Transfer of Property Act.

21. As against this, Mr.Kulkarni, learned Advocate for the appellant has placed reliance on judgment of the Hon'ble Supreme Court in the matter of ***Dharmaji Shankar Shinde and others Vs. Rajaram Shripad Joshi (Dead) through L.Rs. and others [(2019) AIR (SC) 2367].*** In the said case, the parties had executed a document of mortgage by conditional sale with condition that if the amount was not repaid within a period of five years, then the same would be treated as absolute sale between the parties conferring absolute right of ownership on the mortgagee. The said document was executed on 28.07.1967 and suit for redemption was filed on 19.02.1980. The mortgagee contested the suit contending that the transaction was not a mortgage by conditional sale but a sale with condition of repurchase. The suit was dismissed by the learned Trial Court holding that since relationship of debtor and creditor was not established, the document could not be said to be a document of mortgage. However, the first appeal filed by the plaintiff was allowed and the second appeal filed by the defendant-mortgagee was dismissed. In such circumstances, the

defendant – mortgagee approached the Hon'ble Supreme Court. The Hon'ble Supreme Court has referred to earlier decisions on the point and has held that in order to determine as to whether a document styled as sale deed with a covenant for repurchase is mortgage by conditional sale or outright sale with condition of repurchase, the intention of the parties must be gathered on interpretation of the document and if the document is ambiguous then extraneous evidence will also be admissible in order to determine the intention of parties. It is held that the relationship of debtor and creditor must exist in order to construe a document as document of mortgage by conditional sale. The Hon'ble Supreme Court has placed reliance on an express admission by the plaintiff/mortgagor in his evidence that the transaction was one of sale with condition of repurchase and the parties were not described as mortgagor and mortgagee. It has then observed that rate of interest was not mentioned in the document and the document also did not recite that the possession was handed over in order to enable the purchaser/mortgagee to enjoy the property in lieu of interest. In that view of the matter, the Hon'ble Supreme Court has held that although condition of reconveyance may be incorporated in the document of sale itself, the document will not necessarily be a document of mortgage by conditional sale. It is also held that relationship of debtor and creditor was not established. The relevant observations of the Hon'ble Supreme Court are extracted hereinbelow :-

> *“10. ….. A sale with a condition of retransfer is not a mortgage since the relationship of debtor and creditor does not exist and there is no debt for which the transfer is made as a security.*

22. This judgment of the Hon’ble Apex Court is required to be seen in the backdrop of peculiar facts where it was expressly held that relationship of debtor and creditor was not established and the mortgagor had given a categorical admission in evidence that the document was one of sale and not mortgage.

23. In the matter of ***Srinivasaiah Vs. H.R. Channabasappa (Since dead) by his legal representatives and others*** reported in (***2017) (12) SCC 821***, 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.

24. 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 (Ex. P-1), we are of the opinion that the document (Ex. 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 (Ex. P-1). Third, the document (Ex. P-1) is styled as a "Deed of Conditional

> *Sale". Fourth, it contains a condition that Defendant No. 1 will be allowed 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."*

25. Likewise, in the case of ***Vithal Tukaram Kadam and another Vs. Vamanrao Sawalaram Bhosale and others*** reported in

(2018) 11 SCC 172, the Hon'ble Supreme Court has held that when the document uses the word, such as, `**repay**', `**return**', `**subject to condition**' and such other terms, the language would normally suggest that the sale is not a real sale but an ostensible one. It is held that such words indicate the intention of the parties that the transaction is one of mortgage.

26. Having regard to the above judgments of the Hon'ble Supreme Court, I am of the opinion that the document in the case at hand is certainly a document of mortgage by conditional sale and not a document of sale coupled with right of repurchase. I am also of the opinion that the last sentence of the clause which provides that in the event the plaintiff is unable to return the amount within the outer limit of 10 years, the document will be treated as absolute sale is a invalid clause and is required to be ignored in the light of the judgments of the Hon'ble Supreme Court referred to above. It needs to be mentioned that the title of the document is, `*document of conditional sale, not being an absolute sale'*. The words `***not being an absolute sale***' are used by the parties to dispel any confusion as regards interpretation of document. The words have been specifically used by the parties to do away with any confusion. Although, the title of the document does not control the express covenants, the contents of the document also clearly establish that the document is a mortgage by conditional sale, in as

much as, it uses the word conditional sale in the initial portion where it is mentioned that the property is being sold by the plaintiff to the defendant coupled with the last clause in the document which is extracted in paragraph no.10 supra. The words, `**return**', `**reconveyance**', `**repayment**' etc., used in the document are also indicative of the real intention of the parties as has been held in the matter of ***Vithal Tukaram Kadam (supra)***.

