A VANCHALABAI RAGHUNATH ITHAPE (D) BY LR.

v.

SHANKARRAO BABURAO BHILARE (D) BY LRS. AND OTHERS

(Civil Appeal No. 4833 of 2013)

B JULY 1, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

Deeds and Documents – Mortgage by conditional sale
C *or transfer by way of sale with a condition to repurchase – Document described as sale deed transferring land belonging to plaintiff-appellant alongwith the fixtures and also handing over possession to defendant-respondent – Nature of – Held: For purpose of bringing a transaction within meaning of*
D *'mortgage by conditional sale', the first condition is that the mortgagor ostensibly sells the mortgaged property on the condition that on such payment being made, the buyer shall transfer the property to the seller – Although there is a presumption that transaction is a mortgage by conditional*
E *sale in cases where the whole transaction is in one document, but merely because of a term incorporated in the same document it cannot always be accepted that the transaction agreed between the parties was a mortgage transaction – In the instant case, the trial court committed grave error in*
F *construing the document as a mortgage and in holding that plaintiff-appellant was entitled to decree of redemption – The alleged sale document was executed in the year 1967 subject to stipulation/condition that on receiving the sale amount of Rs.3,000/- within five years the land was to be returned to the*
G *plaintiff-vendor – Also after transfer of the land, the defendant-respondent came in possession and used & enjoyed the property as an absolute owner – It was only after 11 years that the plaintiff-appellant filed suit alleging that the property was mortgaged in favour of defendant/respondent with a condition*

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to reconvey the land – Evidently, the transaction in question was an absolute sale with a condition of repurchase – But the plaintiff failed to get the land reconveyed within stipulated period and thus lost her remedy – Transfer of Property Act, 1882 – s.58(a) & (c).

The plaintiff-appellant owned certain landed property. On 12.7.1967, she executed a deed (Ex.31) in respect of the said land in favour of defendant No.1-respondent no.1 for a consideration of Rs.3,000/-, by which the land along with 4 annas share in the mango trees was transferred to defendant No.1 and possession of the same was also handed over, with a specific stipulation to the effect that the land was sold on the condition that after receiving Rs.3,000/- in lumpsum within 5 years before end of any Falgun month by the defendant, the land was to be returned to the plaintiff. The plaintiff's case was that it was a mortgage transaction and the land was to be returned by the original defendant after receiving the said consideration of Rs.3,000/- within 5 years. On 20.7.1979, plaintiff issued notice calling upon the defendant to re-convey the property after accepting the amount. Upon non-compliance, plaintiff filed suit for redemption of the property against defendant No.1. The defendant No.1 filed written statement contending that the transaction in question (Exh.31) was not a mortgage transaction, but was that of outright sale. According to him, the plaintiff had sold the suit property to him as per the said sale deed, but only as a concession the period of 5 years was mentioned in the deed to re-convey the said suit property and since there was no repayment in 5 years no re-conveyance could be claimed. The trial court, however, did not consider the deed to be a sale transaction and held it to be a mortgage transaction by conditional sale. The trial court also answered the issue "whether defendant No.1 proved that time was the essence of the said contract ..." in negative. The suit of the plaintiff for

A redemption was accordingly decreed by the trial court declaring that the plaintiff was entitled to redeem the suit property after paying the amount of Rs.3,000/- to the defendant. The first appellate court set aside the decree of the trial court holding that the transaction in question
B was an absolute sale with a condition of repurchase, but the plaintiff failed to get the land re-conveyed within stipulated period. The High Court did not interfere with the findings of fact recorded by the first appellate court, and therefore the present appeal.

C The question for consideration in the instant appeal was whether the transaction in question was mortgage transaction or a sale transaction with a condition of repurchase.

D Dismissing the appeal, the Court

HELD: 1.1. The document in question has been described as Sale Deed transferring the land along with the fixtures and possession was handed over to the
E defendant. From a perusal of Section 58(a) and (c) of the Transfer of Property Act, 1882, especially, Section 58(c), it is evidently clear that for the purpose of bringing a transaction within the meaning of 'mortgage by conditional sale', the first condition is that the mortgagor ostensibly sells the mortgaged property on the condition
F that on such payment being made, the buyer shall transfer the property to the seller. Although there is a presumption that the transaction is a mortgage by conditional sale in cases where the whole transaction is in one document, but merely because of a term
G incorporated in the same document it cannot always be accepted that the transaction agreed between the parties was a mortgage transaction. [Para 12 & 14] [1038-F; 1040-B-D]

