

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**SECOND APPEAL No. 510 OF 2014**  
**WITH**  
**CIVIL APPLICATION NO. 1225 OF 2014**  
**IN**  
**SECOND APPEAL NO. 510 OF 2014**

Madhukar Babanrao Jadhav & Ors. ...Appellants

Versus

Shri Hanmant Shankar Lawangare & Ors. ...Respondents

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Mr.Uday P. Warunjikar for the Appellants.  
Mr. Vishwanath S. Talkute for the Respondents

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CORAM:     **MRS.MRIDULA BHATKAR, J.**  
DATE     :     **MAY 03, 2018**

**P.C.:**

1.     This Second Appeal is directed against the judgment and order dated 21<sup>st</sup> July, 2012 passed by the learned District Judge-3, Satara thereby dismissing Regular Civil Appeal No. 121 of 2009 and confirming the judgment and decree dated 9<sup>th</sup> February, 2009 passed by the learned Civil Judge, Junior Division, Koregaon.

2. The learned Counsel for the appellants has formulated the following substantial questions of law.

- i) Whether the Courts below were justified in not granting an opportunity to lead evidence about affidavit filed by Mr.Shankar Tukaram which clearly shows that the transaction of suit property is out of sale and not mortgage transaction?
- ii) Whether the Courts below ought to have framed issues regarding tenancy as it was framed initially but which was subsequently deleted without giving proper explanation and opportunity to the appellant while recasting new issues?
- iii) Whether the Courts below have failed to appreciate the grievance of the appellants in respect of the de-exhibition of the document i.e., exhibit 24 and rejecting the prayer to read that document in evidence, has led irregularity?

3. The learned Counsel for the appellants/defendants has submitted that the transaction between the appellants and the respondents/plaintiffs in respect of the suit property was not mortgaged in nature, but the said transaction was out and out sale.

He has further submitted that both the Courts below have wrongly interpreted that the transaction of the suit property was in the nature of mortgage. He has argued that the Sale Deed dated 20<sup>th</sup> May, 1951, which is marked at exhibit 135, was sale and not a mortgage. He has further submitted that in the written statement, the appellants/defendants have mentioned that they are in possession of the suit property as tenants of the respondents/plaintiffs and the Trial Court has settled the issue in respect of the tenancy, as the appellants/defendants have proved that prior to execution of the Sale Deed by the respondents/plaintiffs in their favour, they were in possession of the suit land as tenants. However, the said issue was deleted and the Trial Court re-framed the issue on 3<sup>rd</sup> April, 2004. The application dated 20<sup>th</sup> April, 2004 below exhibit 52 was made by the appellants requesting that the issue to be re-framed because it has raised the defence of tenancy. He has further submitted that the said point was further reiterated before the First Appellate Court. If that issue would have been framed by the Trial Court, then the Trial Court has no jurisdiction to try the suit and the matter ought to have referred to the Mamletdar Court. He has further submitted that the original plaintiff Shankar Tukaram Lavangare had filed claim affidavit, which is at exhibit 24, the suit was decided ex-parte. On that basis

the appellants subsequently filed Appeal and the ex-parte order was set aside and it was directed that the suit be heard afresh. He has further submitted that at the time of second hearing, the respondents/plaintiffs have filed an affidavit-in-chief below exhibit 51 for de-exhibiting exhibit 24. Subsequently, the appellants/defendants have moved applications below exhibit 52 and 53, which were rejected by the Trial Court. Both the Courts have committed irregularity in de-exhibiting the documents. He relied on the judgment of this Court **dated 15<sup>th</sup> June, 2015 in Chamber Summons (L) No. 1678 of 2014 in Suit Nos. 1373 of 1992 and 1488 of 1980** in the case of ***Banganga Co-operative Housing Society Ltd. Another Versus Vasanti Gajanan Nerurkar & Others.***

