

DHARMAJI SHANKAR SHINDE AND OTHERS

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v.

RAJARAM SHRIPAD JOSHI (DEAD) THROUGH LRs. AND
OTHERS

(Civil Appeal No. 7448 of 2008)

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APRIL 23, 2019

[R. BANUMATHI AND R. SUBHASH REDDY, JJ.]

Deeds and Documents – ‘Mortgage by conditional sale’ or ‘Sale with a condition to repurchase’ – Respondents-plaintiffs case was that the suit property was mortgaged by their father in favour of the predecessor-in-interest of the appellants-defendants for Rs.2500/- – Pursuant thereto, a Deed (Ex.P-73) was executed by the parties – According to the respondents the said deed was a deed of ‘mortgage by conditional sale’ with a condition that if the amount is not repaid within a period of five years from the date of execution of the deed, then the same would be treated as an absolute sale between the parties conferring absolute right of ownership on predecessor-in-interest of the appellants-defendants and his legal representatives – It was alleged that father of respondents failed to repay the money within the stipulated period – After death of their father, respondents-plaintiffs filed a suit for redemption of the mortgage and contended that their father had paid Rs.800 (Ex. P-69) – Appellant-defendant defended the suit on the basis that transaction was a sale with condition to repurchase – Trial court dismissed the suit holding that the relationship of debtor and creditor was not established – First Appellate Court set aside the judgment of the trial court and held that (Ex. P-73) was a ‘mortgage by conditional sale’ – Aggrieved, appellants preferred second appeal before the High Court which was dismissed – On appeal, held: Whether the document is a ‘mortgage by conditional sale’ or ‘sale with a condition to repurchase’ is to be ascertained from the intention of the parties – It is trite law that the intention of the parties should be gathered from the recitals of the document itself – In the instant case, by perusal of Ex.P-73 it was clear that eight days prior to Ex.P-73, father of respondents had borrowed orally a sum of Rs.700/- – Later, when Ex.P-73 was executed, the earlier borrowed

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- A *amount of Rs.700 was adjusted from the sale consideration of Rs.2500/- – The intention of the parties in putting an end to the debtor-creditor relationship with respect to the sum of Rs.700/- was clear from the recitals of the document i.e. adjustment of Rs.700/- from the total consideration of Rs.2500/- and parties intended to create a relationship of vendor and vendee by transfer of the suit property for a consideration of Rs.2500/- – Further, period of five years was fixed in Ex.P-73 within which father of respondents was to repay the said amount – Thus, clauses in Ex.P-73 were consistent with the intention of the parties that they made the transaction a conditional sale with an option to repurchase – Having not paid the amount within the stipulated period of five years, the plaintiffs lost their right to repurchase – Insofar as Ex. P-69 is concerned, it cannot be relied upon as corroborative piece of evidence to hold that part payment was made by father of respondents and that parties treated Ex.P-73 as ‘mortgage by conditional sale’ – Therefore, the Judgment of the High Court is set aside – Judgment of the trial court restored – Transfer of Property Act, 1882 – s.58(c).*

Allowing the appeals, the Court

- E **HELD:** 1. By perusal of Ex.P-73, it is clear that eight days prior to Ex.P-73, father of respondents-plaintiffs has borrowed orally a sum of Rs.700/- for the purpose of marriage of his daughter. At the time of execution of Ex.P-73 (28.07.1967), father of respondents-plaintiffs required more money for the same reason and he executed Ex.P-73-document titled as “mortgage by conditional sale” for a consideration of Rs.2500/- and on the date of execution of the said document, father of respondents-plaintiffs received only a sum of Rs.1800/-. The earlier borrowed amount of Rs.700/- was thus adjusted from the sale consideration of Rs.2500/-. The intention of the parties in putting an end to the debtor-creditor relationship with respect to the sum of Rs.700/- is clear from the recitals of the document i.e. adjustment of Rs.700/- from the total consideration of Rs.2500/- and parties intending to create a relationship of vendor and vendee by transfer of the suit property for a consideration of Rs.2500/-. Period of five years was fixed in Ex.P-73 within which father of the respondents-plaintiffs was to repay the said amount. On the date of execution of the document (Ex.P-73), the possession of the
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property was handed over to the appellants-defendants for cultivation. Further, recitals are to the effect that if the consideration amount is paid within five years, father of respondents-executant will get the mortgage redeemed. In case, the amount is not paid within the stipulated period of five years, the mortgage shall be treated as an absolute sale and thereafter predecessor-in-interest of the appellants-defendants to pay the land revenue to the government and all other charges for which executant will have no complaint. The recitals of the document make clear the intention of the parties that if the amount is not repaid within the stipulated period of five years, the transferee will have absolute right and the mortgage will be treated as an absolute sale and the transferee to pay the land revenue and the other charges. These clauses in Ex.P-73 are consistent with the intention of the parties making the transaction a conditional sale with an option to repurchase. [Para 16][269-B-G]

