

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

**SECOND APPEAL NO. 265 OF 1991
WITH
CIVIL APPLICATION NO. 1225 OF 2017**

Nivruti Dnyanu Patil,	]	
Age 44 years, Occupation-Agriculture,	]	
Resident of Budhgaon,	]	
Taluka : Miraj, District : Sangli.	]	<u>... Appellant.</u>

Versus

Shankar Krishna Bhagat-Patil	]	
(Since deceased through his legal heirs	]	
representatives)	]	
a) Uttam Shankar Bhagat-Patil	]	
Age 40 years,	]	
R/o. Budhgaon, Near Chavadi,	]	
Taluka : Miraj, District : Sangli	]	
	]	
b) Hirabai Bhagat Daund	]	
Age 45 years,	]	
R/o. Pachegaon,	]	
Taluka Sangola, District : Solapur.	]	<u>... Respondents.</u>

- Mr.Sachin Chavan for the Appellant.
- Mr.Sarthak Diwan i/b. Mr.A.M. Kulkarni for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 26th JUNE, 2018.

PRONOUNCED ON : 27th JUNE, 2018.

JUDGMENT :-

1] This Second Appeal is directed against the judgment and decree dated 22nd January, 1991 of 4th Additional District Judge, Sangli in Regular Civil Appeal No.181 of 1986, which was preferred against the judgment and decree dated 28th October, 1985 passed by the 2nd Jt. Civil Judge, Junior Division, Sangli in Regular Civil Suit No.428 of 1982.

2] The said suit was filed by the original Respondent, Shankar Krishna Bhagat-Patil, for redemption of mortgage and for getting possession of the suit premises. It was his case that he was in need of money and the Appellant offered to pay him the amount of Rs.1500/-, he executed the mortgage by conditional sale of the suit premises in favour of the Appellant on 24th December, 1973. The mortgage was to be redeemed after the expiry of five years therefrom and the possession was to be taken back by the Respondent. Accordingly, after the expiry of five years, the Respondent demanded the possession and redemption of the mortgage. The Appellant, however, avoided to do so. Hence, the Respondent issued a notice to him on 11th August, 1982, which was served on the Appellant on 12th August, 1982. The Appellant failed to comply therewith or even to give reply to the said notice and hence, the suit was filed.

3] This suit was resisted by the Appellant admitting the execution of the mortgage deed and also showing his readiness for redemption of the said mortgage. However, a specific contention was raised by the Appellant in the written statement at Exhibit-14 that he has been in possession of the suit premises as a tenant since 1968 at the rent of Rs.10/- per month. He was running grocery shop therein. During subsistence of the said tenancy, the mortgage deed was executed and his possession was continued as a mortgagee. Now after the redemption of the mortgage, his tenancy stands revived and hence, he is entitled to remain in possession of the suit premises as a tenant. Therefore, though the decree of redemption of the mortgage can be passed, the Respondent cannot be entitled for possession of the suit premises. The Appellant had also contended *inter-alia* that on the basis of the consent deed executed by the Respondent on 25th October, 1974, he has carried out repairs of the said premises by incurring the expenses of Rs.2985/- and he is entitled to get that amount along with interest at the rate of 9% per annum.

4] On the basis of these respective pleadings of the parties, the trial Court framed the requisite issues and was pleased to decree the suit for possession, holding that the Appellant has failed to prove his plea of tenancy. However, at the same time, the trial Court also

directed the Respondent to pay to the Appellant the amount of Rs.1200/- towards the repair expenses and Rs.1500/- towards the mortgage charges.

5] The First Appellate Court has confirmed the judgment and decree of the trial Court, as regards redemption of the mortgage and for possession of the suit premises. However, it has enhanced the repair charged from Rs.1200/- to Rs.2085/-.

6] This concurrent finding of fact arrived at by the trial Court and confirmed by the Appellate Court is challenged in this Second Appeal. This Second Appeal is admitted on following substantial questions of law as framed in ground No.(a) to (c) of the Appeal Memo.

(a) Having accepted the fact that Appellant-Defendant was already in possession of the suit property for a period of more than five years, even prior to the mortgage-deed, and having accepted the fact that the rent note at Ex-29 and consent deed at Ex-22 have been already proved, whether the finding that there was no tenancy prior to the mortgage, existed between the parties, is correct and legal?

(b) Having established the tenancy, whether such tenancy revives after the redemption of mortgage and in that case whether the tenancy in favour of the Appellant-Defendant has revived?

(c) If the tenancy of the Appellant-Defendant has been so revived after, the redemption of the mortgage, whether the Respondent-Plaintiff is entitled to the claim the possession of the suit house?”

