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**(2019) 06 BOM CK 0040**

**In the Bombay High Court**

**Case No : Second Appeal No. 477, 775 Of 2017**

Subhash Limbraj Mahandule And Ors

APPELLANT

Vs

Pandharinath Chimaji Salunke

RESPONDENT

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**Date of Decision : 14-06-2019**

**Acts Referred:**

Transfer Of Property Act, 1882 — Section 58(c)  
Code Of Civil Procedure, 1908 — Section 100

**Citation : (2019) 06 BOM CK 0040**

**Hon'ble Judges : Vibha Kankanwadi, J**

**Bench : Single Bench**

**Advocate : S.S. Jadhavar, A.K. Gawali**

**Final Decision : Allowed**

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## **Judgement**

1. Both the appeals are arising between the same parties and in respect of same property, hence, taken up together for adjudication.

2. Second Appeal No.477 of 2017 is arising out of concurrent Judgment and Decree in Regular Civil Appeal No.68 of 2013 by learned District Judge-3, Ahmednagar dated 06.07.2015, whereby the Judgment and Decree passed in R.C.S. No.323 by 2nd Joint Civil Judge Junior Division, Shrigonda, Dist. Ahmednagar dated 21.02.2012 came to be confirmed. The said suit was for declaration and permanent injunction filed by present appellants.

3. Second Appeal No.775 of 2017 is filed by original defendants challenging the concurrent Judgment and Decree passed in R.C.A. No.205/2015 by District Judge-3, Ahmednagar dated 09.03.2016, thereby confirming the Judgment and Decree passed in R.C.S. No.199/2012 by 2nd Joint Civil Judge Junior Division, Shrigonda dated 28.04.2015. The said suit Was for redemption of mortgage and possession.

4. What is not in dispute in both the cases is that the present respondent was the owner of agricultural land admeasuring 01 H 48 R out of Gat No.72 situated

at village Raikhel, Tq. Shrigonda. It is also not in dispute that a document named as 'Mudat Kharedi Khat' was executed by respondent in favour of one Subhash Limbraj Mahandule, predecessor of present appellants on 08.11.1995. (For the convenience the parties are referred by the nomenclature in appeal because their nomenclature before the Trial Court is adverse in both the suits.)

5. Original plaintiff Subhash Mahandule and others have come with a case in R.C.S. No.323/2003 that there was a financial need for defendant in 1994-95. He had requested Limbraj Mahandule to lend amount, as he was to repay the loan. A document of sale-deed, with a condition to repurchase suit land within two years, was executed on 08.11.1995, after accepting the amount from Limbraj. Possession of the land was given for two years. It was also agreed that if the present respondent repays the amount within the stipulated period, then Limbraj would re-convey the property in the name of respondent. Further stipulation was made that if the amount is not repaid within the aforesaid period then it would be treated as sale deed and the Possession would be treated as confirmed under the sale deed. It is stated that respondent did not repay amount till 07.11.1997, nor the notice was issued by him for re-conveyance. It is stated that after the said period of two years Limbraj had become owner of the property and since then he and after him his successors are cultivating the said land as owner thereof. Thereafter, the present respondent had filed Regular Civil Suit No.46/2003 for redemption of mortgage and possession. The legal representatives of Limbraj appeared in the matter as Limbraj had expired on 25.01.2000. Those legal representatives contested the matter and on the basis of said suit it was contended by the present appellants that the respondent is disturbing their possession over the suit land and therefore they prayed for declaration as owner and for permanent injunction to protect their possession.

6. The said suit was contested by the present respondent. It has been contended that he was in need of amount of Rs.50,000/- and therefore, he had taken loan from Limbraj and then executed the document by mortgaging the suit property. It is further stated that he had repaid the loan in presence of one Nandkumar Kokate at Limpangaon, Tq. Shrigonda and on that day Limbraj had handed over the possession of the suit property to him. It was decided that he would re-convey the loan within one month. Since they both are from same village, no document was executed at that time. He Had time and again requested Limbraj to execute the re-conveyance deed, but he avoided on one or the other pretext and later on he expired. He was also thereafter pursuing the matter with successors of Limbraj, but they avoided. He had thereafter filed suit for redemption of mortgage and on the day of his written statement the said suit was still pending.