2. Mention of "*borrowed a sum of Rs. 700/-*" in the document is incidental. Mere incorporation of the word "*borrowed*" and "*mortgage by conditional sale*" cannot by itself establish that there is a debtor-creditor relationship. In fact, as pointed out earlier, the recitals of the document make it clear that the parties expressed their intention to put an end to the debtor-creditor relationship with respect to the sum of Rs.700/- that existed prior to the execution of Ex.P-73 and creating a relationship of vendor and vendee by transfer of the suit property for consideration of Rs.2500/-. As rightly observed by the trial court, in Ex.P-73, there is no mention of the rate of interest, right of foreclosure that are essential in a deed of mortgage. [Para 18][270-D-E]

3. Insofar as Ex.P-69-receipt is concerned, the trial court pointed out that though PW-1 claims that he was present at the time of execution of Ex.P-69, PW-1 had not signed in it nor attested it, so PW-1's evidence is of no help to prove the execution of the receipt. Be it noted that though Ex.P-69-receipt was of the year 1972, during his life time, based on Ex.P-69-receipt, father of respondents-plaintiffs had not taken any step to redeem the property. Even after the death of father of respondents-plaintiffs in 1973, Ex.P-69-receipt did not see the light of the day till 1980 when the notice was said to have been issued by the

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- A respondents-plaintiffs. In these factual circumstances, it cannot be said that the plaintiffs have discharged the burden in proving Ex.P-69-receipt as genuine to hold that the parties had intended that Ex.P-73-document is only a “mortgage by conditional sale” and not a sale with condition to repurchase. The receipt Ex.P-69 cannot be relied upon as corroborative piece of evidence to hold that part payment was made by father of respondents-plaintiffs and that the parties treated Ex.P-73 as a “mortgage by conditional sale”. [Para 25][273-C-E]
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- C 4. Though the transaction and condition to repurchase are embodied in one document, having regard to the intention of the parties and the surrounding circumstances, Ex.P-73 does not fall within the proviso to Section 58(c) of the Transfer of Property Act. Ex.P-73 a registered document, is not a mortgage but a transaction of sale with condition to repurchase. The High Court and the first Appellate Court did not properly appreciate the
- D recitals in Ex.P-73 and that it does not create expressly or by implication the relationship of debtor and creditor. The High Court failed to note that since father of respondents-plaintiffs failed to pay the amount within the stipulated period of five years, the respondents-plaintiffs have lost their right to repurchase the
- E property. When the findings of the first Appellate Court and the High Court though concurrent, where they are shown to be perverse, this Court would certainly interfere with the findings of fact recorded by the courts below. The High Court has not properly appreciated the evidence and Ex.P-73 in the light of the surrounding circumstances and the impugned judgment is liable
- F to be set aside. [Para 27][274-A-D]

Bhaskar Waman Joshi (deceased) v. Shri Narayan Rambilas Agarwal (deceased) [1960] 2 SCR 117 – referred to.

G *Chunchun Jha v. Ebadat Ali and another* AIR 1954 SC 345 : [1955] SCR 174 – relied on.

Vithal Tukaram Kadam and another v. Vamanrao Sawalaram Bhosale and others (2018) 11 SCC 172 : [2017] 8 SCR 379 – distinguished.

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<u>Case Law Reference</u>			A
[1960] 2 SCR 117	referred to	Para 12	
[1955] SCR 174	relied on	Para 13	
[2017] 8 SCR 379	distinguished	Para 15	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7448 B
of 2008.

From the Judgment and Order dated 15.11.2006 of the High Court of Bombay in Second Appeal No. 887 of 2003.