7] Thus the main and substantial question of law raised for consideration in this Second Appeal is, whether the Appellant proved that he was in possession of the suit premises as a tenant since prior to execution of the mortgage deed? As stated above, both the trial Court and the Appellate Court had, on the basis of the oral and documentary evidence adduced before it, concurrently held that the Appellant has failed to prove his tenancy over the suit premises since prior to the execution of the mortgage deed.

8] While challenging this finding of the both the Courts below, the submission of learned counsel for the Appellant is that both the Courts below have not properly appreciated the material admission given by the Respondent in his cross-examination that the Appellant runs the grocery shop belonging to him in the property of the Respondent since last 18 years. It is submitted that this admission on the part of the Respondent clearly goes to prove that the Appellant was in possession of the suit premises since the year 1968 i.e. for a period of about 5 years prior to the execution of the mortgage deed in

the year 1973.

9] Further learned counsel for the Appellant has also placed much reliance on the consent deed Exhibit-52 for submitting that in the said consent deed the Respondent has categorically admitted that the suit premises were in possession of the Appellant as tenant and during subsistence of that tenancy and possession, the deed of mortgage by conditional sale was executed. By this consent deed, the Appellant was permitted to carryout the repairs in the suit property and the expenses of the repairs were to be adjusted towards the future rent. The reliance is also placed on the description of the suit premises as given in the mortgage deed dated 24th December, 1973 submitting that if this description is tallied with the description given in the Gram Panchayat extract dated 10th July, 1974 and the Map of the said property, then inference is inevitable that the Appellant has been in possession of the suit premises as a tenant, since prior to the execution of the mortgage deed.

10] As against it, it is the contention of learned counsel for the Respondent that the premises in which the Appellant was running the grocery shop was sold to his brother by the Respondent and after the death of the Appellant's brother, the Appellant had been running the grocery shop therein. It is the contention of the Respondent that the

Appellant is trying to create unnecessary confusion in both these premises though they are totally different.

11] As regards the consent deed, it is submitted by learned counsel for the Respondent that both the trial Court and the Appellate Court has refused to place reliance thereon discarding the evidence of the Appellant and his attesting witness on the said deed. Hence, according to learned counsel for the Respondent in the said finding of fact arrived at by both the Courts below, this Court should restrain itself from interfering in the Second Appeal.

12] In my considered opinion, both the Court below have rightly held that, the material piece of evidence to know whether the Appellant was in possession of the suit premises as a tenant at the time of execution of the mortgage deed, is the mortgage deed itself. The recitals therein are of crucial and vital importance. If really the Appellant was in possession as a tenant and his possession as a tenant was now converted and confirmed as a mortgagee, then definitely there would have been mention to that effect in the mortgage deed. However, the perusal of the mortgage deed clearly goes to prove that it is conspicuously silent about prior possession of the Appellant therein as that of a tenant and such possession being converted to that of a mortgagee. Conversely, the recitals in the mortgage deed clearly go to

show that on the date of mortgage, the possession of the suit premises was delivered to him. Though an attempt is made by learned counsel for the Appellant to contend that these recitals merely go to show that symbolic possession was given to the Appellant on the date of mortgage, it becomes difficult to accept such submission, as there is no corroborating evidence on record to that effect. In the absence of any witness on the mortgage deed being examined to support this contention, recitals in the mortgage deed are required to be accepted as they are and they clearly go to disprove the case of the Appellant, of being in possession as a tenant since before and his possession being converted to that of a mortgagee.

13] It is pertinent to note that the Appellant has also not bothered to give reply to the notice sent by the Respondent before institution of the suit despite receiving the said notice. If it was really his case that he was in possession as a tenant since prior to mortgage then at the very first opportunity, he should have raised that case, by giving reply to the notice. He has however not done so, which fact is rightly held by both the Courts below against him.

14] As regards consent deed, the trial Court has given the reasoning in detail as to why it was not accepting the evidence of the attesting witness on the said consent deed. The trial Court has noticed

several suspicious features in the said consent deed and also found that alleged signature thereon cannot be said to be that of the Respondent. In my considered view, the trial Court has the opportunity to record the evidence of the Appellant and this attesting witness and therefore, the trial Court being the first fact finding Court is the best authority to decide about the credibility of this witness and the evidence adduced by the Appellant on this point. Therefore, if the trial Court found their evidence not credible and said finding of fact is not disturbed by the First Appellate Court also, then as rightly submitted by learned counsel for the Respondent, within the limited scope of the Second Appeal, this Court cannot disturb that finding by becoming a “third fact finding Court”.

