

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO.783 OF 2016****ALONGWITH****CIVIL APPLICATION NO.1279 OF 2016****Pandurang S.Sonawane & Ors.****..... Appellants****VERSUS****Smt.Laxmibai Jagannath Sonawane
(deceased) & Ors.****..... Respondents**

Mr.Girish R.Agrawal for the Appellants.

Mr.R.N.Gite for Respondent nos. 2A to 2E.

CORAM : R.D. DHANUKA, J.**DATE : 7th OCTOBER, 2016****P.C.**

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original defendant nos.1 to 8 and 11) have impugned the judgment and decree dated 7th May, 2012 passed by the learned Ad-hoc District Judge -1 Nashik dismissing the appeal (Civil Appeal No.127 of 2003) filed by the appellants. In the Civil Appeal No.127 of 2003, the appellants had impugned the judgment and decree dated 15th March, 2003 passed by the learned Civil Judge, Junior Division, Nashik Road thereby decreeing the suit filed by the plaintiffs and directing the defendant nos. 1 to 11 to accept the amount of Rs.3,000/- from plaintiffs and to handover the peaceful possession of the suit property i.e. agricultural land bearing Gat No.215, admeasuring 0.37-R, situated at Mouje Jakhori, Tal, Dist.Nashik to the plaintiffs within a period of two months from the date of the said order and redeem the suit property and further directing enquiry in respect of mesne profit.

2. It is the case of the plaintiffs that the suit land which was agricultural land was ancestral property of husband of plaintiff no.1 jointly with defendant no.2. On 6th January, 1971, the deceased Sawliram Namdeo Sonawane and the plaintiff no.2 had executed mortgage deed in favour of the father of the defendant nos. 1 to 5 and 8 and 9 and grand-father of defendant nos. 6 and 7 and father-in-law of defendant no.11. It was the case of the plaintiffs that by the said document by the said deceased Sawliram Namdeo Sonawane and the plaintiff no.2 had mortgaged the suit property for a sum of Rs.3,000/- and the said property was kept as security with those defendants for a period of 7 years and within the period of 7 years, the predecessor of the plaintiffs had agreed to repay the said amount of Rs.3,000/- to those defendants.

3. Before expiry of the period of 7 years, Sawliram Namdeo Sonawane expired. It was the case of the plaintiffs that within the time period of 7 years, the said Sawliram Namdeo Sonawane had offered redemption of the mortgage and offered payment to those defendants. Since the defendants refused to permit the predecessor of the plaintiffs to redeem the mortgage, the plaintiffs filed a suit (RCS No.689 of 1995) inter alia praying for redemption of mortgage and for possession of the suit property. The suit was resisted by some of the defendants by filing written statement. It was the case of the defendant nos. 1 to 4 that there was no mortgage by conditional sale but the agreement entered into between the parties was agreement for sale. The defendants had also pleaded issue of limitation in the written statement.

4. The learned trial judge framed eight issues for determination including the issue of limitation.

5. The plaintiffs made oral as well as documentary evidence and examined various witnesses. The defendants also led oral and documentary evidence.

6. The learned trial judge has rendered a finding that the plaintiffs had proved that the suit property was mortgaged by a mortgage deed in favour of Sawliram Sonawane by the original owner and had further proved that the mortgage was with condition to recover property on receipt of loan amount. The plaintiffs were entitled to the decree of possession with a direction to repay the loan amount.

7. The learned trial judge accordingly passed a decree in favour of the plaintiffs and directed the defendant nos. 1 to 11 to accept the amount of Rs.3,000/- and to handover peaceful possession of the suit property to the plaintiffs within two months from the date of the said judgment and decree and to redeem the mortgage of the suit property.

8. Being aggrieved by the said judgment and decree passed by the learned trial judge, the defendant nos. 1 to 8 and 11 preferred an appeal (127 of 2003) in the Court of Ad-hoc District Judge -1, Nashik. The learned Ad-hoc District Judge-1, Nashik framed three points for determination and after considering the oral and documentary evidence passed judgment and decree dated 7th May, 2012 dismissed the said appeal no. 127 of 2003 filed by the respondent nos. 1 to 8 and 11. The first appellate court has held that the judgment and decree passed by the learned trial judge was not illegal and thus no interference was warranted with the said judgment and decree.