With C

Civil Appeal No. 7449 of 2008.

Ms. Qurratullain, Brij Kishor Sah, Shivaji M. Jadhav (for M/S. S.M. Jadhav And Company), Advs. for the Appellants.

Arvind S. Avhad, Rajat Kapoor, Ms. Abha R. Sharma, Ms. Sujata Kurdukar, Advs. for the Respondents. D

The Judgment of the Court was delivered by

R. BANUMATHI, J.

1. These appeals arise out of the judgment dated 15.11.2006 passed by the High Court of Bombay dismissing the Second Appeal No.887 of 2003 thereby upholding the decision of the first Appellate Court holding that Ex.P-73 is a “mortgage by conditional sale” and that the respondents-plaintiffs are entitled to redeem the suit property upon payment of the balance amount. E

2. Facts giving rise to these appeals are that the respondents-plaintiffs filed a suit for redemption of the suit property bearing S.No.147 present G.No.750 admeasuring 2 Hectares 18 Are situated in village Kudal, Jawli taluka and district Satara. Case of the respondents-plaintiffs is that the suit property was mortgaged by their father Shripad Joshi on 28.07.1967 in favour of Shankar Shinde who is the predecessor-in-interest of the appellants-defendants for Rs.2500/. The said deed (Ex.P-73) is a deed of “mortgage by conditional sale” with a condition that if the amount is not repaid within a period of five years from the date of execution of the deed, then the same would be treated and construed as an absolute sale between the parties conferring absolute right of F

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- A ownership on Shankar Shinde and his legal representatives. As per the recitals in the document, the possession of the suit property was also handed over to Shankar Shinde on the date of execution of the deed. The respondents-plaintiffs further averred that on 26.07.1972, their father had paid an amount of Rs.800/- to Shankar Shinde and to that effect Ex.P-69-receipt was executed. Shripad Joshi died in the year 1973 and the respondents-plaintiffs succeeded to his estate. Further case of the respondents-plaintiffs is that in spite of repeated request to the appellants-defendants for redemption of the suit property and delivery of possession of the property, they failed to receive the money and had not handed over the possession of the property. After issuance of legal notice dated 19.02.1980, the plaintiffs filed the suit for redemption of the mortgage.

3. The appellants-defendants resisted the suit contending that the transaction between their father-Shankar Shinde and the father of the respondents-plaintiffs-Shripad Joshi was a sale with condition to repurchase within a stipulated period of five years. Case of defendants D is that since Shripad Joshi, father of the respondents-plaintiffs failed to repay the money within the stipulated period of five years and failed to take any step to get the property reconveyed to them, after the period of five years as per the terms and conditions of Ex.P-73, father of the appellants-defendants Shankar Shinde has become the absolute owner of the suit property and the plaintiffs have no right, title or interest in the suit property.

4. The trial court dismissed the respondents-plaintiffs suit by holding that the relationship of debtor and creditor is not established and the respondents have failed to prove that the transaction (Ex.P-73) was a mortgage and therefore, they are not entitled to redemption and possession of the suit property. After referring to the recitals in Ex.P-73, the trial court held that the respondents-plaintiffs have agreed that if Shripad Joshi does not pay the amount within stipulated period of five years, the said document was to be treated as sale deed and in his life time executant Shripad Joshi did not take any action to get the property reconveyed. G The trial court also held that Ex.P-69-receipt has not been proved by the respondents-plaintiffs and the respondents-plaintiffs are not entitled to the decree prayed for by them.

5. In appeal, the first Appellate Court set aside the judgment of the trial court by holding that Ex.P-73 is a "mortgage by conditional sale" and not an absolute sale deed or a sale with a condition to

repurchase. The first Appellate Court held that payment of Rs.800/- by Shripad Joshi has been proved and that the respondents have proved the execution of Ex.P-69-receipt by examining Prabhakar (PW-2) who is the son of the scribe of Ex.P-69-receipt. The first Appellate Court held that Ex.P-73 was a “mortgage with conditional sale” as per proviso to clause (c) of Section 58 of the Transfer of Property Act and that the respondents are entitled to redeem the mortgage subject to the payment of balance amount of Rs.1700/-. Being aggrieved by the judgment of the first Appellate Court, the appellants preferred second appeal before the High Court which came to be dismissed by the impugned judgment.