H 1.2. In the instant case, the trial court committed

grave error in construing the document and erroneously held that the transaction is mortgage and hence, the plaintiff is entitled to decree of redemption. The alleged sale document was executed in the year 1967 transferring the suit property by way of sale subject to one stipulation/ condition that on receiving the sale amount of Rs. 3,000/ - within five years the land was to be returned to the plaintiff-vendor. It is also not in dispute that after transfer of the land the defendant-respondent No. 1 came in possession and used & enjoyed the suit property as an absolute owner. It was only after 11 years that the plaintiff-appellant filed the suit alleging that the suit property was mortgaged in favour of the defendant/ respondent No.1 with a condition to reconvey the land. In the aforesaid premises, there is no reason to interfere with the findings recorded by the first appellate court. The High Court has rightly not interfered with the findings of fact recorded by the first appellate court. [Paras 16, 19 and 20] [1040-G-H; 1043-C-F]

Tamboli Ramanlal Motilal (Dead) by LRs. v. Ghanchi Chimanlal Keshavlal (Dead) by LRs. & Another **AIR 1992 SC 1236: 1993 (1) Suppl. SCC 295 – relied on.**

Vasudeo Bhikaji Joshi v. Bhau Lakshman Ravut & Others **ILR 1897 XXI 528 – referred to.**

Williams vs. Owen, **1840, 5 My. & Cr.303 = English Reports 41 (Chancery) 386 – referred to.**

Case Law Reference:

English Reports 41 (Chancery) 386	**referred to**	**Para 15**
ILR 1897 XXI 528		
(Bombay High Court)	**referred to**	**Para 17**
1993 (1) Suppl. SCC 29	**relied on**	**Para 18**

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4833 of 2013.

From the Judgment and Order dated 19.07.2004 of the High Court of Judicature at Bombay in Second Appeal No. 295 B of 1988.

Sushil Karanjkar, Sandeep Singh, Nikhilesh Kumar, Venkateswara Rao Anumolu for the Appellant.

Vinay Navare, Keshav Ranjan, Satyajeet Kumar, Abha R. C Sharma for the Respondents.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Delay condoned. Leave granted.

D 2. This appeal by special leave is directed against the judgment and order dated 19.7.2004 passed by the High Court of Judicature at Bombay in Second Appeal No.295 of 1988, whereby the second appeal filed by the plaintiff-appellant was dismissed and the order of the first appellate court was E confirmed. The appellant is the *legal* heir of the original plaintiff/ widow who was admittedly the owner of the suit property bearing Block No.126 of village Degaon admeasuring 62 R.

3. The facts of the case can be summarized as under:

F 4. Plaintiff's case is that a deed (Ex.31) was executed by Vanchalabai Raghunath Ithape (the original plaintiff - now deceased and represented through her legal representative) in favour of defendant No.1 Shankarrao Baburao Bhilare (the original defendant/respondent No. 1 herein and now G represented through his legal representatives) on 12.7.1967 for a consideration of Rs.3,000/-, by which the suit land along with 4 annas share in the mango trees was transferred to defendant No.1 and possession of the same was handed over, with a specific stipulation to the effect that the land was sold on the H condition that after receiving Rs.3,000/- in lump sum within 5

years before end of any Falgun month by the defendant, the land was to be returned to the plaintiff. The plaintiff's case is that it was a mortgage transaction and the land was to be returned by the original defendant after receiving the said consideration of Rs.3,000/- within 5 years. The plaintiff further alleged that the period of 5 years was nominal as there was no condition that after 5 years the sale would become final. According to the plaintiff, till 1978 the defendant was agreeing to redeem the suit property, but thereafter he started avoiding to do it. On 20.7.1979, plaintiff issued a notice calling upon defendant to reconvey the suit property after accepting the amount. Upon non-compliance, plaintiff filed a suit being RCS No.226 of 1979 for redemption of the suit property against defendant No.1 and his brothers/relatives as a suit for partition, which also included the suit property, was stated to be pending between them. However, only defendant No.1 contested the suit by filing written statement contending that the transaction in question (Exh.31) is not a mortgage transaction, but was that of outright sale. He denied of having any relationship of mortgagee and mortgagor between him and the plaintiff. According to him, the plaintiff had sold the suit property to him as per the said sale deed, but only as a concession the period of 5 years was mentioned in the deed to reconvey the said suit property and since there was no repayment in 5 years no re-conveyance could be claimed.

