

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

APPEAL FROM ORDER NO. 94 OF 2014

Saherao Shankarrao Khapke,
Age : 66 Years, Occu. : Agri.,
R/o. Bherdapur, Tq. : Shrirampur,
Dist. : Ahmednagar

.. Appellant

Versus

Arjun Honaji Bhingare
(Since deceased) Through his L. Rs.,

1. Gitaram Arjun Bhingare,
Age : 64 Years, Occu. : Agri.,
R/o. Bherdapur, Tq. : Shrirampur,
Dist. : Ahmednagar
2. Madan S/o Arujun Bhingare,
Age : 55 Years, Occu. : Agri.,
R/o. : Bherdapur, Tq. : Shrirampur,
Dist. : Ahmednagar
3. Ashok S/o Arujun Bhingare,
Age : 43 Years, Occu. : Agri.,
R/o. : Bherdapur, Tq. : Shrirampur,
Dist. : Ahmednagar
4. Prayaga Arujun Bhingare,
Age : 81 Years, Occu. : Agri.,
R/o. : Bherdapur, Tq. : Shrirampur,
Dist. : Ahmednagar
5. Rekha Ganpat Gayake,
Age : 36 Years, Occu. : Household,
R/o. : Matapur, Tq. : Shrirampur,
Dist. : Ahmednagar
6. Shila Hanuman Gayake,
Age : 37 Years, Occu. : Household,
R/o. Matapur, Tq. : Shrirampur,
Dist. : Ahmednagar

.. Respondents

Shri V. B. Mantri, Advocate for the Appellant.
Shri Kishor S. Bhore, Advocate for Respondent Nos. 1 to 6.

CORAM : S. V. GANGAPURWALA, J.

CLOSED FOR JUDGMENT ON : 13.10.2015
JUDGMENT PRONOUNCED ON : 21.11.2015

JUDGMENT :-

1) The present appeal is filed against the judgment and order dated 03.09.2014 passed by the District Court, thereby allowing the appeal and directing the Trial Court to consider the application for final decree.

2) Deceased Arjun had filed suit bearing Regular Civil Suit No. 160 of 1984 for redemption of mortgage. On 13.12.1985 preliminary decree was passed which reads as under -

“The suit is decreed with costs.

The suit is decreed for redemption of mortgaged property described in para 1 and 3 of plaint, subject to payment of Rs. 5,500/- by the plaintiff within six months from the date of order.

Preliminary decree for redemption be prepared under Order 34 Rule 7 Civil Procedure Code”

3) The legal heirs of deceased Arjun filed final decree application bearing No. 5 of 2008 for execution of re-conveyance

deed and deposit of amount as directed in the preliminary decree. Deceased Arjun died on 21.09.1995. The application for final decree is rejected by the Trial Court on 31.01.2011 on the ground that, same is not filed within the period of limitation as per Art. 137 of the Limitation Act. Aggrieved thereby present respondents filed Regular Civil Appeal No. 22 of 2011. The Appellate Court relying on Order 34 Rule 7 and 8 and the judgment of the learned Single Judge of this Court in a case of, **Yasin Dadu Patil V/s. Kasim Babalal Patil** reported in **A. I. R. 1977 Bombay 341**, allowed the appeal and passed the following order -

“1. The appeal is allowed.

2. The Judgment and order in Final Decree Application No. 5/2008 passed on 31-1-2011 by 2nd Joint Civil Judge, J.D., Shrirampur is hereby set aside.

3. The trial Court is directed to consider the application of applicants for payment of mortgage money and costs of suit and thereafter pass final decree in terms of provisions of clause (a)(b)(c) of Order 34 Rule 8 of C.P.Code.

4. Parties to bear their own costs of appeal.

5. Decree be drawn up accordingly.

6. Record and proceeding of Final Decree Application No. 5/2008 be sent back to the trial Court.”

4) Aggrieved thereby the present appeal filed by original non applicants / defendants.

