

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No. 374 of 1993

* Tukaram Ranganath Undare
Since deceased, through his
legal representatives:

1-A) Mandakini Tukaram Undare,
Age 53 years,
Occupation : Household.

1-B) Kiran Tukaram Undare,
Age 33 years,
Occupation : Service.

1-C) Shital Santosh Nandare,
Age 32 years,
Occupation: Household.
All R/o Shahar Takali,
Taluka Shevgaon,
District Ahmednagar.

1-D) Ganesh s/o Tukaram Undare,
Age 27 years,
Occupation : Business,
R/o Digvijay Housing Society
Nagar Solapur Road, Darewadi,
Ahmednagar.

.. Appellant.

Versus

* Chhagan Rajaram Gund
Died, through legal
representatives :

1-A) Uttam Chhagan Gund
Since deceased through his
legal representatives:

- 1-A-i) Bhagwat s/o Uttam Gund,
Age 28 years,
Occupation : Agriculture,
R/o. At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.
- 1-A-ii) Muktabai d/o Uttam Gund,
Age 26 years,
Occupation: Household,
R/o. At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.
- 1-A-iii) Kaveri Deoram Sathe,
Age 26 years,
Occupation: Household,
R/o At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.
- 1-A-iv) Hirabai w/o Uttam Gund,
Age 55 years,
Occupation: Agriculture,
R/o At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.
- 1-B) Bhagwan s/o Chhagan Gund,
Age 48 years,
Occupation: Agriculture,
R/o At Pot Sukli-Gundwadi,
Taluka Newasa.
- 1-C) Vishnu Chhagan Gund
Died through legal
representatives:
- 1-C-i) Nandabai w/o Vishnu Gund,
Age 43 years,
Occupation : Household,
R/o At Post Sukli-Gundwadi,
Taluka Newasa, District Ahmednagar.

1-C-ii) Akshay s/o Vishnu Gund,
Age 17 years,
Occupation: Education,
R/o At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.

1-c-iii) Abhijit s/o Vishnu Gund,
Age 15 years,
Occupation: Education,
R/o At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.
Both under guardianship
of respondent No.1-C(i).

1-d) Lilabai Tryambak Kale,
Age 52 years,
Occupation: Agriculture,

1-e) Parvatibai Jagannath Undre,
Age 50 years,
Occupation: Household.

1-f) Kamalbai Laxman Kulat,
Age 48 years,
Occupation : Household,

1-g) Malanbai Chhagan Gund
Age 65 years,
Occupation : Household,
All r/o Post Sukli Gundwadi,
Taluka Newasa.

.. Respondents.

Shri. R.N. Dhorde, Senior Advocate, instructed by Shri.
V.R. Dhorde, Advocate, for appellant.

Shri. H.D. Deshmukh, Advocate, for respondents.

With**Second Appeal No. 375 of 1993**

- * Rangnath Savaleram Undare,
Died through legal representatives:
- 1-A) Tukaram S/o Rangnath Undre,
Age 47 years,
Occupation : Service,
R/o Block No.9, Room No.G-4,
Balikashram Road,
Police Colony, Ahmednagar,
Taluka & District Ahmednagar.
- 1-B) Savleram S/o Rangnath Undre,
Age 45 year,
Occupation: Business,
R/o Shevgaon-Newasa Road,
At Post Shevgaon,
Taluka Shevgaon,
District Ahmednagar.
- 1-C) Ram s/o Rangnath Undre,
Age 43 years,
Occupation L: Agriculture
R/o At Post Shahar Takali,
Taluka Shevgaon,
District Ahmednagar.
- 1-D) Kishnabai W/o Balasaheb Satpute,
Age 41 years, Occupation : Service,
R/o Vinayak Colony,
Newasa Road, Shevgaon,
Taluka Shevgaon,
District Ahmednagar.
- 1-E) Shakuntalabai w/o Ankush Wani,
Age 40 years,
Occupation : Household,
R/o At Post Antre,
Taluka Shevgaon, District Ahmednagar.

