

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 1 OF 2016

Shivram s/o Namdeo Bhojanane
Age: 81 years, occupation: Agriculture,
R/o Jamkhed, Taluka : Ambad,
District : Jalana ..Appellant/
orig. Plaintiff'

versus

- 1) Shaikh Munir s/o Sk. Mumtaj,
Age 47 years, occupation: Agriculture,
- 2) Raosaheb s/o Waman Kade,
Age: 52 years, occup. Agriculture:

Both R/o Jamkhed, Taluka Ambad,
District : Jalna
- 3) Satwasen s/o Vishwanath,
Age : 57 years, occupation : Agriculture,
R/o Near Court Building, Behind house of
Ramnath Maind, Ambad, Taluka : Ambad,
District : Jalna
- 4) Shaikh Bazir @ Nazeem s/o Papabhai,
deceased, through :
 - 4-A) Zebunnisa w/o Sk. Bazir,
age major, occupation: Household,
 - 4-B) Sk. Riyazuddin s/o Sk. Nazir,
Age major, occup : Labour,
 - 4-C) Sk. Masood s/o Sk. Nazir,
Age Major, occupation: Labour,
 - 4-D) Sk. Saifoddin s/o Sk. Nazir,
Age : Major, occupation: Labour,
 - 4-E) Sk. Nasir s/o Sk. Nazir,
Age major, occupation: Labour

4-F) Sk. Majid s/o Sk. Nazir,
Age : Major, occup.: Labour,

4-G) Sk. Wajed s/o Sk. Nazir,
Age major, occupation :Labour,

All above R/o Jamkhed,
Taluka Ambad, Dist. Jalna

5) Shivaji Ganpat Vaidya,
Age : 37 years, occupation: Agriculture,

6) Dagadu s/o Baburao Vaidya,
Age 47 years, occupation : Agriculture,

Respondents No. 1, 2, 5 and 6
are r/of Jamkhed, Taluka Ambad,
Dist. Jalna

7. State of Maharashtra, : Respondents/
Through Collector, Jalna Ori. Defendants

Mr. Sanket S. Kulkarni, Advocate h/f Mr. Suvidh S. Kulkarni,
Advocate for appellant

CORAM : SUNIL P. DESHMUKH, J.
6TH JANUARY, 2016

ORAL JUDGMENT:

1. This is an attempt by original plaintiff to challenge concurrent orders, one by civil judge, senior division, Jalna dated 08-12-2005 in Special civil suit no.71 of 2003 and the other in regular civil appeal no. 276 of 2006 by adhoc district judge – 3, Jalna on 30-10-2014, culminating into dismissal of said suit.

2. Survey no. 763 [now block no. 1671/1/2] situated at village Jamkhed, Taluka Ambad, District Jalna, is the suit

property. Briefly stated, it is the case of plaintiff that around 1350 Fasli, said property had been orally mortgaged by his father Namdeo to one Chandmiya Sultanbhai for a period of fifty years for a consideration of ₹ 100/-. The mortgagee had been put in possession. Mortgagor – father of the plaintiff, died in March, 1948. In 1992, period of mortgage expired and during this period mortgagee Chandmiya also expired. Since, even after expiry of period of mortgage, the property had not been handed over to the plaintiff, aforesaid suit ensued.

3. According to the plaintiff though possession of Chandmiya over the property was that of mortgagee, taking disadvantage of the same, his name has been entered into *Namuna* no. 9 and mutation has been sanctioned on that basis. Appellant-plaintiff had no knowledge about the same.

4. While the provisions of the Hyderabad Tenancy and Agricultural Lands Act, 1950 were made applicable to said area, list of tenants was prepared and name of Chandmiya was shown in cultivation column on the basis of batai. Among other persons was one Mahadu Santu Gabade shown to be tenant of Papabhai s/o Babubhai and he had surrendered tenancy rights and Chandmiya continued to be shown in cultivation column. After death of plaintiff's father, name of plaintiff had not been taken in

revenue record. *Khasra Patrak* showed name of Papabhai which is claimed to be not permissible in law. Entries accordingly have continued till 1976 - 77.

5. On application of Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 ("The Celing Act"), Papabhai was declared as surplus land holder. He is claimed to have deliberately allowed taking over of possession by government of 12 acres land from suit land in order to save his personal land. In 1978, Papabhai and his brother Mohinuddin entered into partition in respect of remaining suit property and said Mohinuddin sold two acres of land of his share to one Ramchandra Vaidya.