5) Mr. V. B. Mantri, learned counsel for the appellant strenuously contends that, the Appellate Court failed to consider the nature of the preliminary decree. The suit for redemption of mortgaged property was decreed subject to payment of Rs. 5,500/- by the plaintiff within 6 months from the date of order. The said decree being the conditional decree, the payment of Rs. 5,500/- within 6 months was a condition precedent. As the said amount was not deposited within 6 months the present application was not maintainable and the suit is deemed to be dismissed on lapse of 6 months. The learned counsel further submits that, even as per Art. 137 of the Limitation Act the period of limitation would be 6 months from the date of order or lapse of 6 months from the date of the order decreeing the suit and directing preliminary decree. The application is filed after 22 years of the decree being passed. The same was not within limitation. The learned counsel relies on the judgment of the learned Single Judge of this Court in a case of **Baban Kondiba More (Deceased through L. Rs.) & Others V/s. Kashinath S/o Maruti Kothule and Another reported in 2008 (5) B. C. R. 678.**

6) Mr. Bhore, the learned counsel for the respondents submits that, the Appellate Court has rightly considered the provisions of Rule 7 and 8 of Order 34 of the Code of Civil Procedure. The Appellate Court rightly relied on the judgment of learned Single Judge of this Court in a case of **Yasin Dadu Patil V/s. Kasim Babalal Patil** referred to supra. According to the learned counsel, as per Rule 8 of the Code of Civil Procedure the right of a

mortgagor to redeem the property is not lost until and unless a decree is passed by the Court of foreclosure or a decree declaring the mortgagor as debarred from all right to redeem the mortgaged property. In the present case, the mortgagee had not filed any proceedings for foreclosure. No order is passed by the Court debarring the mortgagor from redeeming the mortgaged property. As such, the application for making preliminary decree final was perfectly maintainable. The learned counsel also relies on the judgment of the Apex Court in a case of, **Singh Ram (Died) Through L. Rs. V/s. Sheo Ram and Others** in **Civil Appeal No.5198 of 2008**, so also, the judgment of the Apex Court in a case of, **Satya Narayan and Others V/s. Om Prakash and Others** reported in **2010 (1) ALL M. R. 457** and the judgment of the Apex Court in a case of **Achaldas Durgaji Oswal (Dead) Through L. Rs. V/s. Ramvilas Gangabisan Heda (Dead) Through L. Rs. and Others** reported in **2003 (1) S. C. R. 340.**

7) I have considered the submissions.

8) The Trial Court had rejected the application for final decree on the ground that it is barred by limitation as per Art. 137 of the Limitation Act, referring to the case of **Baban Kondiba More (Deceased through L. Rs.) & Others V/s. Kashinath S/o Maruti Kothule and Another** referred to supra delivered by the learned Single Judge of this Court. It was also observed that, the ground that, applicants 5 and 6 were minor and therefore they were having no knowledge and could not apply for the same was not proved. No evidence was led. The Appellate Court basically relied on the judgment of the learned Single Judge of this Court in a case of **Yasin Dadu Patil V/s. Kasim Babalal Patil** referred to

supra while allowing the appeal. The appellate Court while dealing with the appeal was required to come within the close quarters of the reasonings given by the Trial Court. The Appellate Court has nowhere dealt with Art. 137 of the Limitation Act. The judgment of the learned Single Judge of this Court in a case of **Yasin Dadu Patil V/s. Kasim Babalal Patil** was with regard to a decree in a usufructuary mortgage. The provisions for usufructuary mortgage and other mortgage would be different. Right of redemption of usufructuary mortgage would be governed by Section 62 of the Transfer of Property Act and that of other mortgages by Section 60.

9. In the present case, the mortgage was in the nature of conditional sale. In a case of **Baban Kondiba More (Deceased through L. Rs.) & Others V/s. Kashinath S/o Maruti Kothule and Another** referred to supra the Court was dealing with a case of mortgage with a conditional sale. The judgment of the Apex Court relied by respondents herein are also predominatory dealing with usufructuary mortgage. The Appellate Court was expected to apply its mind to Art. 137 of the Limitation Act, vis-a-vis, mortgage by conditional sale, so also, provisions of Order 34 Rule 7 and 8 of the Civil Procedure Code. It appears that, the Appellate Court lost sight of Art. 137 of the Limitation Act while deciding the appeal and it was on the basis of Art. 137 of the Limitation Act the Trial Court had rejected the application for final decree. The Appellate Court was required to consider the said aspect and apply his mind. So also, was required to consider the minority of applicants 5 and 6 and its effect on the limitation if the same was required. The fact when they became major was also required to be considered. Considering the fact that, the Appellate Court has not at all dealt with all these aspects I deem it

appropriate to remit the matter back to the Appellate Court to decide Regular Civil Appeal No. 22 of 2011 afresh considering the aforesaid aspects of the matter.

10. In light of the above, the impugned judgment and order is quashed and set aside. The matter is remitted back to the Appellate Court for deciding Regular Civil Appeal No. 22 of 2011 afresh on its own merits and in accordance with law. The parties shall appear before the District Court on 14th December, 2015. Record and proceedings be sent back immediately. Appeal from Order accordingly partly allowed. No costs.

[S. V. GANGAPURWALA, J.]

sam/Oct. 15