IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

SECOND APPEAL No. 79 of 2011

GOPAL KRISHNA

Versus

ANANDPALSINGH S/O GYANPALSINGH DECEASED THROUGH LRS DEEPAK SINGH AND OTHERS

Appearance

Shri Ajay Mishra - advocate for the appellant.

Shri Sunil Kumar Jain, learned Senior advocate with Ms.Nandini Sharma, learned counsel for the respondent [R-1] [LR/S].

Heard On:05.03.2025

Delivered On:26.03.2025

Judgment

The appellant has preferred the present appeal under Section 100 of the Code of Civil Procedure, 1908 (for short "CPC") challenging the judgment dated 22.12.2009 passed by the learned Additional District Judge, Sendhwa, District Barwani in Civil Regular Appeal No.19-A/2008 whereby the learned first Appellate

Court has dismissed the appeal and affirmed the judgment and decree dated 26.09.2008 passed in Civil Suit No.5-A/2002 by the learned Civil Judge, Class-II, Khetiya, District Barwani wherein the learned Civil Judge has dismissed the suit filed by the appellant for redemption of Mortgage (girvi mukti) and for possession of the land in question.

2. Succinctly, the facts of the case are that the appellant filed a suit for redemption of mortgage and for possession of the land bearing Survey No.37/1 ad-measuring 1.60 acres, situated at village Pansemal, District-Khargone. As per pleadings, the aforesaid land in question was mortgaged by late one Shivnarayan, the father of the appellant on 17.03.1969 vide a deed named as "Shartiya Frokhtnama" with consideration of Rs.11000/- in favour of one Janki Devi, the mother of the respondents for a period of five years i.e. up to 17.03.1974. After the lapse of the said period the appellant tried to redeem the mortgage, but the respondent did not give any response, hence, the appellant, on 11.03.2022 served a notice on respondent to accept the sum of Rs.11000/- and give the possession of the land in question to the appellant. In reply to the said notice issued by the appellant, the respondent, denying the execution of such document, remonstrated that the suit land had never been mortgaged to his mother Janki Devi and it was sold to her. As such,

the respondent, being son of late Jankidevi, was the sole owner of the suit property.

3. Then, the appellant/plaintiff had filed a Civil Suit bearing Suit No.5-A/2002 for redemption of mortgage and possession of the suit land. the suit was contested on various grounds. In written statements, the respondents have denied all the averments of the appellant and it is contended that no deed of mortgage was executed by Late Shivnarayan, but rather it is a document of sale. Since, appellant is not the sole heir of Late Shivnarayan, he has no *locus standi* to file the aforesaid civil suit without impleading the other legal heirs of Late Shivnarayan as they are also the necessary parties. The suit is also hopelessly time barred, hence, not maintainable.

4. On the abovementioned pleadings, the learned trial Court has framed the issues and directed both the parties to lead their evidence. After recording and appreciating the evidence of both the parties, the learned trial Court, Civil Judge has dismissed the suit of the appellant vide judgment and decree dated 26.09.2008.

5. Aggrieved by the judgment and decree dated 26.09.2008 passed by learned Civil Judge Class-II, Khetiya, the appellant preferred an appeal bearing Regular Civil Appeal No.19-A/2009 and

the learned First appellate Court also dismissed the appeal of the appellant as stated in para no.1 and affirmed the judgment and decree passed by learned trial Court. Hence, the present appeal before this Court.

6. In this second appeal, the appellant has challenged the findings of learned Courts below on various grounds. Having considered these grounds, the following substantial questions of law *have been framed vide order dated 02.08.2011:*

> *i. Whether the Courts below have committed illegality in treating the document Ex.P/1 as an outright sale deed despite overlooking to the conditions impounded in the document itself:*
>
> *ii. Whether the suit as instituted can be treated as barred by limitation, despite having been instituted within the prescribed period of 30 years?*
>
> *iii. Whether the suit by one of the heirs of the deceased/mortgagor, is competent for the*

purpose of the redemption of mortgage property?

iv. Whether the Courts below are justified in holding the suit to be bared by principle of estoppel under Section 115 of the Indian Evidence Act?