6. Papabhai died in 1987. Thereafter, wife of Mohinuddin, namely, Maryambee sold portion of 60 aar in faouvr of one Manik Dada Shinde who, in turn, sold it in favour of Dagdu Baburao Vaidya. Maryambee had sold another 81 aar portion in favour of Prabhu and Anna sons of Paraji Narale who transferred said land in favour of Ramchandra Ganpat Vaidya. Under the application of Celing Act, portion of land also came to be allotted to defendants no. 1 to 3.

7. According to the plaintiff, all these transactions are null and void and are not binding on him. Plaintiff had demanded

possession on Gudi Padva of 1992 from the defendants but, they refused. Thereafter also, plaintiff kept on repeatedly demanding possession but the same did not yield any fruits and he claims cause of action lastly to have arisen on 02-04-2003 and as such instituted suit for redemption of mortgage and mesne profit.

8. Defendants on appearance had resisted the suit, contending that Chandmiya was not mortgagee, but he was owner in possession of suit property. He had been in possession of the same for over twenty years even before the alleged date of mortgage as has been claimed by the plaintiff. Defendants' possession over respective parts of suit property is legal and suit is time barred and is false.

9. The trial court dismissed the suit, holding that the plaintiff could not prove oral mortgage. Trial court, however, considered the suit to be in limitation and that defendants cannot be said to have acquired title to the property by adverse possession.

10. Plaintiff had been in appeal. The appellate court framed points for consideration with regard to oral mortgage as claimed by plaintiff, title of the plaintiff to the property, suit being within limitation or not, jurisdiction of civil court to try suit and entitlement of plaintiff to possession, finding that the mortgage could not be proved by plaintiff, however, it considered that the

plaintiff would have title to the suit property. Suit is held to be outside the period of limitation and it was considered that the civil court could not have jurisdiction and plaintiff could not have right to possession.

11. The trial court in respect of theory of mortgage appears to have scanned evidence adduced on behalf of the plaintiff. The trial court in paragraph no.10 of its judgment considered that by virtue of operation of Transfer of Property Act, 1882 to Hyderabad area, the oral transfer is not permissible and has considered that said Act had been enforced to Hyderabad area of State of Bombay with effect from 14-10-1949. In next paragraph no.11, the court appears to have considered that oral mortgage may be permissible under the provisions of Hindu law. However, according to trial court, burden of proving oral mortgage could not be said to have been discharged by plaintiff and though he has examined about six witnesses he has not been able to produce evidence of any of the eye witnesses. The trial court has also considered that there is no pleading or any deposition in examination-in-chief that the plaintiff's father had mortgaged the property although the same is hinted at during the course of cross examination. While the plaintiff had been minor at the time of mortgage, the court considered that having regard to the age of the plaintiff at the relevant time, he cannot be said to be

of the age of understanding that the transaction was a mortgage. The court has also considered that the witnesses examined cannot be said to be present at the time of alleged mortgage. The court had not believed correctness of the claim about the mortgage having taken place in 1948 and that the plaintiff has not been able to prove the fact of death of his father in 1948, by adducing cogent and convincing evidence.

12. The trial court has also considered that whole case of the plaintiff is based on oral evidence. The court has considered that if the plaintiff had knowledge about mortgage, he would not have kept lying low when the property was being dealt with by the persons referred to hereinabove. The trial court has also considered that there is no challenge to the entry of the name of Chandmiya. The trial court has adverted to that it has emerged that all the witnesses in the suit have deposed that it was initially Chandmiya who was in possession and thereafter Papabhai for a considerable period and yet the plaintiff had not taken any objection to the same. Papabhai had been declared as surplus land holder and the government had taken possession of about 12 acres from the suit land under the Ceiling Act. The court had further considered that having regard to that the Ceiling Act had been enforced, civil suit would not be a proper remedy since persons had got possession of the lands with

reference to sections 41 as well as 44 of the Ceiling Act. The trial court, further had considered that there is presumption in favour of the defendants in respect of revenue record.

13. The trial court has considered that the suit appears to have been filed ingenuously with intelligent mind in order to make it maintainable and since there does not appear to be availability of any document in favour of Chandmiya or Papabhai about their possession, the theory of mortgage for a period of fifty years for consideration of ₹ 100/- is developed.