6. Taking us through the evidence and materials on record, the learned counsel for the appellants submitted that the amount of Rs.2500/- was paid by Shankar Shinde as consideration for the sale and the recitals in Ex.P-73-document clearly show that the transaction was a sale with condition for reconveyance. It was submitted that during the five years, original owner Shripad Joshi did not repay the amount within the stipulated period of five years and take steps to get reconveyance of the property and therefore, the document dated 28.07.1967 has become an absolute sale. It was submitted that merely because the clause regarding sale and agreement to repurchase are embodied in the same document, proviso to clause (c) of Section 58 of the Transfer of Property Act is not attracted and it cannot be said that the transaction is a mortgage. It was urged that the first Appellate Court and the High Court failed to consider the intention of the parties and the surrounding circumstances which clearly show that the parties intended Ex.P-73 to be a transaction of sale with condition to repurchase and not mortgage by conditional sale. It was further submitted that the execution of Ex.P-69-receipt has not been proved by the plaintiffs and the first Appellate Court and the High Court erred in reversing the well-considered judgment of the trial court.

7. Per contra, the learned counsel for the respondents-plaintiffs submitted that since the sale and agreement to repurchase are embodied in the same document, in view of the mandatory provision of the proviso to clause (c) of Section 58 of the Transfer of Property Act, the transaction is to be treated as a “mortgage by conditional sale” which the respondents-plaintiffs are entitled to redeem. According to the respondents-plaintiffs, though the words “....conditional sale....” have been used in the Ex.P-73, parties intended it to be only a mortgage and not a conditional sale

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- A with condition to repurchase. The learned counsel for the respondents-plaintiffs contended that the first Appellate Court rightly accepted Ex.P-69-receipt under which the plaintiffs paid a sum of Rs.800/- and the first Appellate Court rightly held that the document dated 28.07.1967 is a “mortgage by conditional sale” and not a sale with condition for reconveyance.
- B 8. We have heard Ms. Qurratulain, learned counsel for the appellants and Mr. Arvind S. Avhad, learned counsel for the respondents-plaintiffs and perused the impugned judgment and the judgment of the trial court and materials placed on record.
- C 9. In these appeals, the question falling for consideration is the interpretation of Ex.P-73-document dated 28.07.1967. Upon consideration of the submissions, the following questions arise for determination in these appeals:-
- (i) Whether the respondents-plaintiffs are right in contending that in view of the statutory provision viz. proviso to clause (c) of Section 58 of the Transfer of Property Act, Ex.P-73-document dated 28.07.1967 is to be held as a mortgage by conditional sale?
- (ii) Whether the clause in Ex.P-73-document that in case of non payment of the amount within the stipulated period of five years, the sale will become permanent and the transferee will have an absolute right are not consistent with the intention of the parties of making the transaction a conditional sale with an option to repurchase?
- F 10. Section 58(c) of the Transfer of Property Act contains the definition of “mortgage by conditional sale”. In a “mortgage by conditional sale”, the transfer is made as a security to a loan taken by the mortgagor-owner; whereas in a “sale with a condition to repurchase”, the sale is made by the vendor-owner reserving with himself a right to repurchase it within a stipulated time. 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. Whether the document is a “mortgage by conditional sale” or “sale with a condition to repurchase” is to be ascertained from the intention of the parties. It is trite law that the intention of the parties should be gathered from the recitals of the document itself.
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11. Section 58(c) of the Transfer of Property Act deals with A “mortgage by conditional sale” which reads as under:-

“**58.**

(c) *Mortgage by conditional sale*.—Where the mortgagor ostensibly sells the mortgaged property—

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

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

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.”