7. At the outset, before analyzing the submissions of both parties, it is worth to mention that during the Course of appeal, the sole respondent expired and notices were issued to Legal Heirs of the sole respondent on the application under Order 22 Rule 4 of CPC, notice was served upon two of the legal heirs of respondent, but no one had appeared on behalf of them. However, matter has been heard *ex-parte* against them by co-ordinate Bench of this Court and vide judgment dated 09.08.2024 this matter has been decided finally in favour of the appellant.

8. Thereafter, an application for modification of the said judgment with regard to the area mentioned in the ex-parte judgment was filed by the appellant and subsequently, the LRs of the respondent have also filed MCC No.3143/2024 and MCC No.3221/2024 for setting aside the ex-parte judgment dated 09.08.2024.

9. After hearing the parties, both the MCCs were allowed and disposed off vide order dated 18.02.2025 and the judgment dated 09.08.2024 was set aside. In the result thereof, the application filed by the appellant for modification in decree with regard to area of suit land was dismissed as withdrawn as rendered infructuous.

10. Learned counsel for the appellant has submitted that both the Courts below have erred in misreading the evidence in its proper perspective which has resulted in arriving at the an erroneous finding on the issues involved in the case. Both the courts below have erred in holding that the Document Ex.P/1 is not a mortgage by conditional sale but affecting an outright sale only. Both the Courts below have erred in invoking the provisions of Article 61(B) of the Limitation Act, 1963 which has no application in the present case as there was no transfer of the property by the mortgages for any valuable consideration. The disputed property was mutated in the name of Respondent only because he was the legal heir of the mortgagee Janki Devi. The Courts below have illogically ignored the provisions of Article 61(a) of the Act which applies to the present case and according to which the mortgage can be redeemed within a period 30 years from the date on which right to redeem or to recover possession accrues. Both the Courts below have erred in holding that

the suit suffers from non-joinder of necessary parties as the appellant has five more brothers. The Courts below erred in not considering the fact that the appellant has a substantial interest in the estate of his father, the mortgagor and the appellant was ready to pay the entire amount of mortgage in terms of Ex.P/1. The appellant is elder son of joint Hindu Family, hence, he has all rights to participate the suit on behalf of his family. Both the Courts have further erred in holding that the suit is barred by estoppel under Section 115 of the Evidence Act. Hence, prays for setting aside the impugned judgments and decree passed by learned Courts below.

11. In support of his contention, learned counsel for the appellant has placed heavy reliance over the judgments of Hon'ble Apex Court passed in the case of (i) **M.R. Satwaji Rao (dead) through LRs. vs B. Shama Rao (dead) through Lrs and Others (2008) 5 SCC 124 (ii) Singh Ram (dead) through legal Representatives vs. Sheo Ram and Others (2014) 9 SCC 185 and Prabhakaran and Others vs. M. Azhagiri Pillai (dead) by LRs and Others (2006) 4 SCC 484.**

12. Per contra, learned Senior counsel for the respondent has vehemently supported the impugned judgments passed by learned Courts below. It is argued that both the learned Courts below have

rightly considered the document Ex.P/1. It is further submitted by learned counsel for the respondent that the four corners of the disputed land is not in dispute and the disputed land is situated at Survey No.37/1 total area 6.62 hectare and out of which the father of the appellant has sold out 4.95 acre land to one Kalawatibai which is duly mentioned at Survey no.37/3 and hence, only 1.67 acre of land was remaining with the father of the appellant. Further, the said land i.e. 1.60 acre was not mortgaged by Shivnarayan for consideration of Rs.11000/- but the same was sold out to mother of the respondents Jankidevi w/o Gyanpal Singh on 17.03.1969 (Ex.P/1). It is further submitted that the deed dated 17.03.1969 was a sale deed, and hence, learned Courts below have rightly examined and considered this issue. It is also submitted that the father of the appellant has also later on executed a sale deed on 02.05.1974 also in favour of father of the respondents with regard to the remaining land of 0.07 acre also. Learned Senior counsel for the respondent vehemently submitted that the deed vide Ex.P/1 is not a mortgage and the same is absolute sale, hence, the question of limitation has rightly been decided by both the Courts below, therefore, the suit has already been considered by learned Courts below on the point of limitation also. Further, the appellant, being elder son of his father Shivnarayan, is not a proper party before the courts below and

whether the appellant solely can file the suit on behalf of his family, this Court has to consider the question. Hence, the suit filed by the appellant, itself is not maintainable due to non-joinder of the necessary parties since five other sons of the father of appellant are alive.

