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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION**

SECOND APLPEAL NO.1487 OF 2005

Shrimati Bhupal Wadkar & Ors. ...Appellants

Vs.

Kalgonda B. Patil & Ors.Respondents

Mr. A.M.Kulkarni for the Appellants.

None for Respondents.

CORAM : S.C. DHARMADHIKARI, J.

DATED : 30TH JULY, 2010

P.C.

This Second Appeal is by the original Defendant Nos.1 to 3.
The Respondent No.1 is the original plaintiff and others namely
Respondent Nos.2.1 to 2.3 are the heirs of original defendant No.4,
Sukumar Bhupal Wadkar.

2. The original plaintiff had filed a suit being Regular Civil Suit
No.44 of 1988 for redemption of mortgage dated 24th March, 1969.
It was his case that he was the owner of the suit property. He

executed a Deed of Mortgage in favour of one Bhupal Wadkar for Rs.5,000/-. The period of mortgage was 10 years. After expiry of the said period he asked for redemption of the mortgaged property. That was on 12th February, 1986 and 23rd November, 1987. He also issued notice to the father of the original defendant No.1 Bhupal and asked for redemption of the mortgage by accepting the amount, but he denied the same. Bhupal expired on 14th December, 1987. Therefore, a notice was addressed to the legal representatives reiterating the same demand. That was not accepted and, therefore, the suit came to be filed.

3. The Appellants before me are some of the defendants. The case of the defendants in the written statement is that the transaction was not a transaction of mortgage with a conditional sale, but it was an out-right sale. The property was purchased from the original plaintiff for a consideration of Rs.5,000/-. Their father never applied for reconveyance and in such circumstances so also when the original plaintiff did not take any steps for repayment of the amount, his claim is not maintainable.

4. The trial Court on these pleadings framed necessary issues.

5. Parties went to trial on the basis of the same. On behalf of the defendants save and except defendant No.3 other defendants did not step into the witness box.

6. The Trial Court applied the settled legal tests and concluded that the document was a Deed of Mortgage and the version of the defendants that it was an out-right sale was not acceptable. Therefore, a preliminary decree came to be passed.

7. That was challenged in the Regular Civil Appeal No.542 of 1992 and the learned Judge of the lower Appellate Court after framing the necessary points for consideration heard both sides and has confirmed the trial Court's decree.

8. This is how the present Second Appeal.

9. Shri Kulkarni, learned Counsel appearing on behalf of the original defendant Nos. 1 to 3, appellants before me, contended that the Courts below have misconstrued and misinterpreted the said document. The tests have been laid down by the Supreme Court which have been followed by our Court in a decision reported in

Vamanrao Sawalaram Bhosale & Ors. v. Vithal Tukaram Kadam

& Anr., 2006 (1) Mh. L.J. 867. The finding rendered on identical facts and construing somewhat identical document is that there is a distinguishing point which has to be borne in mind throughout. It has been referred to in the document itself that if the property is sold conditionally and possession is handed over, then, this is a case of conditional sale and not a mortgage at all. The distinction between mortgage by conditional sale and sale with condition of repurchase is lost sight of and, therefore, the Second Appeal deserves to be admitted.

10. With the assistance of Shri Kulkarni, learned Counsel for the appellants I have perused the judgments namely that of the trial Court and the lower Appellate Court and I have also perused the judgment of this Court relied upon by the appellants.

11. The judgment of the trial Court should be read in its entirety. Issue No.1 was whether the original plaintiff proved that he is entitled to redemption of the mortgage property. The case of the plaintiff has been considered and the stray observation in the trial Court's and lower Appellate Court's judgment on the ostensible

character of the document should not, to my mind, conclude the issue. The judgments must be read as a whole. The trial Court in paragraphs 6 and 7 has adverted to the legal position and the relevant statutory provisions. In paragraphs 8 and 10 it analysed the document which was exhibited by consent of parties. The document has been referred to and it has been observed that the description of the property is set out therein with boundaries and dimensions. The recitals are also referred to. The period within which the amount is to be repaid and the consequences that would follow are also set out. It is only upon failure to pay and the time expiring that the right and title in the property was to be transferred. In these circumstances the conclusion drawn that the usual terms that are found in an agreement/deed of sale, namely, conveying an absolute title from the date of execution of the document are absent in this case. Therefore, the intent of the parties was clear.

12. When such is the fact situation, then, the observations of the trial Court in paragraph 10 cannot be read in isolation. If the judgment is read in its entirety in the backdrop of the contents of the mortgage deed, then, I am of the view that no reliance can be placed on the tests that are laid down in the Supreme Court decision

and which have been applied by this Court.

13. In the decision of the learned single Judge of this Court the facts were that in the document there were no recitals to show that interest in the suit land has been transferred for the purpose of securing the payment of money advanced or to be advanced by way of loan, existing or future debt, or the performance of an agreement which may give rise to a pecuniary liability. Therefore, this Court reached the conclusion that it is an outright sale and not a mortgage. The situation is otherwise in the present case. The recitals in the instant deed are to the contrary. Therefore, the judgment of this Court is distinguishable on facts. Thus, the concurrent findings cannot be interfered with by a process of reappreciation of evidence, which is impermissible under Section 100 of C.P.C.

14. As a result of the above discussion, there is no merit in this Second Appeal which is dismissed, but without any order as to costs.

15. At this stage Mr. Kulkarni applies for continuation of the order of status quo which was granted at the stage of issuance of notice. Once I have found that the Courts below have applied the correct

tests and there is no substantial question of law, then the request of Shri Kulkarni to continue the status quo as granted cannot be accepted. Hence the request is rejected.

S.C. DHARMADHIKARI, J