

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 321 OF 2019
WITH
CIVIL APPLICATION NO. 658 OF 2019

Baburao Kallappa Madkari ... Appellant

V/s.

Smt. Shantabai Pargonda Patil and Ors. ... Respondents

Mr. Shriniwas S. Patwardhan a/w. Mr. Bhooshan R. Mandlik for the appellant/applicant.

Mr. G.M. Salunkhe I.by Mr. Tejas Hilage for the respondent no.1.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 12th FEBRUARY 2020

P.C. :

- . Heard the respective counsel.
2. The appellant herein impugns the judgment and order passed by the District Judge-1, Gadhinglaj dated 12th April 2018 in Regular Civil Appeal No. 10 of 2011, thereby confirming the judgment and decree passed by the learned Joint Civil Judge Junior Division, Gadhinglaj in Regular Civil Appeal 135 of 2006 vide judgment and order dated 24th December 2010.
3. The substantial questions of law which fall for determination in the present case are as follows:-

1) Whether a suit for recovery of possession was maintainable, in view of the fact that the predecessor of the plaintiff has executed a mortgage deed in favour of the predecessor of the defendant.

2) Whether it was mandatory to file a suit for redemption of the mortgage deed and as a consequence to seek possession of the suit property which happens to be an agricultural land.

4. The facts of the case in a nutshell are as follows:-

One Pargonda Patil was a protected tenant of Shri Rajaram Chhatrapati Memorial Education Trust (Regd. Public Trust) in respect of survey no. 56. That, the plaintiff had given a public notice in daily newspaper "Satyawadi" on 30th January 1976, bringing it to the notice of the people that Pargonda Patil happens to be an Alcoholic and that no one should enter into any transaction of any kind with Pargonda Patil.

5. Despite that on 23rd April 1976 the present appellant had entered into a transaction with Pargonda Patil wherein Pargonda Patil had transferred his rights of cultivation in the said land, of which he was a protected tenant, for a period of 17 years for a consideration of Rs.7,500/-. It was agreed between the parties that during the said period after expiry of 10 years till 17 years, the mortgage could repay the said amount and seek recovery of possession of the suit property. The said document is at exhibit-68 of the original records before the Court of Civil Judge Junior Division, Gadhinglaj. That, the tenancy rights were transferred in favour of the appellant for a period of 17 years. That, in the year 2006 the wife of Pargonda Patil filed a suit for seeking recovery of possession.

6. It is contended that at the end of 17 years the plaintiff has sought recovery of possession and defendant had refused to give the same and therefore, the plaintiff was constrained to file civil suit seeking recovery of possession. Both the courts below have held that the said document is a mortgage deed and that the predecessor of the plaintiff had mortgaged, only his tenancy rights and nothing beyond the same and therefore, the suit was decreed in favour of the plaintiff. That, the courts below have rejected the contention of the defendant that the suit was bad for non-rejoinder of necessary parties.

7. The claim of the defendant that the suit was hit by the provisions of order 7 Rule 3 of the Code of Civil Procedure. The Appellate Court had held that the said transaction was not necessarily a mortgage deed but it could be in the nature of security document for a consideration of Rs.7,500/-. Needless to state that the document at Exhibit-68 was placed on record by the plaintiffs. It was the photocopy of the original document. The defendant had feigned ignorance about whereabouts of the original document at exhibit-68. It was the contention of the defendant that by virtue of the said transaction, the defendants were given permanent rights of cultivation.

8. The Court cannot be oblivious of the contents of the document. Perused the document at Exhibit-68. The transaction would clearly indicate that the rights of cultivation, for a period of 17 years was transferred in favour of the defendants.

9. The learned counsel for the appellant vehemently submits that there is a specific mention of tenancy rights to be recovered at the

end of 17 years and therefore, it was necessary to refer the suit to the tenancy Court. The said contention cannot be taken into consideration for the simple reason that in fact, the plaintiff was the protected tenant of Shri Rajaram Chhatrapati Memorial Education Trust. That, the further tenancy rights could not have been created nor accepted by the defendant without precise consent of the Trust.

10. The contents of the document at Exhibit-68 would further reflect, that in the eventuality the defendants take crop of sugarcane, the plaintiff would be bound to sign the form, as he happened to be a protected tenant and therefore, it can be said that the plaintiff had retained the locus of a protected tenant and the tenancy rights as well. In fact the land was entrusted in possession of the defendant only for the purpose of cultivation as it is mentioned as **“Bhogvatas dileli asun”** (for cultivation only).

11. The main contention of the learned counsel for the appellant is that a suit for simplicitor recovery of possession was not maintainable and that it was incumbent upon the plaintiff to file a suit for redemption of the mortgage deed and thereafter, possession of the said land as a consequence of redemption of mortgage deed. Section 60 of the Transfer of Property Act, 1882 reads as under:-

*60... **Right of mortgagor to redeem.**—At any time after the principal money has become 1[due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee.*

(a) to deliver 2[to the mortgagor the mortgage-deed

and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by 3[decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

12. The very language of section 60 of the transfer of Property Act, 1882 would indicate the intention of the legislature that although the right is created on the mortgagee, then said right on payment of or compliance of the conditions of the mortgage deed would entitle the mortgagor to recover the property. It would be incumbent upon the mortgagee to deliver the mortgage deed and all documents relevant to the mortgage property which are in the possession and/or power of the mortgagee. In the present case the defendants had contended that they do not have any knowledge about whereabouts the mortgage deed.

13. At the time of recording of substantive evidence the very fact that the defendant had contended that by the said transaction they were put into permanent possession would show that they had not denied the execution of the said mortgage deed.

14. Clause (b) of Section 60 of the transfer of Property Act, 1882 specifically contemplates that *'it is incumbent upon the mortgagee to deliver possession thereof to the mortgagor upon fulfilling the conditions of the mortgage deed'*.

15. Clause (c) contemplates that *'re-transfer of the mortgage property in favour of the mortgagor at the costs of the mortgagor or any third person as he may direct. There is no impediment as such to file a suit for recovery of possession and therefore, it cannot be held that the filing of the suit for redemption of the mortgage deed would be the conditions precedent for seeking recovery of possession on the basis of the mortgage deed'*. Both the issues are answered accordingly.

16. At this stage the learned counsel for the respondent has placed reliance upon the judgment of this Court reported in **AIR (34) 1947 Bombay 206**, wherein this Court had held as follows:-

'in the eventuality of the transaction being in the nature of usufructuary mortgage for over Rs.100 and when the deed is not registered a suit by the mortgagor for redemption is not competent and that the proper remedy would be to file a suit for possession of title'.

17. It is an admitted position that the said mortgage deed was unregistered mortgage deed. However, the defendant had sought cultivation rights in view of the basis of the said deed and no better title, would devolve upon him. The title could not have been passed over by virtue of the said mortgage deed.

18. In view of the above discussion it cannot be said that it was mandatory to file a suit for redemption before seeking recovery of possession. There is no reason to interfere with the concurrent findings recorded by the Civil Judge Junior Division and the Appellate Court. The second appeal deserves to be dismissed. The Civil Application is accordingly disposed of.

(SMT. SADHANA S. JADHAV, J)