IN THE HIGH COURT OF JUDICATURE AT PATNA

Bibi Husnara Begam & Ors.

v

Bhawani Devi & Ors.

Second Appeal No. 276 of 1992

20 May 2025

(Hon'ble Mr. Justice Arun Kumar Jha)

Issue for Consideration

Whether the deed was a zerpeshgi (mortgage) deed or a sale deed with a right to repurchase?

Whether the oral evidence in the case was duly considered by the lower courts or was rejected without sufficient reasoning?

Headnotes

When the recital of a document is ambiguous, then only it is permissible to look into the surrounding circumstances to determine what was intended by the parties. (Para 34)

An absolute conveyance conspicuously not showing relationship of debtor and creditor, would not become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. (Para 35)

Exhibited document is a document of sale with option to repurchase and the same was not executed as the document of mortgage by conditional sale. (Para 42)

Appeal is dismissed. (Para 44)

Case Law Cited

Patel Ravjibhai Bhulabhai (D) Thr. Lrs. v. Rahemanbhai M. Shaikh, **(2016) 12 SCC 216;** Srinivasaiah v. H.R. Channabasappa, **(2017) 12 SCC 821;** Vanchalabai Raghunath Ithape v. Shankarrao Baburao Bhilare, **(2013) 7 SCC 173;** Madhu Lal Singh v. Dhonga Mandal, AIR **1983 Pat 60;** Chunchun Jha v.

Sk. Ebadat Ali, **(1954) 1 SCC 699;** Bhoju Mandal v. Debnath Bhagat, **AIR 1963 SC 1906;** Prakash (Dead) by LRs v. G. Aradhya, Civil Appeal No. **706/2015;** Ganpati Babji Alamwar (D) by LRs. v. Digambarrao Venkatrao Bhadke, Civil Appeal No. **3960/2011;** Samittri Devi & Anr. v. Sampuran Singh & Anr., Civil Appeal No. **846/2011;** Pandit Chunchun Jha v. Sk. Ebadat Ali, reported in **(1954) 1 SCC 699**; Bhaskar Waman Joshi (deceased) & Ors. Vs. Shrinaryan Rambilas Agarwal (deceased) & Ors., reported in AIR **1960 SC 301**

List of Acts

Code of Civil Procedure, 1908; Transfer of Property Act, 1882 (Sections 58(c), 60, 83)

List of Keywords

Mortgage by conditional sale; Zerpeshgi deed; Right to repurchase; Redemption suit; Exhibit-C interpretation; Section 58(c) TP Act; Adequacy of consideration; Oral evidence rejection; Baimiyadi Panchsala

Case Arising From

Judgment and decree dated 20.05.1992 and 20.06.1992 passed by the learned Additional District & Sessions Judge-VI, Siwan in Title Appeal No. 36 of 1989 affirming judgment and decree dated 08.03.1989 and 09.04.1989 of Sub Judge-VI, Siwan in Title Suit No. 143 of 1979.

Appearances for Parties

For the Appellants: Mr. Kamal Nayan Choubey, Sr. Advocate; Mr. Rakesh Kumar Shrivastava, Advocate;

For the Respondents: Mr. Ganpati Trivedi, Sr. Advocate; Mr. Deepak Kumar Sinha, Advocate; Ms. Aishwarya Shree, Advocate

Headnotes prepared by Reporter: Amit Kumar Mallick, Advocate

Judgement/Order of the Hon’ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.276 of 1992

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1. Bibi Husnara Begam W/o Babu Md. Ayub Saheb decs. Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

2. Shamim Jawed W/o Md. Jawed Deceased. Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

3. Shadab Jawed Son of Md. Zawed deceased,, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

4. Zessan Zawed Son of Md. Zawed deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

5.1. Md. Saquib S/o Late Md. Sahab, R/o Vill. - Chatnasool, P.S. Nababganj, Distt. - Gonda (U.P.)

5.2. Azni Sahab D/o Late Md. Sahab, W/o Moobaraque Hussain, R/o Vill. - Chatnasool, P.S. Nababganj, Distt. - Gonda (U.P.)

6. Md. Saldl Son of Md. Ayub, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

7. Md. Sahid Son of Md. Ayub, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

8. Md. Akil @ Md. Wakil Son of Md. Ayub, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

9. Md. Aftab Son of Md. Ayub, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

10. Sahnaz Ayub D/o Md. Ayub, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

11. Sabana Ayub D/o Md. Ayub, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

12. Md. Hamid Son of Babu Md. Habib Saheb deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

13. Md. Ahmad Son of Babu Md. Habib Saheb deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

14.1. Md. Faisal Masood S/o Late Md. Masood, R/o Mohalla - Telhatta Bazar, P.S. - Siwan Town, Distt. - Siwan.

14.2. Sumbul Masood W/o Zisan Ahmad, D/o Late Md. Masood, R/o House no. - D 34, Karaili, P.S. Karaili, Distt. - Allahabad. (U.P.)

15. Sayeeda Begum @ Sahiba Begum D/o Babu Md. Habib Saheb deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

16. Bibi Asma @ Asia Mahmood, W/o Babu Md. Mahmood, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

17. Zamal Ahmad @ Jamal Mahmood, Son of Md. Mahmood deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

18. Md. Ajaz @ Azaje Mahmood, Son of Md. Mahmood deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

19. Md. Imran @ Imran Mohamood, Son of Md. Mahmood deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

20. Ishaq Ahmad @ Ishaq Mohamood Son of Md. Mahmood deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

21. Afzal Mahmood @ Aftab Ahmad, Son of Md. Mahmood deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

22. Iqbal Mahmood @ Akbal Ahmad, Son of Md. Mahmood deceased, Resident of Mohalla - Telhatta Bazar, P.S. Siwan Town, Distt. - Siwan.

... ... Appellant/s

Versus

1.1. Bhawani Devi W/o Late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.2. Prem Kumar Agrawal Son of late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.3. Dilip Kr. Agrawal S/o Late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.4. Ajit Kr. Agrawal, Son of late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.5. Atul Kr. Agrawal Son of late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.6. Sanjay Kr. Agrawal Son of Late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.7. Renu Agrawal D/o Late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.8. Rita Agrawal D/o late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.9. Munni Agrawal, D/o Late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

1.10. Usha Agrawal D/o Late Dwarika Prasad Agrawal, Resident of Mohalla - Agrwal Toli, Siwan, town, P.S. Siwan, town, District- Siwan.

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Kamal Nayan Choubey, Sr. Advocate
Mr. Rakesh Kumar Shrivastava, Advocate
For the Respondent/s : Mr. Ganpati Trivedi, Sr. Advocate
Mr. Deepak Kumar Sinha, Advocate
Ms. Aishwarya Shree, Advocate

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT

Date :20-05-2025

The instant appeal has been filed under Section 100 of

the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') against the judgment and decree dated 20.05.1992 and 20.06.1992, respectively, passed by the learned Additional District & Sessions Judge-VI, Siwan in Title Appeal No. 36 of 1989, whereby and whereunder learned lower appellate Court dismissed the appeal and affirmed the judgment and decree, dated 08.03.1989 and 09.04.1989, respectively passed by the learned Sub Judge-VI, Siwan in Title Suit No. 143 of 1979 by which the suit was dismissed.

02. The appellants were the plaintiffs of Title Suit No. 143 of 1979 and the respondent was the defendant. As the title suit was dismissed, the plaintiff preferred Title Appeal No. 36 of 1989, which again came to be dismissed and against two concurrent findings, the plaintiffs have approached this Court in the second appeal. For the sake of convenience, I will refer the appellants of the instant second appeal as plaintiffs and respondents as defendants.

