

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

SECOND APPEAL NO. 326 OF 1994

1. Bhika S/o Ganpat Kawade
Age : 58 Yrs., Occ. Agril.,
R/o : Nanduri-Dumala,
Tq. Sangamner, Dist. :
Ahmednagar.
 2. Balu S/o Bhika Kawade
Age : 25 Yrs., Occ. Agril.,
R/o : Nanduri-Dumala,
Tq. Sangamner, Dist. :
Ahmednagar.
 3. Vitthal S/o Bhika Kawade
Age : 29 Yrs., Occ. Agril.,
R/o : Nanduri-Dumala,
Tq. Sangamner, Dist. :
Ahmednagar.
 4. Bhagirathibai W/o Bhika Kawade
Age : 45 Yrs., Occ. Agril.,
R/o : Nanduri-Dumala,
Tq. Sangamner, Dist. :
Ahmednagar.
- APPELLANTS/
[ORI. DEFTS.]**

V E R S U S

1. Bajrang S/o Raghu Kawade
[since deceased Thr. L.Rs.]
- 1-a. Hirabai Bajrang Kawade
Age : 50 Yrs., Occ. Household,
R/o : Chikhali, Tq. Sangamner,
Dist. Ahmednagar.
- 1-b. Rajendra Bajrang Kawade
Age : 26 Yrs., Occ. Agril.,
R/o : Chikhali, Tq. Sangamner,
Dist. Ahmednagar.
- 1-c. Sheetal Dattatraya Gade
Age : 24 Yrs., Occ. Household,
R/o : Bharamgaon, Tq. Paithan,
Dist. Aurangabad.
- 1-d. Asha Namdeo Awari
Age : 22 Yrs., Occ. Household,
R/o : Dhamangaon Awari,
Tq. Akole, Dist. Ahmednagar.
- 1-e. Usha Arun Gaykar
Age : 22 Yrs., Occ. Household,
R/o : Brahmanwada,
Tq. Akole, Dist. Ahmednagar.

- 1-f. Nisha Bajrang Kawade
Age : 18 Yrs., Occ. Education,
R/o : Chikhali, Tq. Sangamner,
Dist. Ahmednagar.
- 1-g. Vikas Bajrang Kawade
Age : 16 Yrs., Occ. Education,
u/g of Sheetal Dattatraya Gade
Age : 24 Yrs., Occ. Household,
R/o : Bharamgaon, Tq. Paithan,
Dist. Aurangabad.
- 1-h. Amol Bajrang Kawade
Age : 14 Yrs., Occ. Education,
u/g of Sheetal Dattatraya Gade
Age : 24 Yrs., Occ. Household,
R/o : Bharamgaon, Tq. Paithan,
Dist. Aurangabad.
2. Sampat S/o Raghu Kawade
Age : 39 Yrs., Occ.
R/o : Nanduri-Dumala,
Tq. Sangamner, Dist. :
Ahmednagar.
3. Babubai W/o Murlidhar Wakchore
Age : 48 Yrs., Occ.
R/o : Kalas, Tq. Akole, Dist. :
Ahmednagar.

4. Bajubai W/o Raghu Kawade**RESPONDENTS/**
[died during proceedings]. **[ORI. PLTFFS.]**

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Mr. S.T.Shelke, Advocate for Appellants.

Mr. R.D.Bhalerao, Advocate for R – 1-A to
1-H, 2 & 3.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 07/07/2016

JUDGMENT :

1. The Appeal is filed against the Judgment and Decree of R.C.S. No. 191/1981 which was pending in the Court of the Civil Judge [Jr.Division], Sangamner and also against the Judgment and Decree of R.C.A. No. 343/1986 which was pending in the District Court, Ahmednagar. The Suit filed by the respondents for relief of redemption of mortgage of agricultural land is decreed in their favour by the trial Court and the findings of the trial Court are confirmed by the District Court. Heard both sides.

2. In short, the facts leading to the institution of

the Appeal can be stated as follows.

The Suit was filed in respect of agricultural land bearing S.No. 159/1-A admeasuring 1 H. 33 R. [2 R. portion is additional as Pot Kharab] situated at village Nanduri-Dumala, Tahsil Sangamner, district Ahmednagar. The owner of this land has right to take water from the well situated in the land S.No. 169/3.

3. The plaintiffs are successors of one Raghu. Defendants are successors of one Ganpat. Raghu and Ganpat were real brothers interse. Admittedly, partition between Raghu and Ganpat had taken place prior to 1950.

4. It is the case of the plaintiffs that in the year 1955, Raghu was in need of money and so he mortgage the suit property to defendant No. 1, son of Ganpat, for getting loan of ₹ 1,500/-. It is contended that in the document the consideration was shown as ₹ 2,000/- as interest amount was included in the amount. It is contended that though document of sale deed was executed in favour of defendant No. 1, it was mortgage transaction and on the date of transaction, one separate

agreement was executed in favour of Raghu by defendant No. 1, which was to the effect that it was mortgage transaction.

5. It is the case of the plaintiffs that Raghu died within few days after the aforesaid transaction and at that time there was no support to plaintiff No. 4, widow of Raghu, and the remaining plaintiffs were minor. It is contended that due to these circumstances, plaintiff No. 4 shifted to the place of her parents, other station. It is contended that when sons of Raghu became major, they requested defendant No. 1 to re-convey the suit property in their favour, but defendant No. 1 refused to do so. It is contended that to create complications, defendant No. 1 gave application to the revenue authority and got entered the names of his sons, defendant Nos. 2 and 3, in the revenue record as the owners. It is contended that due to such entry, no right is created in favour of defendant Nos. 2 and 3. The plaintiffs thus claimed relief of redemption of mortgage dated 10/03/1955.

