

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

CIVIL REVISION APPLICATION NO. 136 OF 2022

Mateen Khan s/o Maksud Khan Pathan
Age : 31 years, Occ. Agriculture,
R/o. Madalmohi, Tq. Georai,
Dist. Beed

... APPLICANT
(Orig. Defendant N.8)

VERSUS

1. Mannan Khan s/o Aadam Khan Pathan
Age : 69 years, Occ. Agriculture,
R/o. Dungaon, Tq. Ambad, Dist. Jalna

2. Yasin Khan s/o Aadam Khan Pathan
Age : 63 years, Occ. Agriculture,
R/o. Dungaon, Tq. Ambad, Dist. Jalna

3. Rashid Khan s/o Aadam Khan Pathan
Age : 58 years, Occ. Agriculture,
R/o. Dungaon, Tq. Ambad, Dist. Jalna

4. Mahemudabee w/o Sk. Abdul
Age : 73 years, Occ. Household,
R/o. Naygaon, Tq. & Dist. Aurangabad

5. Khairunisa w/o Sk. Lalu
Age : 53 years, Occ. Household,
R/o. Takka, Tq. Ambad, Dist. Jalna

... (Nos. 1 to 5 are
Orig. Plaintiffs)

6. Hussain s/o Mulla Gulam Ali Naser
Age : 58 years, Occ. Business,
R/o. Dungaon, Tq. Ambad, Dist. Jalna
At present : Sangit complex Co-op Society Ltd.
Building No.12, C-Wing, Second Floor,
Flat No. No.207, Jesal Park Sector MA-1,
Bhaindar (East), Dist. Thane 401105

7. Abbas s/o Mulla Gulam Ali Naser
Age : 53 years, Occ. Business,
R/o. At present : Sangit complex Co-op Society Ltd.

Building No.12, C-Wing, Second Floor,
Flat No. No.207, Jesal Park Sector MA-1,
Bhaindar (East), Dist. Thane 401105

8. Amtuzahira w/o Shabbir Shaikh,
Age : 60 years, Occ. Household,
R/o. At present : Sangit complex Co-op Society Ltd.
Building No.12, C-Wing, Second Floor,
Flat No. No.207, Jesal Park Sector MA-1,
Bhaindar (East), Dist. Thane 401105
 9. Sakeena w/o Shabbar Ujainwala,
Age : 55 years, Occ. Household,
R/o. At present : Sangit complex Co-op Society Ltd.
Building No.12, C-Wing, Second Floor,
Flat No. No.207, Jesal Park Sector MA-1,
Bhaindar (East), Dist. Thane 401105
 10. Taslim d/o Mulla Gulam Ali Naser
Age : 51 years, Occ. Household,
R/o. At present : Sangit complex Co-op Society Ltd.
Building No.12, C-Wing, Second Floor,
Flat No. No.207, Jesal Park Sector MA-1,
Bhaindar (East), Dist. Thane 401105
 11. Rashida d/o Hussaini Baliwala
Age : 66 years, Occ. Agril & Legal Practitioner,
R/o. Nasim Palace, Dugngaon, Tq. Ambad, Dist. Jalna
 12. Naser Khan s/o Subhan Khan Pathan
Age : 50 years, Occ. Agril,
R/o. Nasim Palace, Dugngaon,
Tq. Ambad, Dist. Jalna
- ... RESPONDENTS
(Nos. 6 to 12 – Orig. Deft. Nos. 1 to 7 are formal parties)

Mr. M. B. Ubale, Advocate for the applicants

Mr. K. S. Solanke, Advocate for respondent Nos. 1 to 5.

CORAM : R. M. JOSHI, J.

RESERVED ON : 20/04/2023

PRONOUNCED ON : 27/04/2023

JUDGMENT :-

1. This application is filed under Section 115 of the Code of Civil Procedure taking exception to the order dated 19/09/2022 passed below Exhibit 21 in R.C.S. No. 135/2019 dismissing application filed by the defendants under Order VII Rule 11 of CPC.

2. Parties are referred to by their nomenclature in the suit. Plaintiffs filed RCS No. 135/2019 seeking possession of suit land on redemption of mortgage and alternatively possession thereof is sought on the basis of title. It is averred in the plaint at in the year 1978-79 Aadam Khan was in the need of Rs. Five Thousand and hence he orally mortgaged Gut No. 40 situated at Dungaon, Tq. Ambad, District Jalna with Mulla Gulam Ali for the period of 20 years by way of handing over possession on the condition that he should enjoy usufruct of suit land upto a period of 20 years in satisfaction of loan amount of Rs.5,000/- and after expiry of the said period should deliver back the said land to the mortgager free of encumbrances. It also averred that said Mulla Gulam had obtained signatures of mortgager on some blank papers. It is further claimed that the period of 20 years was denied by the mortgagee and it was claimed that a period of mortgage was for 30 years. It is further alleged that the legal heirs of Mulla Gulam ali executed power of attorney in favour of defendant No. 7 Nasar Khan

who executed a registered sale deed in respect of the suit land in favour of Mateen Khan, defendant No. 8. It is also claimed that after expiry failures of period of oral mortgage it becomes legal by way of prescription and that the plaintiffs are entitled to claim possession on the basis of title as well.