Case of the Plaintiffs:

03. One Bibi Akikul Nisa was the mother of original plaintiff nos. 10 to 13, mother-in-law of plaintiff nos. 1 and 14 and grandmother of plaintiff nos. 2 to 9 and 15 to 20. Respondents are the descendants of the original defendant. After

death of Bibi Akikul Nisa, original plaintiffs and heirs of plaintiff nos. 6 to 12 came in possession of her property. Bibi Akikul Nisa executed a *zerpeshgi* (mortgage) deed for the disputed property for an amount of Rs. 7337/- in favour of original defendant Dwarika Prasad and put the original defendant in possession of the property. This mortgage deed was executed on 24.03.1953 and was for the period of five years which expired on 24.03.1958. Further case of the plaintiffs was that after the expiry of period, money was tendered to the defendant with a request to return the mortgage deed and also for handing over the possession of the suit property. As the defendant did not agree to take the money and return the mortgage deed and hand over the possession to the plaintiffs, the consideration money was deposited through *Chalan* in the court under Section 83 of the Transfer of Property Act (for short 'T P Act') on 03.05.1975. Thereafter, Misc. Case No. 23 of 1978 was instituted under Section 83 of the T P Act and on 08.05.1975, a notice was served upon the defendant, but he did not accept the consideration money and as he did not accept the money and did not handover the possession of the disputed property to the plaintiffs, the plaintiffs filed Title Suit No. 143 of 1979 for redemption.

Case of the Defendants:

04. The original defendant challenged the contention of the plaintiffs on a number of grounds submitting that the suit was not maintainable and the plaintiffs have got no cause of action and also that the suit was time barred on the facts. The defendant claimed that on 24.03.1953, no *zerpeshgi* deed was executed. The defendant came into possession of the suit property, not in the capacity of *zerpeshgidar* (mortgagee) but as a purchaser. The defendant submitted that earlier Bibi Akikul Nisha executed a mortgage deed on 03.01.1950 after receiving an amount of Rs. 3,200/- and put the defendant in possession over the suit property. In March 1953, Bibi Akikul Nisa was in need of more money and therefore, she agreed to sell the suit property in favour of the defendant for consideration amount of Rs. 7337/-. It was also agreed between the parties that if Bibi Akikul Nisa would return Rs. 7337/- to the defendant by 24.03.1958, then defendant would execute a sale deed in favour of Bibi Akikul Nisa for the disputed property and under this arrangement, Bibi Akikul Nisa executed a registered sale deed on 24.03.1953 for Rs. 7337/-, out of which Rs. 3,200/-, consideration money of earlier mortgage deed dated 03.01.1950, was adjusted. The defendant further submitted that the deed

executed by Bibi Akikul Nisa on 24.03.1953 was out and out a sale-deed with the condition of repurchase and Bibi Akikul Nisa transferred her entire interest to the suit property to the defendant by executing the deed of 24.03.1953. After execution of the deed, Bibi Akikul Nisa had no right, title or interest over the suit property and the defendant came in possession as the owner and since then, he has been continuing in peaceful possession over the disputed property as owner. Bibil Akikul Nisa died soon after the expiry of stipulated time and prior to that, on 23.02.1958, defendant had given notice to Bibi Akikul Nisa under postal certificate to the effect that her right to repurchase would extinguish, if she did not pay the consideration money to the defendant by 24.03.1958. Bibi Akikul Nisa neither gave any reply to the notice nor paid the consideration money. So, the right of repurchase of Bibi Akikul Nisa came to an end on 24.03.1958. There was no relationship of mortgager and mortgagee between Bibi Akikul Nisa and the defendant. The defendant further submitted that he had also purchased the southern portion of the suit land from one Sheikh Md. Sadique on 09.08.1952 and came into its possession. The defendant denied any knowledge about plaintiff depositing Rs. 7337/- in the court under Section 83 of T P Act and further

submitted that no notice was served upon him in Misc. Case No. 23 of 1975.

Findings of the Trial Court:

05. The learned trial court on the basis of pleadings of the parties and the materials available before it, framed the following issues:-

> "*1) Is the suit as framed maintainable?*
>
> *2) Have the plaintiffs got any cause of action for the suit?*
>
> *3) Is the deed dated 24.03.1953 a zerpeshgi deed or a sale deed with a right to re-purchase?*
>
> *4) Whether the defendant is in possession of the suit land as a mortgagee as alleged by the plaintiff?*
>
> *5) Is the story of the tendered of money deposit in court of money and service of notice on the defendant correct?*
>
> *6) To what relief, if any, are the plaintiffs entitled to?*"

06. The learned trial court recorded its finding that the most important issue to be decided was Issue No. 3, i.e., "whether the deed dated 24.03.1953 is a *zerpeshgi* deed or a sale deed with a right to re-purchase within five years of execution of the deed?". Thereafter, upon analysis of the oral and documentary evidence(s) on record adduced at the trial, the

learned trial court came to a finding that deed dated 24.03.1953, was a sale deed and there was no question of tendering of money and defendant was in possession of the property as a purchaser and not as a mortgagee and thus, it came to the conclusion that deed dated 24.03.1953 is a sale deed with right to repurchase within five years from 24.03.1953 and as Bibi Akikul Nisa did not tender the consideration money to the defendant by 23.03.1958, the defendant's right of ownership of the suit property became unchallengeable. In this manner, the learned trial court dismissed the suit filed by the plaintiffs.

Findings of the First Appellate Court:-

07. When the issue came up before the learned first appellate court, the learned first appellate court also took the view that the aforesaid Issue No.3 goes to the root of the matter and looking into the issue whether the deed dated 24.03.1953 was a *zerpeshgi* deed or a sale deed with a right to re-purchase within five years of execution of the deed and also the issue of limitation, framed following two points for determination before it:

> *(i) Whether deed dated 24.03.1953 is a zerpeshgi deed or a sale deed with right to repurchase?*
> *(ii) Whether the appeal is barred of law of*

limitation?

08. The learned first appellate court held that the oral evidence adduced by the parties was not material for disposal of the first appeal and took into consideration the two documentary evidences of the defendant, i.e, (i) deed dated 24.03.1953 (Exhibit-C) and (ii) *zerpeshgi* deed dated 03.01.1950 (Exhibit-G).

09. The learned first appellate court examined in detail the nature of deed and like the trial court, came to the conclusion that the deed dated 24.03.1953 was out and out a sale deed and was not a deed of mortgage by conditional sale and for this reason, plaintiffs have no right of redemption. At the same time, the learned first appellate court also recorded its finding that the appeal was not barred by limitation.

Analysis of this Court:

Substantial Question of Law:

10. After admitting the second appeal, a learned Single Judge of this Court formulated the following substantial question of law for consideration in this second appeal:

> 'As to what is the correct interpretation of Exhibit-C and whether the oral evidence can be rejected without assigning any reason?'

Submission on Behalf of Appellants:

11. Mr. Kamal Nayan Choubey, learned senior counsel appearing on behalf of the plaintiffs/appellants submitted that the judgments and decrees of the subordinate courts are not in accordance with law and are fit to be set aside. Mr. Choubey further submitted that the learned subordinate courts erred in holding that the deed dated 24.03.1953 (hereinafter referred to as 'Exhibit-C') was a sale deed with right to repurchase whereas it was a *zerpeshgi* deed (mortgage deed). The learned subordinate courts completely failed to understand the real nature of Exhibit-C, which in column-3 mentions it was a '*Baimiyadi Panchsala'*.Therefore, the finding that there was no relationship of mortgager and mortgagee was based on wrong appreciation and misreading of Exhibit-C. The subordinate courts further failed to see the intention while executing the deed by Bibi Akikul Nisa. The intention was to create mortgage and said intention was to be inferred from attending circumstances and the adequacy of consideration. If for the same property, mortgage deed was executed in 1950 for an amount of Rs. 3,200/-, the same property would not be ripe for purchase in 1953 only for an amount of Rs. 7337/- This inadequacy of consideration was not taken into account. Mr.

Choubey further submitted that the nature of transaction between the parties shows the intention was to create mortgage and relationship between the parties was more like debtor and creditor and there was no intention to put the suit property for sale with right to repurchase. The subordinate courts further failed to appreciate that the purchaser cannot be put under restriction with condition to reconvey the title in favour of the seller after five years.

