

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

SECOND APPEAL NO. 122 OF 2018
WITH
CIVIL APPLICATION NO. 1875 OF 2018

Gulabchand s/o Fakirchand Gandhi
Deceased through his legal heirs -

Pyarabai Gulabchand Gandhi (dead)

1. Kiran Gulabchand Gandhi,
Age : 37 years, Occu: Business,
R/o. Kolpewadi, Tal. Kopargaon,
Dist. Ahmednagar.
2. Sarla Dhanesh Bhalgat,
Age : 39 years, Occu: Household,
R/o. Kolpewadi, Tal. Kopargaon,
Dist. Ahmednagar.
3. Mandabai Amrutlal Ghelot,
Age : 63 years, Occu: Household,
R/o. Raikar Chal, Ward no.3,
Shrirampur, Tal. Shrirampur,
Dist. Ahmednagar.
4. Chandabai Mithulal Bhalgat,
Age : 58 years, Occu: Household,
R/o. Wakadi, Tal. Rahata,
Dist. Ahmednagar.
5. Mayabai Rajkumar Bhandari,
Age : 53 years, Occu: Household,
R/o. Rahuri Factory, Tal. Rahuri,
Dist. Ahmednagar.
6. Kalpana Dilipkumar Bora,
Age : 48 years, Occu: Household,
R/o. Pimpri Chinchwad, Kolpewadi,
Tedenagar, Pune-13.

7. Sunita Anilkumar Bora,
Age : 46 years, Occu: Household,
R/o. Pimpalgaon Malvi,
Tal. & Dist. Ahmednagar.
8. Prakash Gulabchand Gandhi,
Age : 51 years, Occu: Business,
R/o. Sawali Vihir Bk., Tal. Rahata
Dist. Ahmednagar.

...Appellants
(Org.Defendants)

Versus

1. Smt. Indubai Pundalik Jape
Deceased through her legal heirs -
- 1A. Shakuntala Laxman Shirsath,
Age : Major, Occu: Household,
R/o. At post Deswandi, Tal. Rahuri,
Dist. Ahmednagar.
- 1B. Mandakini Bhagwat Agalawe,
Age : Major, Occu: Household,
R/o. Sawali Vihir Bk.,Tal. Rahata,
Dist. Ahmednagar.
- 1C. Shashikala Keshav Musmade,
Age : Major, Occu: Household,
R/o. Tambhere, Tal. Rahuri,
Dist. Ahmednagar.
- 1D. Ratnamala Dilip Pati,
Age : Major, Occu: Household,
R/o. Sawali Vihir Bk.,Tal. Rahata,
Dist. Ahmednagar.
2. Haribhau Pundalik Jape,
Age : 57, Occu: Agri.,
R/o. At present 5519, Maliwadi,
Dist. Ahmednagar.
3. Chandrakant Pundalik Jape,
Age : 46, Occu: Household,
R/o. Sawali Vihir Bk.,Tal. Rahata,
Dist. Ahmednagar.

...Respondents
(Org.Plaintiffs)

Mr. U.S. Malte, Advocate for the Appellants
Ms. Smeeta S. Kulkarni, Advocate holding for
Mrs. Kiran Nagarkar, Advocate for Respondent Nos. 1A to 1D and
2 and 3

CORAM : A.M. DHAVAL, J.

**RESERVED ON : 29TH NOVEMBER, 2018
PRONOUNCED ON : 4TH DECEMBER, 2018**

JUDGMENT :

1. This is an Appeal by the original defendants.
2. Indubai and her two sons Haribhau and Chandrakant had filed Regular Civil Suit No. 678 of 2004 against legal heirs of Gulabchand Gandhi the appellants herein. As per plaint, the suit property was land of 2 acres and 12 gunthas bearing block No. 195, situated at Mouje Savalvihir, Tq. Rahata, Dist. Ahmednagar. According to the plaintiffs, the suit land was their ancestral property. In 1964, their ancestor Pundalik was in financial difficulty. The defendant Gulabchand was running a grocery shop. Pundalik mortgaged the suit land with him on 27.04.1964 by registered mortgage deed for Rs.3,000/-. It was agreed that the amount was to be returned within 10 years and the defendant was to execute reconveyance. It was further recorded that in case the amount would not be returned within 10 years, the document would become a permanent sale deed. The common ancestor of the plaintiffs, Pundalik died and the plaintiffs from time to time approached the defendants with the mortgage amount and requested for reconveyance, but the defendants

