

SOPAN (DEAD) THROUGH HIS L.R.

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v.

SYED NABI

(Civil Appeal No.3506 of 2010)

JULY 16, 2019

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[R. BANUMATHI AND A.S. BOPANNA, JJ.]

Transfer of Property Act, 1882 – s.58(c) – Mortgage by conditional sale – Respondent-plaintiff received a sum of Rs.5000/- from appellant-defendant, however, same was construed as the consideration for the suit property and a registered sale deed dated 10.12.1968 (Exh.23) was executed in favour of the defendant – A separate agreement dated 10.12.1968 (Exh.24) was also entered into between the parties where the plaintiff agreed to repay the said amount and secure reconveyance of the property – Another agreement was entered into on 29.08.1969 (Exh.14/1) under which plaintiff agreed that he had received additional amount of Rs.2,224/-, hence total amount of Rs.7,224/- – Suit was filed seeking redemption of mortgage and recovery of the possession of the suit property – Plaintiff claimed that he was prepared to repay the amount so as to secure back the property and, in that regard, construing the transaction as a mortgage – Trial court decreed the suit – Lower appellate court on reappreciation of the evidence set aside the judgment and decree of the trial court – However, High Court decreed the suit in favour of plaintiff – On appeal, held: On perusal of three documents namely, sale deed dated 10.12.1968 (Exh.23) agreements dated 10.12.1968 (Exh.24) and 29.08.1969 (Exh.14/1), it is clear that sale deed dated 10.12.1968 did not disclose that the transaction is one of mortgage or that of a conditional sale – Agreement dated 10.12.1968 (Exh.24) can only be treated an agreement where the defendant had agreed to reconvey the property subject to the repayment being made as provided thereunder – Further, agreement dated 29.08.1969 (Exh.14/1) disclose that plaintiff did not repay Rs.5000/-and instead received a further sum of Rs.2,224/-, thus in all taking the financial assistance treated as sale consideration to Rs.7,224/- – If the reconveyance as agreed under agreement dated 10.12.1968

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- A *(Exh.24) was to be effected the said amount was to be repaid, failing which the right of reconveyance would be forfeited and sale deed would become absolute after which even the right of reconveyance would not be available – Admittedly the said amount was not repaid by plaintiff – In that background the document cannot be considered as a mortgage by conditional sale – Since the amount was not repaid the defendant had acquired absolute right to the property – In the circumstance, the suit seeking redemption was not sustainable.*
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Allowing the appeal, the Court

- C **HELD: 1. In so far as the legal position relating to the manner in which the document is to be construed, this Court in the case of *Dharmaji Shankar Shinde & Ors. vs. Rajaram Sripad Joshi (D) Lrs. and Ors.* had considered the entire conspectus of the provision contained in Section 58(c) of the Transfer of Property Act, 1882 with reference even to the decisions relied upon by the counsel for the plaintiff and had arrived at the conclusion that a sale with a mere condition of retransfer is not a mortgage. It is further held therein that keeping in view the proviso to Section 58(c) if the sale and agreement to repurchase are embodied in separate documents then the transactions cannot be a mortgage by conditional sale irrespective of whether the documents are the contemporaneously executed. It is further held therein that even in the case of a single document the real character of the transaction is to be ascertained from the provisions of the deed viewed in the light of the surrounding circumstances and intention of the parties. [Para 7] [976-D-E]**
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- F **2. Keeping in view the enunciation of the legal position, in the instant case admittedly the claim of the plaintiff is based on the reliance placed on a contemporaneous document at Exh.24 (agreement dated 10.12.1968). Hence at the outset, it is evident that the case of the plaintiff cannot overcome the rigour of law to term it as a mortgage by conditional sale. That apart even if the nature of the transaction is taken note of and in that context if the sale dated 10th December, 1968 (Exh.23) is carefully perused, it not only does not indicate any clause to demonstrate it as a**
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mortgage but, on the other hand, refers to the sale consideration, the manner in which it was received and the plaintiff as the vendor by executing the document has assured the defendant that he should enjoy possession of the said land ancestrally which, in other words, is an absolute conveyance. In that background, even if the agreement dated 10th December, 1968 (Exh.24) is taken note, the same cannot alter recitals in the sale deed to treat the same as a mortgage by conditional sale. At best the said agreement (Exh.24) can only be treated as an agreement whereby the defendant had agreed to reconvey the property subject to the repayment being made as provided thereunder. It is in that circumstance, the document dated 29th August, 1969 (Exh.14/1) is to be viewed. From a combined reading of Exhibits 24 and 14/1 it would disclose that not only the plaintiff has not repaid the sum of Rs.5,000/- with interest but had received a further sum of Rs.2,224/-, thus in all taking the financial assistance treated as sale consideration to Rs.7,224/-. Hence, if the reconveyance as agreed under Exh.24 was to be effected the said amount was to be repaid on “Velamavasya” failing which the right of reconveyance would be forfeited and the sale deed would become absolute after which even the right of reconveyance will not be available. Admittedly amount of Rs.2,224/- was not repaid by the plaintiff. In that background, in any event, the document cannot be considered as a mortgage by conditional sale. [Para 8] [976-F-H; 979-A-D]