12. Mr. Choubey referred to decision of Hon'ble Supreme Court in the case of ***Patel Ravjibhai Bhulabhai (D) Thr. Lrs. Vs. Rahemanbhai M. Shaikh (D) thr. Lrs. & Ors.,*** reported in ***(2016) 12 SCC 216***, wherein the Hon'ble Supreme Court reading a document (Exhibit-23), observed that condition in Ex.23 that if the plaintiffs (respondents) make repayment of Rs.10,000/- within a period of five years, the defendants shall handover the possession of property in suit back to the plaintiffs, reflects that the actual transaction between the parties was of a loan, and the relationship was of debtor and creditor, as such, the High Court has rightly held that the deed in question Ex. 23 read with Ex. 37 is a mortgage by way of conditional sale. Mr. Choubey next referred to another decision of Hon'ble Supreme Court in the case of ***Srinivasaiah Vs. H.R.***

Channabasappa (since dead) by his LRs & Ors., reported in (***2017) 12 SCC 821***, wherein examining the nature of Ext. P/1 while considering the scope of Section 58(c) of T.P. Act and the test laid down in the case of ***Pandit Chunchun Jha v. Sk. Ebadat Ali,*** reported in ***(1954) 1 SCC 699,*** the Hon'ble Supreme Court expressed its opinion that the document (Ex.P-1) is a mortgage with conditional sale as defined under Section 58 (c) of the T P Act. The Hon'ble Supreme Court gave the following reasons for its consideration: First, it was not in dispute that the plaintiff was the owner of the suit land. Second, the parties concluded the transaction in question by executing one document (Ext.P-1). Third, the document (Ext.P-1) is styled as a "Deed of Conditional Sale". Fourth, it contains a condition that defendant No.1 will be allowed to remain in possession of the suit property for 5 years and enjoy the fruits of the land and that during this period, the plaintiff will be entitled to get the suit property re-conveyed in his name on paying Rs.1500/- by getting the sale deed executed in his name and obtain possession of the suit land from defendant No.1. Lastly, the plaintiff offered to pay Rs.1500/- to defendant No.1 with a request to resell the land to him. Thus, the Hon'ble Supreme Court held that the aforesaid five reasons satisfied the third condition of

Section 58(c) of the T.P. Act, namely, “on condition that such payment being made, the buyer shall transfer the property to the seller”. It also satisfied the tests laid down by the Supreme Court in ***Chunchun Jha’s*** case (supra). First, the transaction is concluded in one document; Second, the document styled as a "Deed of Conditional Sale" itself contains the condition of repurchase on offering the sale money without interest for the reason that defendant No.1 was allowed to use the land till the money was not paid back to him by the seller; and Third, parties’ intention as per terms of Ex.P-1 was also supported by the evidence which was accepted by the two Courts - the Trial Court and the High Court.

13. Mr. Choubey, thus, submitted that the facts of the present case are similar to the case of ***Srinivasaiah (supra)***. Mr. Choubey next submitted that the recital in the deed of 24.03.1953 (Exhibit-C) makes it clear that it was a mortgage deed with stipulation that after five years, the defendant would be required to reconvey the property, if the mortgage amount was paid by him and for this reason, the deed was executed by mentioning in it ‘*Baimiyadi Panchsala’*.

14. Referring to the decision in the case of ***Vanchalabai Raghunath Ithape vs. Shankarrao Baburao***

Bhilare, (2013) 7 SCC 173**,** Mr. Choubey submitted that for determination of nature of document, primacy is to be given to the intention of the parties and intention is to be gathered from terms of the deed. Mr. Choubey further relied on the decision of learned Single Judge of this Court in the case of ***Madhu Lal Singh Vs. Dhonga Mandal,*** reported in ***AIR 1983 Patna 60,*** wherein the learned Single Judge in Para-8 of the said decision held as under:

> ***"8.*** *It cannot be disputed that the law regarding construction of a document is well settled, namely, that the intention has to be gathered in the first place, from the language of the document and if the words are express and clear, then effect must be given to them, and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant, but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. This principle has been laid down in the case of* ***Chunchun Jha v. Ebadat Ali (AIR 1954 SC 345)****. Paragraph 14 of this decision reads thus:—*
>
> > *"Now, as we have already said, once a transaction is embodied in one document and not two and once its terms are covered by S. 58(c) then it must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary, or, in a case of ambiguity, the attendant*

circumstances necessarily lead to the opposite conclusion."

It will be also relevant to quote here a portion of para 8 of the judgment of the Supreme Court in the above case. It reads thus:—

"The legislature has made a clear-cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons, who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of S. 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage."

The aforesaid principles are said to be some of the broad principles for construction of a document. The relevant clauses of the document for consideration before the Supreme Court have been quoted in para 9, and it has been held that the language of that document was not free from difficulty and was ambiguous. Accordingly, the attendant circumstances relied upon by the respondents of that case were discussed and it was ultimately held that the document in that case was a mortgage by conditional sale."

15. Mr. Choubey further relied on the decision in the celebrated case of ***Chunchun Jha*** (supra), wherein the Hon'ble Supreme Court in Paras-5 and 6 held as under:

"5. *The question whether a given transaction is a mortgage by conditional sale*

or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that 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 must be decided on its own facts. But certain broad principles remain.

6. *The first is that the intention of the parties is the determining factor : see Balkishen Das v. Legge [Balkishen Das v. Legge, 1899 SCC OnLine PC 32 : (1899-1900) 27 IA 58] . But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. As Lord Cranworthsaidin Alderson v. White [Alderson v. White, (1858) 2 De G&J 97 : 44 ER 924 at p. 928] : (ER p. 928)*

> *"… The rule of law on this subject is one dictated by common sense; that prima facie an absolute conveyance, containing*

> *nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instruments?"*
>
> *Their Lordships of the Privy Council applied this rule to India in Bhagwan Sahai v. Bhagwan Din [Bhagwan Sahai v. Bhagwan Din, 1890 SCC OnLine PC 3 : (1889-90) 17 IA 98 at p. 102] and in Jhanda Singh v. Wahid-ud-din [Jhanda Singh v. Wahid-ud-din, 1916 SCC OnLine PC 61 : (1915-16) 43 IA 284 at p. 293 : (1917) 5 LW 189] .*

16. Mr. Choubey further submitted that as Exhibit-C has not been correctly interpreted by the subordinate courts and even the concurrent finding of this point could not be sustained. Mr. Choubey further submitted that both the subordinate courts virtually rejected the oral evidence without assigning any reason and thus, the judgments and decrees suffer from gross defect. Moreover, the learned first appellate court was required to furnish reasons for its decision about rejection of the oral evidence but it abdicated its responsibilities imposed upon it under Order 41 Rule 31. Thus, Mr. Choubey submitted that the present second appeal is fit to be allowed after setting aside the judgments and decrees of the learned subordinate courts.

Submission on behalf of the Respondents:

17. On the other hand, Mr. Ganpati Trivedi, learned senior counsel appearing on behalf of the respondents, at the outset, submitted that the whole issue revolves around the correct interpretation of Exhibit-C. Now, from reading the contents of Exhibit-C, Mr. Trivedi submitted, it is clear from the contents of Exhibit-C that the intention of Bibi Akikul Nisa was to transfer her title to the defendant and she only wanted to protect her right to repurchase. If, there was an intention to confer title upon the defendant, the document could not be said to be a mortgage by conditional sale. Bibi Akikul Nisa did not want any loan and she entered into the sale for the suit property for liquidating her responsibility as mentioned in Exhibit-C. Mr. Trivedi further submitted that nomenclature was not important and even if the document has been mentioned as *Baimiyadi Panchshala*, recital of the document in its entirety is to be seen. Mr. Trivedi reiterated that the intention was to transfer the property and not to seek a loan on it or to mortgage it. The recital also shows it was not a mortgage by conditional sale. Mr. Trivedi referred to by a three Judges' Bench decision of Hon'ble Supreme Court in the case of ***Bhoju Mandal vs Debnath Bhagat*****,** reported in ***AIR 1963 SC 1906*****,** wherein distinguishing

