

Narayan Vs Trimbakrao Gopalrao Bagde and Others

First Appeal No. 88 of 1967

Court: Bombay High Court

Date of Decision: Jan. 28, 1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Order 20 Rule 12(1)#Court Fees Act, 1870 â€” Section 7#Evidence Act, 1872 â€” Section 92#Limitation Act, 1908 â€” Article 142, 65#Limitation Act, 1963 â€” Section 14#Transfer of Property Act, 1882 â€” Section 58

Citation: AIR 1988 Bom 94

Hon'ble Judges: M.S. Ratnaparkhi, J

Bench: Single Bench

Advocate: S.N. Kherdekar, for the Appellant; R.L. Khapre, G.D. Patil and Kankale, for the Respondent

Final Decision: Allowed

Judgement

1. The appellant Narayan Harnuji Bhalme, who was the original plaintiff in Special Civil Suit No. 16 of 1965 before the Civil Judge, Senior

Division, Chandrapur has come up in appeal against the decree of dismissal of his claim for possession of the landed property conveyed to him by

the deceased Trimbakrao under the sale deed dated 27th Aug., 1952. This property conveyed to him is described in para. 1 of the plaint and also

the schedule attached to the plaint. In the alternative he claims partition and separate possession of his half share of that property. Mesne profits to

the tune of Rs. 6,000/- for 3 years preceding the date of the suit are also claimed. Further direction into mesne profits from the date of suit till

realisation of possession is also claimed.

2. Facts giving rise to this litigation may be briefly stated as follows : The deceased Trimbakrao Gopal Begde (Original defendant No. 1) and

Krishnarao Begde (the deceased father of original defendant No. 2) were the cousin brothers. The family owned extensive property at different

villages in Chandrapur District. We are not concerned with the other property. The property consisting of survey No. 57 admeasuring 5.47 acres,

Survey No. 58/1 admeasuring 9.47 acres, Survey No. 60 admeasuring 1.84 acres and survey No. 158 admeasuring 34.37 acres, situated at

village Khambada in Warora tahsil of Chandrapur district, was owned jointly by these two cousin brothers. There was a partition between these

two persons in 1917 or so. Though the other property was partitioned by metes and bounds in that partition, the suit property consisting of the four

fields of village Khambada was not in fact partitioned by metes and bounds. However, this property was physically partitioned and each brother

enjoyed this property separately. Trimbakrao had half share in the property, whereas Krishnarao had the remaining half. This property is alleged to

have been assessed to land revenue of Rs. 38/-.

3. It is the case of the plaintiff that the deceased Trimbakrao sold his half share of these four fields to the plaintiff under a registered sale deed dated

27-8-1952 for Rs. 10,000/-. As the crops were standing in those fields, the possession was deferred and it was to be delivered after the removal

of the crops. It is his contention that on or about 6-6-1953 Krishnarao put him in possession of 12.33 acres of land out of these fields. The

remaining land continued to be in possession of Krishnarao. It is alleged that after this sale deed, there was an amicable work-out between the

present plaintiff, Trimbakrao and Krishnarao. In spite of this work-out, the remaining land remained in possession of Krishnarao and in fact due to

the workout arrived at in 1955 between these three persons, the plaintiff was to be put in possession of 25.57 acres of land. The deceased

Trimbakrao, however, continued to be in possession of the remaining land. He sold the portions of the remaining land to the defendants Nos. 5, 6,

7, 8 and 9. This sale, according to him, is illegal as Trimbakrao has no title to convey this property title having already been vested in the present

plaintiff. Thus the possession of Trimbakrao and the defendants Nos. 5 to 9 is illegal. The plaintiff many a time asked the defendant No. 1 and

other defendants to put him in possession of the property, but on some count or the other the request was not complied with. Ultimately the plaintiff

instituted this suit in the Court of Civil Judge, Junior Division, Warora on 27-8-1964.

4. While the regular civil suit was pending against the defendants before the Civil Judge, Junior Division, Warora, the defendants put in their written

statement and the case was fixed for trial in Nov. 1964. On 6-11-1965 the defendant No. 1 filed an application contending that the suit was not

properly valued for the purposes of jurisdiction. According to him, if properly valued, the valuation would be to the tune of Rs. 25,000/- and as

such, it would be beyond the pecuniary jurisdiction of the Civil Judge, Junior Division, Warora. On 8-11-1965 the plaintiff applied for amendment

of the plaint stating that the valuation of the suit property for the purposes of jurisdiction was Rs. 25,000/-. This amendment was allowed on the

same day. The trial Judge observed that he had no pecuniary jurisdiction to entertain and proceed with the suit. The plaint was, therefore, returned

for presentation to the proper Court on 8-11-1965. On the same day it was represented before the Civil Judge, Senior Division, at Chandrapur.

5. The original defendant No. 1 filed his written statement at Exh. 39. He admitted that the property covered under the sale deed dt. 27-8-1952

was jointly owned by Krishnarao and the original defendant No. 1 and each of them had a share in it though it was not exactly half. This property

was never partitioned by metes and bounds. The execution of the so-called sale deed dt. 27-8-1952 is admitted, but it is denied that it was in fact

a sale in respect of the half share. According to him this transaction was in fact a mortgage. It is alleged that there was a larger contract of which

the so-called sale deed is a part. On the very day the kararnama was executed by the plaintiff in favour of the defendant No. 1 and it was agreed

that in case the latter repaid Rs. 10,000/- to the plaintiff, a reconveyance would be executed. The date of repayment was agreed on 6-6-1953.