3. In the above background, if the entire transaction is taken note, since the amount was not repaid the defendant had acquired absolute right to the property. Hence, he had also initiated mutation proceedings to secure the revenue entries relating to the land in his favour. Though the plaintiff had opposed the proceedings the very contention urged herein had been taken note therein and the Tehsildar by the order dated 23rd July, 1974 (Exh.21) has ordered the revenue entries to be changed to the name of the defendant. Change of mutation in the name of the defendant is a formidable circumstance to show that the Exh.23 is a sale deed conveying absolute right and title to the defendant. [Para 9] [977-D-F]

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A 4. In the above circumstance the suit seeking redemption
of mortgage was not sustainable. If at all the agreement of
reconveyance (Exh.24) was to be pressed into service, the
appropriate course ought to have been for the plaintiff to institute
a suit seeking for the relief of specific performance. In such suit
B the consideration would be on the touchstone of the principles
required to be satisfied as governed under the provisions of the
Specific Relief Act. To that effect there should be appropriate
pleading and evidence in support of the contentions which is not
presently satisfied as the suit is instituted on a misconception.
[Para 11] [978-C-D]

C *Dharmaji Shankar Shinde & Ors. v. Rajaram Sripad Joshi (D) LRs.and Ors. (2019) 6 SCALE 682 – relied on.*

D *Bhimabai Mahadeo Kambekar v. Arthur Import and Export Co.* (2019) 3 SCC 191 : [2019] 1 SCR 812 – **inapplicable.**

P.L. Bapuswami v. N. Pattay Gounder [1966] 2 SCR 918 ; *Pandit Chunchun Jha v. Sheikh Ebadat Ali* [1955] 1 SCR 174 – referred to.

E	<u>Case Law Reference</u>
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	[1966] 2 SCR 918	referred to	Para 7
	[1955] 1 SCR 174	referred to	Para 7
	(2019) 6 SCALE 682	relied on	Para 7
F	[2019] 1 SCR 812	inapplicable	Para 10

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3506
of 2010

From the Judgment and Order dated 26.09.2007 of the High Court of Judicature at Bombay, Bench at Aurangabad in Second Appeal G No. 479 of 1991

Subodh S. Patil, Ms. Suiata Kurdukar, Advs. for the Appellant.

Parameshwar, M.V. Mukunda, Shivaji M. Jadhav, Advs. for the Respondent.

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The Judgment of the Court was delivered by

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A.S. BOPANNA, J.

