

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

***SECOND APPEAL NO. 313 OF 2014
ALONG WITH
CIVIL APPLICATION NO. 771 OF 2014***

Rangrao Keshavram Patil

(since deceased, through heirs)

1. Smt.Muktabai Rangrao Patil & ors.

...Appellants/Applicants

v/s

Shri Shankar Dadu Patil

(since deceased, through heirs)

1. Smt.Hirabai Shankar Patil & ors.

... Respondents/Plaintiffs

Mr.P.D.Dalvi for the appellants/applicants.

Mr.N.V. Walawalkar, senior advocate along with Prashant Bhavke for Resp.
Nos.1 (2)and 1 (2).

Coram: N.M. Jamdar, J.

Dated: 4 May 2016

ORAL ORDER:

The Appellants challenge the concurrent decisions of the learned Civil Judge, Kurundwad, Dist. Kolhapur, decreeing the suit of the Respondents/Plaintiffs and dismissing the appeal of the Appellants. The suit was filed by the Respondents/Plaintiffs initially for an injunction and after amendment seeking possession of the suit property.

2 The suit is based on title. Since the Respondents failed to show any right in the property and any ownership right or right as a tenant in the

suit property, the suit was decreed and the appeal was dismissed.

3 Learned counsel for the Appellants submitted that, once the Respondents/Plaintiffs had admitted that the document in question of dated 28 May 1975 was a usufructuary mortgage, it was not necessary for both the Courts to consider whether it was really so and the admission of the Respondents/Plaintiffs to that effect was sufficient. He submitted that, in the circumstances, Respondents/Plaintiffs ought to have filed a suit for redemption of mortgage which was not done.

4 The suit was initially filed for injunction. Plaint was thereafter amended. In the plaint, the document dated 28 May 1975 has been referred to. It is stated by the Respondents/Plaintiffs that this agreement was in the nature of a mortgage, however, since it was not registered, it does not confer any right. Learned counsel for the Appellants has heavily relied on the admission of the Respondents/Plaintiffs as regards this usufructuary mortgage. However, the Respondents/ Plaintiffs have not stated that any rights are conferred to the Appellants under this deed. It is the specific contention of the Respondents/Plaintiffs that due to lack of registration, no rights flow to the Appellants.

5 Both the Courts have considered the provisions of Section 58-D of the Transfer of Property Act and have found that since the deed was not registered, nor there was a term for repayment of loan out of the income generated from the use of the property, the mortgage was not a usufructuary mortgage. That was also the case of the Appellants in the written statement. Since there was no unequivocal admission of the

Respondents/Plaintiffs, no error was committed by the Courts in holding that the ingredients of a usufructuary mortgage were not fulfilled.

6 When the appeal was filed by the Appellants in the first appellate court, in the appeal memo, the contentions that were raised were of tenancy. Even the argument advanced before the first appellate Court was that the Appellants are tenants. Even though the learned counsel for the Appellants has not argued this point, learned senior advocate for the Respondents/Plaintiffs has rightly pointed out that there is a clear admission of the Appellants that the Appellants are not tenants. It is also noted that, no procedure required to be followed for claiming tenancy, was followed.

7 In the circumstances, the suit is based on title to recover possession from the Appellants, the Appellants having failed to demonstrate any right in the property, was rightly decreed. Even otherwise, to balance the equities the Courts have directed the Respondents/Plaintiffs to refund the amount.

8 No substantial question of law arises. The second appeal is dismissed.

9 In view of disposal of the second appeal, the civil application does not survive and is disposed of.

(N. M. JAMDAR, J.)