Thus according to him, the transaction embodied in the document dt. 27-8-1952 is not a sale out and out but it is in reality a mortgage. It is also

alternatively alleged that it was an English mortgage within the meaning of Section 58(e) of the Transfer of Property Act. The suit for possession is,

therefore, not maintainable. It is his contention that on 6-6-1953 there was a specific contract between the plaintiff and the defendant No. 1 that

the plaintiff should be put in possession of 12.33 acres of land out of the property covered by the sale. It was agreed that the plaintiff should enjoy

this property for 12 years and thereafter the whole mortgage debt would be deemed to be repaid. It is specifically alleged that the transaction

embodied in the document dt. 27-8-1952 was in fact a mortgage which secured the loan of Rs. 8,000/- by the Immovable property. The actual

market price at the date of the sale of the property was Rs. 25,000/-. It was the contention of the defendant No. 1 that the land admeasuring

12.33 acres out of these four fields was separately demarcated and put in possession of the plaintiff. The plaintiff was not to become the absolute

owner of the property. The defendant No. 1 continued to be the owner. Accordingly he remained in possession of the property and sold different

pieces of land to the defendants Nos. 5 to 9. It is alleged that the suit is hopelessly barred by limitation inasmuch as it has been instituted in the

Court of Civil Judge, Senior Division, Chandrapur after the expiry of 12 years. A feeble attempt was made to suggest that the suit was not valued

properly for the purposes of court-fee. On these counts the suit came to be resisted

6. The defendants Nos. 2 to 4 who were the heirs of deceased Krishnarao, filed their written statement at Exh. 27. They admitted that the property

in suit was the malik makbuza property jointly owned by Krishnarao and the defendant No. 1. They denied that the suit property was actually

partitioned by metes and bounds. Krishnarao was in possession of 24.62 acres of land out of these four fields. The so-called partition alleged to

have been made in 1955 is denied. They contended that the plaintiff's claim against the defendants Nos. 2 to 4 is liable to be rejected.

7. The defendant No. 5 filed his written statement at Exhibit-46. He admits that he purchased 0.75 acres of land out of Khasra 158 from the

defendant No. 1 by a sale deed dt. 30-3-1956 for Rs. 450/- and since then he is in possession of the same. According to him, he is a bona fide

purchaser for value without notice and therefore his possession cannot be disturbed.

8. The defendants Nos. 6 and 7 filed a written statement at Exhibit-51 admitting that they purchased 2.55 acres of land out of survey No. 158

from the defendant No. 1 for Rs. 4,000/- by registered sale deed dt. 14-7-1951 and since then they are in possession of that land. They also

alleged that they are the bona fide purchasers for value without notice. The suit is branded as barred by limitation.

9. The defendants Nos. 8 and 9 filed their written statement at Exhibit-52. They admit that they purchased 1.50 acres of land out of survey No. 158

from the defendant No. 1 for Rs. 2250/- by a sale deed executed in July 1964 and since then they are in possession of that property. According to

him, they are bona fide purchasers for value without notice. The suit is branded as barred by limitation.

10. Initially the defendant No. 10 was joined on the allegations that he was in possession of the part of the suit property as a tenant, but by his

written statement at Exh. 47 he denied that he was in possession of any property as a tenant.

11. On these pleadings the learned Judge framed the necessary issues and directed the parties to prove on merits. He found that the claim of the

plaintiff was barred by limitation. He also found that the plaintiff was neither diligent in pursuing his remedy before the Civil Judge, Junior Division,

Warora, nor was that proceeding ensued bona fide. He negated the contention of the plaintiff that the suit property was partitioned by metes and

bounds in between the defendant No. 1 and Krishnarao. He, however, accepted the case that these brothers were cultivating their shares

separately. The learned Judge found that the defendant No. 1 executed a registered sale deed dt. 27-8-1952 for Rs. 10,000/- in favour of the

plaintiff and at the same time there was a separate kararnama executed by the plaintiff in favour of the defendant No. 1 regarding the reconveyance

of that property. He, however, negated the contention of the defendant No. 1 that this transaction in fact constitutes a mortgage. Thus virtually the

learned Judge found that the transaction embodied in the sale deed dt. 27-8-1952 was not a mortgage. Regarding the contract alleged to have

been entered into on 6-6-1953 in between the plaintiff and the defendant No. 1 the finding has been in the negative. The learned Judge found that

the plaintiff was not entitled to claim possession of the suit lands and similarly his claim for mesne profits was not tenable. The case of the amicable

workout between the parties in 1955 has also been negated. The sales in favour of defendants Nos. 5 to 9 have been held as proved, but it has

been held that the plaintiff is not estopped from challenging those sales. On the finding that the suit is barred by limitation, the whole suit of the

plaintiff came to be dismissed in spite of the fact that the learned Judge recorded a positive finding that the transaction embodied in the document

dt. 27-8-1952 was a sale and not a mortgage.

12. Feeling aggrieved by this decree of dismissal, the plaintiff has come up in appeal. The learned advocate for the appellant strenuously urged

before me that the finding of the trial Court that the suit was barred by limitation was absolutely bad and perverse particularly when the plaintiff was

entitled to the benefit of exclusion of time spent in pursuing the litigation before the Civil Judge, Junior Division, Warora. He also urged before me

that the other findings recorded by the Court are in his favour and, therefore, if the finding on limitation is reversed by this Court he would

automatically be entitled to a decree as the suit was dismissed on the point of limitation. Both the counsel took me thoroughly through the evidence

adduced before the trial Court. It may be pointed out at this stage that before me the legal representatives of the defendant No. 1 were

represented by Mr. Khapre, respondents Nos. 2 to 4 were represented by Mr. Kankale. The other respondents did not put in appearance. The

respondents who did not put in appearance are the subsequent purchasers.

