

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

SECOND APPEAL NO.36 OF 1995

1. Shaikh Rasool S/o Abdulsahab
Mujawar (Died through L.Rs.)
- 1(a) Madina w/o Rasool Mujawar,
Age : 60 Years, Occ. Household
- 1(b) Ajim S/o Rasool Mujawar,
Died though his L/Rs.
- 1bi) Wasim S/o Ajim Mujawar,
Age : 20 Years, Occ. Driver,
R/o. Near Masjid, Chausala,
District Beed.
- 1(c) Nizam s/o Rasool Mujawar,
Age : 35 Years, Occ. Driver.
- 1(d) Jalil s/o Rasool Mujawar,
Age : 32 Years, Occ. Business,
R/o. 1(a) to 1(d) all R/o Chousala,
District Beed.
2. Sk. Mohammeds S/o Abdul Saheb
Mujawar died through his L.Rs.
- I. Zaharabee w/o Mohd. Mujawar,
Age : 70 Years, Occ. Household,
R/o. Near Bus Stand, Chousala,
District Beed.
- II. Rafiq s/o Mohd. Mujawar,
Age : 52 Years, Occ. Agriculture
R/o. Near Bus Stand, Chousala,
District Beed.
- III. Khalil s/o Mohd. Mujawar
Age : 47 Years, Occ. Agriculture

R/o. Near Bus Stand Chousala,
District Beed.

- IV. Sikandar s/o Mohd. Mujawar
Age : 43 Years, Occ. Agriculture
R/o. Near Bus Stand, Chousala,
District Beed.
- V. Sadeq s/o Mohd. Mujawar,
Age : 41 Years, Occ. Agriculture,
R/o. Near Bus Stand, Chousala,
District Beed.
- VI. Tayyab s/o Mohd. Mujawar,
Age : 39 Years, Occ. Agriculture,
R/o. Near Bus Stand, Chousala,
Dist. Beed.
- VII. Farzana d/o Mohd. Mujawar,
Age : 49 Years, Occ. Household,
R/o. Wadwani Dist. Beed.
- VIII. Ruksana D/o Mohd Mujawar,
Age : 49 Years, Occ. Household,
R/o. Wadwani Dist. Beed.
- IX. Shabana D/o Mohd. Mujawar,
Age : 32 Years, Occ. Household,
R/o. Ooti Tq. Ausa, Dist. Latur.
- 3. Sk. Anis S/o Abdul Mujawar,
Age : 41 Years, Occ. Agrilculture
R/o. Near Masjid, Chausala,
District Beed.
- 4. Babukhan s/o Hasan Khan Pathan,
Age : 40 Years, Occ. Business,
Prop. of Hotel Pathan Tea House,
Chausala, Beed.

.. Appellants
(Original Defendants)

Versus

Hamida begum w/o Abdul Samadkhan
since died through her L.Rs.

- 1(i) Zakir s/o Samadkhan Pathan,
Age : 50 Years, Occ. Medical Practitioner
R/o. Teli Galli, Ashti Tq. Ashti
District Beed.
- 1(ii) Ayub s/o Samadkhan Pathan,
died through LR.s
- A Muddassir Ayubkhan Pathan,
Age : 40 Years, Occ. Service,
R/o. Noorani Colony, Jamkhed,
Dist. Ahmednagar
- B Mujahid Ayubkhan Pathan,
Age : 34 Years, Occ. Labor,
R/o. Noorani Colony, Jamkhed
District Ahmednagar.
- C Shaker Khan Ayubkhan Pathan,
Age : 32 Years, Occ. Labor,
R/o. Noorani Colony, Jamkhed,
Dist. Ahemdagar.
- D Khuddusia Javed Ahmed Syed
Age : 44 Years, Occ. Housewife,
R/o. Noorani Colony, Jamkhed,
District Ahmednagar.
- E Kadirabanon Zakir Syed,
Age : 42 Years, Occ. Housewife,
R/o. Noorani Colony, Jamkhed
District Ahmednagar.
- F Sadekha Javede Shaikh,
Age : 38 Years, Occ. Housewife,
R/o. Noorani Colony, Jamkhed
District Ahmednagar.
- G Saleha Aziz Baig

Age : 36 Years, cc. Housewife,
R/o. Noorani Colony, Jamkhed,
District Ahmenagar

H. Farah @ Sadia Rizwan Shaikh
Age : 34 Years, Occ. Housewife,
R/o. Noorani Colony, Jamkhed
District Ahmednagar.

1(iii) Baiyyo d/o Samadkhan Pathan,
Age : 38 Years, Occ. Household,
R/o. Telli Galli, Asthi Tq. Ashti
Dist. Beed.

