IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 21 OF 2024

WITH

INTERIM APPLICATION NO. 430 OF 2024

Vitthal Kashiram Magar (Deceased through its Legal Heirs) 1(a) Shalan Vitthal Magar & Ors ..Appellants

Versus

Bapu Laxman Yadav …Respondent

Mr. Nitin Gaware Patil, with Divyesh K. Jain, for the Appellant.
Mr. Pranav Bhoite, for the Respondent (through VC).

CORAM: N. J. JAMADAR, J.

DATE : 12th NOVEMBER 2025

ORDER:

1. This Second Appeal is directed against a judgment and decree dated 18th March 2023 passed by the learned District Judge, Baramati in RCS No. 154 of 2016, thereby confirming the judgment and decree dated 6th October 2016 passed by the learned Civil Judge, Daund, Pune, whereby the learned Civil Judge allowed the Respondent-Plaintiff to redeem the mortgage evidenced by the Instrument dated 4th January 1990 and directed the Appellant-Defendant to execute a re-conveyance in favour of the Plaintiff.

2. The Respondent-Plaintiff instituted the Suit for redemption of the mortgage and re-conveyance of the mortgage property, i.e., 50R land out of Survey No. 233, situated at Kusegaon, Taluka Daund, District Pune and execution of conveyance in favour of the Plaintiff and perpetual injunction with the assertion that late Awadabai was the Plaintiff's mother. The Defendant is the brother of late Awadabai. On 4th January 1990 late Awadabai had executed a registered mortgage by conditional sale. The mortgagor had accepted mortgage money of Rs.5,000/- under the said instrument. It was agreed that the mortgagor would return the mortgage money of Rs.5,000/- within a period of five years and, thereupon, the mortgagee would reconvey the mortgaged property. Awadabai passed away on 17th April 1991. The Plaintiff was unaware of the said mortgage. In the year 2012, the Plaintiff became aware of the said mortgage. The Defendant was called upon to accept the mortgage money and execute a re-conveyance. As the Defendant refused, the Plaintiff was constrained to institute the suit for redemption of mortgage and re-conveyance of the mortgaged property.

3. The Appellant-Defendant resisted the Suit contending, *inter alia,* that the transaction in question was that of an outright sale with a condition of repurchase, and not a mortgage by conditional sale. The predecessor-in-title of the Plaintiff and the Plaintiff failed to comply with the condition of repurchase and, therefore, the Defendant has become an absolute owner of the suit property.

4. By a judgment and decree dated 6th October 2016, the learned Civil Judge decreed the Suit observing *inter alia* that the instrument in question was a mortgage by conditional sale. The condition of re-conveyance was incorporated in the instrument itself. Late Awadabai had passed away during the term of five years, within which the mortgage money was agreed to be repaid and re-conveyance executed. Having regard to the recitals in the instrument in question and the attendant circumstances, the transaction between the parties was that of a mortgage by conditional sale.

5. Being aggrieved, the Appellant carried the matter in Appeal before the District Judge, Baramati. After appraisal of the evidence and material on record and testing the judgment of the trial Court, the learned District Judge concurred with view of the trial Court. In the view of the learned District Judge, the recitals in the instrument clearly indicated that the instrument was that of a mortgage by conditional sale, and since the limitation for a suit for redemption of mortgage is 30 years, the Suit was rightly decreed by the trial Court.

6. Mr. Nitin Gaware Patil, the learned Counsel for the Appellant, submitted that a substantial question of law arises for consideration as both the Courts have misconstrued the nature of the instrument in question, which has vitiated the findings recorded by the Courts below. Taking the Court through the Instrument dated 4th January 1990, Mr. Patil made a strenuous effort to draw home the point that the instrument in question has the trappings of a sale, with a condition to repurchase. Emphasis was laid on the fact that there is no reference to the existence of the debt; nor the parties had agreed that the purported mortgage money would carry interest. In the absence thereof, the Courts below committed a grave error in law in construing the instrument in question as a mortgage by conditional sale.