13. From the arguments advanced before me the points which arise for decision in this appeal are :

(1) Whether the suit is barred by limitation?

(2) Whether the transaction embodied in the document dt. 27-8-1952 (Exh. ID-155) is a sale or a mortgage or a loan transaction?

14. Before I proceed to deal with the nature of the document, it will be proper at this stage to consider the point regarding limitation. Admittedly

the plaintiff has instituted this suit on the basis of title. His simple claim is that the defendant No. 1 sold this property to him by a sale deed dt. 27-8-

1952 and in spite of this sale he has not been put in possession of the whole property. He has, therefore, simply claimed possession of the

property. Alternatively, he claims that if the Court finds that there was no separation by metes and bounds of two shares of defendant No. 1 and

Krishnarao, then he claims a partition and separate possession of half share in that property. The transaction no doubt was entered into on 27-8-

1952 when the Indian Limitation Act, 1908 was on the statute book. Under Article 142 of the Limitation Act, as it stood then, it was necessary for

the plaintiff to institute his suit within 12 years. However, the Limitation Act, 1908 has been repealed and a new Limitation Act (Act No. XXXVI

of 1963) has come on the statute book with effect from 1-1-1964. Under Article 65 of this Limitation Act, a suit for possession of Immovable

property or any interest therein based on title requires to be instituted within 12 years from the date when the possession of the defendant becomes

adverse to the plaintiff. In this case none of the defendants have raised any plea that at any stage the possession of the defendants assumed a

hostility vis a vis the plaintiff. There is not even a whisper regarding the holding of possession with hostility either with the intention or with the

knowledge that the plaintiff would be ousted from his rightful claim.

15. The learned Advocate for the respondents Nos. 1 (A) to (I) strenuously urged before me that though adverse possession has not been claimed

in specific terms, all the ingredients which make the possession adverse have been pleaded with sufficient implications at least. For example, it was

urged before me that admittedly the plaintiff did not get possession of the property on the date of sale. Even on 6-6-1953 the defendant No. 1 got

possession of 12.33 acres of land which was only a part of the land alleged to have been sold under Exh. ID-155. Thus the very fact that the

defendant No. 1 in spite of the sale deed Exh. ID-155 dt. 27-8-1952 held possession is sufficient only to establish that the defendant No. 1 did

not give any credence to the title of the plaintiff and continued to hold at least part of the property as he held it prior to the sale deed. This,

according to Mr. Khapre, was sufficient to assert the hostile possession vis a vis the plaintiff. I am not very much impressed with this argument of

Mr. Khapre. Even the case pleaded by the defendant No. 1 shows that the defendant No. 1 held the possession of the remaining land, not in

pursuance of the title, but in pursuance of the contract alleged to have been effected on 6-6-1953. In the result, it cannot be said that on putting the

plaintiff in possession of 12.33 acres of land on 6-6-1953, the possession of the remaining land by the defendant No. 1 assumed any hostility vis a

vis the plaintiff. The essential of adverse possession is well known. It consists of repudiating the title of the real title holder and assumption of that

title by a person in actual possession. Even considering his own pleadings, as they stand, no concept of repudiation of the title of the title holder and

the assumption of the hostile title can even be smelt. There is one more point which has to be remembered at this stage. In 1958 the plaintiff served

a notice on the defendant No. 1 claiming the possession, of the remaining property. This notice has been admitted by the defendant No. 1 in his

deposition. This clearly shows that the plaintiff was asserting his title and this assertion has not been denied by the defendant No. 1 in 1958 or even

thereafter. It is only in his written statement that the defendant No. 1 has repudiated the title and assumed his own title. Thus even by a stretch of

imagination, can it be said that the plaintiff's title was ever repudiated by the defendant No. 1 or that the possession of the defendant No. 1 over

the property disclosed any hostility vis a vis the plaintiff.

16. The case pleaded by the defendant No. 1 that there was a special contract in June, 1953 whereunder the plaintiff was put in possession of

12.33 acres of land itself harms the very foundation of hostile possession. As the pleadings show, with sufficient clarity, the share purchased by the

plaintiff was half share out of the fields mentioned in Exh. 1D 155. Admittedly the plaintiff remained in possession of at least 12.33 acres of land

throughout. This circumstance itself negatives the defendant No. 1's case that he was in possession of the whole property adversely. The

admission that the plaintiff was in possession of 12.33 acres of land which was admittedly the part of the whole purchased under Exh. ID-155

negatives the very concept of adverse possession. There cannot be any adverse possession as pleaded by the defendant No. 1.

17. Even otherwise, the suit cannot be branded as barred by limitation. That the title to claim possession accrued on 27-8-1952 vide Exh. ID-155.