(emphasis added)

12. Proviso to Section 58(c) was added by Act 20 of 1929. Prior to the amendment, there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The conflict was resolved by adding proviso to Section 58(c). Considering the scope of proviso to Section 58(c) which was added by Act 20 of 1929 and elaborating upon the distinction between “mortgage by conditional sale” and “sale with agreement to repurchase”, in *Bhaskar Waman Joshi (deceased) v. Shri Narayan Rambilas Agarwal (deceased)* (1960) 2 SCR 117 : AIR 1960 SC 301, it was held as under:-

“**6.** The proviso to this clause was added by Act 20 of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document

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- A which effects or purports to effect the sale. But it does not follow 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 the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property.”
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- E 13. As per proviso to Section 58(c), if the sale and agreement to repurchase are embodied in the separate documents then the transaction cannot be a “mortgage by conditional sale” irrespective of whether the documents are contemporaneously executed; but the converse does not hold good. Observing that the mere fact that there is only one document, F it does not necessarily mean that it must be a mortgage and cannot be a sale, in *Chunchun Jha v. Ebadiat Ali and another* AIR 1954 SC 345, it was held as under:-
- G “**6. The first is that the intention of the parties is the determining factor:** see *Balkishen Das v. Legge* 27 IA 58. But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended
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or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. As Lord Cranworth said in *Alderson v. White* 44 ER 294 at 928:

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“The rule of law on this subject is one dictated by commonsense; that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase.... In every such case the question is, what, upon a fair construction, is the meaning of the instruments?”

7. Their Lordships of the Privy Council applied this rule to India in *Bhagwan Sahai v. Bhagwan Din* 17 IA 98 at 102 and in *Jhanda Singh v. Wahid-ud-din* 43 IA 284 at 293.

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8. The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity. Unfortunately, they form the bulk of this kind of transaction.

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9. Because of the welter of confusion caused by a multitude of conflicting decisions the legislature stepped in and amended Section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. 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. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore it is reasonable to suppose

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- A that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage. (emphasis added)
- B In ***Chunchun Jha***, after considering the recitals in the document thereon and the surrounding circumstances thereon, the Supreme Court held that there was a relationship of debtor and creditor between the parties existing at the time of the suit transaction.
14. The question in each case is the determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of the surrounding circumstances. If the words are plain and unambiguous then in the light of the evidence of the surrounding circumstances, it must be given their true legal effect. If there is any ambiguity in the language employed, the intention is to be ascertained from the contents of the deed and the language of the deed is to be taken into consideration to ascertain the intention of the parties. Evidence of contemporaneous conduct of the parties is to be taken into consideration as the surrounding circumstances.
15. After referring to number of judgments and the essentials of agreement to qualify as a “mortgage by conditional sale”, in ***Vithal Tukaram Kadam and another v. Vamanrao Sawalaram Bhosale and others*** (2018) 11 SCC 172, it was held as under:-
- F “**14.** The essentials of an agreement to qualify as a mortgage by conditional sale can succinctly be broadly summarised. An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale. The execution of a separate agreement for reconveyance, either contemporaneously or subsequently, shall militate against the agreement being mortgage by conditional sale.
- G There must exist a debtor and creditor relationship. The valuation of the property and the transaction value along with the duration of time for reconveyance are important considerations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner.”
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In the light of the consistent view taken in various decisions, let us consider whether Ex.P-73 is a “mortgage by conditional sale” or a “sale with condition for reconveyance” and whether there exists any debtor and creditor relationship.

16. Intention of the parties as seen from the recitals of Ex.P-73:- By perusal of Ex.P-73, it is clear that eight days prior to Ex.P-73, Shripad Joshi has borrowed orally a sum of Rs.700/- for the purpose of marriage of his daughter. At the time of execution of Ex.P-73 (28.07.1967), Shirpad Joshi required more money for the same reason and he executed Ex.P-73-document titled as “mortgage by conditional sale” for a consideration of Rs.2500/- and on the date of execution of the said document, Shripad Joshi received only a sum of Rs.1800/-. The earlier borrowed amount of Rs.700/- was thus adjusted from the sale consideration of Rs.2500/-. The intention of the parties in putting an end to the debtor-creditor relationship with respect to the sum of Rs.700/- is clear from the recitals of the document i.e. adjustment of Rs.700/- from the total consideration of Rs.2500/- and parties intending to create a relationship of vendor and vendee by transfer of the suit property for a consideration of Rs.2500/-. Period of five years was fixed in Ex.P-73 within which Shirpad Joshi-father of the respondents-plaintiffs was to repay the said amount. On the date of execution of the document (Ex.P-73), the possession of the property was handed over to the appellants-defendants for cultivation. Further, recitals are to the effect that if the consideration amount is paid within five years, Shripad Joshi-executant will get the mortgage redeemed. In case, the amount is not paid within the stipulated period of five years, the mortgage shall be treated as an absolute sale and thereafter Shankar Shinde to pay the land revenue to the government and all other charges for which executant will have no complaint. The recitals of the document make clear the intention of the parties that if the amount is not repaid within the stipulated period of five years, the transferee will have absolute right and the mortgage will be treated as an absolute sale and the transferee to pay the land revenue and the other charges. These clauses in Ex.P-73, in our view, are consistent with the intention of the parties making the transaction a conditional sale with an option to repurchase.

