

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

SECOND APPEAL NO.699 OF 2014

Santosh Kachrulal Gandhi

Age major, occ. Business

residing at Kapad Bazar, Barshi,
Taluka Barshi, District. Solapur.

.. Appellant.

V/s

1. Shrikant Dattatraya Sutre
age 55 years, occ. Business.
Residing at Mahadwar Chowk
Barshi, District. Solapur
2. Prakash Dattatraya Sutre
Since deceased through legal heirs
2A. Mangal Prakash Sutre
adult, occ. Household.
Residing at Mahadwar Chowk
Barshi, District Solapur
3. Madan Dattatraya Sutre
since deceased through legal heirs
3A. Manisha Madan Sutre
age adult, occ. Household
3B. Devika Madan Sutre
age adult, occ. Not known
3C. Devashri Madan Sutre
age adult, occ. Not known
All residing at Mahadwar Chowk
Barshi, District Solapur,
4. Sou. Vijaya Rajendra Malvadkar
Age 37 years, occ. Business

residing at Sai Siddha Hostel
Deccan Gymkhana, near P.M.T.
Bust Depot, Pune.

.. Respondents.

Mr. P.G. Chavan, for appellant.
Mr. Sachin Pande, for respondents.

Coram : Smt. R.P SondurBaldota, J.
Date : 18th March, 2015

P.C.

1. The appellant who is the original defendant, challenges by this Second Appeal, the concurrent findings of facts of the Courts below. Respondents had filed the Regular Civil Suit No.462 of 2002 interalia for redemption of mortgage and possession of the suit property. The Trial Court by its judgment and order dated 05th April, 2007 decreed the suit and directed the appellant to deliver the possession of the suit property within a period of two months from the date of the decree and mesne profits of Rs.9,000/- for the period from 10th January, 2002 to 11th July, 2002. The Trial Court further directed inquiry into mesne profits for the period subsequent to the decree. Being aggrieved by the order of the Trial Court, appellant had approached the District Court by Regular Civil Appeal No.163 of 2007. His appeal was dismissed by the District Court by its

judgment and order dated 22nd April, 2014. Thereafter, he has approached this Court by way of Second Appeal.

2. Brief statement of facts leading to the present appeal is as follows :

The respondents are the heirs and legal representatives of one Dattatraya, who died on 22nd December, 1996. He was the owner of the suit property, being premises in the building at City Survey No.2877 as specifically described in the plaint. During the month of January, 1982, Dattatraya was in need of money. He, therefore, decided to take loan from the appellant by mortgaging the suit property to him. Accordingly, a document styled as 'phed patra' was executed and registered on 12th January, 1982. The possession of the suit property was handed over to the appellant on the same day and appellant had paid Dattatraya an amount of Rs.21,000/- by cheque. It was agreed between the two that the period of mortgage would be upto 11th January, 2002. During this period of 20 years, the appellant was to retain the possession and make use of the mortgaged property. He had agreed to pay the electricity bill as also the municipal cess. The appellant was allowed to make suitable changes in the property for the requirements of his business. It was

also agreed that at the time of redemption of mortgage, the appellant will not remove the permanent structure, electricity fittings and furnitures and will remove only his movables from the suit property. Appellant agreed not to create any third party right in the suit property during the subsistence of mortgage. The mortgage was self redeeming mortgage i.e. instead of paying rent to the mortgagor, it was to be retained by the mortgagee towards the installments of repayment of mortgage money and interest. On expiry of the mortgage period, the appellant was required to hand over possession of the suit property without any encumbrance to the mortgagor. He was also required to find out suitable alternative accommodation for himself six months before the date of redemption of mortgage. He agreed that he will not refuse to hand over the possession of the suit property on the ground that he had created a goodwill in the suit property. Further, a separate notice for claiming possession from the mortgagee was not necessary.

3. During subsistence of mortgage, appellant made suitable alternations to the suit property for running business of the Medical Store therefrom. When the period of mortgage came to an end on 11th June, 2002, appellant failed to hand over the possession of the

suit property despite demand from the respondents. Therefore, notice dated 17th April, 2002 was served by the respondents upon him. The appellant sent reply through his advocate, contending that he had tried to convince some of the respondents for extension of the period of mortgage, but they had given evasive answers. When the appellant failed to hand over possession of the suit property, the respondents filed suit for redemption of mortgage, possession of the suit property and mesne profits.

4. The appellant in his written statement admitted that self redeeming mortgage was executed by Dattatraya and the suit property had been handed over to him thereunder. For last 20 years, he has been running his business as Chemists from the suit property. He has invested huge amount for the business and therefore, he requested the respondents to extend the mortgage period beyond the date of redemption. Some of the respondents agreed to the proposal and extended the period of mortgage for another period of 20 years by accepting the same amount. It is also the case of the appellant that the respondents had given consent when he had applied to the Competent Authority for renewal of license for the business.

5. The Courts below noted that the only defence raised by

appellant was of continuation of the mortgage deed for another period of 20 years for the same amount i.e. of Rs.21,000/-. It is not case of the appellant that any document was executed for this purpose. Appellant has not stated any particulars as regards oral agreement by some of the respondents for extension of the mortgage period. Apart from the inadequacy of evidence to substantiate the defence the Lower Appellate Court has noted the patent fallacy of the argument. The Lower Appellate Court has observed that the very plea of extension of period of mortgage is erroneous and baseless. It further observes that transaction between the parties is of mortgage and not of lease which is incapable of extension. Extension of mortgage period at the instance of the mortgage would amount to compelling the mortgagor to be indebted to the mortgagee for further period. Nobody can be compelled to become indebted to any person. Therefore, there could not have been an agreement for extending the period of mortgage. Thus, the defence of the appellant was completely without any substance. In the circumstances, the Courts below were correct in granting the relief of redemption to the respondents.

6. Mr. Chavan, the learned advocate for the appellant

sought to argue that time was not the essence of the mortgage agreement. Therefore, the Courts below could not have decreed the suit. It is also his argument that the conduct of the respondents in permitting the appellant to renew the registration of establishment under the Shops & Establishments Act, would indicate that they had agreed to continue with the mortgage. There cannot be any substance in his argument for the simple reason that as has been observed by the Lower Appellate Court that extension of mortgage deed would mean compelling the respondents to be indebted to the appellant. This cannot be permitted.

7. The conduct of the respondent in the suit transaction as also in the court proceedings needs to be strongly deprecated. It is unfortunate that despite clear and unambiguous mortgage deed, the appellant, solely in his self interest engaged the respondents in litigation over the period of 13 years and has been enjoying the suit property till date. Therefore, exemplary costs must be imposed against him.

8. The appeal is liable to be dismissed with costs. The appellant shall pay costs quantified at Rs.50,000/- to the respondents

in one set within six weeks.

(Smt. R.P. SondurBaldota, J.)