5. Considering the pleadings and evidence tendered by the parties, the trial court opined that the suit land was originally owned by the plaintiff and after execution of the said deed, possession is with the defendant. On perusing said Exhibit 31, the trial court found it in the nature of the sale deed, but in the last paragraph of the said deed, there is a mention that the said amount of Rs.3,000/- was to be repaid by the plaintiff within the period of 5 years at the end of Falgun, and that at that time the defendant was to accept the said amount and to reconvey the suit land thereafter. Considering the said recital coupled with the evidence of the defendant and provisions of Section 58(c) of the Transfer of Property Act, 1882, the trial court did not

A consider it to be a sale transaction and held it to be a mortgage transaction by conditional sale. The trial court also answered the issue "whether defendant No.1 proved that time was the essence of the said contract ..." in negative. The suit of the plaintiff for redemption was accordingly decreed by the trial B court declaring that the plaintiff is entitled to redeem the suit property after paying the amount of Rs.3,000/- to the defendant.

6. Aggrieved by aforesaid judgment and order, the defendant preferred first appeal before the District Judge, Satara, who, after hearing both the parties, allowed the appeal C holding that there was no relationship of debtor and creditor between the parties nor it was it the case of the plaintiff that the defendant was known to her before the transaction and thus the transaction in question was an absolute sale with a condition of repurchase, but the plaintiff failed to get the land reconveyed D within stipulated period.

7. The plaintiff took exception to the aforesaid judgment by filing second appeal before the High Court raising several contentions. The High Court dismissed the second appeal E mainly relying on the observations made by the first appellate court that admittedly there was no relationship of debtor and creditor between the parties nor was it the case of the plaintiff that the defendant was known to her before the transaction was settled and there was nothing on record to show that the said F observation was incorrect and thus the document in question was of absolute sale with condition of repurchase. The High Court held that the findings recorded by the first appellate court were neither perverse nor illegal and, therefore, no interference was called for in the second appeal under Section 100 of the Code of Civil Procedure. G

8. We have heard Mr. Sushil Karanjkar, learned counsel appearing on behalf of the appellant and Mr. Vinay Navare, learned counsel appearing for legal representatives of respondent No.1.

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9. Admittedly, the plaintiff filed the suit claiming a decree for redemption of the suit property. According to the plaintiff, the suit land was mortgaged by her to the original defendant for the mortgaged amount of Rs. 3,000/-; a period of five years mentioned in the sale deed is nominal; and in fact it was agreed between the plaintiff and the defendant that whenever the plaintiff repay the said amount of Rs. 3,000/-, defendant No.1 was to take back the said amount and redeem the suit property. The trial court decreed the suit by passing a decree of redemption. The first appellate court reversed the findings recorded by the trial court and allowed the appeal and set aside the judgment and decree of the trial court. As against that, the plaintiff preferred the second appeal. The High Court did not interfere with the findings of fact recorded by the first appellate court.

10. Since the first appellate court has gone into the details of facts and evidence and recorded findings to the effect that the transaction in question was not a mortgage but contract sale, we would refer some of the findings recorded by the first appellate court. Paragraphs 19, 20, 25, 26 and 29 of its judgment are worth quoting herein:

> "19. Admittedly the plaintiff is a widow but she has adopted her grand son. Rajaram stays at Malgaon. Both the plaintiff and Rajaram have admitted that they were in need of money, not only to purchase another land at Malgaon but the amount was also necessary for payment of the Society debts of Rajaram. In case of mortgage as well as sale transaction it is quite possible that for the necessity alienation takes place. So by itself these two circumstances would not weigh in favour of the plaintiff or the defendant. It is admitted that with the consideration amount of this sale deed Exh.31, a land was purchased at Malgaon and that too in the name of Rajaram. This clearly indicates that in order to enable Rajaram to cultivate the land it was purchased at Malgaon Rajaram

A obviously is managing the affairs of the plaintiff.

20. Apart from the term incorporated in Exh.31, it is the contention of the plaintiff that a separate document was executed by the defendant covering the suit transaction. That document according to the plaintiff was taken back by the defendant at the time of Akshya Tritiya of 1979, stating that it was required for the partition suit between the brothers. A bare perusal of different stages of the suit indicate that from time to time the plaintiff has tried to make improvements in her story. The defendant has flatly denied that there was any other document executed on the date of the sale. For about 11 years after the transaction the plaintiff was quite silent. In the plaint, it is mentioned that after 1978, the defendant was ready to abide by the terms but later he avoided the transaction. In this connection it may be noted that in the notice Exh.32, issued by the plaintiff, there is absolutely no mention of the fact that any such document had been executed much less, that it was taken by the defendant on the Akshya tritiya day. No doubt, it is an admitted fact that defendant No.2 had filed the Civil suit for partition of the suit land and that suit was still pending at the date of the present suit. A pointed question was asked to the plaintiff as to why in the notice the fact that another document had been executed and it was taken at the time of Akshya Tritiya is not mentioned. She has no explanation to offer. According to her nobody else was present when this document was taken.