7. In another suit which was filed by the present respondent i.e. R.C.S. No.199/2012 for redemption of mortgage, he had contended the same facts and submitted that he had withdrawn R.C.S. No.46/2003 due to technical reasons and by that time R.C.S. No.323/2003 was decided. Declaration to the extent of

ownership was not given to the plaintiffs in R.C.S. No.323/2003, however, liberty was given to him to redeem the mortgage, on the ground that he has failed to prove that he has paid the amount of Rs.50,000/-. It was stated that the present respondent was ready and willing to pay amount of Rs.50,000/- to the successors of Limbraj and therefore, he had issued notice on 22.03.2012 and offered to repay the said amount before Sub Registrar, Shrigonda and asked them to re-convey the property. When they failed, he filed suit for redemption of mortgage.

8. The said suit was resisted by present appellants by filing written statement. It was stated that the suit was not within limitation. Though Their prayer for declaration of ownership was rejected, injunction has been granted and they have preferred appeal challenging the said decree. It is stated that the issue regarding mortgage is under consideration before the Appellate Court and therefore, the suit is not maintainable.

9. In both the suits, issues came to be framed. Parties have led oral as well as documentary evidence on record. After taking into consideration the evidence on record the learned Trial Court in R.C.S. No.323/2003 held that the present appellants are in possession of the suit property. Present respondent had failed to prove that he repaid amount of Rs.50,000/- to Limbraj, but then went on to decree the suit partly. The relief of declaration was rejected, however, the prayer of permanent injunction was granted stating that till the re-conveyance, the possession of the plaintiffs therein shall not be disturbed. In R.C.S. No.199/2012, the learned Trial Court held that the transaction is of mortgage and the plaintiff is entitled to redeem the mortgage. Hence, the suit was decreed. Defendants therein were directed to execute re-conveyance deed by accepting amount of Rs.50,000/- and also to hand over the possession of the property to the plaintiff therein.

10. Both the Judgments and Decrees were challenged by the present appellants before learned District Judge-3, Ahmednagar as aforesaid. R.C.A. No.68/2013 was dismissed, whereas R.C.A. No.205/2015 was partly allowed only to the extent of modification in terms of decree. The modification was in respect of the procedure for redemption. Hence, the present appellants are challenging Judgments and Decrees passed in both the civil appeals.

11. Heard learned Advocate Mr. S.S. Jadhavar for appellants in both the cases and learned Advocate Mr. A.K. Gawai for respondent. This Court by order dated 01.08.2017 framed following substantial question of law.

"Whether the document mortgage of conditional sale Exh.31 dated 08.11.1995 can be termed as only mortgage deed ?"

12. The learned Advocate appearing for the appellants submitted that taking into consideration the substantial question of law it can be seen that as per present respondent, the said transaction is mortgage, whereas the appellants contend that the transaction was conditional sale. The condition that was put was to

repay the amount of Rs.50,000/- within two months and get re-conveyance and in case of failure after the stipulated period the said document was to be treated as sale deed. It is not necessary here to go into other conditions mentioned in document Exh.31, however, both the Courts went wrong in holding that it is a mortgage. The Trial Court in R.C.S. No.323/2003 went wrong in not giving declaration that plaintiff has become Owner after failure of defendant therein to repay the amount. When a specific stipulation was made in Exh.31 and that there is no dispute raised about the stipulation by the present respondent; further when he had failed to prove that he repaid the amount of Rs.50,000/- within stipulated period, obviously the Courts ought to have held that successors of Limbraj have become owner of the suit property. In the second suit the said document Exh.31 has been wrongly held to be a mortgage. The basic difference between a transaction of "mortgage" and a "sale with condition to repurchase" was not properly appreciated by both the Courts and therefore perverse findings has been given.