declined. Hence, the suit for redemption of mortgage, for return of mortgage deed and execution of reconveyance and for possession with mesne profits was filed. The defendant-Gulabchand denied that he has advanced loan of Rs.3,000/-. He also denied the other contents regarding cause of action. He claimed that it was a sale transaction with right for the vendor to obtain reconveyance by paying amount within five years or extended period of five years total 10 years. The suit was not filed within 3 years from the said cause of action when the period was over, and therefore, the suit was barred by limitation.

3. The learned trial Judge framed issues. Plaintiff No. 3 Chandrakant examined himself and produced some documents including certified copy of mortgage deed, exhibit-27. The legal heirs of the defendants did not enter the witness box. The trial court by Judgment dated 16.04.2011 held that it was mortgage transaction and the suit was within limitation. He granted the decree for redemption and directed the plaintiff to deposit the amount within 30 days.

4. The aggrieved defendants preferred Regular Civil Appeal No. 47/2011 before District Judge-I, Kopargaon, District Ahmednagar. The learned Judge of the Appellate Court after hearing the parties, by Judgment dated 14.12.2017 dismissed the appeal with costs. The aggrieved defendants have preferred the second appeal.

5. The following substantial question of laws are framed :

- I) Whether the suit document dated 27.04.1964 is out and out sale deed or it is mortgage by conditional sale as interpreted by the courts below ? and ;
- II) Whether the suit is within limitation ?

6. Learned Advocate Mr. Malte submitted that plaintiff No. 3, the only witness on behalf of the plaintiffs had no personal knowledge. Their is admission that his knowledge is hearsay. There was no debtor-creditor relationship between the parties. The contents of the document exhibit-27 disclose that it is a sale deed with the right to repurchase within the time limit fixed. The plaintiff had not complied the terms and conditions and of reconveyance and the suit filed after 40 years was barred by limitation. In the alternative, he submitted that even if it is assumed to be mortgage by conditional sale, the period of limitation was till the end of month of Marathi month Phalgun, within 10 years from the date of the deed dated 27.04.1964. He argued that the right to redeem mortgage was upto end of Phalghun of 1974. The month of Phalgun was over by 27th March, 1974. The suit is not filed within 30 years from the date of cause of action as per Article 61 of the Limitation Act. He relied on number of Rulings, which will be considered in due course.

7. Per contra, learned Advocate Ms. Smita Kulkarni made submissions that when there are concurrent findings as held in

Gurudev Kaur Vs. Kaki AIR (2006) SC 1975, there cannot be re-appreciation of facts in the second appeal. There cannot be interference by way of re-appreciation of facts. She argued that the execution of deed, exhibit-27 has not been disputed and the terms and conditions therein clearly disclose that it was mortgage transaction. The concurrent findings should not be interfered with. Thirdly, she argued that the period for redemption of mortgage was 10 years from the date of the mortgage deed i.e. 27.04.1964. Thus, the period of limitation was up to 26.04.1974 for redemption of mortgage. The cause of action occurred on 26.04.1974 and the period of limitation was 30 years from that date. The suit filed on 06.04.2004 is within limitation. She alternatively argued that even if it is assumed that the period of limitation was up to the end of Phalgun, Phalgun of that year was over, and therefore, the period of 10 months of Phalgun would be till Phalgun end of 1975. She also argued that the redemption was to be sought after the standing crop was harvested. There is no evidence of defendants that standing crop was harvested, and therefore, the suit filed on 06.04.2004 was within time. She also relied on the contents in the written statement to submit that it was not the case of defendants that the period of limitation was commencing from the end of Phalgun. She has also relied on rulings, which will be considered in due course.

8. Before taking up issue-wise discussion, I deal with the first objection that this Court has no power to interfere with the

concurrent findings of both the courts below.

(I) In the Judgment of *Gurudev Vs. Kaki (supra)*, relied upon by the respondents, it is held that -despite declaration of law in numerous judgments, it is evident that the scope and ambit of section 100 has not been properly appreciated and applied in a large number of cases.

38. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering u/s 100 C.P.C. Only in a case where substantial questions of law are involved in a case where substantial questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

42. The High Court has clearly deviated from the settled principle of interpretation of the Will. The Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will, that the Court looks into the nature of the bequest.

43. The learned Single Judge of the High Court has not even properly appreciated the context of the circumstances. The contents of the Will have to be appreciated in the context of his circumstances, and appreciated in the context of his circumstances, and not vis-a-vis the rules for intestate succession. It is only for this limited purpose that the Court examines the nature of bequest. The Court does not substitute its own opinion for what was the testator's Will or intention as manifested from a reading of the written instrument. After all, a Will is meant to be an expression of his desire and therefore, many result in disinheritance of some and grant to another. In the instant case, wife of the testator Bhagwan Kaur alone

had lived with the deceased and only she had looked after him throughout his life. The other daughters were all happily married a long time ago and in their weddings the testator had spent huge amount of money. In his own words, he had spent more than what they would have got in their respective shares out of testator's property. If a Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Statute, a presumption of due execution and attestation applies.

It is no doubt true that when there are concurrent findings of facts, the scope of this Court in second appeal is very limited. This Court cannot work as a second appreciating Court and cannot replace its views in place of views of the lower Courts. However, it is totally different contention to say that when there are concurrent findings of facts, howsoever erroneous those may be, this Court would be helpless.

(II) In ***Haryana State Vs. Gram Panchayat Village Kalehri (2016) 11 SCC Page 374***, there were concurrent findings of the facts and the Punjab and Haryana High Court dismissed the second appeal holding that there was no substantial question of law involved. In the facts situation, it was observed that whether the Courts below were justified in properly interpreting the documents/exhibits relied upon by the parties for determining the ownership rights over the suit lands, gave rise to substantial question of law. It was observed in other words, we are of the view that where the court is required to properly interpret the

nature of the documents, it does not involve any issue of fact as such but it only involves legal issue based on admitted documents. It is, therefore, obligatory upon the High Court to decide the legality and correctness of such findings as to which party's documents are to be preferred for conferring title over the suit land. In this case, the High Court could do so only when it had first admitted the appeal and framed substantial questions.

(III) Similarly in ***Chandna Impex Vs. Commissioner of Customs (2011) 7 SCC Page 289***, there were concurrent findings of Commissioner of Customs and the Tribunal. It is observed – It is trite law that findings of fact may give rise to substantial question of law inter alia, in the event of findings are based on no evidence, and or while arriving at the said findings relevant admissible evidence has not been taken into consideration, or admissible evidence is ignored or settled legal principles have not been followed or the evidence has been misread. [Reference (2007) 4 SCC 118, Commr. of Customs v. Vijay Dashrath Patel, (2006) 5 SCC 545, *Hero Vinoth v. Sheshammal*, (2004) 12 SCC 505, *Metroark Ltd. vs. CCE and* (2004) 5 SCC 568:(2008) 2 SCC (Cri) 49, *State of Orissa v. Dhaniram Luhar*]

14. In *Hero Vinoth v. Seshammal*, (2006) 5 SCC 545 referring to the Constitution Bench decision of this Court in *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.* As also a number of other decisions on the point, this Court culled out

three principles for determining whether a question of law raised in a case is substantial. One of the principles so summarised is: (Hero Vinoth case, SCC p. 556, para 24)

“24.(iii) The general rule is that the High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence,” it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the findings.”

(IV) Similar view is taken in ***Ishwar Dass Vs. Sohan Lal AIR 2000 SC 426***. I find these rulings are squarely applicable where the interpretation of the documents is involved and based on such interpretation, the legal issue about bar of limitation is to be considered. I therefore, hold that there is no substance in the submissions of the learned Advocate Ms. Smita Kulkarni that this Court cannot interfere with the concurrent findings of the Courts below.

Substantial question No.1 - the nature of document dated 27.04.1964 exhibit-27.

9. In this matter, the defendant has not examined himself whereas the plaintiff has given admission that his knowledge is hearsay knowledge. Both relied on contents of the documents exhibit-27, certified copy, exhibit-15.