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25. Thus, ultimately what remains is the fact that the sale deed Exh.31 contains the provision of re-conveyance. Whether by itself is it sufficient to conclude that the transaction was a mortgage transaction. Not only the sale deed is drafted a pure and simple sale deed but the plaintiff has tried to make out inconsistent case. If it had been agreed that the transaction was to be a mortgage,

normally the Bond writer would have styled the document as (conditional sale deed). Rajaram states that the defendant No.1 was to enjoy the land in lieu of interest. Neither any such case is made out nor there any clue from the recitals in the document. Entire blot is tried to be put on the Bond writer by stating that he prompted that some period should be mentioned. In fact the suggestion made to the defendant is that, the bond writer Sapkar is his friend and he gets document written from Sapkal, thereby suggesting that Sapkal had written some terms not consistent with the agreement between the parties. It is strange, even such a suggestion made when neither plaintiff nor Sapkal have come out with a positive case that the document does not incorporate the terms agreed. At the most their stand is that, there was contemporaneous agreement of re-conveyance and that document has been suppressed. The existence of the separate document has been discarded by me.

26. Admittedly, there was no relationship of debtor and creditor between the parties, nor is it the case of the plaintiff that the defendant was known to her or Rajaram before the transaction was settled. The document does not purport to create any relationship of landlord and tenant. The shorter period in which the land was to be got re-conveyed is an indication of absolute sale with a concession to the vendor to get back the land in the stipulated period. In the R of R also in the other right column there is reference to this term and the period is of 5 years only. If there was any other document, it is not the case of the plaintiff that it was shown to the village officer. Naturally we have to proceed on the basis that the agreement of re-conveyance was an integral part of the sale deed Exh.31. No parole evidence to vary the terms of the same can be allowed. It is quite easy to make such a case to get over the obstacle in the way of the plaintiff but unless the circumstances justify it cannot be believed.

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29. As against this, the document Exh.31, apparently shows that it was a sale absolute. Not only title passed to the defendant No.1 because there was consistent recitals that plaintiff and her heirs have no subsisting interest and defendant has become full owner. Only at the end a concession was given to get the land re-conveyed in 5 years. Hence in my opinion, the learned Civil Judge was completely in error in concluding that the transaction was a mortgage transaction. I hold that the transaction was an absolute sale. The plaintiff has failed to get the land re-conveyed within stipulated period. Hence, she has lost her remedy. The appeal therefore, must succeed."

11. At the very outset, we are of the view that the findings recorded by the lower appellate court are pure findings of fact and hence the High Court has rightly refused to interfere with those findings in second appeal under Section 100 of the Code of Civil Procedure. However, we would like to discuss some of the relevant points on the basis of those findings recorded by the first appellate court. The only question for consideration befpre us and which has rightly been considered by the first appellate court, is as to whether the transaction in question is mortgage transaction or it is a sale transaction with a condition of repurchase.

12. The document in question has been described as Sale Deed transferring the land along with the fixtures and possession was handed over to the defendant. The relevant portion of the Sale Deed is extracted hereinbelow:-

"Thus the sale land along with the fixtures and all rights is being sold to you with all rights along with its possession. Thus you may cultivate the same. Hence forth I or my heirs shall not be having any right over the same and you have become the owner of the said land. Any obstruction would be removed at my cost. I have received the consideration

for the same for which there is no complaint. If Rs. 3000/ - is paid within 5 years at the end of any Falgun month at that time you should accept the said amount and return the land to me and on this condition the land is being sold to you."

13. Section 58(a) and (c) of the Transfer of Property Act, 1882, needs to be reproduced here:-

"**58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined. —** (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) .....

(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, 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 mortgage by conditional sale and

A 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."

B 14. From a perusal of the aforesaid provisions especially, Section 58(c), it is evidently clear that for the purpose of bringing a transaction within the meaning of 'mortgage by conditional sale', the first condition is that the mortgagor ostensibly sells the mortgaged property on the condition that C on such payment being made, the buyer shall transfer the property to the seller. Although there is a presumption that the transaction is a mortgage by conditional sale in cases where the whole transaction is in one document, but merely because of a term incorporated in the same document it cannot always D be accepted that the transaction agreed between the parties was a mortgage transaction.