1. The appellant herein was the defendant in Regular Civil Suit No.237 of 1980 filed before the Civil Judge, Junior Division at Ahmedpur. The suit in question was filed seeking a judgment and decree for redemption of mortgage and recovery of the possession of the suit scheduled land. The land in question is situated in Survey No.2/A measuring 6 acres 2 guntas. The Civil Court by its judgment dated 20th September, 1984 accepted the contention of the plaintiff and decreed the suit whereby the redemption of the suit land was ordered treating the transaction to be a mortgage. The appellant herein, namely the defendant in the said suit claiming to be aggrieved by the said judgment was before the lower appellate court i.e. the Additional District Judge at Latur in Regular Civil Appeal No.233 of 1984. The Lower Appellate Court on reappraisal of the evidence on record and consideration of the legal position has through its judgment dated 29th June, 1990 allowed the appeal and set aside the judgment and decree of the Civil Court. Accordingly, the suit filed by the respondent herein was dismissed. The plaintiff/respondent herein therefore filed the Second Appeal before the High Court of Judicature at Bombay, bearing S.A.No.479 of 1991. The High Court on answering the substantial question of law in favour of the respondent herein had allowed the appeal and consequently decreed the suit. The appellant herein who was the defendant in the suit is, therefore, before this Court in the present appeal.

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2. For the purpose of convenience and clarity the parties will be referred to in the same rank as assigned to them in the Civil Suit namely, the appellant herein would be referred to as the defendant, while the respondent herein would be referred to as the plaintiff.

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3. The brief facts are that the plaintiff and the defendant were known to each other and due to such acquaintance, the plaintiff had taken money from the defendant as and when such financial assistance was required. At a stage when the plaintiff received a sum of Rs.5,000/- , the same was construed as the consideration for the land owned by the plaintiff bearing Survey No.2/A measuring 6 acres 2 guntas and the defendant already being put in possession of the said property, a registered sale deed dated 10th December, 1968 was executed in favour of the defendant. A separate agreement dated 10th December, 1968 was also

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- A entered into between the parties whereby the plaintiff had agreed to repay the said amount and secure reconveyance of the property. Another agreement was entered into on 29th August, 1969 between the parties under which the respondent-plaintiff agreed that he has taken Rs.5,000/- from the appellant-defendant and the possession of the land was given.
- B In addition, respondent-plaintiff has received a sum of Rs.2,224/- without any interest, in all Rs.7,224/-. The respondent-plaintiff agreed if the amount is not repaid on “Velamavasya” the deed will be considered as sale deed. It is in that background the plaintiff claiming that he is prepared to repay the amount so as to secure back the property and, in that regard, construing the transaction as a mortgage, got issued a demand notice
- C dated 10th September, 1980 through his Advocate. The defendant got replied the said notice on 23rd September, 1980 and disputed the claim put forth by the plaintiff. The plaintiff, therefore, filed the suit as stated above. The defendant entered appearance and filed the written statement disputing the claim. The trial court though had framed several issues, the entire consideration rested on the construction of the sale deed dated
- D 10th December, 1968 and the contemporaneous documents, so as to consider whether the same amounts to a mortgage by conditional sale in the nature of contention put forth, or as to whether it is a sale transaction.

4. In the present appeal, it would not be necessary for us to reappreciate the evidence inasmuch as, only the nature of the transaction
- E will have to be taken note from the three documents, namely, Exhibits 23, 24 and 14/1 around which the entire controversy revolves. Before advertent to the said documents, it would be also necessary to take note of the provision as contained in Section 58 (c) of the Transfer of Property Act which reads as hereunder:

- F 58(c) Mortgage by conditional sale. Where the mortgagor ostensibly sells the mortgaged property:
- on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute
- G on condition not on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller,
- the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

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[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]. A

(emphasis supplied)