13. In order to buttress his submission he has relied on a decision in Bhoju Mandal and others vs. Debnath Bhagat and others, AIR 1963 SUPREME COURT 1906, wherein it has been observed that

"There is a clear legal distinction between the two concepts, a mortgage by conditional sale and a sale with a condition of repurchase. The former is a mortgage, the relationship of debtor and creditor subsists and the right to redeem remains with the debtor. The latter is an out and out sale whereby the owner transfers all his rights in the property to the purchaser reserving a personal right of repurchase. The question to which category a document belongs presents a real difficulty which can only be Solved by ascertaining the intention of the parties on a consideration of the contents of a document and other relevant circumstances. Decided cases have laid down many tests to ascertain the intentions of the parties but they are only illustrative and not exhaustive. For ascertaining the intention of the parties under one document a decision on a construction of the terms of another document cannot ordinarily afford any guidance unless the terms are exactly similar to each other."

Further, in Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. And another, AIR 1992 SUPREME COURT 1236, it has been held that in clauses of deed consistent with express intention of making the transaction a conditional sale with option to repurchase then such document cannot be said to be a mortgage by conditional sale.

Further, in Vanchalabai Raghunath Ithape (D) by LR vs. Shankarrao Baburao Bhilare (D) by lrs. And others, 2013 AIR SCW 3993, it has been held that a mortgage by conditional sale or sale with condition of repurchase, plaintiff transferring land to defendant by way of document of sale, defendant put in possession and used/enjoyed property as absolute owner. Further, the document containing stipulation that on receipt of sale amount defendant shall return property to plaintiff vendor. Mere Stipulation of return of property in document of

sale does not make the transaction mortgaged by conditional sale.

Reliance has also been placed on Umabai and another vs. Nilkanth Dhondiba Chavan (dead) by L.Rs. and another, 2005(4) Mh.L.J., 306, wherein it has been observed that

"There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. 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 a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to section 58(c) of the Transfer of Property Act, however, states that if the condition for re-transfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage."

14. Per contra, the learned Advocate appearing for the respondent submitted that taking into consideration the definition of 'mortgage' under Section 58(c) of the Transfer of Property Act, it can be seen that two ingredients have been fulfilled in this case. It has been specifically mentioned that respondent herein had taken loan as he was in need of money and in lieu of that he has given possession of the property to Limbraj for two years only, because of this transaction the relationship that was created between Limbraj and the respondent was that of creditor and debtor. Therefore, it was a mortgage transaction. Present respondent had right to redeem the same mortgage, though there was failure on his part to repay the said amount within the stipulation period of two years. Though respondent had come with the case that he had repaid the said loan amount, yet the Court was not in his favour in R.C.S. No.323/2003 and therefore, he offered the said amount in the suit filed for him for redemption of mortgage. Both the Courts have appreciated the evidence properly, therefore, there is no question of substantial question of law. He has also relied on the decision in Umabai's case in order to demonstrate as to how the transaction is 'mortgage' and not as 'sale with condition to repurchase'. He has also further relied on the case of Tamboli Ramanlal Motilal (supra).

15. Taking into consideration the substantial question of law, interpretation of the document Exh.31 was the main subject involved in both the cases. The said document was required to be interpreted. In both the cases, it was held to be a 'mortgage'. Important point to be noted is that when R.C.S. No.199/2012 was filed, R.C.S. No.323/2003 was already decided, however, the appeal challenging the said Judgment and Decree i.e. R.C.S. No.68/2013 was still pending. Under such circumstance, there was no question of point of res judicata involved in R.C.S. No.199/2012. Therefore, the concerned Trial Court dealing with R.C.S. No.199/2012 was required to consider the recitals in document Exh.31 independently, on the basis of the evidence adduced before it. Further, the First Appellate Court dealing with R.C.A. No.205/2015, in which the Judgment and