1(iv) Maleka d/o Samadkhan Pathan,
Age : 53 Years, Occ. Household,
R/o. as above

1(v) Sultana d/o Samadkhan Pathan,
Age : 39 Years, Occ. Household,
R/o. as above

1(vi) Bibi d/o Samadkhan Pathan,
Age : 28 Years, Occ. Household,
R/o. as above.

Added Respondents
L. Rs. of deceased of
R-1.

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Advocate for Appellants : Mr. M M Patil Beedkar

Advocate for Respondent No.1(i),r/1(iii) to 1(vi) Mr. A.N. Ansari

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CORAM : S. G. MEHARE, J.

DATE : 30.10.2023

JUDGMENT :

1. Heard the learned counsel for the appellants and the learned
counsel for the respondents.

2. The appellants were defendants. The respondent had filed a suit for possession based upon the title. Simultaneously, the plaintiff had come with a case that defendants Nos.1 to 3 had unauthorizedly sublet the suit premises to defendants Nos.4 and they were recovering the rent for which the plaintiff was entitled. The pleadings of the plaintiff reveal that he was treating the respondent as a tenant. Defendant had come with a case that sale transaction was nominal and never intended to be acted upon. Therefore, there was no landlord tenant relationship. They were in possession as a owner.

3. The defence of the defendant Nos. 1 to 3 was that it was a nominal document which was discarded by the First Appellate Court and it reversed the findings of the trial Court.

4. Heard the learned respective counsels. At the time of admission of the appeal a substantial question of law was framed, which reads thus :-

“There involves substantial question of law in regard to admissibility of the document”.

5. The learned counsel for the appellants would submit that the ‘document’ means the sale deed in question. The learned counsel for the plaintiff has also argued at length.

6. From the arguments it has been emerged that the plaintiff treated defendants as tenant and subtenant. Therefore, the tenancy was to be terminated as provided under Section 106 of the Transfer of Property Act. Hence, the following additional substantial question of law is formulated;.

(1) Whether the eviction decree can be passed against the tenant without determination of the tenancy by way of notice under Section 106 of the Transfer of Property Act.

7. The learned counsel for the appellants states that the document of sale was a registered document. Such document is admissible but the intention of the appellants/defendants was that though it was a document of sale, it was a nominal sale deed against the loan.

8. Admittedly, registered sale deed of the suit property was executed in favour of the plaintiff. The recitals of the sale deed reveals that the possession of the suit property was handed over to the plaintiff. The legal document of transfer was created. So, considering the definition of 'mortgage' the nature of the document may be said that it was a mortgage by a conditional sale. Therefore, the substantial question of law formulated by the order of this Court dated 6.2.1995, is modified as follows :-

Whether the sale transaction was a mortgage by a conditional sale ?.

9. The learned counsel for the appellants has vehemently argued that the possession of the suit property, though recited in sale deed, was never parted with the plaintiff. Therefore, it was not out and out a sale transaction. The case of the plaintiff was not clear about getting the possession of the suit property after the sale transaction. Though the defence has been raised that the said document was nominal against loan, there was no specific pleading how much loan amount was raised and for what purpose the loan was raised. The learned counsel for the appellants submits that the oral evidence was led on the amount borrowed.

10. The evidence without pleadings in a civil suit is no evidence. Hence, whatever defendant No.1 deposed about the amount borrowed, that cannot be considered to prove his defence.

11. In the absence of any pleadings, he has also deposed that it was agreed between him and Pathan/the plaintiff that after returning the money he should execute the reconveyance deed.

12. The sale deed is silent about the reconveyance. Proviso to Section 58 (c) of the Transfer of Property Act, 1882 provides that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale. The proviso is very clear that in a mortgage of conditional sale, the condition of reconveyance shall be embodied in the document itself. If it is not the defence of the defendant cannot be considered. There was no such condition embodied in the sale deed; therefore, the defence of the defendants of mortgage by conditional sale goes. Hence, the substantial question is answered in the negative.

