

# SUPREME COURT OF INDIA

Vithal Tukaram Kadam

Vs.

Vamanrao Sawalaram Bhosale

C.A.No.7245-7246 of 2011

(L.Nageswara Rao and Navin Sinha,JJ.,)

09.08.2017

## JUDGMENT

**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.
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.
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.
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 to be a sale, with an option to repurchase.
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 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<sup>1</sup>, and Patel Ravjibhai Bhulabhai (D) thr. Lrs. vs. Rahemanbhai M. Shaikh (D) thr. Lrs and Ors<sup>2</sup>,.*

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 Chimanlal Keshavlal (dead) by Lrs<sup>3</sup>,.*

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 Eba.dat Ali and Another<sup>4</sup>*, 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 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 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.”

9. In *Bhaskar Waman Joshi (deceased) and Ors. vs. Shrinarayan Rambilas Agarwal (deceased) and Ors<sup>5</sup>,* the principles for determination of the nature of the document were explained as follows:-

“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 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.”

10. In *P.L. Bapuswami vs. N. Pattay Gounder*<sup>6</sup>, 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:-

“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.. ”

Similar is the view expressed in *Ramlal vs. Phagua*<sup>7</sup>.. 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.

11. In *Indira Kaur vs. Sheo Lal Kapoor*<sup>8</sup>, 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:-

“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:

(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.

(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.”

12. In *Patel Ravjibhai Bhulabhai (D) thr. Lrs. vs. Rahemanbhai M. Shaikh (D) thr. Lrs. and ors*<sup>9</sup>, 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.

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:-

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

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.

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:-

“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.”

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.

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.

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.

**Judgment Referred.**

<sup>1</sup>(2008) 11 SCC 0504

<sup>2</sup>(2016) 12 SCC 0216

<sup>3</sup>(1993) Suppl.1 SCC 0295

<sup>4</sup>(1955) SCR 0174

<sup>5</sup>AIR 1960 SC 0301

<sup>6</sup>AIR 1966 SC 0902

<sup>7</sup>(2006) 1 SCC 0168

<sup>8</sup>(1988) 2 SCC 0488

<sup>9</sup>(2016) 12 SCC 0216