the facts of the case of ***Chunchun Jha*** (supra), the Hon'ble Supreme Court observed that 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. The Hon'ble Supreme Court, referred to the circumstance that a smaller extent was sold for a higher amount in discharge of an earlier mortgage of a larger extent for a smaller amount which was not present in the case of ***Chunchun Jha*** (supra) and considering the cumulative effect of the terms of the document in the context of the surrounding circumstances, held that the document in question was not a mortgage but a sale with the condition of repurchase and upheld the decision of High Court. Mr. Trivedi further referred to the decision of Hon'ble Supreme Court in the case of ***Prakash (Dead) By Lr. vs G.Aradhya (decided on 18th August, 2023, Civil Appeal No. 706 of 2015),*** submitting that facts of the said case squarely cover the case of the defendant and further submitted that in almost similar circumstances, the Hon'ble Supreme Court recorded its finding that a perusal of contents of the Sale Deed shows that the same was an absolute sale for a total sale consideration of Rs.5,000/- (Rupees Five Thousand) required by the vendor to meet

domestic expenses and to meet education expenses of his minor son and to discharge some debts. Total sale consideration was Rs.5,000/- (Rupees Five Thousand). Out of this amount, a sum of Rs.3,000/- was received earlier and Rs.2,000/- was to be received in the presence of the Sub-Registrar at the time of the registration of the Sale Deed. Possession of the property was to be delivered on registration of the Sale Deed. The vendee was entitled to get the mutation entered in her name and enjoy the property by paying the taxes, if any. Mr. Trivedi further submitted that similarly, in the present case, the defendant paid Rs. 3,200/- earlier by Ext-G and subsequently, the said amount was adjusted when Ext-C was executed. The vendee was allowed to get the land mutated in his favour and enjoy the property after paying taxes. Therefore, the same does not leave any doubt that Ext-C was a sale deed with right to repurchase and it was not a mortgage deed by conditional sale or a mortgage deed for five years as claimed by Mr. Choubey.

18. Mr. Trivedi distinguished the authorities cited by the learned senior counsel appearing on behalf of the appellants. Referring to Paras-11, 13, 17 and 18 of the decision cited on behalf of appellants in the case of ***Vanchalabai Raghunath Ithape (supra),*** Mr. Trivedi submitted that nomenclature was

not important and recital was to be seen. Mr. Trivedi, referring to Paras-7 and 23 of the decision in the case of ***Srinivasaiah (supra)***, submitted that the same is not applicable to the facts of the present case and are rather against the case of the appellants. Referring to Para- 12 of the decision in the case of ***Patel Ravjibhai Bhulabhai (D) Thr. Lrs. (supra),*** Mr. Trivedi submitted that the intention was to transfer the property not to loan or mortgage as the Hon'ble Supreme Court held that a document must be read in its entirety. When character of a document is in question, although the headline thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but thereafter circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question. For the said purpose, it is essential that all parts of the deed should be read in their entirety. Thus, Mr. Trivedi submitted that the authorities cited by the appellants are of no help to the cause of the appellants.

19. Mr. Trivedi next submitted that the learned trial court even considered the oral evidence and the decision of the learned trial court cannot be faulted on this account. On the other hand, the learned first appellate court was not required to

give any finding on the oral evidence of the parties as the same was hardly an issue before it and moreover, maintainability of appeal itself was in question. As the learned trial court has already considered the oral evidence and the learned first appellate court framed the point for determination about the nature of Exhibit-C, there was no need for the learned first appellate court to consider the oral evidence as the same was not material for the purpose of determination of real controversy between the parties. Mr. Trivedi further submitted that the defendant adequately discharged the burden cast upon him and by sending the notice for repurchase to the plaintiff through Exhibit-E under certificate of postal on 28.02.1958, there was no further responsibility of the defendant, as it was incumbent upon the vendor, Bibi Akikul Nisa, to come forward to repurchase the property but she did not do so and even her heirs/legal representatives moved to tender the amount of Rs. 7337/- only in the year 1975 and this also shows that they were knowing that the transaction was an outright sale with condition to repurchase and it was never a mortgage with condition for sale.

20. Thus, Mr. Trivedi submitted that there is no merit in the present second appeal, which has been filed against two

concurrent findings of two subordinate courts and the same ought to be dismissed with cost.

Reply made on behalf of the Appellants:

21. By way of reply, learned senior counsel, Mr. Choubey, further relied on the decision of Hon'ble Supreme Court in the case of ***Ganpati Babji Alamwar (D) by Lrs. Ramlu & Ors. Vs. Digambarrao Venkatrao Bhadke & Ors.(decided on 12.09.2019, Civil Appeal No(s). 3960 of 2011*** and referring to Paras-3, 11 and 12 of the said decision, Mr. Choubey submitted that in the said decision, the Hon'ble Supreme Court relied on the decision in the case of ***Bhaskar Waman Joshi (deceased) & Ors. Vs. Shrinaryan Rambilas Agarwal (deceased) & Ors.,*** reported in ***AIR 1960 SC 301,*** wherein 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. It 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."

22. Mr. Choubey next relied on the decision of Hon'ble Supreme Court in the case of ***Samittri Devi & Anr. Vs. Sampuran Singh & Anr. (Civil Appeal No. 846 of 2011, decided on 21.01.2011)*** on the point of adequacy of notice sent through postal certificate and referred to Paras-21 and 22 of the said decision wherein it has been held that it would all depend on the facts of each case, whether the presumption of service of a notice sent under postal certificate should be drawn. The presumption would apply with greater force to letters which are sent by registered post, yet, when facts so justify, such a presumption is expected to be drawn even in the case of a letter sent under postal certificate. Paras-21 and 22 of the decision in the case of ***Samittri Devi & Anr. (supra),*** read as under:

*"21. As far as a notice sent under postal certificate is concerned, in **Mst. L.M.S. Ummu Saleema Vs. B.B. Gujaral & Anr. [1981 (3) SCC 317]**, a bench of three judges of this Court on the facts of that case, refused to accept that the notice sent under a postal certificate by a detenue under the Conservation of Foreign Exchange and Smuggling Activities Act, 1974, to the Assistant Collector of Customs, retracting his original statement had*

been duly served on the concerned office. This was because the respondent rebutted the submission by producing their file to show that such a letter had not been received in their office in the normal course of business. However, the proposition laid down in that case is relevant for our purpose. This Court observed in paragraph 6 of that judgment as follows:

> *"6. .....The certificate of posting might lead to a presumption that a letter addressed to the Assistant Collector of Customs was posted on August 14, 1980 and in due course reached the addressee. But, that is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compels the court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the court may refuse to draw the presumption. On the other hand the presumption may be drawn initially but on a consideration of the evidence the court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever dispatched as claimed. After all, there have been cases in the past, though rare, where postal certificates and even postal seals have been manufactured. In the circumstances of the present case, circumstances to which we have already referred, we are satisfied that no such letter of retraction was posted as claimed by the detenu."*

22. The proposition laid down in this judgment has been followed in two subsequent cases coming before this Court in the context

of Section 53(2) of the Companies Act 1956 providing for presumption of service of notice of the board meeting, sent by post. In M.S. Madhusoodhanan vs. Kerala Kaumudi (P) Ltd. and others [2004 (9) SCC 204], a bench of two Judges of this Court referred to the proposition in Mst. L.M.S. Ummu Saleema (supra) in para 117 of its judgment, and held in the facts of that case, that the notice by postal certificate could not be presumed to have been effected, since the relations between the parties were embittered, and the certificate of posting was suspect. As against that, in a subsequent matter under the same section, in the case of VS Krishnan Vs. Westfort Hi-Tech Hospital Ltd. [2008 (3) SCC 363], another bench of two Judges referred to the judgment in M.S. Madhusoodhanan (supra), and drew the presumption in the facts of that case that the notice sent under postal certificate had been duly served for the purposes of Section 53(2) of the Companies Act, 1956, since the postal receipt with post office seal had been produced to prove the service. Thus, it will all depend on the facts of each case whether the presumption of service of a notice sent under postal certificate should be drawn. It is true that as observed by the Privy Council in its above referred judgment, the presumption would apply with greater force to letters which are sent by registered post, yet, when facts so justify, such a presumption is expected to be drawn even in the case of a letter sent under postal certificate.

FINDINGS:-

23. I have given my thoughtful consideration to the rival submission of the parties and perused the record as well as

authorities cited by the parties.

