

VITHAL TUKARAM KADAM AND ANOTHER

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v.

VAMANRAO SAWALARAM BHOSALE AND OTHERS

(Civil Appeal Nos. 7245-7246 of 2011)

AUGUST 09, 2017

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[L. NAGESWARA RAO AND NAVIN SINHA, JJ.]

Transfer of Property Act, 1882 – s.58(c) – Mortgage by conditional sale – When – Appellant-plaintiff’s suit for redemption of mortgage, decreed by two courts – Decree reversed in second appeal by High Court holding that the agreement in question was a sale with an option to repurchase and not a mortgage by conditional sale – On appeal, held: Whether a document is a mortgage by conditional sale, or a sale with an option to repurchase, has to be determined in the facts of each case, depending on the recitals in the document, intention of the parties, coupled with attendant surrounding circumstances – In the instant case, the language used in the agreement conveys that the plaintiff did not intend to relinquish all rights, title and claims in his lands – Parties were admittedly well known to each other – Thus, there was a relationship of debtor and creditor – Further, the clause for reconveyance was in requirement with s.58(c) – Agreement in question, though styled as a sale deed, is a mortgage by conditional sale and not a sale with an option to repurchase – Mortgage.

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Allowing the appeals, the Court

HELD: 1.1 The question whether a document is a mortgage by conditional sale, or a sale with an option to repurchase, has to be determined in the facts of each case, dependent on the recitals in the document, intention of the parties, coupled with attendant surrounding circumstances. There can be no hard and fast rule for determining the nature of the document devoid of these circumstances. [Para 7][383-D-E]

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1.2 An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58 (c) of the Transfer of Property Act, 1882 will clothe the agreement as a mortgage by conditional sale. The execution

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A of a separate agreement for reconveyance, either
contemporaneously or subsequently, shall militate against the
agreement being mortgage by conditional sale. 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
B 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. [Para 14][386-B-D]

C 1.3 In the instant case, the agreement, Exhibit 62, though
styled as a sale deed, for a consideration of Rs.700/- is but an
ostensible sale, containing a clause for reconveyance. The
significance of the words “repay”, “return” and “subject to this
condition” cannot be overlooked. They are not commensurate
with a deed of absolute sale. The language used, conveys the
D distinct impression that the plaintiff did not intend to relinquish
all rights, title and claims to his lands. The defendant was aware
of the limited nature of right conveyed and had agreed to a
conditional sale along with an obligation to return the lands if the
amount was repaid. [Para 15][386-E-G]

E 1.4 The parties were admittedly well known to each other
since before. The plaintiff had been borrowing money from the
defendant even earlier from time to time according to need, and
even at the time of execution of the agreement he was in need of
money. The value of the land was Rs. 3500/- far in excess of the
amount of Rs.700/- mentioned in the agreement. The defendant
F in cross-examination did not deny that he had demanded the sum
of Rs.3500/-with interest for reconveyance. The relationship of
debtor and creditor cannot be faulted with. The respondent did
not take any steps for mutation for three long years after the
execution of the deed. The plaintiff had specifically objected to
G mutation in the name of the defendant. The period for
reconveyance provided in the agreement itself was inordinately
long for ten years. The clause for reconveyance was in
requirement with Section 58 (c) of the Act. The High Court failed
to consider the aforesaid factors in totality and in a holistic manner,
while arriving at the finding that there was no debtor and creditor
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relationship between the parties, and that the agreement was a sale deed with an option to repurchase. The findings are clearly unsustainable. [Para 17][387-A-D] A

Tamboli Ramanlal Motilal (dead) by Lrs. v. Ghanchi Chimanlal Keshavlal (dead) by Lrs. (1993) Suppl. 1 SCC 295 – distinguished. B

P. L. Bapuswami v. N. Pattay Gounder AIR 1966 SC 902 : [1966] SCR 918 – followed.

Vishwanath Dadoba Karale v. Parisa Shantappa Upadhye (D) thr. Lrs. (2008) 11 SCC 504 : [2008] 4 SCR 993; *Patel Ravjibhai Bhulabhai (D) thr. Lrs. v. Rahemanbhai M. Shaikh (D) thr. Lrs and Ors.* (2016) 12 SCC 216; *Bhaskar Waman Joshi (deceased) and Ors. v. Shrinarayan Rambilas Agarwal (deceased) and Ors.* AIR 1960 SC 301 : [1960] SCR 117; *Indira Kaur v. Sheo Lal Kapoor* (1988) 2 SCC 488 – relied on. C D

Pandit Chunchun Jha v. Sheikh Ebadat Ali and Another [1955] SCR 174; *Ramlal v. Phagua* (2006) 1 SCC 168 : [2005] 4 Suppl. SCR 331 – referred to.

Case Law Reference

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|-------------------------|---------------|---------|---|
| [1955] SCR 174 | referred to | Para 7 | E |
| [1960] SCR 117 | relied on | Para 9 | |
| [1966] SCR 918 | followed | Para 10 | |
| [2005] 4 Suppl. SCR 331 | referred to | Para 10 | F |
| [2008] 4 SCR 993 | relied on | Para 10 | |
| (1988) 2 SCC 488 | relied on | Para 11 | |
| (2016) 12 SCC 216 | relied on | Para 12 | |
| (1993) Suppl. 1 SCC 295 | distinguished | Para 13 | G |

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7245-7246 of 2011.