4. The learned Counsel for the respondents has submitted that the claim affidavit i.e., exhibit 24, which is available in the record and produced by the appellants may be read at this stage even assuming that it is not de-exhibited. It will not change the nature of the Deed of Mortgage i.e., exhibit 135. It is to be pointed out that the learned Counsel for the appellants was allowed to rely on exhibit 24, however, he could not point out what was the valid admissions given by the plaintiffs in exhibit 24, which will demolish the interpretation of

the Deed of Mortgage Exhibit 135 by the Trial Court and the First Appellate Court. Thus, there is no substantial question of law on the point of irregularity in respect of de-exhibition of the document. On the point of interpretation of the Deed of Mortgage, he has relied on para 17 of the judgment of the First Appellate Court. He has relied on the judgment of this Court dated **7<sup>th</sup> March, 2017** in **Second Appeal No. 369 of 2013** in the case of ***Sou. Mangal Popatrao Sodmise vs. Sou. Abdagiri Vishvanath Narale, Through her Power of Attorney holder Shri Lahu Vishvanath Narale.*** He has also relied on the judgment of the Supreme Court in the case of ***Vithal Tukaram Kadam and Ors. Vs. Vamanrao Sawalaram Bhosale & Ors.*** reported in ***AIR 2017 SC 3853.***

5. The learned Counsel for the respondents took me through the judgment passed by the First Appellate Court and pointed out para 15 especially where the First Appellate Court has discussed the issue of tenancy and has considered the issue of tenancy by relying on 7 X12 extract produced by the plaintiff. There is no *prima –facie* evidence and only vague averments in respect of the tenancy are made and thus, the Trial Court was right in dealing with the issue of tenancy.

6. Heard submissions.

7. I have perused the judgments passed by the Trial Court as well as the First Appellate Court. Also perused the order passed below exhibits 52 and 53 i.e., applications for re-framing the issue of tenancy.

8. In the case of **Banganga Co-operative Housing Society Ltd. Another** (*supra*), the learned Single Judge of this Court has considered the aspect of de-exhibition of the documents and has held that no evidence affidavit under Order XVIII Rule 4 of the CPC can be allowed to be 'withdrawn'. It is evidence as soon as it is affirmed. In that suit, the evidence affidavit was filed and permission sought to withdraw because of the physical disability of the plaintiff. The facts and circumstances of the case in hand are different than the case before the learned Single Judge of this Court. In the present case, the suit was decided on the basis of claim affidavit i.e., exhibit 24, Subsequently, the written statement was filed by the appellants/ defendants and, therefore, after considering the defence, the original plaintiff was required to file an affidavit-in-chief within

time. After taking into account the evidence, further affidavit-in-chief is filed, which is taken on record. Prior affidavit-in-chief is filed and earlier exhibit 24 was de-exhibited. The original plaintiff was not available for cross-examination. The affidavit-in-chief was filed by one Jaywant, the Power of Attorney holder of the legal heirs of the plaintiff. It was objected by the appellants. However, the Trial Court has passed a reasoned order on 30<sup>th</sup> March, 2005. The said order was not challenged by the appellants.

9. The Trial Court has rightly said that no issue on the point of tenancy can be framed due to vague pleadings and no particulars are provided in respect of the tenancy in the pleadings. I have considered the ratio laid down in the case of **Vithal Tukaram Kadam & Ors.** (*supra*), wherein it is held that a particular document is a mortgage by conditional sale, or a sale with an option to repurchase, has to be determined in the facts of each case, dependent on the recitals in the document, intention of the parties, coupled with attending surrounding circumstances. In the case of **Sou.Mangal Popatrao Sodmise** (*supra*), the learned Single Judge of this Court has considered the terms used in the vernacular language when such Deed of Mortgage by conditional sale is executed. The word

“Mudat Kharedi Khat” (“मुदत खरेदीखत”) was to be translated as a “conditional sale deed”. If there is a word of “sodwoon ghein” (“सोडवून घेईन”), then it is to be interpreted as a “redeem” or “release”. In the present case, the word Deed of Mortgage is mentioned. Moreover, the words “Muddal” (“मुद्दल”) i.e., “capital amount” and “parat” (“परत”) i.e., “return of the capital amount” are mentioned. Thus, it shows the relationship of debtor and creditor. Hence, there is no substantial question of law is made out, which can be framed. Both the Courts have given concurrent findings, which are well reasoned and legal. No interference is required in the said orders. Second Appeal is hereby dismissed.

10. In view of dismissal of the Second Appeal, nothing survives in the Civil Application and the same is accordingly disposed of.

**(MRIDULA BHATKAR, J.)**