9. Mr.Agrawal, learned counsel appearing for the appellants (original defendant nos. 1 to 8 and 11) invited my attention to the agreement dated 6th

January, 1971 executed between Sawliram Sonawane and Jagannath Namdeo Sonawane and Venubai Vasant Jadhav. He submits that on plain reading of the said document, it was clear that no relationship of debtor and creditor was established in the said document. He submits that in the said document, the exclusive rights in the property were already transferred in favour of his clients in respect of the suit property. He submits that though there was no relationship of debtor and creditor established by the plaintiffs before the learned trial judge as well as the first appellate court, both the courts have erroneously rendered a finding of debtor and creditor relationship between the plaintiffs and the defendants. He submits that the suit was ex-facie barred by law of limitation. A period of 30 years was not applicable to the writing entered into between the parties.

10. A perusal of the document dated 6th January, 1971 entered into between the parties to the said document clearly indicates that the said Sawliram Sonawane had taken a sum of Rs.3,000/- from the other two parties to the documents which he had agreed to return within a period of 7 years. It was provided in the document that if the amount was not paid within three years, in that event the document shall be considered as a sale deed. In my view, learned counsel for the appellant is not right in his submission that the document created title in favour of his clients on the date of the execution of the said document or that no relationship of debtor and creditor was created under the said document.

11. A perusal of the judgment and decree passed by the learned trial judge indicates that the learned trial judge has considered the oral and documentary documents in the impugned judgment and decree and has held that the said document marked as Ex.60 was nothing but mortgage by conditional sale and not

sale with the right of the re-purchase. The learned trial judge also considered the cross examination of the witness examined by the plaintiffs whose examination in chief was not shattered in the cross examination. The learned trial judge has held that the plaintiffs had proved by satisfactory and cogent evidence that the suit property was mortgaged on 6th January, 1971 by mortgage deed in favour of Sawliram Sonawane and accordingly answered the said issue in affirmative.

12. The learned trial judge also considered the notice issued by the plaintiffs calling upon the defendants for redemption of the suit property. The said notice was duly received by the defendants. The learned trial judge also considered the oral evidence in which it was proved that before the expiry of one year of the period of seven years provided in the said document Ex.60, the original mortgagor had tried to give redemption amount to the defendants but the same was refused. After considering this evidence, the learned trial judge rejected the plea of limitation urged by the defendants. It is rightly held that since the plaintiffs had applied for redemption of mortgage, the period of 30 years provided in Article 61(a) of the Limitation Act stood attracted.

13. The first appellate court by judgment and decree has considered the documentary and oral evidence led by both the parties and has rendered a finding that the transaction between the parties was of mortgage by conditional sale and was not a sale deed. The first appellate court also dealt with the judgment of Gujarat High Court in case of *Ismail Nathabhai Khatri vs. Muljibhai Shankerbhai Brahmabhatt*, AIR 1994 Gujarat 8. The first appellate court has also rightly adverted to the judgment of this court in case of *Vamanrao Sawalaram Bhosale vs. Vithal Tukaram Kadam*, AIR 2006 (3) Bombay 388. The first appellate court has held that the right of redemption is a statutory right which

cannot be fettered by any condition which impedes or prevents redemption.

14. The first appellate court also rightly opined that the period of limitation in this case was 30 years. In my view both the courts have considered the entire oral and documentary evidence led by both the parties and have interpreted the documents and have rendered various findings of fact. In my view the findings recorded by the two courts below being concurrent and being not perverse cannot be interfered with by this court in this second appeal under section 100 of the Code of Civil Procedure, 1908.

15. The appeal is totally devoid of merits and is accordingly dismissed with cost quantified at Rs.10,000/- which shall be paid by the appellants to the respondents within two weeks from today. In view of the dismissal of the second appeal, civil application does not survive and is accordingly dismissed.

(R.D.DHANUKA, J)