24. The relevant provisions of law, i.e. Sections 54, 58(c) and 60 of the T P Act read as under:-

> ***"54. "Sale" defined.***—*"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*
>
> ***58...(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 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.]*
>
> ***60. Right of mortgagor to redeem.***—*At any time after the principal money has become [due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage - money, to require the mortgagee (a) to deliver 10 [to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost*

of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by [decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

***Redemption of portion of mortgaged property.**—Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except [only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgager."*

25. The question of mortgage by a conditional sale and the sale with right to repurchase has vexed the Courts for long time. In the case of ***Chunchun Jha*** (supra), a four Judges' Bench of Hon'ble Supreme Court had considered this issue. In

the facts before the Hon'ble Supreme Court in the case of ***Chunchun Jha*** (supra), the plaintiff's case was that the transaction of 15-4-1930 was a mortgage and, as the subsequent mortgagee was not joined as a party to the earlier suit, the plaintiff was entitled to redeem. The first defendant's case was that the transaction of 15-4-1930 was not a mortgage but an out and out sale with a covenant for repurchase which became infructuous because no attempt was made to act on the covenant within the time specified. The learned trial Judge and the lower appellate court both held that the document was a mortgage and so decreed the plaintiff's claim. The High Court on second appeal reversed these findings and held it was a sale. Consequently the High Court dismissed the plaintiff's suit. Against the finding of the High Court, the plaintiff approached the Hon'ble Supreme Court.

The judgment was delivered by Hon'ble Justice Vivian Bose and discussion in Paragraphs-5, 6, 7, 8 and 18 are quite illuminating:

> *"**5.** The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the*

High Courts in collating and analysing them. We think that 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 must be decided on its own facts. But certain broad principles remain.

6. *The first is that the intention of the parties is the determining factor : see Balkishen Das v. Legge [Balkishen Das v. Legge, 1899 SCC OnLine PC 32 : (1899-1900) 27 IA 58] . But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. As Lord Cranworth said in Alderson v. White [Alderson v. White, (1858) 2 De G&J 97 : 44 ER 924 at p. 928] : (ER p. 928)*

"… The rule of law on this subject is one dictated by common sense; that prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to

repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instruments?"

Their Lordships of the Privy Council applied this rule to India in Bhagwan Sahai v. Bhagwan Din [Bhagwan Sahai v. Bhagwan Din, 1890 SCC OnLine PC 3 : (1889-90) 17 IA 98 at p. 102] and in Jhanda Singh v. Wahid-ud-din [Jhanda Singh v. Wahid-ud-din, 1916 SCC OnLine PC 61 : (1915-16) 43 IA 284 at p. 293 : (1917) 5 LW 189] .

7. *The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity. Unfortunately, they form the bulk of this kind of transaction.*

8. *Because of the welter of confusion caused by a multitude of conflicting decisions the legislature stepped in and amended Section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear-*

cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage.

18. *The point made on behalf of the respondents about the adequacy of the consideration and the absence of interest can be explained. The transferee was to take possession of the property and would thus get the produce and it is evident to us from the tenor of the document that he was not to be accountable for it. We say this because the indemnity clause (clause 9) says in sub-clause (b) that in the event of the transferee's possession being disturbed the executants would, among other things, pay him, in addition to damages, the entire consideration together with interest at 2 per cent per month from the date of the deed and would not require the transferee to account for the usufruct. It is true this can also be read the other way but considering these very drastic provisions as also the threat of a criminal prosecution in sub-clause (a), we think the transferee was out to exact more than his pound of flesh from the unfortunate rustics with whom he was dealing and that he would not have agreed to account for the profits : indeed that is his own case, for he says that this was a sale out and out. In these circumstances, there would be no need to keep a reasonable margin between the debt*

> *and the value of the property as is ordinarily done in the case of a mortgage. Taking everything into consideration, we are of opinion that the deed is a mortgage by conditional sale under Section 58(c) of the Transfer of Property Act."*

26. Based on the test as laid down in the case of ***Chunchun Jha*** (supra), the Hon'ble Supreme Court went on to decide the case of ***Srinivasaiah*** (supra) where the document in question was held to be a document of mortgage with conditional sale. Now, facts of the case in the case of ***Srinivasaiah*** (supra) were as follows:

> *"**3.** The appellant is Defendant 2 whereas Respondents 1 to 5 are the legal representatives of the original plaintiff and Respondents 6 to 11 are the legal representatives of original Defendant 1 in the civil suit out of which these appeals arise. The original plaintiff M.N. Channabasappa was the owner of the suit land (described in detail in schedule to the plaint). He fell in need of money in 1969. He, therefore, approached the original Defendant 1, B.M. Narayana Shetty, and requested him to give some money to overcome the financial crisis faced by him during that time. Defendant 1 agreed and accordingly gave Rs 1500 to the plaintiff by way of loan. In order to secure the repayment, the plaintiff on request made by Defendant 1 executed a document on 28-7-1969 (Ext. P-1) in favour of Defendant 1 and got the same registered with the Sub-Registrar, Kanakapura. Defendant 1 was also*

> *placed in possession of th*e suit property pursuant to the document.
>
> *4. On 30-6-1987, the plaintiff sent a legal notice to Defendant 1 and offered to repay Rs 1500 to him with a further request to redeem the suit land in his favour in terms of the conditions of Ext. P-1. The plaintiff contended that Ext. P-1 was essentially a mortgage deed executed by him in favour of Defendant 1 by way of security for repayment of the loan given to him by Defendant 1. The plaintiff contended that in terms of the conditions of Ext. P-1, he delivered possession of the suit land to Defendant 1 for a period of 5 years to enable Defendant 1 to reap the fruits of the suit land and on repaying Rs 1500 within five years, restore the possession of the suit land by redeeming the mortgage.*
>
> *5. Defendant 1 sent a reply to the notice on 13-8-1987. He denied the plaintiff's offer and contended therein that the document dated 28-7-1969 (Ext. P-1) is not a "mortgage deed" as described by the plaintiff in the notice but it is in substance a "sale deed" out and out in relation to the suit land executed by the plaintiff in his favour for Rs 1500 pursuant to which Defendant 1 was also placed in possession of the suit land as owner. It was contended that Defendant 1, in the meantime, on 25-9-1986 sold the suit land to the appellant herein (Defendant 2) by executing the deed of sale for consideration.*

In the case of ***Srinivasaiah*** (supra), the plaintiff filed a civil suit for redemption of mortgage of the suit land in plaintiff's favour, apart from declaration that the sale made by defendant no.1 of the suit land in favour of defendant no. 2 vide

sale deed dated 25-9-1986 was bad in law and also for recovery of possession of the suit land from the defendants. The learned trial court decreed the suit on 30-6-2000 holding that the document (Ext. P-1) is a mortgage by conditional sale and not a sale deed. The first appeal was allowed setting aside the judgment/decree of the trial court holding that the document dated 28-7-1969 (Ext. P-1) was not a mortgage deed but it was in the nature of a sale deed. Thereafter, the plaintiff preferred the second appeal before the High Court in which one of the substantial questions was whether the interpretation placed by the first appellate court as to the suit document, to hold that it is not a mortgage by conditional sale was proper. The High Court allowed the second appeal, set aside the judgment/decree of the first appellate court and restored the judgment/decree of the trial court. The High Court held that the document (Ext.P-1) was a mortgage by way of conditional sale and not a sale out and out. The Hon'ble Supreme Court upheld the decision of the learned trial court as well as the High Court, holding that the document (Ext. P-1) was a mortgage by conditional sale and not a sale deed.