6. Defendant No. 1 filed Written Statement and contested the matter. He denied the contention of

plaintiffs that it was mortgage transaction. He contended that it was out and out sale transaction and there was no promise to re-convey the property in favour of Raghu from defendant No. 1. He contended that on the date of transaction, by deceiving him, one document got executed by Raghu, but that document can not be used as fraud was played on defendant No. 1 by Raghu.

7. Defendant No. 1 took the defence that the Suit was not within limitation. He also contended that he had spent around ₹ 20,000/- for improving the quality of the land and only to harass him and to extract something from him, false Suit is filed.

8. Issues were framed on the basis of aforesaid pleadings. Both sides gave evidence. The trial Court and the District Court gave findings that the transaction in dispute was mortgage transaction. The first appellate Court has directed the plaintiff to give the price of improvement viz. ₹ 20,000/- to defendant No. 1 and to that extent first Appeal is allowed by the District court.

9. This Court [other Hon'ble Judge] admitted

the Appeal on 10/11/1994 by holding that the interpretation of the documents dated 10/03/1955 was involved as substantial question of law.

10. The plaintiffs examined one Sakharam, witness on the agreement which was executed in favour of Raghu by defendant No. 1 on the same day. It can be said that in the Written Statement, execution of such document was not disputed. After recording of the deposition of Sakharam, the document is given Exh. 44 by the trial Court. The agreement is written on stamp paper and it bears the signature of defendant No. 1. The agreement is to the effect that after giving ₹ 2,000/- by Raghu, the land was to be re-conveyed in favour of Raghu by defendant No. 1 or his successors. No time limit was given for returning the amount. The possession of the land was to remain with defendant No. 1 under sale deed and he was to enjoy the income received from the land. There was thumb impression of Sakharam, witness examined by the plaintiffs. The plaintiffs have no personal knowledge regarding the transaction, but in view of the aforesaid circumstances, the document is exhibited and it is read in evidence by the Courts below.

11. Defendant No. 1 has examined himself to give evidence in rebuttal and he has denied the signature appearing on Exh. 44. It is already observed that in Written Statement it is pleaded that by playing fraud on him, one document was got executed by Raghu. As such document is there on record at Exh. 44, the burden was on defendant No. 1 to prove that the said document was prepared by playing fraud on him. It needs to be mentioned that in the pleadings, the particulars of fraud are not given. Thus, the defence taken by defendant No. 1 on the nature of transaction was weak. It appears that some letters written by defendant No. 1 were confronted to him during cross examination by the counsel of the plaintiffs and these documents are given exhibits by the trial Court as Exh. Nos. 56-C and 56-D. In those documents also, the nature of transaction is described as mortgage transaction. It can be said that these documents were not properly proved. Even if these documents are ignored for ascertaining the nature of transaction, there is other evidence which is sufficient to draw inference about the nature of transaction.

12. For appellant, reliance was placed on 2 cases

reported as 2013 (6) Mh.L.J. - 80 [Vanchalabai Raghunath Ithape (dead) by L.Rs. Vs. Shankarrao Baburao Bhilare (dead) by L.Rs. & Ors.] and (2011) 1 Supreme Court Cases – 657 [Raj Kishore (dead) by L.Rs. Vs. Prem Singh & Ors.]. In the first case, the Apex Court has laid down that, “ merely due to incorporation of term of re-conveyance in the document of sale, inference can not always be drawn that it was mortgage transaction .” The provisions of Section 58-C of the Transfer of Property Act is interpreted. In that document, time of 5 years was mentioned as the period during which the amount was to be paid for re-conveyance and the Apex Court held that it was out and out sale. In the second case, the facts were totally different.

13. For respondents, reliance was placed on few reported cases. In the case reported as AIR 1988 Supreme Court – 1074 [Smt. Indira Kaur & Ors. Vs. Sheo Lal Kapoor], there was contemporaneous agreement to re-convey the property shown to be sold under sale deed and the period of re-conveyance was fixed as 10 years. In view of the facts of that case, the

Apex Court held that it was mortgage transaction even when the condition was not incorporated in the document itself as provided u/s 58-C of the Transfer of Property Act.

14. The facts of the case reported as *AIR 1975 Gujrat – 120 [Patel Atmaram Nathudas & Ors. Vs. Patel Babubhai Kashavlal]* were different. In the case reported as *AIR 1954 Supreme Court – 345 (1) [Chunchun Jha Vs. Ebadat Ali & Anr.]*, the Apex Court has laid down that, in such cases the intention of the parties is the determining factor.

15. There can not be a dispute over the proposition made in the cases cited supra by both sides. The last case shows that it is the duty of the Court to ascertain the intention. In the present matter, the relationship between the parties and the circumstance that liberty was given to Raghu to return the amount at any time for getting re-conveyance are sufficient to draw inference that it was mortgage transaction. Such findings are given by the Courts below. The first appellate Court has taken care to protect the interest of

the defendants in view of the evidence given by defendant No. 1 that he spent amount to improve the quality of the land. So, this Court holds that it was mortgage transaction and the point is answered accordingly.

16. In the result, Second Appeal stands dismissed. In view of dismissal of Second Appeal, Civil Applications also stand disposed of.

17. At this stage, learned counsel for the appellants requested for time. Time of six weeks is given to challenge the decision of this Court.

[T.V.NALAWADE, J.]