17. Admittedly, executant of Ex.P-73, Shripad Joshi expired in the year 1973 and till his life time, he never took any action or step to get the property reconveyed. After death of Shripad Joshi in the year 1973, no

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- A immediate action was taken by his successor. Obviously, all the legal action were started in the year 1980 by the present plaintiffs based upon a receipt-Ex.P-69 dated 26.07.1972 under which an amount of Rs.800/- is said to have been paid to Shankar Shinde. Much emphasis has been placed by the respondents-plaintiffs on Ex.P-69-receipt which we would refer a little later. When being confronted with the recitals in
- B Ex.P-73, in his cross-examination, PW-1-Rajaram Joshi admitted that "*the transaction was that of sale with the condition of repurchase*" and "*neither parties are described therein as mortgagor or mortgagee*". Admission of PW-1 is a formidable evidence indicating the intention of the parties. Having not paid the amount within the
- C stipulated period of five years, the plaintiffs have lost their right to repurchase.

18. Mention of "*borrowed a sum of Rs.700/-*" in the document is incidental. Mere incorporation of the word "*borrowed*" and "*mortgage by conditional sale*" cannot by itself establish that there is a debtor-creditor relationship. In fact, as pointed out earlier, the recitals of the document make it clear that the parties expressed their intention to put an end to the debtor-creditor relationship with respect to the sum of Rs.700/- that existed prior to the execution of Ex.P-73 and creating a relationship of vendor and vendee by transfer of the suit property for consideration of Rs.2500/-. As rightly observed by the trial court, in Ex.P-73, there is no mention of the rate of interest, right of foreclosure that are essential in a deed of mortgage.

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

20. As per Section 58(a) of the Transfer of Property Act, the mortgage is the transfer of an interest in specific immovable property as

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

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

22. The respondents-plaintiffs contended that the market value of the suit property was higher than the transaction value and therefore, Ex.P-73 is to be construed as a mortgage. In support of their contention, reliance was placed upon the judgment in *Vithal Tukaram*. The facts in *Vithal Tukaram* are clearly distinguishable with the facts and evidence on record in the present case. In that case, the value of the land was Rs.3500/- far in excess of the amount of Rs.700/- mentioned in the

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- A document. Considering the evidence of the respondent-defendant thereon and the facts of the said case, the Supreme Court held that the value of the land was far in excess of Rs.700/- mentioned in the agreement. Further, in the said case, the defendant thereon did not take any step for mutation of the land for three long years and the plaintiff thereon specifically objected to mutation in the name of respondent-defendant.
- B The case in hand is clearly distinguishable on facts.

23. In the present case, there are no averments in the plaint as to the market value of the property and as to the inadequacy of the consideration. In his evidence, PW-1 has stated that the transaction of absolute sale could have been worth Rs.60,000-70,000/- in the year 1967; C but the respondents-plaintiffs have not produced the certificate of valuation of the land or the circle rate of the property at the time when Ex.P-73 was executed. The appellants contended that the suit property was sold for a proper consideration and relied upon the transaction that took place in the village in the year 1957 to establish that the sale D consideration is appropriate. The trial court while deciding issue No.4 has held that the respondents-plaintiffs have failed to adduce any evidence to show that the market value of the suit property in the year 1967 was much more than what was paid by the appellants-defendants.

24. The respondents-plaintiffs have placed much reliance upon E Ex.P-69-receipt to show that Shripad Joshi paid an amount of Rs.800/- to Shankar Shinde who in turn executed the receipt dated 26.07.1972 in favour of his father and at that time, PW-1 was also present. The appellants-defendants contend that Ex.P-69-receipt is forged. Admittedly, neither parties to Ex.P-69-receipt nor the scribe who wrote the receipt F are alive. In the light of defence plea questioning the correctness of Ex.P-69, the burden of proof is on the respondents-plaintiffs to adduce the best possible evidence to prove Ex.P-69-receipt. The respondents-plaintiffs examined PW-2-Prabhakar, son of the scribe-Gopal Tukaram Shivade to identify the handwriting and signature of the scribe of Ex.P-69. In his evidence, PW-2 stated that he is acquainted with the handwriting G and signature of his father and that Ex.P-69-receipt was written by his father.