(I) The learned Advocate for the appellant relied on ***Vanchalabai Raghunath Ithape (D) by L.Rs. Vs. Shankarrao Baburao Bhilare (D) by L.Rs. AIR 2013 SC 2924.***

18. In the case of Tamboli Ramanlal Ramanlal Motilal (Dead) by L.Rs. v. Gandhi Chimanlal Keshavlal (Dead) by L.Rs. And Anr. MANU/SC/0229/1992 : AIR 1992 SC 1236, the facts of the case were similar to this case. In that case, a document of transfer was executed and the property was handed over. At the same time, the document proceeded to state that the property is sold conditionally for a period of five years and possession is handed over. The document stated: "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right." The further clause in the document was to effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he or his heirs or legal representatives would have any right to take back the said properties. The last important clause was that after the period of five years the transferee would have a right to get the municipal records mutated in his name and pay tax. On these facts, this Court held that:

16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex. 26 dated December 11, 1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not conclusive of the matter.

17. What does the executant do under the document ? He takes a sum of Rs.5,000/- in cash. The particulars are (a) Rs.2,499/- i.e. Rs. 899/- by mortgage of his house on 27-1-1944 and (b) Rs.1,600/- by a further mortgage on 31-5-1947 totalling to Rs.2,499/-. Thereafter, an amount of Rs.2,501/- in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It has to be carefully noted that this amount of Rs.5,000/- was not taken as a loan at all. As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of Rs.5,000/- with the conditional sale is

executed, we are unable to see how the relationship of debtor and creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that there is a debt and the relationship between the parties is that of a debtor and a creditor. This is a vital point to determine the nature of the transaction.

This Court, therefore, held that the document was not a mortgage by conditional sale, rather the document was transfer by way of sale with a condition to repurchase.

(II) He also placed reliance on ***Srinivasaiah Vs. H.R. Channabasappa AIR 2017 SC 2141.*** In this case, defendant No.1 had given loan of Rs.1,500/- to the plaintiff and the document came to be executed. Defendant No.1 was placed in possession. The plaintiff contended that it was essentially mortgage deed executed by him by way of security. The trial court and High Court held it was mortgage. The Apex Court held that the decision of the trial court was correct.

But Mr. Malte has relied on the observation that the amount was paid by the appellant and there was debtor-creditor relationship.

(III) Mr. Malte further relied on ***Nana Tukaram Jaikar Vs. Sonabai Madhav AIR 1982 Bom. 437.*** He also relied on the Judgment of Pandit ***Chunchun Jha vs. Ebadat Ali 1955 SCR 174 and Bhaskar Joshi vs. S.R. Agrawal 1960 (2) SCR***

117.

It was held that the definition of mortgage by conditional sale postulated the creation by the transfer of the relation of mortgagor and mortgage. The price being charged on the property conveyed. In sale, there was no relationship of debtor and creditor nor was the price charged upon the property converted. But the sale was subject to the application on obligation to re-transfer the property within the period specified. What distinction transaction was the relationship of debtor and creditor. The transfer being the security of the debt.

(IV) In ***N.K. Simruthmull Vs. Nanjalingiah Gowder AIR 1963 SC 1182***, it was held that execution of sale deed and deed of reconveyance on the same date does not necessarily amount to mortgage by conditional sale.

(V) In ***Vasant Vs. Shankar 1995 Mh.L.J. 471*** – The property was transferred by registered document titled as 'sale deed' and possession was also delivered. There was recital in document that within 10 years of execution. If 'A' return the total consideration to 'B', the property would be transferred back to 'A'. 'A' also undertook to remove legal complications. The document is held as sale deed and not a mortgage.

(VI) In ***Umabai vs. Nilkanth 2005 (6) SCC 243*** - the plaintiff executed the deed of sale of land in favour of the defendant and

not by that deed but by another deed although executed on the same day, the defendant agreed to reconvey the land in favour of the plaintiff on receipt of a certain amount during the specified period. It was held as sale and not a mortgage.

(VII) In ***Gaurishankar Prasad Vs. Brahma Nand Singh 2008 SCC 287***, the similar view has been taken.