13. Learned Senior counsel for the respondent has further submitted that the land in question has already been mutated in the name of the respondents and till 1969 to 2002, they have neither challenged the mutation proceedings nor the other proceedings on the said land and only after death of the father of the appellant in the year 1995, they have sent a legal notice to the respondents in 2002. However, Learned Senior counsel for the Respondent has admitted that the respondents could not produce the proceedings of mutation with regard to the said land, because the record could not be achieved since, the same has been demolished. At the end, learned Senior counsel for the respondent has closed his arguments mainly on three grounds i.e. Ex.P/1 is not the mortgage deed but the same was absolute sale, secondly, since, Ex.P/1 is absolute sale, the limitation period for the same shall only be three years and thirdly, the suit has rightly been dismissed by the Courts below since non-joinder of parties is appears to be reasonable for proper adjudication of the suit land, and prays for dismissal of this appeal with cost.

14. In reply of the aforesaid submissions of learned Senior counsel for the respondent, learned counsel for the appellant has mainly submitted that at the similar time, some other transactions of adjacent lands were executed by Shivnarayan in favour of family of respondent and in favour of one Kalawati in the form of absolute sale deeds vide Ex.P/6 and Ex.D/34 respectively. However, only the execution of Ex.P/1 is pertaining to Shartiya Faroktnama. Therefore, this deed should be acknowledged as Shartiya Faroktnama.

15. I have heard the counsel for the parties at length and perused the material available on record including the impugned judgments and decree.

16. Prior to consideration of the substantial questions of law involved in the present appeal, this Court has to go through the relevant part of entire document i.e. Ex.P/1 which is necessary to arrive at the conclusion. The respective portion of Ex.P/1 is worth mentioning here in the same words:

‘‘ जानकी देवी पति ज्ञानपालसिंह जाति राजपुत उम्र ७० वर्ष

धन्दा गृह’- कार्य निवासन खेतिया तहसील सेंघवा प0नि0 ------
लिखा लेने वाली

शिवनारायण पिता अमराजी जाति माली उम्र ४५ वर्ष-

धन्दा कृषि निवासी पानसेमल तहसील सेंधवा जिला प0नि0 ------ लिख देने वाला

ग्राम पानसेमल जंगल की काश्त खाता नंबर ५३ जुमला खसरा नंबर २ रकबा ६.६७ निधारण रूपये १६.५७ नये पसे कि भूमि में से खसरा नंबर ३७/१ रकबा ६.६२ निर्धारण रूपये १६.६२ पैसे कि भूमि पैकी रकवा १.६० निर्धारण रूपये ४.३५ पैसे कि भूमि- उतर साईड की, पूर्व- पश्चिम पानी की नाली का बान्ध है उसके उत्तर तरफ की , कुवें के आधे स्वत्व आपको वर्ष ५: पांच : के करार से रूपये ११/००० |- ग्यारह हजार रूपयों में शर्तिया- फरोत की हैं

ग्राम पानसेमल प0 ह0 नं0 ३२ में कास्त खाता नंबर ५३ खसरा नंबर:-

खसरा नंबर	रकबा	निर्धारण	रूपये-पैसे कि भूमि
३६/२	०-०७		०-०५
३७/१	६.६२		१६-५२
जु0ख0 नं0 २	६.६९		९६-५७