1-F) Jaibai Rangnath Undre,
Age 65 years,
Occupation : Nil,
R/o At Post Shahar Takali,
Taluka Shevgaon,
District Ahmednagar.

1-G) Subhadrabai Rangnath Undre,
Age 63 years,
Occupation : Nil,
R/o At Post Shahar Takli,
Taluka Shevgaon,
District Ahmednagar.

.. Appellants.

Versus

* Chhagan Rajaram Gund
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1-A) Uttam Chhagan Gund
Since deceased through his
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Age 26 years,
Occupation: Household,
R/o At Post Sukli-Gundwadi,
Taluka Newasa, District Ahmednagar.

- 1-A-iv) Hirabai w/o Uttam Gund,
Age 55 years,
Occupation: Agriculture,
R/o At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.
- 1-B) Bhagwan s/o Chhagan Gund,
Age 48 years,
Occupation: Agriculture,
R/o At Pot Sukli-Gundwadi,
Taluka Newasa.
- 1-C) Vishnu Chhagan Gund
Died through legal
representatives:
- 1-C-i) Nandabai w/o Vishnu Gund,
Age 43 years,
Occupation : Household,
R/o At Post Sukli-Gundwadi,
Taluka Newasa,
District Ahmednagar.
- 1-C-ii) Akshay s/o Vishnu Gund,
Age 17 years,
Occupation: Education,
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Taluka Newasa,
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- 1-c-iii) Abhijit s/o Vishnu Gund,
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Age 48 years,
Occupation : Household,

1-g) Malanbai Chhagan Gund
Age 65 years,
Occupation : Household,
All r/o Post Sukli Gundwadi,
Taluka Newasa.

.. Respondents.

Shri. R.N. Dhorde, Senior Advocate, instructed by Shri.
V.R. Dhorde, Advocate, for appellant.

Shri. H.D. Deshmukh, Advocate, for respondents.

CORAM: T.V. NALAWADE, J.

DATE : 28th OCTOBER 2015

JUDGMENT :

1) Second Appeal No.374 of 1993 is filed against the judgment and decree of Regular Civil Suit No.200 of 1986 which was pending in the Court of the Civil Judge, Junior Division, Shevgaon, District Ahmednagar and also against the judgment and decree of Regular Civil Appeal No.414 of 1989 which was pending in the District Court, Ahmednagar. Second Appeal No.375 of 1993 is filed against the judgment and decree of Regular Civil Suit

No.201 of 1986 which was pending in the aforesaid trial Court and also against the judgment and decree of Regular Civil Appeal No.413 of 1989 which was pending in the District Court Ahmednagar. Both the suits were filed by present respondent for redemption of mortgage. They were in respect of two portion of land Gat No.257/1 situated at village Shahar Takali, Tahsil Shevgaon, District Ahmednagar. They were filed by the same plaintiff against father (Rangnath) and son (Tukaram Undre). The Trial Court had given decree of redemption of mortgage and so aforesaid two first appeals were filed by original defendants. In the first appeals cross objections were filed by the original plaintiff but the relief claimed was limited and correction was sought of the operative part of the order of the judgment of the trial Court to make the decree properly enforceable. That correction is allowed by the first appellate Court. Both the sides are heard.

2) It is the case of the plaintiff that Rangnath and Tukaram had given loan of Rs.10,000/- each to him on 5-9-1974 and for security of this amount he had executed two mortgage documents which were mortgage by conditional

sale in favour of these two persons. It is contended that about one month prior to the date of the suit, the plaintiff had approached these defendants and had requested them to redeem the property and hand over the possession by accepting the amount but they refused to do so. It is contended that as the transactions were mortgage transactions, plaintiff is entitled to get back both the portions.

3) Both the defendants contested the two suits. They contended that the transactions were out and out sale and they were not mortgage transactions. They contended that right was given to the plaintiff to repurchase these portions but time of three years was fixed for repurchasing these portions and as within the time, the plaintiff did not repay the money and did not repurchase, both the suits are barred by limitation. They had also contended that in the past a suit was filed by them for relief of injunction and decree of injunction was given against the plaintiff and that decision operates as *res judicata* to the preset suit. The defendants took another defence that they have made improvement in the

portions of the lands by spending amount of more than Rs.60,000 and that was done after the expiry of period of 3 years. However, no counter claim was made in that regard.