The suit was instituted before the Civil Judge, Junior Division, Warora on 27-8-1964. When it was filed before the Civil Judge, Junior Division,

Warora, there was no plea that the suit was barred by limitation. It can be said with good deal of certainty that the suit was filed within limitation

before the Civil Judge, Junior Division, Warora (even assuming for the time being that limitation for bringing such suit was 12 years). The suit was

before the Civil Judge, Junior Division, Warora from 27-8-1964 to 8-11-1965. What happened during this period is very interesting. The

defendants put in their appearance before the Civil Judge, Junior Division, Warora. They filed their written statement. They never raised the plea

that the suit was beyond the pecuniary jurisdiction of the Civil Judge, Junior Division, Warora. It is not my intention to say that the jurisdiction of a

Court depends upon the consent of the parties. Admittedly the Civil Judge, Junior Division, Warora could entertain civil disputes which were not

beyond his pecuniary or territorial jurisdiction. The suit was valued for the purposes of Court-fee as well as jurisdiction at 20 times the land

revenue and that valuation was not initially challenged, with the result that both the parties submitted themselves before that Court knowing full well

that the Court had jurisdiction. They filed the written statement filed the documents, called upon the Court to frame issues, and further called upon

the Court to fix the case for trial. The case was fixed for trial in Nov., 1965. It is for the first time on 6-11-1965 that the defendant No. 1 made an

application before the trial Court contending that the valuation for the purposes of jurisdiction is not proper and on proper valuation, the trial Court

would have no pecuniary jurisdiction to entertain the dispute. Thus for the first time on 6-11-1965 the initial jurisdiction of the Court came to be

challenged and on 8-11-1965 i.e. within 2 or 3 days the plaintiff amended the plaint and accepted that the valuation for the purposes of jurisdiction

would be Rs. 25,000/-. On 8-11-1965 itself the amendment was allowed. It was incorporated on the same day and the Court passed the order it

had no pecuniary jurisdiction. It returned the plaint for presentation to the proper Court. On the very same day the plaint was represented before

the Civil Judge, Senior Division, at Chandrapur. There is no dispute that the Civil Judge, Senior Division, Chandrapur had the necessary

jurisdiction to entertain and decide this controversy.

18. Mr. Kherdekar, the learned Advocate for the appellant urged before me that the period commencing from 27-8-1964 to 8-11-1965 can be

legitimately excluded from computing the limitation u/s 14 of the Limitation Act inasmuch as the plaintiff was prosecuting his remedy before that

Court bona fide and in good faith. This argument gets sufficient support from the very conduct not only of the plaintiff but even of the contesting

defendants who themselves had submitted to the jurisdiction of the Court and did not contend till 6-11-1965 that the Court had no pecuniary

jurisdiction to entertain this suit. If this argument is examined on the background that is prevailing in the case the matter would be crystallised. The

plaintiff under the advice of his advocate filed the suit before the Civil Judge, Junior Division, Warora. His contention was that the property was

separately assessed to land revenue and he had claimed half share in that property. Under the rules framed by the State Government that were

prevailing at the relevant time, the valuation of the suits for possession of Immovable property or share in that property separately assessed to land

revenue was the same. Even assuming for the time being that after the reorganisation of States the suit came to be governed by the Bombay Court-

fees Act, no rules came to be framed under the Suits Valuation Act regarding such suits and as such there was always a doubt in the mind not only

of litigants but even of the legal practitioners regarding the actual valuation and the controversies went right up to the High Court. My purpose in

pointing out all these positions is that the suit was filed before the Civil Judge, Junior Division, Warora on the advice of the legal practitioner. A

litigant coming from the rural areas is not expected to know the fineness of legal provisions. He has to depend upon the advice of his counsel.

Moreover, the advice given by the counsel cannot be called as totally wrong or totally perverse inasmuch as this has been a point which was

always disputed in a majority of cases. Apart from this, there is one more glaring circumstance. Right from the institution of the suit or right from the

date the defendants put in their appearance before the Court, they also did not challenge that the valuation was improper or that the Court had no

pecuniary jurisdiction to try that suit. On the other hand they went before the Court under a bona fide belief that the Court was competent to try

the matter. They went before the very Court right till the date of trial. It is only on the fine morning of 6-11-1965 that the defendant No. 1 came to

the Court with the illumination that the suit was not properly valued for the purposes of jurisdiction. There is nothing on record to show as to what

led to this illumination. But the fact remains that for the first time it struck the mind of the defendant No. 1 that the Court had no pecuniary

jurisdiction. Till then both the parties were bona fide pursuing their respective claims and the cases. At least till 6-11-1965 the pursuing of the

proceedings before that Court, not only by the plaintiff but also by the defendants, was bona fide.

19. What happened thereafter is clear. The objection came for the first time on 6th Nov., 1965 and on 8th Nov., 1965 the plaintiff realised his

mistake and applied for amendment and accepted the valuation of Rs. 25,000/- for the purposes of the jurisdiction. On the very date the plaint was

returned for presentation to the proper Court and on the very same day it was presented before the proper Court. Can it be said under these

circumstances, by any stretch of imagination that the plaintiff lacked in bona fides and good faith in pursuing this matter before that Court in

between the 6th and 8th of November 1965. The plaintiff was pursuing his claim for near about 25 acres of land which was a very valuable

property. Can it be said by any stretch of imagination that he would just spend not only the money but his time and energy in fruitless litigation

before the Court which he knew to be devoid of any jurisdiction. I am not prepared to accept the contention that the plaintiff knowing full well that

he was pursuing his remedy before the Court devoid of jurisdiction continued to pursue that remedy. There is good circumstantial evidence to

show that not only the plaintiff but even the contesting defendants were under the impression, right or wrong, that the Court had jurisdiction. I may

also accept the contention of the defendant No. 1 that he was after all an ignorant litigant, but that does not mean that he was pursuing his defence

before the Court which he knew to be devoid of any jurisdiction. Thus what is apparent from the record is that both the parties plaintiff as well as

the defendant No. 1 were under the bona fide belief at least till 6-11-1965 that they were prosecuting their remedy before the Court of competent

jurisdiction. There is nothing to deviate from this proposition as far as the period ranging in between 6-11-1965 and 8-11-1965 is concerned. I

have no hesitation in coming to the conclusion that the period intervening between 27-8-1964 and 8-11-1965 spent in pursuing the proceedings

before the Civil Judge, Junior Division, Warora was the period when both the parties were pursuing their litigation bona fide and in good faith. This

period can legitimately be excluded from computing the limitation u/s 14 of the Limitation Act.