15] Even as regards the alleged rent receipt and the contention that the Respondent has accepted the rent of three months by the said rent receipt, I do not find that the trial Court has committed any error in disbelieving the same. Moreover, as the said rent receipt does not bear the number of the suit premises, it becomes difficult to accept that this rent receipt pertains to the suit premises; especially when admittedly the brother of the Appellant was in possession of the adjacent premises owned by the Respondent and thereafter, he has purchased the same. The Appellant has also not examined any

adjoining occupant or neighbour to prove that he was in possession of only one premises belonging to the Respondent. It is clear that the Appellant is trying to create confusion about these two premises, though the description of the suit premises as given in the mortgage deed and in the suit is very clear to show that these premises are distinct from the premises which were purchased by the Appellant's brother and in which he was running the grocery shop, which now the Appellant is running.

16] Thus, as regards the finding of fact arrived at by the trial Court and confirmed by the Appellate Court, there is no ground made out to disturb the same and once it is held that the Appellant has failed to prove that he was in possession of the suit premises since prior to the execution of the mortgage, then it follows that on redemption of the mortgage, the Respondent becomes entitled to get the possession of the suit premises.

17] In this respect, learned counsel for the Respondent has also relied upon the judgment of the Hon'ble Apex Court in the case of *Tarachand V/s. Sagarbai Alias Chaiyalibai*¹ to submit that even assuming that the Appellant was in possession of the suit premises as a tenant, on execution of the mortgage deed, the implied surrender of

1 (2007) 5 SCC 392

that tenancy is required to be inferred and therefore, on this ground also the Respondent is entitled to get the possession of the suit premises.

18] To counter this submission, learned counsel for the Appellant has relied upon the judgment of the Hon'ble Apex Court in the case of *Gambangi Applaswamy Naidu & Ors. V/s. Behara Venkataramanayya Patro & Ors.*² and *Gopalan Krishnankutty V/s. Kunjamma Pillai Sarojini Amma & Ors.*³. Out of these two judgments, the judgment of *Gambangi Applaswamy Naidu & Ors. V/s. Behara Venkataramanayya Patro & Ors.* (*Supra*) is already considered by the Hon'ble Apex Court in the case of *Tarachand V/s. Sagarbai Alias Chaiyalibai* (*supra*) and it was distinguished. The judgment of *Gopalan Krishnankutty V/s. Kunjamma Pillai Sarojini Amma & Ors.* (*supra*) is based on the judgment in *Gambangi Applaswamy Naidu & Ors. V/s. Behara Venkataramanayya Patro & Ors.* (*supra*). Hence, it also cannot be useful to the Appellant to advance his submission.

19] In the judgment of *Tarachand V/s. Sagarbai Alias Chaiyalibai* (*supra*) it is categorically held by the Hon'ble Apex Court that, if the tenant surrenders the tenancy, either explicitly or by necessary implication, the terms of mortgage shall prevail. It was held

² (1984) 4 SCC 382

³ (1996) 3 SCC 424

that the question whether rights of tenant would give way to rights of mortgagor would essentially depend upon the terms and conditions of the mortgage. As per the Hon'ble Apex Court, the facts that would separate the inference of surrender of tenancy are the fixed term for redemption of mortgaged property, the liability of tenant to pay rent not kept alive, right conferred on the mortgagee to get the property auctioned in the event of non-repayment of mortgage amount, etc.

20] In the facts of the present case, admittedly, there is no mention of the alleged tenancy in the mortgage deed. Moreover, the mortgage deed was admittedly for a fixed term of five years. The liability to pay rent was not kept alive and the right was given to consider it as a sale-deed, if the Respondent was unable to redeem the mortgage within stipulated period of 5 years. Therefore, the terms and conditions of the mortgage deed clearly spell out the implied surrender of the tenancy. Hence, as held in this judgment of *Tarachand V/s. Sagarbai Alias Chaiyalibai (supra)*, assuming that the Appellant was in possession of the suit premises as a tenant, in view of the implied surrender of tenancy on execution of the mortgage deed, on redemption of mortgage the Respondent becomes entitled to get possession of the suit property. The Respondent-landlord was therefore not required to proceed against the Appellant under the

provisions of Rent Control statute to recover the possession. Therefore, having surrendered his tenancy may be impliedly, the Appellant cannot retain his possession. Hence, on this ground also, the judgment and decree passed by the trial Court and confirmed by the Appellate Court does not call for any interference.

21] The Second Appeal therefore holds no merits, hence stands dismissed.

22] In view of the dismissal of the Second Appeal, nothing survives in the Civil Application and therefore, it stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]