राजस्व – पत्रों में मेरे नाम पर अंकित होकर के उक्त कास्त में से खसरा नंबर ३७/१ रकबा ६.६२ नि0 रूपये १६-५२ नये पैसे कि भूमि पैकी रकबा १-६० निर्धारण रूपये ४-३५ पैसे कि भूमि उतर साइर्ड की, जो सदर खसरा नंबर – ३७।१ में पानी जाने की लांगी पर्व- से पश्चिम को जाति है, उसके उपर-तरफ की भूमि पश्चिम ओर से रकबा १-६० की भूमि मैंने आपकी वर्ष ५:पांच: के करार से शर्तिया – फरोक्त - कीमत ११००/- अक्षरी ग्यारह हजार रूपयों में की है, सदर शर्तिया-फरोक्त सुदा कास्त के पूर्व- साईड मेरी बचत जमीन रहेगी तथा सदर शर्तिया-फरोख्त -सुदा-कासत का कबजा भी मैंने आपको मौके पर चलकर के दे दिया है, जो सदर कास्त के भू0 स्वामी हक्क जो जो मुझे प्राप्त थे वो वो समस्त हक्क अब- आपको प्राप्त रहेंगे।

सदर फरोख्त–सुदा-कास्त के पर्व-साईड में मेरी बचत भूमि होकर के मेरी-बचत भूमि के पर्व- में नदी के किनारे से लगा हुआ

एक कच्चा कुवा है, उसका आधा स्वत्व भी मैंने आपको शर्तिया-फरोख्त किया हैं व आधा स्वत्व कलावती बाई राधेश्याम चौहान को मैंने- सदर खसरा नंबर पैकी रकबा ४-९५ बिक्री किया है उसके समेत फरोख्त कर दिया है व कुवें के पानी के लांगी पर पूर्व से पश्चिम की ओर जाती हैं, सो सदर लांगी के उत्तर तरफ का आधा स्वत्व भी मैंने आपको शर्तिया-फरोख्त किया है तथा कुवें के नजदीक से कलावतीबाई पति राधेश्याम चौहान का आने जाने का रास्ता रहेगा।

सदर शर्तिया-फरोक्त नामे की यह शर्त निश्चित की गई है कि मैं शर्तिया-फरोख्त- नामा लिख देने वाला आप शर्तिया-फरोख्त–नामा लिखा लेने वालों को आज दिनांक:- १७-३-१९६९ से दिनांक :- १७-३-१९७४ यानी वर्ष ५:पांच: के भीतर सदर शर्तिया-फरोख्त-नामे के चुकते रूपये ११/०००। ग्यारह हजार आप लिखा लेने वाले को भुगतान कर दुंगा तो मैं सदर शर्तिया-फरोख्त की कास्त का कबजा मैं आपसे वापस मांगने का- अधिकारी रहुंगा तथा आपका यह कर्तव्य होगा की सदर कास्त आप मेरी ओर परिवर्तित करें।

सदर कास्त परिवर्तित करने में जो भी खर्च होगा उसका जवबदार मैं रहुंगा- सदर कास्त के- निस्बत मेरा या मेरे किसी भी वारीसदारों का किसी भी प्रकार का दावा-झगड़ा वगैरह नहीं है अगर कोई भी नियत बदलकर किसी भी पकार का मालीकाना अधिकार या दावा- झगड़ा वगैरह करेंगे तो वें इस लेख द्वारा नाजायज व झूठे माने जावेंगे।

सदर कासत पर आज से आपने अपना कबूजा करके सदर कास्त का उपभोग उत्पन्न लेते रहना उसमें मेरा या मेरे किसी भी वारीसदारों का झगड़ा या हकक बगरह नहीं रहेंगे।

सदर कास्त का नामन्तरण आपने निश्चित मियाद् समाप्त होने के पश्चात् याने दिनांक :- १७-३-१९७४ के पश्चात भू0 राजस्व- संताि सन् १९५९ की धारा ११० के- करा लेना उसमें मेरा या मेरे किसी भी वारीसदारो का दावा-झगड़ा रहेगा नहीं अगर- कोई भी नियतबदलाकर किसी भी प्रकार की आपधि करेंगे तो वे इस लेख द्वारा नाजायज व-झूठे माने जावेंगे।

लिहाजा यह शर्तिया- फरोख्त– नामा मैंने मेरी राजी खुशी से बिना नशे पानी के हो शो हवाश में स्व संतोष के साथ लिखा व

पढवाकर सुना व मेरा सही एव खुशी से व एवं- ईच्छा से की सो सही व मर्जुर है दिनांक :- १७-३-१९६९'' .