20. Thus firstly, according to him, the suit is not at all barred by limitation because there is no limitation for the suits based on title. The only defence

to such an action would be adverse possession and once adverse possession is alleged, then the plaintiff is necessarily put on guard and in that case

alone he has to institute a suit within 12 years from the date when the hostile title is assumed. In this case there is nothing like assumption of the

hostile title by the defendant No. 1. Thus there is no case of any bar of limitation. Secondly even assuming that the suit has to be instituted as

contended by the defendant No. 1 within 12 years, the suit has been in fact instituted within 12 years and the period intervening between 27-8-

1952 and 8-11-1965 has necessarily to be excluded from computing the period of limitation as it is permissible u/s 14 of the Limitation Act.

Disagreeing with the learned Judge of the trial Court, I hold that the suit is within limitation.

21. This now brings me to another part of the controversy regarding which the debate was very hot. Admittedly there was a transaction between

the plaintiff and the defendant No. 1 on 27-8-1952. This transaction has been evidenced by a deed duly registered and filed at Exh. ID-155.

Execution of this deed has been admitted without any reservation. It is none of the contentions of the parties that the said transaction is without any

consideration. It is none of the contentions of the defendant No. 1 that he has not executed this document. Only contentions raised by the

defendant No. 1 are :

(1) That he had obtained a loan of Rs. 8,000/- and in pursuance of this loan by way of security the document has been executed,

(2) That on the very same day there was a contemporaneous agreement of reconveyance evidenced by Exh. 1D-154, whereunder on payment of

Rs. 10,000/- by defendant No. 1 to the plaintiff the latter agreed to reconvey the property on 6-6-1953.

(3) That there was a fresh contract between the plaintiff and the defendant No. 1 on 6-6-1953 to the effect that as the defendant No. 1 was unable

to repay this amount, the plaintiff should be put in possession of 12.33 acres of land out of the property covered under Exh. 155; that he should

enjoy the property for 12 years and that thereafter the property should revert back to the defendant No. 1.

These are the only three contentions that have been specifically raised by the learned Advocate for the defendant No. 1 and according to me these

are the only contentions raised in the written statement which has considerable length but little of depth. It will be, therefore, necessary to consider

whether the transaction embodied in Exh. 1D-155 is in fact a sale or whether it is a transaction of mortgage or a loan.

22. There was a tremendous crop of disputes regarding the nature of such similar transactions in spite of a specific amendment carried in Section

58(c) of the T.P. Act in 1929. It was at one stage thought that the amendment would act as a solution to all controversies, but in spite of the said

amendment, the position remained as clouded as it was. The matter has been much clarified in Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and

Another, , where it was observed :

Because of the welter of confusion caused by a multitude of conflicting decisions the legislature stepped in and amended Section 58(c) of the T.P.

Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. If the sale and agreement to repurchase are

embodied in separate documents then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But

the converse does not hold good, that is to say the mere fact that there is only one document does not necessarily mean that it must be a mortgage

and cannot be a sale. If the condition of repurchase is embodied in the document that effect or purports to effect the sale, then it is a matter for

construction which was meant.

It was further observed :

The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of

mortgages, therefore it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the

transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then

we are of opinion that the deed should be construed as a mortgage.

23. The observations of the Supreme Court would help us a lot in the present controversy. I have already adverted to Exh. 1D-155. It is not

necessary to reproduce it again. Enough to say that the subject matter of transfer is specifically defined. Sheer transfer is specifically denied. Price

had been fixed. Title has been transferred. Only the possession was deferred. I have pointed out all these things in detail because at one stage the

learned advocate for the respondents urged before me that this document cannot be a "sale" as contemplated u/s 54 of the T. P. Act. In fact,

"sale" is defined as a transfer of ownership in exchange for a price paid or promised, part paid and part promised From this point of view, what

has been stated in the sale deed does not fall short of what is meant by "sale". It is true that the possession has been deferred, but the delivery of

possession is not necessarily an integral part of the sale, particularly when the property is Immovable property and the value thereof exceeds Rs.

100/- and particularly when the sale has been effected by registered instrument.

24. The abovementioned sale is executed on 27-8-1952. As already pointed out, under that document the original defendant No. 1 has transferred

his title to the property in favour of the plaintiff. It is no use saying that the sale was not acted upon because the appropriate revenue authorities

have been informed about this sale and this sale has been recorded in the revenue records vide khasra, the copy whereof can be found at Exh.

144. On the very same day the plaintiff appears to have executed a document styled as kararnama in favour of the defendant No. 1. Even in this

kararnama the defendant No. 1 admits that this property has been absolutely transferred in favour of the plaintiff. A concession has been given

under this kararnama that in case the defendant No. 1 repaid Rs. 10,000/- to the plaintiff on or before 6-6-1953, the plaintiff would reconvey the

said property to the defendant No. 1 without any objections. This document can be found at Exhibit 154. It may be pointed out at this stage that

the execution of this document is also admitted without any hesitation. If Exh. ID-155 (sale deed), and Exh. ID-154 (kararnama) are read

together, it would show unreservedly that the defendant No. 1 had sold his property to the present plaintiff for Rs. 10,000/- on 27-8-1952 and the

defendant No. 1 reserved his right of repurchase of the suit property in case he paid Rs. 10,000/- to the plaintiff on or before 6-6-1953. Prima

facie these two documents show that under Exh. 1D-155 the title has been vested in the plaintiff and with the contemporaneous agreement the very

property was agreed to be reconveyed to the defendant No. 1 in case a consideration of Rs. 10,000/- was paid by the defendant No. 1 to the

plaintiff by 6-6-1953. Suffice it to say at this stage, that there was a complete transfer of title and vesting thereof in the plaintiff on 27-8-1952. At

the same time, there was a contemporaneous agreement between the plaintiff on one hand and the defendant No. 1 on the other of reconveyance

of the property.