15. In the case of *Williams vs. Owen,* 1840, 5 My.&Cr.303 = English Reports 41 (Chancery) 386, a similar question arose E for consideration as to whether a conveyance by the plaintiff's father to the defendant was to be considered as having been a mortgage as contended by the plaintiff, or as having been a sale, with a right of repurchase at a given date. It was held that in a mortgage the debt subsists and a right to redeem remains with the debtor, but a sale with a condition of repurchase is not F a lending and borrowing arrangement; no debt subsists and no right to redeem is reserved by the debtor, but only a personal right to purchase. This personal right can only be enforced strictly according to the terms of the deed and at the time agreed upon.

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16. In the instant case, the trial court committed grave error in construing the document and erroneously held that the transaction is mortgage and hence, the plaintiff is entitled to decree of redemption.

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17. In the case of *Vasudeo Bhikaji Joshi v. Bhau Lakshman Ravut & Others* reported in ILR 1897 XXI 528 a Bench (comprising Sir C. Farran, Kt., Chief Justice and Mr. Justice Parsons) of the High Court at Bombay considered a similar question in which the fact was that the plaintiffs sued to redeem an alleged mortgage made in 1823 by their ancestor to the ancestor of the defendant. The alleged mortgage recited a previous mortgage under which the mortgagee Gopal Gokhale was in possession, and it stated that a sale had been contemplated, but the parties could not agree as to price, but that they had now settled it at Rs. 125/- and the amount due on the mortgage at Rs. 200/-, and that it was agreed that if within four years the mortgagor paid Rs. 125/- with interest, he should get back the land; if not, that the land should be the absolute property of Gokhale. On these facts, the Court held that:-

> "This was not a mortgage but a sale. It was an agreement which put an end to the previously existing mortgage. A mere stipulation for repurchase does not make a transaction a mortgage. To make a mortgage there must be a debt, and here there was no debt, nor was the property here conveyed as security."

18. In the case of *Tamboli Ramanlal Motilal (Dead) by LRs.* v. *Ghanchi Chimanlal Keshavlal (Dead) by LRs. & Another,* AIR 1992 SC 1236, the facts of the case were similar to this case. In that case, a document of transfer was executed and the property was handed over. At the same time, the document proceeded to state that the property is sold conditionally for a period of five years and possession is handed over. The document stated: "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right." The further clause in the document was 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 would have any right to take back the said

properties. The last important clause was that after the period of five years the transferee would have a right to get the municipal records mutated in his name and pay tax. On these facts, this Court held that:-

> "16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex. 26 dated December 11, 1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not conclusive of the matter.
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> 17. What does the executant do under the document? He takes a sum of Rs. 5,000/- in cash. The particulars are (*a*) Rs 2,499/- i.e. Rs 899/- by mortgage of his house on 27-1-1944 and (*b*) Rs. 1,600 by a further mortgage on 31-5-1947 totalling to Rs 2,499/-. Thereafter, an amount of Rs 2,501/- in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It has to be carefully noted that this amount of Rs 5,000/- was not taken as a loan at all. As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of Rs 5,000/- with the conditional sale is executed, we are unable to see how the relationship of debtor and

creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that there is a debt and the relationship between the parties is that of a debtor and a creditor. This is a vital point to determine the nature of the transaction."

This Court, therefore, held that the document was not a mortgage by conditional sale, rather the document was transfer by way of sale with a condition to repurchase.

19. In the instant case, the alleged sale document was executed in the year 1967 transferring the suit property by way of sale subject to one stipulation/condition that on receiving the sale amount of Rs. 3,000/- within five years the land was to be returned to the plaintiff-vendor. It is also not in dispute that after transfer of the land the defendant-respondent No. 1 came in possession and used & enjoyed the suit property as an absolute owner. It was only after 11 years that the plaintiff-appellant filed the suit alleging that the suit property was mortgaged in favour of the defendant/respondent No.1 herein with a condition to reconvey the land.

20. In the aforesaid premises, we do not find any reason to interfere with the findings recorded by the first appellate court. As stated above, the High Court has rightly not interfered with the findings of fact recorded by the first appellate court.

21. For the aforesaid reasons, we do not find any merit in this appeal which is, accordingly, dismissed, but without any costs.

B.B.B. Appeal dismissed.