25. Gopal Tukaram Shivade-scribe, father of PW-2, was a Police Patil of Kudal for ten years and he expired in the year 1990. Ex.P-69-receipt was of the year 1972 and PW-2 was examined in the year 1994.

After perusal of Ex.P-69-receipt, the trial court held that there are glaring defects in the said receipt i.e. faded and incomplete thumb impression of Shankar Shinde on the revenue stamp. The trial court has observed that except the evidence of PW-2, no other evidence has been adduced by the respondents-plaintiffs to prove Ex.P-69-receipt. Since the scribe was a Police Patil of Kudal, it was very much possible for the respondents-plaintiffs to prove the execution of the document by producing the admitted handwriting of the scribe so as to compare them with the questioned writing in the receipt. The trial court also pointed out that though PW-1-Rajaram Joshi claims that he was present at the time of execution of Ex.P-69, PW-1 had not signed in it nor attested it, so PW-1's evidence is of no help to prove the execution of the receipt. Be it noted that though Ex.P-69-receipt was of the year 1972, during his life time, based on Ex.P-69-receipt, Shripad Joshi had not taken any step to redeem the property. Even after death of Shripad Joshi in 1973, Ex.P-69-receipt did not see the light of the day till 1980 when the notice was said to have been issued by the respondents-plaintiffs. In these factual circumstances, it cannot be said that the plaintiffs have discharged the burden in proving Ex.P-69-receipt as genuine to hold that the parties had intended that Ex.P-73-document is only a "mortgage by conditional sale" and not a sale with condition to repurchase. The receipt Ex.P-69 cannot be relied upon as corroborative piece of evidence to hold that part payment was made by Shripad Joshi and that the parties treated Ex.P-73 as a "mortgage by conditional sale".

26. When Ex.P-73 is clear and unambiguous, the first Appellate Court erred in relying upon Ex.P-69-receipt to draw inference as to the intention of the parties. The first Appellate Court did not keep in view that the appellants-defendants have denied Ex.P-69-receipt, hence, burden lies upon the plaintiffs to prove the contents of Ex.P-69 to bring in the intention of the parties that the transaction between the parties was only a "mortgage by conditional sale". When the recitals in Ex.P-73-document is sufficient to gather the intention of the parties, the first Appellate Court erred in placing reliance on Ex.P-69-receipt to ascertain the intention of the parties to upset the findings of fact recorded by the trial court. The findings of the first Appellate Court and the High Court in placing reliance upon Ex.P-69-receipt to conclude that the transaction was a mortgage and not a sale are erroneous and the same cannot be sustained.

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- A 27. Though the transaction and condition to repurchase are embodied in one document, having regard to the intention of the parties and the surrounding circumstances, in our considered view, Ex.P-73 does not fall within the proviso to Section 58(c) of the Transfer of Property Act. Ex.P-73 a registered document, in our considered view, is not a mortgage but a transaction of sale with condition to repurchase. The High Court and the first Appellate Court did not properly appreciate the recitals in Ex.P-73 and that it does not create expressly or by implication the relationship of debtor and creditor. The High Court failed to note that since Shripad Joshi failed to pay the amount within the stipulated period of five years, the respondents-plaintiffs have lost their right to repurchase the property. When the findings of the first Appellate Court and the High Court though concurrent, whey they are shown to be perverse, this Court would certainly interfere with the findings of fact recorded by the courts below. The High Court has not properly appreciated the evidence and Ex.P-73 in the light of the surrounding circumstances and the impugned judgment is liable to be set aside.
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- D 28. In the result, the impugned judgment of the High Court in Second Appeal No.887 of 2003 dated 15.11.2006 is set aside and these appeals are allowed. The Suit No.100/89 filed by the respondents-plaintiffs is dismissed and the judgment of the trial court shall stand restored. No order as to cost.
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Ankit Gyan

Appeals allowed.