14. The trial court, however, on the point of limitation considered that suit was within limitation having regard to articles 61(a) of the Limitation Act, 1963 for, there is a contention on behalf of plaintiff that the property had been mortgaged for a period of fifty years. Thus, the court considered whether the plaintiff could make out case for redemption of mortgage on the basis of theory of mortgage. The court has further considered that defendants having denied title of plaintiff and their's being not a case of adverse possession, it cannot be said to be a case of adverse possession.

15. Appellate court appears to have considered that the documentary evidence may not favour the appellant-plaintiff. The court had considered that theory of oral mortgage cannot be

said to have been proved. The theory depicts that each event appears to be hearsay in nature and there is no evidence in respect of any of such events and evidence of plaintiff's witnesses is not free from doubt. The examination-in-chief by them is stereotype and witnesses have deposed just putting their thumb impressions/signatures. The appellate court considered, when the persons examined by plaintiff as witnesses were not the witnesses to oral mortgage transaction, such evidence can hardly be said to be admissible. The appellate court further considered that the theory of oral mortgage is not supported by any other evidence. Revenue record does not depict said transaction. Even the appellant – plaintiff did not take pains to have the same recorded. The appellate court, in paragraph number 26 of the judgment, has considered that the oral mortgage theory developed by plaintiff is imaginary.

16. The appellate court further found that since there is no record to show that Chandmiya had ever purchased the property and the title of the plaintiff's father having not been disputed, it appears that the plaintiff may have title to the suit.

17. The appellate court has further considered that the question of adverse possession does not crop up in the matter since it has not been claimed by the defendants. The court,

however, considered the suit to be outside the period of limitation for the reason that the situation has been covered by article 61(b) rather than 61(a) of the Limitation Act as has been considered by trial court. The appellate court has considered that there are several transactions of alienations of different portions of suit properties which have been subsisting for more than twelve years. Under the circumstances, from the date of such alienations, it would have to be deemed that the persons who dealt with the properties had been doing so with hostility to plaintiff's title and plaintiff having not filed suit within twelve years, the same is barred by limitation.

18. Learned counsel Mr. Kulkarni appearing on behalf of appellant vehemently submits that transaction of oral mortgage was for ₹ 100/- for a period over fifty years and that the plaintiff's title to suit land cannot be said to have been disputed. Under the circumstances, having regard to evidence by witnesses about registered mortgage having not been entered into and the defendants having failed to establish their relationship to the property as owners, by preponderance of probability, the suit ought to have been decreed. It is being submitted that it was not necessary to have the mortgage in writing under the Transfer of Property Act since said Act was not applicable to the area while the transaction was entered into.

He, therefore, submits that both the courts have committed error in dismissing the suit.

19. Upon perusal of the judgments by the courts below, it clearly emerges that the theory of oral mortgage cannot be said to have been proved and has been based on hearsay evidence. While it appears to be plaintiff's case that transaction was entered into 1948, revenue record does not support it because Chandmiya was already in possession for over twelve years and the trial court has recorded the same and after death of plaintiff's father there is no entry in plaintiff's name in respect of suit property. The plaintiff had not asserted his title to suit property till 2003. In the interregnum, the property had been dealt with by the parties concerned, they alienated the same and the transactions subsisted for over twelve years continuously, uninterruptedly and peaceably without there being assertion of right by the plaintiff. The appellate court has given instance of alienation of 1978 and recorded that the suit had been filed in 2003 developing theory of oral mortgage for fifty years for ₹ 100/-, stating that the cause of action had arisen in 1992. This again, cannot be reconciled and is incompatible with theory pleaded by plaintiff about mortgage having taken place in 1948 for it cannot be said that period had been over in 1992. It appears that the change in pleadings from time to time is being

resorted to, to flex to wishes and convenience of the plaintiff. The courts below have properly considered that there is no substantial evidence coming on record in order to establish a case of oral mortgage. Further, it having come on record that the property was dealt with by various persons as owners with enjoyment of possession for a period over twelve years without any interruption and peaceably and without assertion of right by the plaintiff, the suit cannot be said to be within the period of limitation. On aforesaid counts, the appellate court appears to have given proper findings as have been recorded.

20. Second appeal does not appear to give rise to any substantial question of law and as such, stands dismissed.

SUNIL P. DESHMUKH, J.

pnd