27. Similar to the effect is the decision of Hon'ble Supreme Court in the case of ***Patel Ravjibhai Bhulabhai***

(supra), wherein the Hon'ble Supreme Court held in Paras-3, 12, 13 and 14 as under:

> *"**3.** Brief facts of the case are that original plaintiffs Shaikh Rahemanbhai Mohamadbhai (since died) and Shaikh Ismailbhai Mohamadbhai, executed a deed dated 30-12-1960 in favour of Defendants 1 and 2, namely, Patel Ravjibhai Bhulabhai (since died) and Patel Dahyabhai Bhudarbhai, which was titled as conditional sale, for a sum of Rs 10,000 providing therein that if the repayment is made within a period of five years, the defendants shall give back the property in suit with possession to the plaintiffs with further stipulation that the plaintiffs would have no right to get back the property after the expiry of the period of five years. The plaintiffs instituted Civil Suit No. 156 of 1984 before the Civil Judge, Junior Division, Dakor, for redemption of property in question (i.e. Survey No. 148, admeasuring 3 acres 29 guntas situated in Village Rustampura, Taluk Thasra) on repayment of the mortgage money under the deed dated 30-12-1960, and further sought to recover the possession of the property with mesne profits. The plaintiffs pleaded that the deed in question was a mortgage deed, and as such they have right to redeem the same.*
>
> ***12.** In C. Cheriathan v. P. Narayanan Embranthiri [C. Cheriathan v. P. Narayanan Embranthiri, (2009) 2 SCC 673 : (2009) 1 SCC (Civ) 692] , the principle relating to interpretation of a document as to whether the sale is mortgage by conditional sale or sale with a condition to repurchase was discussed, and this Court held as under : (SCC p. 677,*

para 12)

> *"12. A document, as is well known, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefor circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question. For the said purpose, it is essential that all parts of the deed should be read in their entirety."*

13. *In the case at hand the document in question (Ext. 23) contains the condition as under:*

"In this deed condition is that the said amount of Rs 10,000.00 when we pay back to you within five years from today, you shall give back the said property to us with possession. And in the same manner, we shall have no right to ask back the same after expiry of the time-limit."

14. *The above condition in Ext. 23 that if the plaintiffs (respondents) make repayment of Rs 10,000 within a period of five years, the defendants shall hand over the possession of property in suit back to the plaintiffs, reflects that the actual transaction between the parties was of a loan, and the relationship of debtor and creditor existed, as such, we are of the view that the High Court has rightly held that the deed in question, Ext. 23 read with Ext. 37 is a mortgage by way of conditional sale and the decree passed in favour of the plaintiffs does not require to be interfered with. Needless to say, since the possession of the land was handed over to the*

mortgagee, no interest was charged. It has also come on record that the defendants leased the land to third parties, after possession was given by the plaintiffs in 1960. In the circumstances, after perusal of the evidence on record, we agree with the view taken by the High Court."

28. Further, the Hon'ble Supreme Court in Paras-3, 11 and 12 of the decision in the case of ***Ganpati Babji Alamwar (D) by Lrs. Ramlu & Ors.*** held as under:

"3. The Civil Judge held that the nature of the document coupled with the recitals therein and conduct of the plaintiff, left him in no doubt that the document was a sale deed. The First Appellate Court and the High Court on an interpretation of the document held it to be a mortgage by conditional sale, opining that their existed the relationship of a debtor and a creditor, and not that of a transferor or transferee. Thus, the present appeal.

11. 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:− "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." 1

12. In the light of the aforesaid discussion and the facts of the present case, an examination of the recitals in the agreement dated 29.04.1971 holistically, including the heading of the document, we are left with no doubt that it was not a sale deed with an option for repurchase but a document of mortgage by conditional sale. An agriculturist will normally not so easily dispose his agricultural land, the source of his survival and livelihood merely for purchases made by him on credit. The dire financial straits of the plaintiffs is evident from the fact that they were left with no option but to mortgage 2½ acres of their agricultural lands for credit purchase of daily necessities. The financial stringency of the plaintiffs is apparent from their failure to repay anything even after execution of the instalment bond. Given the limitations of the plaintiffs because of their poor financial status, the fact that they may not have objected to the mutation so done three years later cannot be considered as sufficient for a contrary interpretation of the agreement dated 29.04.1971, especially when the Appellate Court held that the plaintiffs were in possession of the lands. In the facts of the case, a debtor and creditor relationship stands clearly established and hardly needs further elucidation. The limitation for the right to redeem, under Article 61(a) of the Limitation Act 1963, is 30 years. The suit for redemption was therefore within limitation. In the facts of the present case, we do not consider the delay of seven years in filing the suit so fatal, as to disinherit the plaintiff from his agricultural lands."

29. On the other hand, the authority cited by the learned senior counsel for the respondents in the case in the case of ***Bhoju Mandal*** (supra),wherein the Hon'ble Supreme Court distinguished the facts of the said case from the case of ***Chunchun Jha*** (supra) and Paragrphs-2 and 7 are relevant which read as under:

> *"**2.** The facts that gave rise to this appeal may be briefly stated : On February 2, 1924, Appellants 1 & 2, their father late Matooki Mandal and their uncle late Lila Mandal executed a deed purporting to convey a property of the extent of 12.6 acres in favour of Respondents 1 & 2 for a consideration of Rs 2800 and put them in possession of the same. In 1950 the appellants instituted title Suit No. 73 of 1950 in the Court of the Munsif, 1st Court, Bhagalpur, Bihar, for redemption on the ground that the said document was a mortgage by conditional sale. The contesting defendants i.e. Respondents 1 & 2 pleaded that the said document was not a mortgage but an out and out sale and therefore the suit for redemption was not maintainable. The Munsif and on appeal the Subordinate Judge, Bhagalpur, accepted the contention of the appellant and decreed the suit but on second appeal the High Court held that the document was a sale and on that finding the appeal was allowed and the suit was dismissed with costs throughout. The appellants by special leave preferred the present appeal against the decree and judgment of the High Court.*
>
> *7. Reliance is placed by the learned counsel for the appellant on a judgment of this*

court in 'Pandit Chunchun Jha v. Sheikh Ebadat Ali [(1955) 1 SCR 174] . It may be stated at the outset that for ascertaining the intension 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. It is true that some of the terms of the document in that case may be approximated to some of the terms in the present document but the said judgment of this Court really turned upon a crucial circumstance. There is one important recital found in the document in that case which does not appear in the document in question and there is another important recital found here which is not present there. There the document under scrutiny was executed on April 15, 1930. Before the execution of the document the executants initiated commutation proceedings under Section 40 of the Bihar Tenancy Act. Those proceedings continued till February 18, 1931 i.e. for some ten months after the deed. The executants borrowed Rs 65/6 to enable them to carry on the commutation proceedings even after they executed the document. Bose, J. speaking for the court adverting to the said circumstance observed at p. 183:"This, we think, is crucial. Persons who are selling their property would hardly take the trouble to borrow money in order to continue revenue proceedings which could no longer benefit them and could only enure for the good of their transferees". It is, therefore, obvious that this circumstance clinched the case in favour of the executants. The crucial circumstance in the present case, namely, that a smaller extent was sold for a higher amount in discharge of an earlier mortgage of a larger extent for a smaller amount was not present in that case. The said

crucial circumstances make the two cases entirely dissimilar and therefore the said judgment of this court is not of any help in construing the document in question. On a consideration of the cumulative effect of the terms of the document in the context of theg circumstances we hold that the document in question is not a mortgage but a sale with the condition of re-purchase. The conclusion arrived at by the High Court is correct." surrounding circumstances we hold that the document in question is not a mortgage but a sale with the condition of re-purchase. The conclusion arrived at by the High Court is correct."

30. Further, in Paragraphs 11, 13, 17 and 18 of the decision in the case of ***Vanchalabai Raghunath Ithape (supra),*** the Hon'ble Supreme Court held as under:

"11. *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. Henceforth 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. *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 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 be accepted that the transaction agreed between the parties was a mortgage transaction.*

17. *In Tamboli Ramanlal Motilal v. Ghanchi Chimanlal Keshavlal [1993 Supp (1) SCC 295 : 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 nor the 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: (SCC*

pp. 298-99, paras 16-17)

"16. In order to appreciate the respective contentions, it is necessary for us to analyse Ext. 26 dated 11-12-1950. 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.

