

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

SECOND APPEAL NO.269 OF 1993

Sahebrao s/o. Deochand Patil,
since deceased by his legal heirs:-

1. Smt. Thagubai Sahebrao Patil,
Age : 61 years, Occ. Household
2. Miss. Latabai Sahebrao Patil,
Age : 27 years, Occ. Agri.,
3. Sunil Sahebrao Patil,
Age : 23 years, Occ. Agri.,

Nos.1 to 3 r/o. Deshmukhwada,
Amalner, Tq. Amalner, Dist. Jalgaon

4. Mrs. Pramilabai Kashinath Patil,
Age : 40 years, Occ. Household,
r/o. Post, Khalane, Tq. Shindkheda,
Dist. Dhule
5. Mrs. Sushilabai Dharma Patil,
Age : 45 years, Occ. Household,
r/o. A and Post Hisol, Tq. Shirpur,
Dist. Dhule
6. Gokul Sahebrao Patil,
Age : 35 years, Occ. Service,
r/o. At Post Tambapur, Amalner,
Tq. Amalner, Dist. Jalgaon

..Appellants
(orig. Defendant)

Vs.

Manikchand s/o. Gulabrao Deshmukh,
Aged : 44 years, Occ. Agri. r/o. At Ner,
Tq. and Dist. Dhule

..Respondent
(orig. Plaintiff)

Mr.Sanket Kulkarni, Advocate h/f. Mr.V.T.Choudhary, Advocate for appellant

Mr.V.J.Dixit, Senior Advocate for respondent

CORAM : R.G. AVACHAT, J.

DATE : JUNE 13, 2022

JUDGMENT :-

This is original defendant's Second Appeal from the judgment and decree directing him to hand over vacant possession of the suit premises i.e. one of the three rooms, bearing City Survey No.2230, particularly described in paragraph 1 of the plaint.

2. For the sake of convenience, the parties to this Second Appeal are referred to as per their status in the suit.

3. The facts, giving rise to the present appeal, are as follows:-

The plaintiff filed a suit for redemption of mortgage. It is his case that he was in need of money. He, therefore, requested the defendant to pay him a sum of Rs.2,200/-. The defendant agreed to lend him money. Since the defendant did not have a license for money lending, a document dated 11.02.1974 titled as "*Sauda*

Pavti" (Exh.14) was executed in favour of the defendant as a security for repayment of the amount. It was an understanding between the parties that on repayment of the amount, the document was to stand cancelled. The defendant agreed not to charge interest on the amount lent, as he was to enjoy possession of the premises until repayment of the amount. As such, in lieu of interest on the amount lent, the defendant was to occupy the suit premises.

4. It is also the case of the plaintiff that after the time for repayment of the amount arrived, he offered the defendant a sum of Rs.2,200/- and asked him to hand over possession of the suit premises back to him. Since the defendant refused to comply with the plaintiff's demand, the suit was filed with the following prayers:-

अ. फि.क.१/२ प्रमाणे दाव्याची खोली प्रतिवादीस ताबेगहाण रुपये २२००/- स दिली व रक्कम परत करण्यात येईल त्यावेळी घर खोलीचा कब्जा द्यावा असा करार ता. ११.०९.१९७४ रोजी तथाकथित सौदे कराराचे वेळी तोंडी ठरला असे जाहीर करुन ही सौदे पावतीचा अंमल झाला नाही व व्हावयाचा नाही म्हणून ही नॉमिनल घर म्हणून रुपये २२००/- करता झाली आहे. सबब रुपये २२००/- ताबेगहाण रक्कम प्रतिवादीने घेउन ताबेगहाण मुक्त झालेने दाव्याचे घराचा कब्जा प्रतिवादीकडून वादीस देववावा ही विनंती.

5. The defendant appeared in the suit and filed his written statement and disputed it to be a transaction of mortgage. It was his case that the plaintiff intended to sell the suit premises. On negotiation, the sale price was fixed at Rs.6,000/-, out of which Rs.2,200/- was paid as earnest money. The defendant had, time and again, requested the plaintiff to receive the balance consideration amount and execute the sale deed. The defendant, in his written statement, urged for grant of relief of specific performance. It, however, appears that he did not pay the Court fee on his counter claim.

6. The trial Court dismissed the suit on the ground that oral transaction of mortgage is not recognised by law. The trial Court, however, found it to be a case of mortgage. The trial Court did not grant the plaintiff relief of possession of the suit premises on the ground of title for want of prayer and pleadings in that regard. The trial Court also negated the defendant's counter claim for specific performance of agreement for sale.