27. The clauses which fall for interpretation in the present case bear close resemblance with clauses which fell for consideration before the Hon'ble Supreme Court in the cases of ***Seth Ganga Dhar, Dharmaji Shankar Shinde and Srinivasaiah.*** In all three cases almost identical clauses are held to be a document of mortgage by conditional sale and not a document of sale coupled with right to reconveyance. Apart from this, the title of the document and use of the words 'repay', 'return', 'subject to condition' will also suggests that the document is one of mortgage by conditional sale as has been held in the matter of ***Vithal Tukaram Kadam.*** In that view of the matter, I am inclined to hold that the document in question is a mortgage by conditional sale within the meaning of Section 58(c) of the Transfer of Property Act and not a document of sale with condition of repurchase.

28. Even otherwise, the document in question is dated 23.11.1978. Even according to the case of the defendant-appellant, the

respondent no.1 – plaintiff was entitled for reconveyance of the property, if he repaid the amount of Rs.7,000/- after a period of 8 years and before the period of 10 years from the date of execution of the document i.e. between 23.11.1986 to 22.11.1988. It is undisputed that the respondent-plaintiff had issued notice for reconveyance on 30.11.1988 i.e. on the 8th day from the date on which his right to claim reconveyance had expired as per the appellant-defendant. It will be pertinent to mention here that the plaintiff – respondent has stated in his examination-in-chief that he had approached the appellant-defendant seeking reconveyance of property by offering to make repayment of the amount since beginning of the 10th year and since the appellant-defendant avoided to execute document of reconveyance, notice dated 30.11.1988 was issued. In his cross-examination also he has maintained his stand that he had approached the defendant seeking reconveyance of property before issuing the notice. The statement of the respondent-plaintiff appears to be correct. It is improbable that the respondent-plaintiff would issue legal notice directly without making any attempt to seek reconveyance by contacting the appellant-defendant. The notice seeking reconveyance is issued immediately on the 8th day from the last date on which the period for seeking reconveyance had lapsed according to the appellant-defendant. Therefore, even if it is assumed that the transaction between the parties was one of sale coupled with covenant for repurchase, in my opinion, the respondent-plaintiff will also be entitled for reconveyance. The conduct of the respondent-plaintiff showing prompt action for reconveyance of the property speaks about his readiness and willingness. Pleadings and evidence are also sufficient to establish readiness and wiliness on the part of the respondent-plaintiff, although the words `readiness and willingness' are not mentioned. It is well settled that the provisions from the sections are not to be quoted in order to make out case under Section 16(c) of the Specific Relief Act. In that view of the matter, even if the interpretation of document as put-forth by the appellant is accepted, the decree for reconveyance cannot be disturbed.

29. Both the learned Courts apart from holding that the transaction between the parties is a mortgage, have nonetheless, also examined the aspect of specific performance of contract for enforcement of clause of reconveyance, assuming that the transaction between the parties was one of sale. Both the courts have concurrently held that even if the transaction is treated to be a sale transaction, the plaintiff will be entitled to relief of specific performance. The conduct of the plaintiff, which is referred to above is sufficient to hold that the findings recorded by both the courts in this regard are also just and proper and do not warrant any interference.

30. It is however clarified that the above observations with respect to readiness and willingness are besides the conclusion drawn by me that the transaction between the parties was one of the mortgage by conditional sale.

31. In view of the above, question of law framed is answered in favour of respondent no.1-plaintiff and against the appellant-defendant. The second appeal, therefore, stands dismissed. The appellants shall bear the costs of defendant no.1 – plaintiff throughout.

32. The Civil Application, if any, stands disposed of.

[ROHIT W. JOSHI]
JUDGE

sga/