Decree passed in R.C.S. No.199/2012 was challenged, was also required to consider the interpretation of Exh.31 independently; not influenced by the decision in R.C.S. No.323/2003 and appeal arising out of it R.C.A. No.68/2013. With this background, though the same document is involved in both the matters, it is, therefore, required to be seen as to what was the nature of the document. That means, whether it was transaction of "mortgage" or transaction of "sale with option to repurchase". It will not be out of place to mention here that Limbraj had expired prior to the institution of R.C.S. No.323/2003. Therefore, in respect of intention of the parties, apart from the evidence led by the plaintiff, the main evidence on behalf of defendant was of himself and that of his witness in R.C.S. No.323/2003 DW Nandkumar Kokate, in whose presence he had alleged that he had returned the amount of Rs.50,000/-. Further it can be seen that the Trial Court in R.C.S. No.323/2003, while giving finding to issue No.1 had come to the conclusion that present respondent-original defendant had failed to prove That he had repaid the amount of Rs.50,000/- to Limbraj. This finding was never challenged by him and in his suit i.e. R.C.S. No.199/2012 he has not led any evidence to prove that he had repaid that amount. Therefore, as regards that fact is concerned it will have to be conclusively held that respondent Pandharinath had failed to prove that he had repaid the amount of Rs.50,000/- to Limbraj.

16. Perusal of Exh.31 which has been styled as "Mudat Kharedi Khat" would show that Pandharinath was in need of amount of Rs.50,000/- and it is specifically stated that, that amount was taken for mitigating loan. Though word "xgkk" has been used in the document, it is yet settled position of law that mere use of the word in a document will not make that document as 'mortgage transaction'. What has been stated is that Pandharinath has sold the property to Limbraj and had given the same in possession for two years as mortgage and Limbraj should enjoy the property for the said period. Further, stipulation is that Pandharinath will return the amount within two years and in that case Limbraj would re-convey the property. Further, stipulation is that if Pandharinath fails to give that amount within the said stipulation period then the same document should be treated as absolute sale deed. The entire recital in Exh.31 would make it clear that no relationship of debtor and creditor as such was created. Mere extending amount of Rs.50,000/- will not Make Pandharinath a 'debtor' and Limbraj as 'creditor', because no further stipulations as are required for a loan transaction were mentioned in the document Exh.31. Further, when it was specifically stated that if Pandharinath fails to repay the loan within the stipulated period; then the same document should be treated as sale deed. That means, both of them had agreed that there will not be necessity to execute a sale deed by Pandharinath in favour of Limbraj, in case of failure on the part of the Pandharinath to repay the said amount of Rs.50,000/- to Limbraj. On the contrary, it was agreed that if the said amount of Rs.50,000/- is paid within two years, then Limbraj would execute re-conveyance deed in favour of Pandharinath. When absolute rights of ownership are transferred then only the question of re-conveyance would arise and

therefore, it will have to be inferred that by Exh.31 the ownership rights were altogether transferred by Pandharinath in favour of Limbraj. The period of two years was stipulated for return of amount and that would amount to transaction of sale with condition to repurchase. Both the Courts below in both the matters have failed to consider the interpretation of document Exh.31 and only by nomenclature it appears that they have concluded that the transaction is of mortgage and Exh.31 is a mortgage deed.

17. Both the Courts in both the matters have lost sight of the fact That Pandharinath had failed to prove that he has repaid the amount of Rs.50,000/- to Limbraj and then what would be the effect of non-compliance of said term in Ex.31. The said finding though given by the Trial Court in R.C.S. No.323/2003, it erred in holding that as a hand loan was taken by Pandharinath, the relationship between Limbraj and Pandharinath would be that of creditor and debtor. The case of Tamboli Ramanlal Motilal (supra) has similar facts. In that case also the executant of the document had taken sum of Rs.5,000/- in cash and the purpose was to repay miscellaneous debts and domestic expenses and business. It was held by Hon'ble Apex Court that the said amount of Rs.5,000/- was not taken as a loan at all. By executing that document the executant had discharged all the prior debts and outstanding and therefore, it was held that where, therefore, for a consideration of a sum of Rs.5,000/- with the conditional sale is executed no relationship of debtor and creditor can be forged in. Herein, in this case one more aspect is also required to be considered, whether on the execution of Exh.31 the title had passed to Limbraj or not. For that purpose, it can be seen that the recitals thereof stated that for a period of two years Limbraj should go on paying taxes of the suit land to the Government and if his possession over the property is distributed then Pandharinath would resolve that dispute. Further recitals says that "ksizekks prq%flek iwozdph foghj ckxk;r gh rqegkl ojhy :i;kl >km>qmwiklg o vkrhy dkgh ,d jk[kwu u Bsork dk;e [kjsnh nsowu ..."