7. Original plaintiff, therefore, preferred first appeal, being Regular Civil Appeal No.316 of 1989 (Old Civil Appeal No.311 of

1984). The first appellate Court allowed said appeal granting decree for possession of the suit premises. Cross-Objections preferred by the defendant came to be dismissed as not pressed. The first appellate Court passed the decree in terms of the following order:-

- “(i) The appeal is allowed with costs throughout.*
- (ii) The impugned judgment and decree, in this appeal, is hereby set aside.*
- (iii) The mortgage transaction is hereby redeemed. The plaintiff should pay the amount of Rs.2,000/- (Two thousand two hundred) to the respondent-defendant within a month from today and on receipt of the said amount, the respondent-defendant, shall deliver vacant possession of the suit room, after taking out his or any other persons’, on his behalf, bag the bagges, to the appellant-plaintiff. If the respondent-defendant refuses to accept the remaining amount and deliver vacant possession, in that event, appellant-plaintiff is at liberty to deposit the said amount in the court and get the vacant possession through Court.*
- (iv) The cross-objections are rejected.*
- (v) Decree be drawn accordingly.”*

This is how, the original defendant is in Second Appeal before this Court.

8. Heard Mr.Sanket Kulkarni, learned counsel, for the appellants-defendant and Mr.V.J.Dixit, learned Senior Counsel for respondent-plaintiff.

9. Learned counsel for the appellant/defendant would submit that both the Courts below have concurrently held the document (Exh.14) to be of a mortgage. The document is unregistered one. In view of Section 17 of the Registration Act, 1908, a document of mortgage of immovable property worth over Rs.100/- was required to be executed by registered instrument. In view of Section 49 of the Indian Registration Act, an unregistered document of mortgage cannot be read in evidence. According to learned counsel, the plaint was silent to pray for a relief of possession on the basis of title. The first appellate Court ought not to have granted such relief. The defendant was taken by surprise. The principles of natural justice, thus, get violated. In support of his contentions, learned counsel has relied on a judgment of the Apex Court in the case of **Bachhaj Nahar Vs. Nilima Mandal and ors., MANU/SC/8199/2008**, wherein it has been observed thus:-

“ Jurisdiction to grant relief in a civil suit necessarily depends on pleadings, prayer, court fee paid, evidence let in – In absence of claim by plaintiffs based on easementary right, defendant did not have an opportunity to demonstrate that plaintiffs had no such right – There was absence of pleadings and an opportunity to defendant to deny such claim – High Court erred in converting suit for title into a suit for enforcement of an easementary right.....”

Learned counsel has also relied on a judgment of this Court in the case of **Pundlik s/o. Narayan Mahure Vs. Keshao s/o. Narayan Mahure and ors., Second Appeal No.55 of 2008** decided on **27.09.2021.**

10. Learned counsel for the respondent/plaintiff would, on the other hand, submit that the plaintiff was owner of the suit premises. The defendant did not have a right to continue to possess the suit premises. Attention of this Court was adverted to prayer clause (c) of the plaint, which reads thus:-

"क. मे. कोर्टास वाटतील ते इतर न्यायाचे हुकूम व्हावेत ही विनंती."

11. In the memo of appeal, a number of points have been raised for being considered as substantial questions of law. Learned counsel for the defendant has, however, urged this Court for deciding present Second Appeal on following substantial questions of law:-

(i) Whether the decree of redemption may be passed based on an unregistered document of mortgage ?

(ii) Whether in the facts and circumstances of the case, the first appellate Court was justified in decreeing the suit ?

(iii) What order ?

R E A S O N S

12. There can be no two views over what has been submitted by learned counsel for the defendant, that a case of oral mortgage is unsustainable in law and relief thereunder could not be granted. Close reading of the findings recorded would indicate that the document (Exh.14) was rightly not held to be a document of mortgage. It is reiterated that the case of the plaintiff is that the defendant advanced the plaintiff Rs.2,200/- as a loan. As a security towards repayment of the said loan, the document in the nature of *Sauda Pavti* (agreement for sale) was executed. Same indicates that it was not the plaintiff's case that the document (Exh.14) is of mortgage. Needless to mention that the nature of document is to be ascertained from the recitals therein. The question of considering nature of the document based on its contents is necessarily a

substantial question of law. Considering the rival claims of the parties, oral evidence need not be adverted to.

13. The defendant admits execution of document (Exh.14). According to him, it is an agreement for sale. The plaintiff also did not dispute the nature of the said document. It is, however, his case that the said document was executed as a security and was never intended to be acted upon. While deciding this Second Appeal, it is necessary to advert to the recitals of the document (Exh.14).