17. What does the executant do under the document? He takes a sum of Rs 5000 in cash. The particulars are (a) Rs 2499 i.e. Rs 899 by mortgage of his house on 27-1-1944 and (b) Rs 1600 by a further mortgage on 31-5-1947 totalling to Rs 2499. Thereafter, an amount of Rs 2501 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 5000 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 5000 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.*
>
> ***18.** 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 3000 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 Respondent 1-defendant came in possession and used and enjoyed the suit property as an absolute owner. It was only after 11 years that the appellant-plaintiff filed the suit alleging that the suit property was mortgaged in favour of the defendant-Respondent 1 herein with a condition to reconvey the land."*

31. On the ground of similarity of facts, Mr. Trivedi referred to the decision of Hon'ble Supreme Court in the case of ***Prakash (Dead) By Lr. (Supra),*** Paras-19, 21, 25 and 29 wherein read as under:

> ***19.** In the appeal filed by the appellant against the judgment and decree of the trial Court, following two questions were framed by*

the High Court: "1. Whether the trial Court was justified in holding the document dated 20.12.1973 [registered on 24.12.1973] as sale deed and consequently rejecting the claim of the plaintiff that the said sale deed if read along with the agreement of buy back dated 24.12.1973 would not constitute mortgage of suit schedule property in favour of Smt. Rudramma?. 2. Whether the trial Court was justified in dismissing the suit holding that the documents dated 20.12.1973 [registered on 24.12.1973] as absolute sale deed and consequently rejecting the prayer of the plaintiff for redemption of mortgage?"

21. *A perusal of the aforesaid questions framed by the High Court shows that, these are co-related. The core issue was as to whether the transaction between the parties was an absolute sale of the property or it was a mortgage. The issue of limitation, with reference to the challenge to the Sale Deed having been decided against the appellant by the trial Court, was not raised before the High Court, as is evident from the questions framed. Hence, this aspect could not be addressed before this Court.*

25. *Similar argument, where two separate documents were executed, came up for consideration before this Court in Bishwanath Prasad Singh's case (supra). One was the Sale Deed and the second was the agreement for sale. Both were executed on the same date. It was opined therein that to appreciate a document its contents are to be read in entirety and the intention of the parties is to be gathered from the language used therein. Para 16 of the aforesaid judgment is referred to for ready reference:*

16. A deed as is well known must be construed having regard to the language

used therein. We have noticed hereinbefore that by reason of the said deed of sale, the right, title and interest of the respondents herein was conveyed absolutely in favour of the appellant. The sale deed does not recite any other transaction of advance of any sum by the appellant to the respondents which was entered into by and between the parties. In fact, the recitals made in the sale deed categorically show that the respondents expressed their intention to convey the property to the appellant herein as they had incurred debts by taking loans from various other creditors." 25.1. Further, in the aforesaid judgment, this Court while interpreting the terms of the agreement executed along with the Sale Deed and opined that the same cannot be treated to be a mortgage as the expression used therein were 'vendor', 'vendee', 'sold' and 'consideration'. Fixed period was granted for execution of the Sale Deed.

29. *A perusal of the contents of the Sale Deed shows that it is clearly mentioned therein that the same was an absolute sale for a total sale consideration of Rs.5,000/- (Rupees Five Thousand) required by the vendor to meet domestic expenses and to meet education expenses of his minor son and to discharge some debts. Total sale consideration was Rs.5,000/- (Rupees Five Thousand). Out of this amount, a sum of Rs.3,000/- (Rupees Three Thousand) was received earlier and Rs.2,000/- (Rupees Two Thousand) was to be received in the presence of the Sub-Registrar at the time of the registration of the Sale Deed. Possession of the property was to be delivered on registration of the Sale Deed. The vendee was entitled to get the mutation entered in her name and enjoy*

> *the property by paying the taxes, if any. She would become an absolute owner thereof from generation to generation. There were no encumbrances attached to the property.*

32. From the reading of the authorities referred by the learned senior counsels for the parties, the fact which emerges is that for deciding the issue about nature of the document as to whether such document is document of mortgage by conditional sale or whether it is a document of out and out sale, recital of document and intention of parties are of paramount importance. Outcome on such consideration would entirely depend upon facts of the each casse. For this reason, for arriving at a finding, the authorities cited by the learned senior counsels for the parties would help the Court to a limited extent only.

33. Coming to the facts of the case, at the outset, I want to make it clear that the insistence of learned senior counsel for the appellants on the learned first appellate court not considering the oral evidence of the parties is not a much significance, as for determination of the dispute between the parties, the same relates to interpretation of Exhibit-C and oral evidence has nothing to do with the said interpretation. Similarly, this Court would not like to go into other findings recorded on facts about other issues by the two subordinate

courts. For this reason, the satisfaction of the subordinates courts on this point could not be reopened in the second appeal.

34. Before proceeding further, it would be beneficial to gather the intention of the parties. It is to be seen whether the document would come under the provision of Section 58(c) of the T P Act. Now, the intention of the parties are to be gathered from the recital of the doucment in question. If the words are clear, then the words would prevail and there would be no need to look into the surrounding circumstances to gather the intention of the parties. When the recital of a document is ambiguous, then only it is permissible to look into the surrounding circumstances to determine what was intended by the parties.

35. Further, an absolute conveyance conspicuously not showing relationship of debtor and creditor, would not become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. Thus, the meaning of the document is of foremost importance. Similarly, a purportedly mortgage deed cannot become a document of sale by reference to extraneous and irrelevant considerations. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage but converse is not

always true as held in the case of ***Chunchun Jha (supra).*** If the condition of repurchase is embodied in the document, that effects or purports to effect the sale, then it is a matter for construction which was meant.

36. The position of law has been further made clear in the Mulla's commentary on the Transfer of Property Act, 1882, wherein distinguishing features between "mortgage by conditional sale" and "sale with an option to repurchase" have been enumerated as under:

> *"(i) In a mortgage with conditional sale, the relation of a debtor and a creditor subsists while in a sale with an option of re-purchase, there is no such relationship and the parties stand on an equal footing.*
>
> *(ii) A mortgage by conditional sale is effected by a single document, while a sale with an option of repurchase is generally effected with the help of two independent documents.*
>
> *(iii) In a mortgage with conditional sale the debt subsists as it is a borrowing arrangement, while in a sale with an option of repurchase, there is no debt but a consideration for sale*
>
> *(iv) In a mortgage with conditional sale, the amount of consideration is far below the value of the property in the market but in a sale with an option of repurchase the amount of consideration is generally equal to or very near to the value of the property.*
>
> *(v) In a mortgage with conditional sale,*

since this is a mortgage transaction, the right of redemption subsists in favour of the mortgagor despite the expiry of the time stipulated in the contract for its payment.

37. Since Exhibit-C is the pivotal document, the transliteration of the same is reproduced for the purpose of further reference:

"वजिमे मन मोकिरा देन महजनान हो गया है जिसका अदायकारी जरूरी है और सरेदस्त भी कुछ रूपया की जरूरत है वास्ते करने अन्जाम यादी अपने पेसर खुद जो बेला करने इन्तकाल जायदाद खाना नं० ५ के अन्तजाम होना दूसवार है चुनान्चे मन मोकीरान ने मोकीर अलह से इस्तदोआ किया के जायदाद खाना नं० ५ बय करा लिजीये लेकिन मन मोकीरा को एक मौका दीजीये के अगर पांच बरसा के अंदर रूपया अदा कर सकें तो आप वापस ले लिजीयेगा जिसको मोकीर अलह ने कबूल वो मन्जूर किया ।बनावीर मन मोकीरा बखुशी यो रजामंदी अपने जायदाद खाना नं०-५ जिसपर दखल कब्जा मन मोकीरा का बेला सरोकार दूसरे के रहता चला आता है उसको बदस्त मोकिर अलह बयमैयादी कर लिया बय एवज उसके मो० ७३३७ रूपया के आधा उसका मो० ३६६८. ५० रूपया होता है हाथ माल के मोकीर अलह मजकुर से कुल जरसमन हसब तफसील मोफसिले जैल के वसुल पा लिया अब खर मोहरा बाकी नहीं है वो न रहा। बनावीर एकशर मातबीर करते है वो लिख देते हैं कि मोकिर अलह बहैसियत बयदार उपर सयमोवइया ब अदाय देने मोजरइया काबिज दाखिल हो कर व रह कर महासील आमदनी से मतसरिफ हुआ करे वो टैक्स म्युन्सिपालीटी अदाय किया करें यो नाम अपना म्युन्सिपालीटी या जहां जरूरत हो दर्ज करा लेवें वो अब