5. From a perusal of the proviso to Section 58(c) as emphasised, it indicates that no transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale. Therefore, any recital relating to mortgage or the transaction being in the nature of a conditional sale should be an intrinsic part of the very sale deed which will be the subject matter. In that background, a perusal of the document at Exhibit 23, namely, the sale deed dated 10th December, 1968 would make it clear that the document does not disclose that the transaction is one of mortgage or that of a conditional sale. However, the issue as to whether it should be construed as mortgage has presently arisen since the agreement dated 10th December, 1968 at Exhibit 24 being a contemporaneous document is relied upon by the plaintiff to claim that the same indicates that the transaction is a mortgage and the relationship of debtor and the creditor is established by the said document. In addition, the document which is also to be noticed is at Exhibit 14/1 dated 29th August, 1969. It is no doubt true that in the document at Exhibit 24 it depicts that the sale deed is reconveyable when the plaintiff would repay Rs.5,000/- to the defendant and the land would be retransferred. It also indicates that the interest of Rs.720/- is agreed to be paid every year on the day of “Gudi Padwa”. B C D E

6. The contention on behalf of the defendant is that in addition to the sum of Rs.5,000/- which was taken by the plaintiff earlier and was treated as the sale consideration, a further sum of Rs.2,224/- was taken by the plaintiff and accordingly a total amount of Rs.7,224/- was agreed to be repaid without interest on the “Velamavasya” and the said understanding was reached on 29th August, 1969. The case, therefore, set up by the defendant was that notwithstanding the agreement dated 10th December, 1968 (Exh.24) and the document dated 29th August, 1969 (Exh.14/1) whereunder reconveyance was agreed, since the amount was not repaid within one year, though the defendant had agreed to reconvey the property, the sale deed had become absolute since the plaintiff had failed to repay the amount and secure the reconveyance. F G

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A 7. However, the learned counsel for the plaintiff has contended
that when the documents at Exhibits 24 and 14/1 is admitted by the
defendant and since it refers to the relationship of debtor and creditor
the sale deed dated 10th December, 1968 (Exh.23) is to be construed as
a mortgage by conditional sale. The learned counsel has referred to the
B decision of this Court in the case of **P.L. Bapuswami vs. N. Pattay
Gounder** (1966) 2 SCR 918 to contend that it should be construed as
mortgage and in that context would also refer to the decision in the case
of **Pandit Chunchun Jha vs. Sheikh Ebadat Ali** (1955) 1 SCR 174 to
C contend that the subsequent document would rebut the presumption. In
so far as the legal position relating to the manner in which the document
is to be construed, we notice that this Court in the case of **Dharmaji
Shankar Shinde & Ors. vs. Rajaram Sripad Joshi (D) Lrs. and
Ors.** (2019) 6 SCALE 682 had considered the entire conspectus of the
provision contained in Section 58(c) with reference even to the decisions
relied upon by the learned counsel for the plaintiff and had arrived at the
D conclusion that a sale with a mere condition of retransfer is not a
mortgage. It is further held therein that keeping in view the proviso to
Section 58(c) if the sale and agreement to repurchase are embodied in
separate documents then the transactions cannot be a mortgage by
conditional sale irrespective of whether the documents are the
contemporaneously executed. It is further held therein that even in the
E case of a single document the real character of the transaction is to be
ascertained from the provisions of the deed viewed in the light of the
surrounding circumstances and intention of the parties.

8. Keeping in view the enunciation of the legal position, we notice
that in the instant case admittedly the claim of the plaintiff is based on
F the reliance placed on a contemporaneous document at Exh.24. Hence
at the outset, it is evident that the case of the plaintiff cannot overcome
the rigour of law to term it as a mortgage by conditional sale. That apart
even if the nature of the transaction is taken note of and in that context
if the sale dated 10th December, 1968 (Exh.23) is carefully perused, it
not only does not indicate any clause to demonstrate it as a mortgage
G but, on the other hand, refers to the sale consideration, the manner in
which it was received and the plaintiff as the vendor by executing the
document has assured the defendant that he should enjoy possession of
the said land ancestrally which, in other words, is an absolute conveyance.
In that background, even if the agreement dated 10th December, 1968