10. Ms. Kulkarni has relied on section 58-C of Transfer of Property Act and the Judgment in ***Srinivasaiah Vs. Channabasappa AIR 2017 SC 2141***. In that case, Rs.1,500/- was given to the plaintiff by way of loan and in order to secure the repayment, document dated 28.07.1969 was executed. It was titled as 'deed of conditional sale'. The Apex Court relied on Chunchun case 1955 SCR 174 wherein it is held the question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are, contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the -sale, then it is a matter for construction which was meant. The Legislature has made a clear cut classification and

excluded transactions embodied in more than one document.

It is therefore, relevant to minutely consider the documents on record to determine whether it was mortgage with conditional sale or sale deed with right to purchase.

11. On carefully going through the documents, I find following contents which indicate that it is mortgage by conditional sale and not sale deed with reconveyance.

(I) Title is 'mudat kharedi khat' (Time limit sale deed). There is also term disclosing that the land was sold for a limited time as 'mudat kharedi'.

(II) The agreement discloses that the amount was to be paid within five years as compulsory period and further period of five years as discretionary total period of 10 years.

12. It states that if the amount would not be paid within a stipulated period, the sale deed would become permanent. It is held that the vendor will repay the amount within the stipulated time and will get the property released. The Marathi words are “उलटून परत सोडवून घेईन”.

The document shows that the vendor was in financial constraints. The amount was received for making the court expenses and repayment of minor loans.

The document shows that the purchaser is not money lender. The defendant was not indulging in business of money and only because of the request of the vendor. Considering the financial constraints, the transaction was entered into which indicates that it was a loan transaction but loan was friendly loan and not money lending business.

There is no concept of temporary sale for limited period as parties agreed to enter into by using words 'mudat kharaedi khat'. There is no concept of temporary sale and permanent sale. The sale is always absolute. There is also no concept of getting the sale property released. The term regarding reconveyance is incorporated in the documents itself.

In *Srinivasaiah's* case, it was observed that -

- (1) Plaintiff was owner of the suit land.
- (2) The parties concluded the transaction in question by executing one document.
- (3) The document is styled as 'deed of conditional sale'.

- (4) Its condition that the defendants will be allowed to deny the possession of the suit property for five years and enjoy the fruits of the land and during that period, the plaintiff will be entitled to get the suit property reconveyed in his name on paying Rs. 1,500/- by getting the sale deed executed in his name.
- (5) The plaintiff offered to pay Rs.1,500/- with a request to resale the land to him.

The Apex Court observed the aforesaid five reasons satisfied the third condition of Section 58-C on condition that transaction of such transfer the property to the seller. There is mortgage by conditional sale. There is always ostensible sale on condition that on default of payment of mortgage money on certain consent of sale shall become absolute or on condition that on such payment is being made, sale shall become void or condition that on such buyer shall transfer the property to the seller.

I find that the document on record fulfills all the conditions and the language used in the term incorporated in the documents that it was mortgage by conditional sale and not sale with reconveyance.

Point No. 2 - Limitation :

13. Learned Advocate Mr. Malte relied on ***Dwarka Prasad V.***

Raja Ram, Allahabad High Court Judgment dated 7th April, 1995. In that case, the bond amount was payable latest by *Magh Sudi Purnamashi*, that is to say, the date on which the eighth installment was payable. The earlier part disclosed that the debt was repayable within eight years but this was qualified by the clause which follows. It was held that the true test in a case of this kind is on what date were the plaintiffs entitled to demand their money if payment was not made of the eight instalments fixed in the bond. If default made on *Magh Sudi Purnamashi*, corresponding to the 14th of February 1900, there can be no doubt that the creditors would be entitled to demand their money on the expiry of that date, and it would be no answer to their demand for the money to say that they were bound to wait till the expiry of eight years calculated from the date of the bond according to the English Calender. The whole question turns upon the intention of the parties and it seems to us that in this case the intention clearly was that payment of the instalments was to be made on the Hindi dates mentioned in the bond, and that the last payment was to be made on the date on which, the eight instalment was payable.