25. With this background in the view, it will be necessary at this stage to advert to the controversy regarding the nature of this transaction. The

plaintiff insists that the transaction embodied in Exh. 1D-155 is the sale out and out; whereas the original defendant No. 1 insisted that the

transaction is a mortgage or in any case a temporary loan transaction. An attempt was made at one stage to show that it was a sale with the

condition of repurchase as contemplated u/s 58(c) of the T.P. Act, Section 58(c) of the T.P. Act defines the "mortgage by conditional sale". A

proviso, however, is added to this section which reads as follows :

Provided 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 Supreme Court in Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, has very positively observed :

Under the proviso to Section 58(c), T.P. Act, if the sale and agreement to repurchase are embodied in separate documents, then the transaction

cannot be a mortgage whether the documents are contemporaneously executed or not.

This observation unequivocally excludes the existence of mortgage with the condition of sale and the condition of repurchase are not embodied in

the same document, but are embodied in two different documents though contemporaneously executed In the present case admittedly there has

been a sale which has been executed on 27-8-1952. Admittedly a separate document came into existence (Exh. 1D-154) whereunder the very

property has been agreed to be reconveyed to the defendant No. 1 by the plaintiff in case the former paid Rs. 10,000/- to the latter by 6-6-1953.

It cannot, therefore, be said, particularly in view of the positive provisions of the proviso to Section 58(c) of the T.P. Act, that this document can

be a mortgage by conditional sale. Had this conveyance been accompanied by a condition of reconveyance by the same document whereunder the

property was transferred to the vendee, there were possibilities of holding it was a mortgage, but that possibility has to be excluded in the present

case.

26. It will not be out of place to critically examine the conditions underlying the transfer as mentioned in Exh. 1D-155. The very first condition

shows that a consideration of Rs. 10,000/- has been paid by the vendee to the vendor. It is no doubt true that in his pleadings a consideration of

Rs. 8,000/- only has been admitted by the vendor, but it does not make any difference as far as the character and the real nature of Exh. 1D-155

is concerned. Secondly there has been unequivocal and absolute transfer of title. Only the possession has been deferred and it has been specifically

mentioned in the document Exh. 1D-155 that possession will be delivered after the standing crops were harvested. The vendor undertook the

responsibility of putting the vendee in possession of the property after taking away the crops. There is no condition that on default of payment of

mortgage money on a certain date, the sale shall become absolute, nor is there any condition that on such payment being made the sale will

become void. There is, however, a contemporaneous agreement evidenced by Exh. 1D-154 that on payment of Rs. 10,000/- by 6-6-1953, the

buyer shall transfer the property to the seller. Scrutinising these conditions together, it is clear that the present transaction does not fall under either

of the categories mentioned in Section 58(c) of the T.P. Act. The condition of reconveyance on receipt of full consideration not being the part of

the same document, it cannot be a mortgage by conditional sale. On the other hand Exh. 1D-155 and Exh. 1D-154 read together would mean that

there was a contemporaneous agreement of reconveyance which shows that the property has been absolutely conveyed and the same property

was agreed to be reconveyed by the vendee to the vendor in case the consideration were paid by 6-6-1953. It thus conveys that there was

absolute transfer of title in favour of the vendee under Exh. 1D-155 and at the same time there was a contract whereunder this title was agreed to

be reconveyed to the vendor if Rs. 10,000/- were paid by 6-6-1953. Exh. 1D-155 vested the title of suit property in the plaintiff, whereas Exh.

1D-154 contemplated revesting of the title in the vendee (original defendant No. 1) in case the conditions mentioned in Exh. 1D-154 were

complied with.

27. We have thus no alternative but to hold that the property was absolutely transferred under Exh. 1D-155. By no stretch of imagination can it be

called a mortgage by conditional sale. It was the case of the original defendant No. 1 before the trial Court that the transaction embodied in this

document should at least be covered within the definition of "English mortgage" given in Section 58(e) of the T.P. Act and that may be legitimately

called as English mortgage. English mortgage contemplates a matter convenient to the mortgagor binding himself to repay the mortgage money

on a certain date. Another requisite of Section 58(e) is that the mortgagor transfers the mortgaged property absolutely to the mortgagee and this

absolute transfer was subject to a proviso that he will transfer it to the mortgagor upon payment of the mortgage money as agreed. It will now be

necessary to see whether in this case the three guidelines conditions are satisfied.

28. Exh. 1D-154 as it stands, does nowhere say that the mortgagor has bound himself to repay the mortgage money on a certain date. It is true

that Exh. 1D-154 which had come to be executed on the same day shows that the mortgagee undertook to reconvey the property to the

mortgagor if the money were paid by 6-6-1953. Exh. 1D-154 does not in itself restore the property in favour of the mortgagor. The property is

absolutely transferred in favour of the mortgagee under Exh. 1D-154, whereas the mortgagor came to have bound himself to repay the mortgage

money under Exh. 1D 154. The absolute transfer and the condition binding himself by the mortgagor not having been contained in the same

document, it cannot be inferred even by any stretch of imagination that it is an English mortgage.