17. From bare perusal of the aforesaid documents Ex.P/1, it appears that both the Courts below have erred in holding that the aforesaid document Ex.P/1 in question is an absolute sale deed. Actually, it is peculiar in the nature. It is pertinent to note that earlier Shivnarayan has sold his land bearing Survey No.37/1 area 6.62 acre Paike 4.95 Acre to one Kalawati vide sale deed dated 25.02.1969 (Ex.D/34) only in Rs.5000/- i.e. only 20 days prior to the Execution of deed of Ex.P/1 dated 17.03.1969. Further, Kalawati has sold it out to Malkhan Singh on vide sale deed dated 11.06.1971 for consideration of Rs.10000/- (Ex.D/35). Whereas, as per the record, Jankidevi has paid Rs.11000/- for the said land *qua* Ex.P/1 which is only 1.60 acre i.e. in the year 1969 which is 1/3 of the earlier sold land measuring 4.95 acre. The question arises as to why the respondent has purchased the land in question having only area of 1.60 acre for consideration of Rs.11000/- in the year 1969. It is very surprising that on the one hand, the land ad-measuring 4.95 acre was purchased for consideration of only Rs.10000/- in the year 1971 and on the other hand, the respondent has paid Rs.11000/- for the land ad-measuring 1.60 acre only. It is also surprising that prior to the execution of Ex.P/1, the respondent Jankidevi has also purchased a

land ad-measuring 0.38 decimal for consideration of Rs.4000/- from Shivnarayan vide sale deed dated 29.12.1965 (Ex.P/6) and this fact is admitted by the respondent in the cross-examination. The consideration of the land in question is nether justified in accordance with the consideration of land executed vide Ex.P/6 nor vide Ex.D/34 and Ex.D/35.

18. In view of that and on bare perusal of Ex.P/6, Ex.D/34 and Ex.D/35 alongwith Ex.P/1, it is clear that the contents of the Ex.P/1 which is in dispute, are totally different to the contents of Ex.P/6, D/34 and Ex.D/35, which are absolute sale and looking to the contents of Ex.P/1, the same is not a sale but rather it is a shartya fharoktnama in the form of mortgage of conditional sale. However, the learned both the Courts below have held the Ex.P/1 as absolute sale without considering the aforesaid factual matrix of the case.

19. Further, looking to the difference of the contents of Ex.P/1 in comparison to Ex.P/6, Ex.D/34 and Ex.D/35, Ex.P/1 is not an absolute sale in any manner and the same is Mortgage by conditional sale" as defined in Clause (C) of Section 58 of the Transfer of Property Act, which provides as under:

> **(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 mortagee 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."

20. Having gone through the impugned judgments and decree passed by learned Courts below, it emerges that the learned Courts below have decided and dismissed the suit of appellant/plaintiff regarding maintainability of the suit on the ground of limitation by holding that since mortgage was effected on 17.03.1969 and the plaintiff was free to repay the amount in pursuance to the deed Ex.P/1 on any date prior to 17.03.1974 i.e. before the expiry of

period of five years as contained in Ex.P/1 i.e. **सदर शर्तिया-फरोक्त नामे की यह शर्त निश्चित की गई है कि मैं शर्तिया-फरोख्त- नामा लिख देने वाला आप शर्तिया-फरोख्त–नामा लिखा लेने वालों को आज दिनांक:- १७-३-१९६९ से दिनांक :- १७-३-१९७४ यानी वर्ष ५:पांच: के भीतर सदर शर्तिया-फरोख्त-नामे के चुकते रूपये ११/०००। ग्यारह हजार आप लिखा लेने वाले को भुगतान कर दुंगा तो मैं सदर शर्तिया-फरोख्त की कास्त का कबजा मैं आपसे वापस मांगने का- अधिकारी रहुंगा तथा आपका यह कर्तव्य होगा की सदर कास्त आप मेरी ओर परिवर्तित करें।** Therefore, the learned Both the Courts below have wrongly adjudicated the question by holding that the deed Ex.P/1 was a sale deed and have erred in calculating the period of limitation as only 03 years instead of 30 years and dismissed the suit.