7. To buttress these submissions, Mr Patil placed reliance on the judgments of the Supreme Court in the cases of **Prakash (Dead) By LRs Vs G. Aradhya & Ors**[1] and **Umabai & Anr Vs Nilkanth Dhondiba Chavan (Dead) by LRs & Anr.**[2] Reliance was also placed on a judgment of this Court in the case of **Nana Tukaram Jaikar Vs Sonabai Madhav Saindate & Ors.**[3]

8. I have perused the instrument in question, the evidence on record and the judgments rendered by the Courts below. Indeed, there is a distinction between mortgage by conditional sale with a condition of repurchase. In a mortgage the debt subsists and thus the debtor retains the right to redeem. In contrast, in a sale with a condition of

1 2023 SCC OnLine SC 1025.
2 (2005) 6 SCC 243.
3 1982 SCC OnLine Bom 46.

repurchase, there is no subsisting debt. A condition of repurchase is essentially in the nature of an agreement for sale which can be enforced by seeking specific performance, where the purchaser reneges. The proviso to Section 58(c) of the Transfer of Property Act, 1882 which defines a mortgage by condition sale, provides that no transaction shall be deemed to be a mortgage unless the condition that upon payment being made the buyer shall transfer the property to the seller is embodied in the document which effects or purports to effect the sale.

9. It is trite, the form of transaction is not decisive. The true test is the intension of the parties in entering into the transaction. If the intension of the parties is that, the transfer of interest in the property was by way of security, it would be a mortgage. The effect of proviso to Section 58(c) is that an ostensible sale with a condition cannot be regarded as a mortgage unless the condition is contained in the same document. However, it does not necessarily imply that, if the condition is incorporated in the Deed effecting or purporting to effect a sale, a mortgage transaction must of necessity have been intended. The question whether by incorporation of such a condition, a transaction ostensibly of sale is to be considered as a mortgage is one of the intension of the parties to be gathered from the language of the deed, interpreted in the light of the attendant circumstances. These propositions are well-settled.

10. On the aforesaid touchstone, reverting the facts of the case, especially the instrument in question, it becomes abundantly clear that the document has been styled as "a sale for term of five years". The instrument incorporates a clear stipulation that within the said term of five years, the purported vendor would repay the consideration of Rs.5,000/- and thereupon re-conveyance would be executed in favour of he vendor. The term of repayment of the consideration of Rs.5,000/- is impregnated with the existence of the debt and obligation to repay the same.

11. Conversely, the instrument in question contains not more than three recitals, namely, conditional sale for a term of five years, repayment of consideration of Rs.5,000/- and re-conveyance thereof and the purchaser having a right to cultivate and take the crops from the suit land. There are no recitals which are usually associated with a sale. Even there is no covenant to the effect that, on and from the date of the execution of the said instrument, the suit property would vest in the purchaser as an absolute owner thereof.

12. The attendant circumstances also throw light on the intent of the parties. First and foremost the relationship of sister and brother between the vendor and the purchaser. Second, the consideration of Rs.5,000/- for an agricultural land admeasuring 50R with a right to draw water from a well, appears to be *prima facie* inadequate. Third, though the Plaintiff was then major, it did not appear that the Plaintiff was in any way associated with the said transaction.

13. Applying the tests to determine whether the transaction in question is a mortgage by conditional sale or a sale with a condition to repurchase, the Courts below have justifiably recorded concurrent findings that the instrument in question is a mortgage by conditional sale. Thus the submission on behalf of the Appellant that the Courts below have misconstrued the nature of the instrument, does not merit acceptance.

14. Resultantly, no substantial question of law arises for consideration.

15. Hence the following order:

: O R D E R :

(i) The Second Appeal stands dismissed.

(ii) In view of the dismissal of the Second Appeal, the Interim Application No. 430 of 2024, also stands disposed.

[N. J. JAMADAR, J.]