4) On the basis of the aforesaid pleadings issues were framed in the trial Court. Both the sides gave evidence. The original documents are produced on record. The notice given by the defendants to the plaintiff was also produced and the evidence in that regard was given. Both the Courts below have held that transactions were mortgage by conditional sale and as it was mortgage transaction suits were within limitation. As no counter claim was made, there was no question of considering the giving of relief in respect of so called improvements. Further no specific evidence was given in that regard. The defence of *res judicata* was not accepted as the previous suit was for relief of injunction only and interpretation of document was not in question.

5) When the present appeals were admitted by this Court (other Hon'ble Judge) following substantial question of law was formulated :-

"Whether or not in the absence of terms of foreclosure the document dated 5th September 1974 could be considered as a mortgage and whether or not the interpretation of the document as made by the Court below is correct ?

6) There is oral evidence on record but in view of settled position of law, the documents in such a case play important role. Original document is at Exhibit 45 in Regular Civil Suit No.200/1986 and it is at Exhibit 40 in other suit. Both the documents were executed on the same day and the contents are almost the same. The title of both the documents "conditional sale" (शर्तीचे खरेदीखत). At the end of the document following condition was incorporated :

" सदरहूशर्त खरेदीखतांतील रक्कम मी तुम्हांस मी आजपासून तीन वर्षांचे आत कोणत्यासालचे हंगामशीर परत करून सदरहू मिळकत सोडवून घेण्याची विशिष्ट अट आहे."

The aforesaid condition is in accordance with the provision of Section 58(c) of the Transfer of Property Act. On this point learned Senior Counsel for the appellant placed reliance on the case reported as **(2013) 7 SCC 173 (Vanchalabai Raghunath Ithape v. Shankarrao Baburao Bhilare)**. The Apex Court has made following observations

:- (i) For construing the document intention of the parties needs to be considered; (ii) The intention needs to be construed and gathered from terms of the document itself, (iii) In sale debtor-creditor relationship does not exist between the parties but in mortgage such relationship exists; (iv) due to incorporation of condition of repurchase presumption will be available in favour of the executor - owner that it was a mortgage transaction, but the transaction cannot always be presumed to be one of mortgage by conditional sale. If there was agreement that transaction would be the mortgage, normally the bond writer would style the document as "conditional sale deed". But that is not conclusive of the matter. In view of the distinction between the mortgage by conditional sale with option to repurchase one should be guided by the terms of the document alone without much help from the case law. There cannot be any dispute over the proposition made by the Hon'ble Apex Court in the case cited supra.

7) The relevant contents of the document are already mentioned and the document shows that there was the condition of repurchase in the document itself and

the specific right was given to get back the land by using word "redemption" (सोडवून घेण्याची विशिष्ट अट आहे). Persons of this area use the word (सोडवून घेणे) (redemption) when the transaction is of the nature of mortgage. In substantive evidence given by the defendant Rangnath he has given specific admission as follows : "It is fact that it was agreed to redeem the suit land in favour of the plaintiff after three years on receipt of payment Rs.20,000/- from him."

8) Though the Courts below have not considered the copy of notice given by the defendants to the plaintiff on 12-11-1979, document at Exhibit 44 can be considered as there was admission given in one matter by the plaintiff that he had received the notice. In this notice also it was informed that right to get redeemed the property had come to an end on 12-11-1979.

9) Both the Courts below have considered the aforesaid circumstances (except the circumstance of the notice and reply given by the defendants). The finding given by the Court below on the thing like intention

behind the document etc. can become the question of law. Though the construction of document can be the question of law, it needs to be shown that there is substantial question of law. In the document right of redemption is mentioned. There is admission in that regard in the evidence of defendant. In view of these circumstances, this Court holds that the point which is formulated as substantial question of law needs to be answered against the present appellants.

10) In the result, both the appeals stand dismissed.

Sd/-
(T.V. NALAWADE, J.)

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