बहैसियत मालीक मोकतील दखल कब्जा अपना जारी रखें। मनमोकिर वो अब अंदर सयमोवइया कोई हकियत बाकी नहीं है वो न रहा, जो कुछ हक हकुक मनमोकिर को हासिल था व बजरिये तहरीर वोसिका हाजा बहक मोकिर अलह मुन्तकिल हो गया। आइंदे मनमोकिरा वो वारिसान मनमोकिरान किसी किसीम का कोई दावी देय नहीं करेंगे अगर करें तो रद वो बातील समझा जाएगा वो होगा अगर मनमोकिरा अंदर पांच वर्ष अज तारीख इमरोजे लगायत तारीख २४. ०३. १९५८ ई० के कुल जरसमन वैयमियादी निज्द मोकिर अलैह नकद एक दस्त एवं एक मुश्त अदाय बेबाक कर देंगे तो मोकिर अलह बय वापस कर देंगे वरना हकीयत मोकिर अलह का बहरहाल हमेशा के लिए मोकसिल समझा जायेगा। बनावीर चन्द कलमा बतरिक वोसीका बयमैयादी लिख दिया के वक्त पर काम आवे ।"

The translation of document (Exhibit-C) reads as under;

"That, the Executant has a lot of debt, the payment of which is necessary. And he is in dire need of money to fulfill his own personal requirement. Regarding the arrangement of money the Executant asked the same to his father upon which he replied that there was no way by which the required amount could be arranged, only to sale the property mentioned in 'khana no.-5'. Therefore, the Executant requested the vendee/purchaser to purchase the said property mentioned in 'Khana no.-5'. At the same time, the Executant prayed "let one chance be given to him that if he returns the amount taken within a time period of 5 years then it would be acceptable by the vendee/purchaser, upon which the vendee/purchaser agreed and admitted the terms and conditions.

That, with mutual understanding, the Executant having full conscious mind and with full happiness and consent entered into 'BAI MIYADI' (Lease Agreement for a period of 5 years as said above) with the vendee/purchaser and has written the 'BAI MIYADI' Deed for the property mentioned in

> 'Khana n0.-5' over which he has been coming in full possession peacefully. In lieu of the said property the Executant has received an amount of rupees 7337/- (The half of which is Rs. 3668.50/-) from the vendee/purchaser. Now, no any single penny is left with the vendee/purchaser nor would be. The Executant agrees and has written that the vendee/purchaser in the said capacity may utilise the yeilding crops and the earning of the said landed property as per his wish by taking the possession over the property said. And pay the Municipality Taxes year after year. The vendee/purchaser may get his name registered in the Municipality office and wherever is required and he should continue to have possession of the said land. Now, the Executant has no more right over the said property mentioned in 'Khana no.-5' and nor would be. The rights in respect of this property which the Executant had, are transferred to the vendee/purchaser through this 'BAI MIYADI' Deed. From today, either the Executant or his heirs would not create any claim over the Deed property. If they do so, it would be illegal and invalid. If the Executant returns the entire amount taken in lumpsum to the vendee/purchaser within the stipulated time period of 05 years with effects from today till 24-03-1958 the the vendee/purchaser would accept it and return the property taken. If the Executant does not return the money given, then the property given will be considered that of vendee/purchaser.
>
> That, with mutual consent this 'BAI MIYADI' Deed is written, so that it may be of use in future."

38. Now, recital of the aforesaid document Exhibit-C make certain points very clear:

(i) Bibi Akikul Nisa offered the property of Thana No. 5 to Dwarika Prasad for sale with a rider that if she is able to return the money, property would be reconveyed.

(ii) In this manner, the suit property was transferred to

Dwarika Prasad for a consideraiton amount of Rs. 7337/- and the purchaser came into possession of the same and the right, title and possession of Bibi Akikul Nisa with regard to property conveyed, ceased to exist.

(iii) Bibi Akikul Nisa also made it clear that Dwarika Prasad could enter his name in the records of municipality and would start paying the municipal taxes and whatever right was available to Bibi Akikul Nisa would be enjoyed by Dwarika Prasad.

(iv) It has further been declared that if any claim was made by the heirs of the executant Akikul Nisa, it would be void. If Akikul Nisa would retrun the consideraiton amount in one go till 24.03.1958, the property would be reconveyed, otherwise, the title of Dwarika Prasad would continue for all time to come.

39. The aforesaid points make the nature of document crystal clear that it is a document of sale with right to repurchase and not a document of mortgage with conditional sale. Notwithstanding the cotnention that it is a *zerpeshgi* deed, recital makes it abundantly clear that Bibi Akikul Nisa abandoned her right, title and interest over the suit property in favour of original defendant. Allowing the original defendant

who get his name entered into the records of right (municipal record), establishes that the Bibi Akikul Nisa abdicated her rights in favour of the original defendant because a mortgagor would not allow the mortgagee to mutate his name in place of mortgagor. Thus, the original defendant got his right, title and possession over the property mentioned in the deed as the purchaser. There is one more thing which also points to the fact that the document was a document of sale and not a mortgage. Prior to executing the said document, Bibi Akikul Nisa executed a mortgage deed on 03.01.1950 for consideration amount of Rs. 3,200/-, for the same property. Just after three years more than double of the amount was paid to Bibi Akikul Nisa, though the amount of mortgage, i.e., 3,200/- was adjusted. It is also an important factor to be taken into consideration, if the deed was a zerpeshgi deed as claimed, the property which was mortgaged for an amount of Rs. 3,200/- would not again be mortgaged for an amount of Rs. 7337/- just after three years. It was an adequate consideration for sale and submission of learned senior counsel for the plaintiffs/appellants about inadequacy of consideration is not justified. From the recital it is also clear that there is no relationship of debtor and borrower. Further, no right of redemption has been kept in the deed, as it has been

mentioned that if Bibi Akikul Nisa fails to return the total consideration amount in one go to the original defendant, she would have no further right over the property transferred.

40. It is true that after coming to effect of Section 58(c) of the T P Act, there is a supposition that sale with an option to repurchase is generally effected by two independent documents but as held in the case of ***Chunchun Jha*** (supra) that mere fact that there is only one document does not necessarily mean that it must be mortgage and cannot be a sale.

41. In the light of aforesaid discussion, the reliance placed by the learned senior counsel for the appellants on the decisions in the cases of ***Patel Ravjibhai Bhulabhai (D) Thr. Lrs.*** (supra)***, Srinivasaiah*** (supra), ***Chunchun Jha*** (supra), ***Vanchalabai Raghunath Ithape*** (supra), ***Madhu Lal Singh*** (supra), ***Ganpati Babji Alamwar (D) by Lrs. Ramlu & Ors.*** (supra) and ***Bhaskar Waman Joshi (deceased) & Ors.*** (supra) are of no help considering that the facts of the present case are quite distinguishable and the same time reliance placed by the learned senior counsel for the respondents on ***Bhoju Mandal*** (supra) and ***Prakash (Dead) By Lr.*** (supra) is most apt.

42. Thus, in view of the discussion as above, there appears no doubt that Exhibit-C is a document of sale with

option to repurchase and the same was not executed as the document of mortgage by conditional sale. Therefore, the substantial question of law formulated is answered accordingly. Moreover, the objection regarding oral evidence has already been disucsed in preceding paragraphs and already negated.

43. In the aforesaid facts and cirucmsntaces, I am of the considered opinion that both, the learned trial court as well as learned first appellate court, recorded a correct finding that Ext-C is a deed of outright sale with right to repurchase and is not a document of mortgage by conditional sale and hence, the judgments and decrees of the learned first appellate court as well as learned trial court are upheld.

44. Accordingly, the present second appeal is dismissed being devoid of any merit.

(Arun Kumar Jha, J)

Ashish/-

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