From the Judgment and Order dated 17.11.2005 in Second Appeal No. 552 of 1996 and Judgment dated 23.12.2005 in Review Petition No. 30 of 2005 of the High Court of Judicature at Bombay. H

A Ms. Mukti Chowdhary, Adv. for the Appellants.

Dilip Annasaheb Taur, Amol V. Deshmukh (for Ranjith K. C.),
Adv. for the Respondents.

The Judgment of the Court was delivered by

B **NAVIN SINHA, J.** 1. The appellants' suit for redemption of mortgage, decreed by two courts, has been reversed in second appeal by the High Court. The parties shall be referred to by their respective positions in the suit, for convenience and better appreciation.

C 2. The only question of law for consideration is, whether the deed dated 21.04.1953, Exhibit 62, was a mortgage by conditional sale, or a sale with an option to repurchase.

D 3. The Civil Judge and the Additional District Judge in appeal, after consideration of the recitals in the deed, intention of the parties, and the attendant circumstances, held that it was a mortgage by conditional sale.

E 4. The High Court in second appeal, opined that there did not exist a debtor and creditor relationship between the parties. The deed contained no recital that the suit lands were being transferred for securing payment of money. The agreement was a sale deed, transferring title and possession. The option for reconveyance, was not exercised within the stipulated period of ten years. The suit itself was thus not maintainable. The plaintiff, while objecting to mutation in the name of the defendant, did not make any offer to repay the amount of Rs. 700/- mentioned in the deed, seeking consequent return of the lands. The agreement was held F to be a sale, with an option to repurchase.

G 5. Learned counsel for the plaintiff submits that the clause for reconveyance being contained in the agreement itself, it was a mortgage by conditional sale under Section 58(c) of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act'). It was redeemable at any time during ten years under the agreement. The plaintiff had objected to mutation in the name of the defendant. The defendant in his evidence, had admitted that the plaintiff had taken money from him from time to time. The land was valued at Rs.3500/- and the defendant was demanding that amount for reconveyance. The plaintiff could not have sold his lands

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for a paltry sum of Rs.700/-. The High Court erred in not appreciating the distinction between a mortgage by conditional sale and a sale with an option to repurchase. Reliance was placed on *Vishwanath Dadoba Karale vs. Parisa Shantappa Upadhye (D) thr. Lrs.*, (2008) 11 SCC 504, and *Patel Ravjibhai Bhulabhai (D) thr. Lrs. vs. Rahemanbhai M. Shaikh (D) thr. Lrs and Ors.*, (2016) 12 SCC 216.

6. Learned counsel for the respondent submitted that mere incorporation in the agreement of a provision for reconveyance, cannot be singularly determinative of the deed being a mortgage by conditional sale. The agreement was styled as a sale deed, conveying an absolute title, free of encumbrances. The failure to redeem within ten years, coupled with the absence of a debtor and creditor relationship, were sufficient evidence of the agreement being a sale with option to repurchase. Reliance was placed on *Tamboli Ramanlal Motilal (dead) by Lrs. vs. Ghanchi Chimantal Keshavlal (dead) by Lrs.*, 1993 Supplement (1) SCC 295.

7. The question whether a document is a mortgage by conditional sale, or a sale with an option to repurchase, has to be determined in the facts of each case, dependent on the recitals in the document, intention of the parties, coupled with attendant surrounding circumstances. There can be no hard and fast rule for determining the nature of the document devoid of these circumstances. Precedents, in abundance, will not suffice alone, as observed in *Pandit Chunchun Jha vs. Sheikh Ebadat Ali and Another*, 1955 SCR 174, as follows:-

“There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analyzing them. We think that it is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each case must be decided on its own facts.”

8. Section 58, clause (c) of the Transfer of Property Act, 1882 defines mortgage by conditional sale as follows:-

“Where the mortgagor ostensibly sells the mortgaged property—
on condition that on default of payment of the mortgage-money

A 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 condition that on such payment being made the buyer shall
 B transfer the property to the seller,
 the transaction is called a mortgage by conditional sale and the
 mortgagee, a mortgagee by conditional sale;
 C 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.”

9. In *Bhaskar Waman Joshi (deceased) and Ors. vs. Shrinarayan Rambilas Agarwal (deceased) and Ors.*, AIR 1960 SC 301, the principles for determination of the nature of the document were explained as follows:-

D “7...The question in each case is one of determination of the real
 character of the transaction to be ascertained from the provisions
 of the deed viewed in the light of surrounding circumstances. If
 the words are plain and unambiguous they must in the light of the
 evidence of surrounding circumstances be given their true legal
 E effect. If there is ambiguity in the language employed, the intention
 may be ascertained from the contents of the deed with such extrinsic
 evidence as may by law be permitted to be adduced to show in
 what manner the language of the deed was related to existing
 facts.”