Under such circumstance, it can be said that the parties had intention to transfer the title on the date of the execution of Exh.31. The option was kept for repurchase, to be exercised within a period of two years. This right has not been exercised by Pandharinath-respondent. As a result of which the further term in Exh.31 can be said to have got finalized. In other words, when respondent failed to repay the said amount within two years, the said Exh.31 became sale deed giving absolute ownership rights to Limbraj and then to his successors. Therefore, the ratio laid down in Tamboli Ramanlal Motilal's case is definitely applicable here. So also, the similar ratio in Bhoju Mandal is also applicable, wherein also on almost similar recitals in the document it was held that the document was of a sale with condition of repurchase. Here, the transaction and execution of Exh.31 had taken place on 08.11.1995 and the suit for redemption of mortgage was filed on 10.04.2012. Another aspect i.e. Also required to be considered is that R.C.S. No.323/2003 was filed by the present appellants. Though the said suit was contested by respondent he had not filed any counter claim for redemption of mortgage. Under such circumstance, the ratio in

Vanchalabai Ithape (supra) is applicable. In that 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.3,00,000/- within five years the land was to be returned to the plaintiff-vendor. In that Case also after the transfer of the land the defendant therein was put in possession and he enjoyed the suit property as an absolute owner. It was only after 11 years the plaintiff had filed suit alleging that the suit property was mortgaged in favour of defendant with a condition to re-convey the land. In that case also it was held that the vendor had failed to repay the amount within stipulated period and therefore the said transaction was of a sale with condition to repurchase. In that case also the case of Tamboli Ratanlal Motilal was relied. Therefore, in the present case the substantial question of law needs to be answered in the negative. It rather deserves to be answered that document Exh.31 was not a document of "mortgage" transaction but it was a document of transaction of "conditional sale with option to repurchase". Under such circumstance, both the appeals deserve to be allowed.

18. Though both the Courts in both the matters had given concurrent findings and in the normal course this Court would have been slow in Second Appeal under Section 100 of CPC to interfere with the concurrent findings; yet, taking into consideration the fact that both the Courts have not considered the ratio laid down in aforesaid decision by Apex Court. Reliance also can be placed on the decision in Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar reported in (1999) 3 SCC 722, wherein It has been held that

"In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

(i). Contrary to the mandatory provisions of the applicable law;

OR

(ii). Contrary to the law as pronounced by the Apex Court; OR

(iii). Based on in-admissible evidence or no evidence. Both the appeals fall in category (i) and (ii) above. The Judgment and Decree under challenge in both matters deserve to be interfered with. Hence, following order.

ORDER

1. Second Appeal No.477 of 2017 and Second Appeal No.775 of 2017 are hereby allowed.

2. The Judgment and Decree passed in Regular Civil Appeal No.68 of 2013 by learned District Judge-3, Ahmednagar on 06.07.2015 is hereby set aside. So also, the Judgment and Decree passed by learned 2nd Joint Civil Judge Junior Division, Shrigonda, Dist. Ahmednagar in Regular Civil Suit No.323/2003 dated 21.02.2012 is hereby set aside to the extent of rejecting the relief of declaration.

That suit stands decreed in entirety.

3. It is hereby declared that the plaintiffs therein have become owner of the suit property.

4. Judgment and Decree passed in Regular Civil Suit No.199/2012 by 2nd Joint Civil Judge Junior Division, Shrigonda, Dist. Ahmednagar dated 28.04.2015 and the Judgment and Decree passed in Regular Civil Appeal No.205/2015 dated 09.03.2016 are hereby set aside.

5. R.C.S. No.199/2012 is hereby dismissed.

6. Taking into consideration the above said facts, parties to bear their own costs of the proceedings.

7. Decree be drawn accordingly.