21. On this aspect, Hon'ble Apex Court in the case of **Smt. Indira Kaur and Ors. vs. Shri Sheo Lal Kapor, AIR 1988 SUPREME COURT 1074** has observed as under:

> "......There is an increasing tendency in recent years to enter into such transactions in order to deprive the debtor of this right of redemption within the prescribed period of limitation. In fact, very often the mortgagee in place of getting a mortgage deed executed in lieu of a loan obtains an agreement to sell in his favour from the mortgagor so as to bring pressure on the mortgagor by seeking to enforce specific performance to enable the mortgagee to obtain possession of the property for an amount smaller than the real value of the property..........."

22. In this regard, the learned counsel for the appellant has relied upon a judgment rendered in **Veersingh vs. Dharamsingh 982 RN 395** wherein it has been held that "in the registered sale deed, Ikrarnama executed that after payment of debt money, land well be returned, it is a mortgage and not a sale." Though the judgment has been passed by learned Tribunal, but the ratio held in the judgment has been acknowledged.

23. The maxim *"once a mortgage always a mortgage"* may be said to be a logical corollary from the doctrine, which is the very substratum of the law of mortgages. As such, the time is not the essence of the contract in such transactions, In this regard the law endorsed by Full Bench of Hon'ble Apex Court in the case of S**eth Ganga Dhar vs. Shankar Lal [AIR 1998 SC 770]**, is worth to be reproduced here:

> The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley M. R. in Santley v. Wilde (1) in these words:
>
> > " The principle is this: a mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or

> discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that "once a mortgage always a mortgage ".

24. In so far as the oral evidence with regard to execution of Ex.P/1 is concerned, actually it will be excluded by the operation of law predicated under Section 95 of Bhartiya Sakshya Adhiniyam, 2023 (Section 92 of Indian Evidence Act, 1872) which is as under:-

> **95. ...**
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 94, **no evidence of any oral agreement or statement shall be admitted**, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

25. However, the aforesaid law is applied subject to its proviso, but neither the respondent has raised any ground with regard to those proviso nor raised any contention in this regard. Hence, the word (Shartiya Faroktnama) used in the said deed Ex.P/1

will govern the nature of said deed and it excludes any oral evidence in this regard. Actually, the aforesaid provision of law forbids proving of the contents of writing otherwise then by writing itself and merely lays down the "best evidence rule".

26. In this regard, the law laid down by Hon'ble Apex Court in the case of **Singh Ram (dead) through legal representative Vs. Sheo Ram and others reported in (2014) 9 SCC 185** is also poignant to point out here:-

> "The right of redemption, therefore, cannot be taken away. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for 'once a mortgage always a mortgage' and therefore always redeemable. The same result also follows from Section 60 of the Transfer of Property Act..."

27. In view of the aforesaid law and the factual matrix of the case, this Court is of the considered opinion that the mortgagee purchased the mortgage property in pursuance to Shartiya Faroktnam Ex.P/1 and therefore, the relations of mortgagor and mortgagee

continues to subsist even thereafter. In view of the same, the right to redeem the mortgage is not extinguished and in the eyes of law, the purchase of the mortgaged property must be deemed to have been in favour of the mortgagor/appellant.

28. Since, the aforesaid deed i.e. Ex.P/1 which is particularly, in any manner, not an absolute sale deed and varies from the contents of actual and absolute sale deed, the learned Courts below have wrongly held the same is absolute sale whereas Ex.P/1 which is clearly a mortgage and falls within the definition of mortgage by conditional sale as prescribed under Clause (C) of Section 58 of the Transfer of Property Act. Hence, the Answer of Substantial Question No.I is "Yes". The learned trial Court has committed an error of law in holding that Ex.P/, is outright sale.