F 10. In *P.L. Bapuswami vs. N. Pattay Gounder*, AIR 1966 SC 902, it was further observed that the difference in the valuation of the property, and the consideration mentioned in the agreement, was also relevant for deciding the nature of the document:-

G “6...The criticism of learned counsel for the appellant is justified
 and we must proceed on the basis that the valuation of the property
 was Rs.8000/- and since the consideration for Ex- B-1 was only
 Rs.4000/- it was a strong circumstance suggesting that the
 transaction was a mortgage and not an outright sale....”

H Similar is the view expressed in *Ramlal vs. Phagua*, (2006) 1 SCC 168. In *Vishwanath Dadoba Karale* (supra) the recitals in the

agreement were similar to that in the present case. It was held that limited transfer of title with option for reconveyance in one document, qualified the agreement as mortgage by conditional sale. A

11. In *Indira Kaur vs. Sheo Lal Kapoor*, (1988) 2 SCC 488, it was held that the inordinately long period of time for ten years, under the agreement to seek reconveyance, was indicative of the intention of the parties to create a mortgage by conditional sale, observing as follows:- B

“5. There is no manner of doubt that the transaction in question was one of mortgage in essence and substance though it was clothed in the garb of a transaction of ostensible sale. The factors adumbrated hereinunder leave no room for doubt on this score: C

(2) The stipulated period for conveying the property was a very long period of 10 years. The very length of the period is suggestive of a transaction of mortgage and not a transaction of absolute sale with a stipulation to reconvey the property in such peculiar circumstances, bearing on the relationship between the parties or some other relevant consideration. D

(5) The obvious reason for entering into such a transaction of ostensible sale coupled with a contemporaneous agreement to sell within 10 years was that if it was not garbed with this paraphernalia and was given the nomenclature of a mortgage the period of redemption would have been 30 years. This period could not have been curtailed without attracting the doctrine of clog on equity of redemption. This was obvious reason for resorting to this device.” E

12. In *Patel Ravjibhai Bhulabhai (D) thr. Lrs. vs. Rahemanbhai M. Shaikh (D) thr. Lrs. and ors.*, (2016) 12 SCC 216, the document was held to be a mortgage by conditional sale, in view of the clause for reconveyance contained in the same in view of Section 58 (c) of the Act, and the existence of a debtor and creditor relationship. F

13. *Tamboli Ramanlal Motilal (dead) by Lrs.* (supra) is distinguishable on facts. It was held therein that there existed no relationship of debtor and creditor. The absence of any right in the mortgagee to foreclose the mortgage was also noticed observing:- G

“20. The further clause in the document is to the effect that the executant shall repay the amount within a period of five years H

A and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised, while the right of the transferee to foreclose the mortgage is not spoken to....”

B 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. 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.

D 15. The agreement, Exhibit 62, though styled as a sale deed, for a consideration of Rs.700/- is but an ostensible sale, containing a clause for reconveyance. The agreement concludes as follows:-

E “If I repay your amount of Rs.700/- in any year (at any time) during the period of ten years from now then you have to return my said land to me, subject to this condition I have sold land to you.”

F The significance of the words “repay”, “return” and “subject to this condition” cannot be overlooked. They are not commensurate with a deed of absolute sale. The language used, conveys the distinct impression that the plaintiff did not intend to relinquish all rights, title and claims to his lands. The defendant was aware of the limited nature of right conveyed and had agreed to a conditional sale along with an obligation to return the lands if the amount was repaid.

G 16. The plaintiff initially filed Civil Suit no. 89/1975 for specific performance to transfer the lands back to him. It was withdrawn with liberty to file a fresh suit for redemption. The filing of the fresh suit in 1986, beyond the period of ten years is hardly relevant. The limitation for the right to redeem, under Section 60 of the Act is thirty years.

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17. The parties were admittedly well known to each other since before. The plaintiff had been borrowing money from the defendant even earlier from time to time according to need, and even at the time of execution of the agreement he was in need of money. The value of the land was Rs. 3500/- far in excess of the amount of Rs.700/- mentioned in the agreement. The defendant in cross-examination did not deny the recital in Exhibit 66, dated 11.6.1975 in reply to notice, that he had demanded the sum of Rs.3500/-with interest for reconveyance. The relationship of debtor and creditor cannot be faulted with. The respondent did not take any steps for mutation for three long years after the execution of the deed. The plaintiff had specifically objected to mutation in the name of the defendant, by Exhibits 33 and 34. The period for reconveyance provided in the agreement itself was inordinately long for ten years. The clause for reconveyance was in requirement with Section 58 (c) of the Act. The High Court failed to consider the aforesaid factors in totality and in a holistic manner, while arriving at the finding that there was no debtor and creditor relationship between the parties, and that the agreement was a sale deed with an option to repurchase. The findings are clearly unsustainable.

18. The agreement, Exhibit 62, is held to be a mortgage by conditional sale and not a sale with an option to repurchase. Consequently the order of the High Court is held to be unsustainable and is set aside. The appeals are allowed.