14. The document (Exh.14) has been styled as "*Sauda Pavti*". It was executed for a consideration of Rs.6,000/- on 11.02.1974. The recitals thereof are to the effect that the plaintiff agreed to sell the suit premises to the defendant for a consideration of Rs.6,000/-. He received a sum of Rs.2,200/-. Possession of the suit premises was handed over to the defendant. The balance amount of consideration of Rs.3,800/- was agreed to be paid at the time of execution of the sale deed. It was agreed between them that the sale deed would be executed on or before 10.02.1976. Expenditure required for execution of the sale deed was agreed to be borne by both of them equally. The last clause of the document

reads that if the plaintiff pays a sum of Rs.2,200/- on or before 10.02.1977, the document "*Sauda Pavti*" was to stand cancelled. Based on the last clause, both the Courts below have rightly observed that the transaction between the parties must have been of money lending. Be that as it may.

15. If one goes by the terms of the document (Exh.14), sale deed was to be executed on or before 10.02.1976. The defendant, therefore, ought to have filed a suit for specific performance within three years therefrom i.e. before 09.02.1979. His counter claim (without payment of court fee) for specific performance was first time made when the written statement was filed on 03.02.1981. As such, the claim for specific performance of agreement for sale was barred by limitation. Since the suit was dismissed, the original plaintiff preferred first appeal. The defendant filed Cross-Objection (again without paying court fee) and claimed relief of specific performance. The relief under Section 53-A of the Transfer of Property Act was also urged for. For the reasons best known to the Advocate for the defendant, the Cross-Objection were not pressed for. No submission on cross objections was ever made before the first appellate Court. The first appellate Court has observed

accordingly in so many words. Before this Court as well, nothing has been urged on those two points.

16. Now, the question is whether the first appellate court was justified in passing the decree for possession based on title. It is reiterated that there can be no two views over what has been submitted by learned counsel for the defendant relying on judgment of the Apex Court in the case of **Bachhaj Nahar** (supra). One has, however, to go by the facts and circumstances obtainable in the case.

17. The obtainable position in the case in hand is that the document in the nature of Sauda Pavti/agreement for sale was executed between the parties. The plaintiff received Rs.2,200/- as against the consideration of Rs.6,000/-. The balance amount was to be paid at the time of execution of the sale deed. The sale deed was agreed to be executed on or before 10.02.1976. If the plaintiff repaid the amount of Rs.2,200/- by 10.02.1977, the document was agreed to be treated as cancelled. Admittedly, the defendant did neither file a suit for specific performance of the agreement for sale within the period of limitation nor did he urge for the relief under

Section 53-A of the Transfer of Property Act. Whatever averments were there in this regard in Cross-objection were given up before the first appellate Court itself. No such relief was urged for before this Court. As such, the facts indicate that the title of the suit property remained with the plaintiff. The defendant did not have any right, title and interest to continue to possess the suit premises once the plaintiff offered to repay the sum of Rs.2,200/-. This Court is surprised to hear the submission that the defendant would be taken aback and the principles of natural justice would stand violated if the decree for possession passed by the first appellate court is upheld in this Second Appeal.

18. A three-Judge bench of the Hon'ble Supreme Court, way back in 1951, in the case of **Firm Shrinivas Ram Vs. Mahabir Prasad and ors.**, AIR 1951 SC 177 has observed thus:-

“A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon

or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit. As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in Mohan Manucha Vs. Manzoor Ahmad, 70 I.A.1:(A.I.R.(30) 1943 P.C.29). This appeal arose out of a suit commenced by the plaintiff appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect to by both the lower 'courts as well as by the Privy Council. But the Privy Council held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under section 65 'of the [Indian Contract Act](#). Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit.....

19. For the reasons given herein above, the first substantial question of law is answered in negative. It is, however, held that the document (Exh.14) was, admittedly, in the nature of Sauda Pavti/agreement for sale. In view of this Court, the first appellate

Court was very much justified in passing the decree for possession in favour of the plaintiff. However, the same needs to be modified. Hence, the following order:-

O R D E R

- (i) The plaintiff shall pay the defendant a sum of Rs.2,200/- within a period of one month from today.
- (ii) On receipt of the said amount, the defendant shall hand over vacant possession of the suit premises to the plaintiff immediately, failing which the plaintiff shall have recourse to execution proceedings.
- (iii) The appeal stands disposed of accordingly.

[R.G. AVACHAT, J.]

KBP