13. The next question is about the status of the defendants holding the possession of the suit premises. The pleadings of the plaintiff were very specific that defendant Nos. 1 to 3 had sublet the suit premises to defendant No.4. The averments in the plaint clearly indicate that the plaintiff treated the defendants as tenants. Defendant Nos. 1 to 3 had denied the title on the basis of mortgage by conditional sale. However, the plaintiff proved that it was out and out sale deed. The plaint averments bind the plaintiff. From the pleadings, it cannot be doubted that the plaintiff treated them as tenants. It was a specific pleading of the plaintiff that on the request of the defendants, the plaintiff leased out the suit house to the defendants for a rent of Rs. 150 per month at

the time of Dipawali of 1981. Accordingly, specific issue was framed and parties have led the evidence.⁵

14. The learned counsel for the appellants has submitted that the learned trial Court has correctly considered the facts and dismissed the suit. The learned trial Court recorded the finding that the plaintiff failed to prove that she became the owner and possessor of the suit house by way of registered sale deed and plaintiff leased out the suit house to the defendants. The learned trial Court also believed that defendant Nos. 1 to 3 had proved that the transaction between plaintiff and them was a loan transaction and no possession was handed over to the plaintiff.

15. The First Appellate Court reappreciating the evidence held that the plaintiffs proved the title over the suit house. The plaintiff is not entitled to mesne profits by recording the findings that admittedly defendant No.4 was in possession of the suit property the plaintiff never inducted him in the suit premises. Even assuming that defendants were in possession right from the beginning, till the plaintiff has filed present suit for possession she is entitled to the said relief and the said relief cannot be denied to her. It was a claim by the plaintiff that defendants were given the suit land on lease. However, she does not have substantial evidence on record to that effect.

16. The learned First Appellate Court had apparently committed a mistake in discarding the case of the plaintiff for want of evidence. It misconstrued the rule of pleadings and its binding force. When the plaintiff herself came with a case that she had leased out the suit premises to the defendant, it was binding on her. She cannot part with her own pleadings.

17. The First Appellate Court further observed that admittedly no notice was issued to the defendants before calling upon them to hand over the vacant and peaceful possession of the property to the plaintiff. Therefore, they are not entitled to any past mesne profit from the defendants as defendants have refused to hand over the possession of the property even after filing of the present suit. However, the plaintiff is entitled to claim future mesne profits. The defendant No.4 was in possession of the property and paying rent of Rs. 250/- to defendant Nos. 1 to 3. Therefore, atleast no separate evidence is required to decide the quantum regarding the future mesne profits and accordingly, granted the mesne profits.

18. The above findings of the First Appellate Court appear contradictory to itself. At one hand, it formed an opinion that plaintiff herself did not prove that the suit property was leased out and

defendant failed to prove the case of the nominal sale against the loan. There shall be no such contradictory findings. The cardinal rule resolving the dispute is to identify the controversy between the parties and such controversy can be ascertained from the pleadings of the respective parties. Therefore, the Court has to frame issue as contemplated under Section 14 of the C.P.C.

19. For the above reasons, this Court is of the view that the finding of the First Appellate Court that the plaintiff failed to prove the landlord-tenant relationship, is illegal and erroneous and consequently the relief of granting mesne profits is also illegal.

20. Considering the case of the plaintiff that the suit premises was leased to defendant Nos. 1 to 3 and then they inducted defendant No.4 as a subtenant, it falls under the landlord tenant relationship. There is no quarrel that the suit premises was situated in a small village where the rent Act was not applicable at the relevant time. However, once landlord-tenant relationship is admitted and if the landlord wishes to vacate the premises, notice under Section 106 of the Transfer of Property Act is mandatory. The suit was filed without issuing such statutory notice. Therefore, there appears substance in the argument of the learned counsel for the appellants that the suit was bad for want

of notice under Section 106 of the Transfer of Property Act and accordingly, the question is answered that the defendants were holding the possession as tenants and they cannot be evicted without notice under Section 106 of the Transfer of Property Act.

21. For the above reasons, the appeal is liable to be allowed. Hence, the following order :-

ORDER

- (i) The appeal is allowed.
- (ii) The Judgments and decrees of the learned joint Civil Judge Senior Division, Beed passed in RCS No. 334 of 1987 dated 6th August, 1990 and of the learned Additional District Judge, Beed passed in Regular Civil Appeal No. 116 of 1990 dated 30.11.1994, are quashed set aside.
- (iii) The suit of the plaintiff stands dismissed.
- (iv) No order as to costs.
- (v) Record and proceeding be returned to the learned trial Court.

ysk/

(S. G. MEHARE)
JUDGE