

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

**2 SECOND APPEAL NO.25 OF 1993**

**VANA SHAMRAO PATIL.  
VERSUS  
JAVARILAL MOHANLAL JAIN and OTHERS.**

...  
Advocate for Appellant : Mr. P.P. Kothari a/w. Ms. Nandari Chittal i/b.  
Satyajit S. Bora  
...

**CORAM : ARUN R. PEDNEKER, J.  
DATED : 03/08/2023**

**PER COURT :**

1. The appellant/plaintiff filed a suit for redemption of mortgage of the suit property against the defendants/respondents. The appellant/plaintiff failed in the suit, so also in the first appeal.
2. It is the case of the appellant/plaintiff that the suit was filed for redemption of mortgage of the suit property. The suit property was given to the father of defendant No. 1 and 2 by way of conditional sale deed as the plaintiff was in need of money and therefore, the plaintiff was entitled for redemption of mortgage. The suit property was sold to father of defendant Nos. 1 and 2 and the suit was filed against defendant Nos. 1 and 2 as they have inherited the mortgaged property from their father at the relevant time.
3. The suit was dismissed by the Trial Court, which was maintained by the Appellate Court. Thus, the contention of the appellant that the sale deed executed in favour of father of defendant Nos. 1 and 2 was infact a conditional mortgage was negatived by the Courts below. The same is challenged before this Court.

4. During the pendency of the second appeal, defendant No. 1/respondent No. 1 expired on 14.7.2015 and the appeal as against respondent No. 1 is abated vide order dated 30.11.2016. When the matter came up for final hearing, the question was posed to the appellant as to how the appeal would survive as against defendant No. 2 when the legal heirs of the deceased defendant No. 1 were not brought on record and the abatement is not set aside.

4. The first Appellate Court dismissed the appeal filed by the present appellant/plaintiff and the decree of the Appellate Court has attained finality as against defendant No. 1. In the event, decree is passed against the defendant No. 2, it would not be binding upon the legal heirs of deceased defendant No. 1. If the present appellant's appeal is continued against defendant No. 2 and in the event, the order is passed in favour of the appellant, there would be two contradictory decrees operating in the field on the same subject matter. Thus, the judgment and decree against the plaintiff qua defendant Nos. 1 and 2 is inseparable and the same cannot be only proceeded against one of the defendants.

5. The Hon'ble Supreme Court in the case of the **State of Punjab Vs. Nathu Ram reported in AIR 1962 SC 89**, has observed that the test to determine whenever the Court can proceed with the appeal when the appellant has approached against one of the defendant is that (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the

appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

6. The learned counsel for the appellant relied upon the case of **Mohd. Hussain (Dead) by Lrs and Ors Vs. Occhavial and Ors**, reported in **AIR 2008 SC 1462**, wherein the Hon'ble Supreme Court has held that if any one of the legal heir of the deceased respondents are already on record then the interest of the party is represented and the appeal can proceed against the legal heirs of the said deceased respondent. However, in the instant case, none of the legal heirs of the respondent No. 1 are on record. In view of the same, the judgment cited in the case of **Mohd. Hussain** supra will not be applicable to the facts of the present case.

7. In the instant case, even if the appellant succeeds, the decree cannot be executed against defendant No. 1 and the decree having attained finality against defendant No. 1, there can be no redemption of mortgage even if the appellant succeeds in the present second appeal.

8. The decree having attained finality against legal heirs of defendant No. 1 and the decree being inseparable against defendant No. 2, nothing survives in the present second appeal. Second appeal is dismissed.

[ARUN R. PEDNEKER J.]

ssc/