29. Mr. Khapre, learned Advocate for the respondents urged before me that in any cause there are circumstances established on record which

shows that the transaction is not a sale, but it is either a mortgage or a loan transaction. In view of a bar created by proviso to Section 58(c) of the

T.P. Act, it is futile to consider the case of mortgage by conditional sale. As already discussed in the foregoing paragraph, it is even futile to treat

this transaction as an English mortgage. According to him, this transaction could have been treated at the most as a mortgage by conditional sale or

an English mortgage, but it does not fall in any other categories contemplated by Section 58 of the T.P. Act. It is, therefore, not necessary to

consider the other circumstances, but as Mr Khapre strenuously urged before me to consider these circumstances, I would discuss the same.

30. Mr. Khapre urged before me that same property was conveyed by the original defendant No. 1 to the plaintiff more than once prior to 27-8-

1952 and same property came to be reconveyed by the plaintiff in favour of the original defendant No. 1. Exh. ID-152 shows that on 7-10-1949

this very property was conveyed in favour of the present plaintiff by the original defendant No. 1. On the same day contract of reconveyance was

effected and that can be found at Exh. 1D-153. In pursuance of this contract, this property came to be reconveyed by the plaintiff to the original

defendant No. 1 on 1-6-1950 vide Exh. 1D-149. Subsequently the same property was sold by the original defendant No. 1 to the present plaintiff

for Rs. 7,500/- on 20-9-1951 vide Exh. ID-151. Same property came to be reconveyed to the original defendant No. 1 on 3-6-1952 vide Exh.

1D-150. It appears that during the period commencing from 1949 to 1951 and ending with 1952, the same property came to be conveyed by the

defendant No. 1 in favour of the plaintiff and the property came to be reconveyed in favour of the defendant No. 1. Suffice it to say that at each

occasion there was a complete transfer and a complete retransfer. Mr. Khapre, learned advocate for the respondents urged before me that it is

absurd to imagine that a person would sell the property and purchase it, again sell it and again purchase it for no rhyme or reason. On the other

hand, according to him, these transactions unequivocally go to show that there was a relationship established between the defendant No. 1 and the

plaintiff showing that the defendant No. 1 was in financially pressing circumstances to raise some funds and it is only from that point of view that

this transaction came into existence. It is very difficult, in the circumstances as established on record, to say that at each and every stage the

property came to be conveyed the defendant No. 1 was hard pressed for money. On the other hand, the transactions as are embodied in the

different documents do not logically convey that the defendant No. 1 was hard pressed for money. For example, the defendant No. 1 sold the

property to the plaintiff on 20-9-1951. Exh. 1D-150 shows that on 3-2-1952 he paid Rs. 7,500/- to the plaintiff and got the property reconveyed.

Again on 27-8-1952 i.e. two and half months after execution of Exh. 1D-150 he again sold the property to the plaintiff. Are we to assume without

any evidence that the defendant No. 1 was hard pressed for money every time. On the other hand, there is unequivocal admission of the defendant

No. 1 while in the witness-box that during the period commencing from 1949 and ending with 1952 he sold not less than 150 acres of land in

Warora tahsil. Can we contemplate in these circumstances that at the time of each and every transaction the defendant No. 1 was hard pressed for

money. On the other hand, what we can gather is that the defendant No. 1 had already left the village and settled at Nagpur and he wanted to

dispose of the property, which was situated at a far off distance from Nagpur. Warora property was neither convenient, nor beneficial as he was

living miles away from Warora where the property was situated. It is also his testimony that he collected not less than Rs. 1 1/2 to 2 lakhs of

rupees from the property by selling the property at Warora and other places. Thus the reason for selling this property is not the financial stringency,

but something else, which made him to collect the liquid cash out of the assets that he had.

31. It was at one stage urged before me that the defendant No. 1 squandered the property like anything. But squandering of the property is not

relevant as far as the present litigation is concerned. We are not examining the case from the point of view of whether the sales are binding on the

defendants -- legal representatives of the original defendant No. 1. One thing is clear that there is no proof that the original defendant No. 1 was

hard pressed for money on 27-8-1952 and that made him execute Exh. 1D-155. Mr. Khapre, learned advocate for the respondents, however,

urged before me that there was a separate contract between the plaintiff on the one hand and the original defendant No. 1 on the other on or about

6-6-1953 and this contract changed the whole colour of the transaction. As is already pointed out, under Exh. 1D-155 the property came to be

transferred by the defendant No. 1 in favour of the plaintiff. By contemporaneous agreement Exh. 1D-154 the same property was contracted to be

reconveyed to thg defendant No. 1 if the latter paid Rs. 10,000/- to the plaintiff by 6-6-1953. It is an admitted position that till 6-6-1953 the

plaintiff did not get possession of the property conveyed. The defendant No. 1, came before the Court with a defence that on 6-6-1953 he found

himself unable to repay the amount of Rs. 10,000/- to the plaintiff. Therefore, another attempt was made. According to the defendant No. 1 he

actually put the plaintiff in possession of 12.33 acres out of the land conveyed under Exh. 1D 154. At the same time there was a contract

according to the defendant No. 1 that the plaintiff should enjoy the usufruct of this land (12.33 acres) for 12 years absolutely towards repayment of

Rs. 10,000/-. The evidence on this point, however, is not very clinching. The defendant No. 1 no doubt entered the witness-box.