29. In view of the factum that since, the learned Courts below have erred in holding the Ex.P/1 as outright sale whereas the same is not an outright sale, but rather mortgage by conditional sale, the Limitation period for redemption shall be 30 years which is a settled and prescribed law and is not in dispute. Since, it is not in dispute that the suit is filed in the year 2002 which is within 30 years from the date of 17.03.1974, the suit is filed within limitation. The period for limitation as prescribed under Section 61(a) of the Limitation

Act, 1963 reads as under:

61. By a mortgagor-

(a) to redeem or to recover possession of immovable property mortgaged: <u>Thirty years.</u>

30. The Hon'ble Apex Court in the case of **Prabhakaran and Others vs. M. Azhagiri Pillai (dead) by Lrs and others Reported in (2006) 4 SCC 484** has held that where the mortgagee makes a direct admission that he is liable to deliver back possession to the mortgagor, then limitation period is prescribed for 30 years because the right of redemption of mortgage is one as provided under Article 60 of the Transfer of Property Act. The Provisions contained in Section 58 of the Transfer of Property Act, 1882 entitles the mortgagor to redeem the property at any time within the period of Limitation for the principal money, has become due. Article 61 of the Limitation Act, 1963 provides the starting point and limitation for using in "right to redeem accrued to the mortgagor."

31. Article 61(c) of the Limitation Act provides that the period of limitation for a suit by a mortgagor to redeem or recover the possession of the immovable property is 30 years. The period of limitation begins to run when right to redeem or to recover of

possession accrues.

32. In view of the aforesaid discussions, right to redeem accrued to the plaintiff only expiry of five years i.e. 17.03.1974and the suit having been instituted in the year 2002 is absolutely within the limitation period as prescribed by law.

33. In view of the aforesaid settled prescribed law, the second substantial Question of Law that whether the suit as instituted can be treated as barred by limitation, despite having been instituted within the prescribed period of 30 years, the answer is **"negative"** and that is in favour of appellant. The answer of this question is having togetherness with answer of question no.1, since, the answer of first substantial question is positive, the answer of second substantial question of law is automatically changed as above, in view of prescribed law of Limitation.

34. Learned counsel for the appellant/plaintiff contended that the Courts below erred in holding that the suit suffers from non-joinder of necessary party as the appellant has five more brothers and having not impleaded as party in the matter and the appellant alone has no *locus-standi* to sue the suit without impleading all the legal heirs of his father Late Shivnarayan. In the instant case, it should be remembered that the appellant/plaintiff is the Karta of Hindu and

Undivided family and as per the settled law in the case of **Nanhibai @ Tulsibai vs. Badriprasad [1959 MPLJ 1018],** the appellant/plaintiff being karta of Hindu and Undivided Family is alone competent to sue on behalf of other heirs of the mortgagor, hence, the suit is held maintainable without impleading other brothers of the appellants. It is also pertinent to mention here that no brother of the appellant has ever raised objection in this regard either before the Courts below or before this Court with regard to authority of appellant to file the suit. Hence, the third substantial question is also answered "positive" in favour of appellant.

35. On the point of 4th substantial question of law with regard to section 115 of Indian Evidence Act, this Court is of considered opinion that when the said deed Ex.P/1 has been adjudicated as mortgage by conditional sale and it has been already adjudged that suit for redemption has been filed within limitation, then no question arises regarding estopple. As such, the 4th substantial question of law is answered in "Negative" in favour of appellant.

36. At the cost of repetition, it is worth mentioning that this Court has noticed that herein before, nature of the deed Ex.-P/1 described that the document is not ambiguous as it is clearly mentioned as Shartiya Farokht Nama. The transaction however,

categorically stated that the plaintiff is entitled to divert the use of agriculture at the expenses of seller. If the intention of the parties was to transfer the suit property absolutely, no such stipulation was required to be made at all. In a case of absolute transfer, the vendee has absolute right to deal his property in any manner, he likes. It is clearly stipulated in the deed that if the executant repays the entire consideration by 17/03/1974, the purchaser would reconvey the property and furthermore deliver the possession thereof. The sale was to become absolute only when transferee fails to pay the said amount within the stipulated period of limitation i.e. 30 years. The Courts below have not taken into consideration all the aforesaid conduct of both the parties in treating transaction to be one of the mortgage and not of sale, therefore, this Court is of the considered opinion that the parties intended to enter into transaction of mortgage and not of sale.