14. In the case of **Roshan Lal Vs. Chaudhari Bashir Ahmad AIR 1925 ALLAHABAD 138**, the issue was regarding the starting point of limitation. The principal amount was payable within three years and interest was payable every six months according to the Hindi Calender and if any interest remain unpaid the mortgagee would be entitled to enforce his bond without

waiting for three years' time. It was observed - The true principle seems to be this. If the starting point is to be calculated, as so many months or so many years from a particular date, that point was to be calculated according to the Gregorian calendar. On the other hand, if the starting point is otherwise fixed by the stipulation itself, the Court cannot apply section 25 of the Limitation Act.

15. The deed exhibit-27 provides for period of five years as compulsory period for refund of amount and obtaining reconveyance. The subsequent period of five years was discretionary. The terms clearly indicate that the amount was to be repaid by the end of the *Phalgun* month. It also states that within a period of five years, "पुढील जी पाच वर्षे मुदत ठेवली, या पाच वर्षात दरम्यान सुमारास ज्या वर्षी फाल्गून अखेर तुमचे उभे पीक नसेल त्यावेळी [during the period of five years, when there would be no standing crop).

16. Article 61 of the Limitation Act, 1963 reads as follows :

ARTICLE 61

Description of suit	Period of limitation	Time from which period begins to run
PART V SUITS RELATING TO IMMOVABLE PROPERTY		
61. By a mortgagor- (a) to redeem or recover possession of immovable property mortgaged ;	Thirty years	When the right to redeem or to recover possession accrues.
(b) to recover possession	Twelve years	When the transfer

of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration ;		becomes known to the plaintiff.
(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor reenters on the mortgaged property.

17. The period of fixed five years has been vaguely stated and the specific time is by the end of Phalgun, which is year end of Hindu Calendar. The word “दरम्यान” (within five years) clearly indicates that the period provided was not more than five years. It was for the period of five years, but by the end of Phalgun month from the date of document, as rightly suggested by learned Advocate.

18. The reliance in the present case is on the words 'till the end of month of Phalgun.' Ms. Kulkarni placed reliance on section 24 of Limitation Act, which reads as follows :

24. Computation of time mentioned in instruments – All instruments shall for the purposes of this Act be deemed to be made with reference to the Gregorian calendar.

The illustration shows that where a promissory note shall execute deed showing native date payable four months after that date, it was held that the period of limitation applicable to a suit on the note runs from the expiration of four months after date computed as per the Gregorian calendar year.

19. In the present case, issue is not about the calculation of the period, but determination of the starting point. The right to redemption was existing and accrued to the plaintiff by the end of deed. Right to redeem is co-extensive with right of foreclosure. As per Article 63 of right of foreclosure accrues when the money secured by the mortgage becomes due. In the present case, the money was due and payable within five years at the end of Phalgun month from the year 1964. Thus, the initial payment became due by the end of Phalgun of 1969. There is absolutely no pleading and evidence to show that the subsequent period of extension of five years was claimed and granted. Even if it is held that the subsequent period of five years was to be considered still mortgage amount became due and payable by the end of Phalgun of 1974. Thereafter, the right of foreclosure accrued at that time.

20. When the terms of the contract specifically lay down that the amount was payable by the end of Phalgun, the period of limitation starts running as soon as the month of Phalgun is over. If the suit for redemption was to be brought within 30 years, it should have been brought within 30 years in the month of Phalgun. In the present case, the month of Phalgun ended on 20th March, 2004, whereas the suit was filed on 06.04.2004. In case of the suit, there is no provision for condonation of delay of a single day.

21. The learned Judges of the Courts below assumed that the period of limitation was 10 years from the date of agreement dated 27.04.1964. It was within 10 years but before the end of Phalgun month, this term before the end of Phalgun month has been overlooked by the Courts below. I, therefore, agree that the suit filed on 06.04.2004 was barred by limitation.

22. The substantial question No.2 is answered accordingly, and therefore, the appeal deserves to be allowed. Hence, the order :-

ORDER

- (A) The Second Appeal is allowed.
- (B) The Judgment and decree of both the Courts below are set aside.
- (C) The suit is dismissed as barred by limitation.
- (D) The parties are left to bear their own costs throughout.
- (E) Civil Application stands disposed of.

**(A.M. DHAVAL)
JUDGE**

mta