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(Exh.24) is taken note, the same cannot alter recitals in the sale deed to treat the same as a mortgage by conditional sale. At best the said agreement (Exh.24) can only be treated as an agreement whereby the defendant had agreed to reconvey the property subject to the repayment being made as provided thereunder. It is in that circumstance, the document dated 29th August, 1969 (Exh.14/1) is to be viewed. From a combined reading of Exhibits 24 and 14/1 it would disclose that not only the plaintiff has not repaid the sum of Rs.5,000/- with interest but had received a further sum of Rs.2,224/-, thus in all taking the financial assistance treated as sale consideration to Rs.7,224/-. Hence, if the reconveyance as agreed under Exh.24 was to be effected the said amount was to be repaid on “Velamavasya” failing which the right of reconveyance would be forfeited and the sale deed would become absolute after which even the right of reconveyance will not be available. Admittedly amount of Rs.2,224/- was not repaid by the plaintiff. In that background, in any event, the document cannot be considered as a mortgage by conditional sale.

9. In the above background, if the entire transaction is taken note, since the amount was not repaid the defendant had acquired absolute right to the property. Hence, he had also initiated mutation proceedings to secure the revenue entries relating to the land in his favour. Though the plaintiff had opposed the proceedings the very contention urged herein had been taken note therein and the Tehsildar by the order dated 23rd July, 1974 (Exh.21) has ordered the revenue entries to be changed to the name of the defendant. Change of mutation in the name of the defendant is a formidable circumstance to show that the Exh.23 is a sale deed conveying absolute right and title to the defendant.

10. Though the learned counsel for the plaintiff has relied upon the decision in the case of *Bhimabai Mahadeo Kambekar vs. Arthur Import and Export Co.*, (2019) 3 SCC 191 to contend that the mutation of land in the revenue records does not create or extinguish the title for such land, nor has it any presumptive value on the title, the said decision would not be of relevance in the present context as the mutation proceeding becomes relevant in the instant proceedings though not for the purpose of title. We say so only to indicate that in the present facts, while construing the nature of the transaction and while considering as to whether the plaintiff had a right of redemption as a mortgagor, the fact that the defendant had acted upon the sale deed dated 10th December,

- A 1968 on the same becoming absolute in view of the reconveyance not being affected pursuant to the agreement dated 10th December, 1968 and in that circumstance, the right was exercised to secure the mutation order pertaining to the land is to be treated as a relevant circumstance. Further, though such mutation order was passed on 23rd July, 1974 in a proceeding in the presence of the plaintiff the said order was not assailed before an appropriate forum and it is only in the year 1980 the suit in question came to be filed.
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11. In the above circumstance the suit seeking redemption of mortgage was not sustainable. If at all the agreement of reconveyance (Exh.24) was to be pressed into service, the appropriate course ought to have been for the plaintiff to institute a suit seeking for the relief of specific performance. In such suit the consideration would be on the touchstone of the principles required to be satisfied as governed under the provisions of the Specific Relief Act. To that effect there should be appropriate pleading and evidence in support of the contentions which is not presently satisfied as the suit is instituted on a misconception.
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12. In that background, if the consideration as made by the courts below is taken note, we are of the opinion that the Civil Court and the High Court were not justified in their conclusion. On the other hand, the lower appellate court in Regular Civil Appeal No.233 of 1984 has taken into consideration the factual aspects in its correct perspective and keeping in view the legal position had allowed the appeal and dismissed the suit. Hence, we hereby set aside the judgment dated 26th September, 2007 passed by the High Court in S.A.No.479 of 1991 and restore the judgment dated 29th June, 1990 passed by the Additional District Judge in Regular Civil Appeal No.233 of 1984.
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13. Accordingly, the above appeal is allowed. Consequently, the Regular Civil Suit No.237 of 1980 filed by the plaintiff i.e. the respondent herein shall stand dismissed. However, we pass no order as to costs.