37. In the case of **Patel Ravjibhai Bhulabhai (D) and Ors.vs. Rahemanbhai M Shaikh (D) and Ors [2016 LawSuit (SC) 433]**, the facts were somewhat similar to the case at hand. In this case, Hon'ble Supreme Court endorsing its earlier judgments ordained as under:-

[11]. In P.L. Bapuswami vs. N. Pattay Gounder[2], it is held that:

> “The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document viewed, in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances, be given its true legal effect”.

[12]. In Vishwanath Dadoba Karale vs. Parisa Shantappa Upadhya[3], the facts of the case were somewhat similar to the present case, and as is evident from paragraph 2 in said case, the Court held the deed was a mortgage by conditional sale, and upheld the decree of redemption for mortgage.

[13]. In C.Cheriathan vs. P. Narayanan Embranthiri [4], the principle relating to interpreting of 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:

> “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".

[14]In the case at hand the document in question (Exh. 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." The above condition in Exh.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 existed, as such, we are of the view that the High Court has rightly held that the deed in question Exh.23 read with Exh. 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."

(Emphasis supplied)

38. Applying the aforesaid principle laid down as above and from comparison of other sale deed Ex.-D/34, Ex.D/36 and Ex.-D/8 with Ex.-P/1 it is clear that document / instrument Ex.-P/1 constitutes mortgage by conditional sale as the condition of repayment has been contained in the same document by which the property was sold out, therefore, the transaction between both the parties should be treated to be a mortgage by conditional sale.

39. Having regard to the circumstances of the case, it is held that document Shartiya Farokht Nama Ex.-P/1 is definitely a mortgage deed; it cannot be treated as absolute sale deed. The appellant had demanded for redemption and he was ready to pay the said amount of Rs.11,000/- to the respondent and also sent a notice Ex.P/3 for the same purpose, but the respondent/defendant did not ready to comply their part in the deed Ex.-D/1.

40. In view of the aforesaid, all the substantial questions of law framed by this Court has been decided in favour of the appellant. Impugned judgment and decree passed by both the Courts below are erroneous in the eyes of law and facts, therefore, impugned judgment and decree passed by both the Courts below cannot be sustained and is liable to be set aside. The appellant is entitled to a decree of redemption of suit properties.

41. Accordingly, this Second Appeal is allowed and disposed off. Impugned judgment and decree dated 22.12.2009 passed by the learned Additional District Judge, Sendhwa, District Barwani in Civil Regular Appeal No.19-A/2008 as well as the judgment and decree dated 26.09.2008 passed in Civil Suit No.5-A/2002 by the learned Civil Judge, Class-II, Khetiya, District Barwani are hereby set aside. The suit filed by the appellant/plaintiff for redemption of mortgage and possession of the suit land is decreed accordingly as under:-

(a) With regard to the suit land bearing Survey No.37/1 ad-measuirng 1.60 acre situated at village Pansemal, District Khargone (M.P.), legal representatives of respondent / defendant shall execute a deed of redemption or re-conveyance as required under law in favour of the appellant/plaintiff after receipt of the amounts as agreed by them through Ex.P-1 i.e. Rs.11,000/- within four months from today.

(b) If the appellant/plaintiff deposited the same within three months from this date with notice to the mortgagee, all the legal

representatives of defendant jointly and severally vacate the suit premises and shall hand over vacant possession of the suit property to the plaintiff/appellant within four months from the date of this judgment. It is also clarified that if there is any inconvenience in depositing the amount, the appellant is at liberty to deposit the amount in the trial Court concerned immediately by intimating the respondents.

(c) If the appellant fails to deposit the amount within three months as directed aforesaid, the respondent will not be bound to comply with the aforesaid decree.

(d) Parties would suffer their respective cost in the circumstances of the case.

C c as per rules.

(PREM NARAYAN SINGH)
JUDGE

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