3. After causing appearance before Trial Court, application (Exhibit 21) was filed under Order 7 Rule 11 CPC for rejection of plaint. Learned Trial Court rejected said application by passing impugned order with the observation that the redemption of oral mortgage in respect of the mortgage amount of more than Rs.100/-. It is however held that since the suit is alternatively filed for the possession of suit property on title and therefore question of limitation being mix question of fact and law the same cannot be determined at this stage.

4. Learned counsel for the defendants submitted that Trial Court committed error in not taking into consideration the averments in the plaint as a whole and that the clever drafting cannot be allowed to bring the suit which is hopelessly time barred. To support his contentions he placed reliance on the case of **C.S. Ramaswamy Vs. V. K. Senthil and others, 2023(2) Mh.L.J., Ramprasad Vs. Smt. Kalyani and other, AIR 1973 Rajasthan 208** and **Boddu Ramulu**

Vs. Gokarla Ramaswamy and others, AIR 1971 Orissa 58.

5. On the other hand learned counsel for the plaintiffs submitted that even assuming that the suit is not tenable for a redemption of mortgage it being oral mortgage, in any event suit for possession of the suit property on title is certainly tenable and it would not be barred by Limitation Act. It is also contended that even in respect of oral mortgage on completion of 12 years by prescription the said mortgage becomes valid and therefore, the suit filed by the plaintiffs is maintainable even on that count. To support his contentions he placed reliance on the case of ***Kolathoor Variath and another Vs. Pairaprakottoh Cheriya Kumhahammad Haji, AIR 1974 Supreme Court.***

6. As regards exercise of the jurisdiction under Order 7 Rule 11 of CPC it is settled law that for the purpose of deciding the application for rejection of plaint what would be relevant is only the averments in the plaint and supporting documents filed along with plaint. The written statement of the defendants or even contents of the application under Order 7 Rule 11 of CPC could not be taken into account for the purpose of said decision. Similarly judgment cited supra by both sides, indicates that Trial Court must ascertain as to whether the reading of the plaint as

a whole indicates it to be manifestly vexatious or meritless for non disclosure of case of action and also that the clever drafting cannot be permitted to maintain the suit which is otherwise hopelessly time barred.

7. In the instant case plaintiffs have filed suit for redemption of the oral mortgage where the principal money secured is Rs.5000/-.

Section 59 of Transfer of Property Act reads thus:

"59. Mortgage when to be by assurance.- Where the principal money secured is one hundred rupees or upwards, a mortgage [other than a mortgage by deposit of title-deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [a registered instrument] signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property."

8. This provision makes it mandatory to effect mortgage to secure principal amount of Rs.100/- or more, except in case of mortgage by deposit of title deeds, only by registered instrument. Oral mortgage is not permissible under the provisions of Act, for security of Rs.100/- or more principal amount. Here in this case, it is rightly held by the Trial Court that suit is not maintainable, as principal amount secured is Rs.5000/-

9. The suit is alternatively filed for possession of the suit land on the basis of title. Plaintiff discloses that the suit land is owned by Aadam Khan i.e. predecessor of plaintiffs and that he mortgaged the said land to Mulla Gulam Ali. Thus, the pleadings of the plaintiff does not show that title in suit land was ever transferred by the owner in favour Gulam Ali. As regards suit for possession on title Article 65 of the Limitation Act would apply and such suit can be filed within 12 years when the possession of defendants becomes adverse to the plaintiffs. The plaintiff does not admit that the possession of defendants became adverse to the plaintiffs. Such question could arise for determination only by the written statement of defendant if it is claimed as to the date from which his possession over the suit land becomes adverse to the plaintiffs. Merely, on the basis of the averments in the plaintiff it cannot be said that suit is not filed within 12 years from the date of possession of the suit land by defendant becomes adverse to the plaintiffs. This not only requires pleadings of defendants but also it being mix question of fact and law, can be decided only after leading evidence. Learned Trial Court thus has rightly observed that at this stage the said issue cannot be determined and consequently application filed by defendant for rejection of plaintiff is rejected.

10. In the result, this Court finds no infirmity in the impugned order to cause for any interference therein. In the result, application stands dismissed.

(R. M. JOSHI, J.)

ssp