32. It has to be stated at this stage that this subsequent contract alleged to have been entered into on 6-6-1953 is an oral contract and it speaks

about the mode of repayment. It cannot affect the rights and liabilities created either under Exh. ID-155 or Exh-ID 154. The very case of the

defendant No. 1 suffers from contradictions inasmuch as he does not treat all these contracts as part and parcel of the same transaction. On the

other hand he is treating the oral contract dt. 6-6-1953 independently. If it is so, then by no stretch of imagination can it be said that it affects the

rights once determined or fixed under Exh-ID-155. Exh-1D-155 absolutely transfers the property in favour of the plaintiff. Exh-1D-154 affords

concession to the defendant No. 1 to get the property reconveyed on fulfilling the conditions mentioned in Exh-1D-154. Had these conditions been

fulfilled, the defendants would have definitely earned rights. Having failed to perform his part under Exh-1D-154, whatever rights or concessions he

received thereunder, got extinguished due to his own failure. There cannot be now a fresh oral contract affecting the rights created under the

registered instrument. This is one aspect of the matter.

33. Going through the evidence, as it stands, the defendant No. 1's testimony regarding the contract entered into on 6-6-1953 does not appear

very convincing. He states that he did put the plaintiff in possession of 12.33 acres of land. The plaintiff also admits that he was put in possession of

that much land. It is pertinent to note at this stage that the plaintiff served a notice on the defendant No. 1 in 1958 calling upon him to deliver the

possession of the remaining land. This, in my opinion, is against the very spirit of the contract alleged to have been settled between the parties on 6-

6-1953. It is pertinent to note at this stage that in spite of the receipt of the notice the defendant No. 1 had no audacity to deny what the plaintiff said

by his notice served in 1958. He did not come forth with a case that the matter was already settled and the plaintiff was debarred from claiming the

possession of very additional property in view of the special oral contract. Thus the present defence of oral contract alleged to have been entered

on 6-6-1953 appears to be an afterthought. It is inconsistent even with his plea of mortgage inasmuch as a mortgage has been created under the

registered sale deed and there could be no deviation from the conditions merely by oral agreement. Even assuming that there could be a deviation

by oral agreements, the evidence, as it stands, is not sufficient enough to establish these deviations. It is no doubt true that the defendants Nos. 5 to

9 do state vaguely that there was an oral contract as contended by the plaintiff, but their own evidence shows that they were deeply interested in

that contract from the point of view. They cannot be called as independent witnesses inasmuch as they are now merely interested in preserving their

own property which has become the subject-matter of dispute in the suit. Thus by and large, there has been an absolute conveyance of the

property under Exh- 1D-155. The transaction embodied in that document is a transaction of sale. It is not a transaction either of mortgage or loan.

34. Mr. Khapre learned advocate for the defendants relied on Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi, . The question which arose in

that case was regarding the bar created by Section 92 of the Evidence Act in leading oral evidence. That question does not arise in this suit

because it is none of the contentions of the defendants that any evidence was barred on the pretext that Section 92 barred oral evidence, when in

fact the whole evidence has been recorded without any objection and it has been read not only by the trial Court but also by this Court. Thus there

is hardly any force in the argument that the transaction embodied in Exh-1D-155 is not a sale but a mortgage.

35. During the pendency of this appeal, the original defendant No. 1 died and in his place his legal representatives have been brought on record.

He died on 20-3-1979 and his legal representatives were brought on record at the end of 1984. Mr. C. J. Ghate, a senior advocate practising in

this Court put in appearance. However, Mr. Ghate died in or about June 1984. It is interesting to note that right from June 1984 till 9-1-1987 the

legal representatives did not move in the matter. They sat quiet. Mr. Khapre filed his vakalatnama in this appeal only on 9-1-1987. On 21-1-1987

when this appeal was taken for hearing, an application for amendment came to be filed. By this amendment a plea is sought to be raised by adding

paras 30B and 30A to the written statement. Two pleas are sought to be raised. First is that this property was a joint Hindu family property and,

therefore, it could not be sold by the father except for legal necessity which is wanting in the present case. It is also sought to be pleaded that

Trimbakrao was addicted to the vices and he was indulging in satta betting and. this property came to be sold for satisfying immoral debts which

are not binding on the legal representatives. Secondly it was sought to be pleaded that the plaintiff being a stranger- purchaser, he cannot bring a

suit for possession against a non-alienating coparcener. His remedy is only for general partition.

36. Mr. Kherdekar, learned advocate for the appellant, strenuously urged before me that these pleas cannot be allowed to be raised for the first

time after the lapse of more than 22 years. According to him, by raising these pleas the litigation is relegated back to the stage of filing the written

statement and in spite of the fact that the parties have spent not less than 22 years in this litigation, that all be again taken back to the stage

prevailing in 1965. It is no doubt true that this plea is available to the present legal representatives because apart from being the legal

representatives of the deceased, they are also the coparceners of the family along with the deceased defendant No. 1. They are, therefore, entitled

to raise these pleas. There cannot be any dispute regarding this. The only point which arises at this stage is whether this plea is necessary at this

stage. To repeat once again, the litigation was commenced on 27-8-1964 on the plaint presented by the plaintiff. The plaint came to be re-

presented before the Civil Judge, Senior Division, Chandrapur on 8-11-1965. The defendants put their defences before that Court. At that stage

the legal representatives were not before the Court. Whatever defences were open to defendant No. 1 were put before the Court. He could have

legitimately put before the Court that he was not the sole owner of the property. He could have also told the Court that there are some necessary

parties which could be joined. He has not done so. One thing is certain that till the suit was pending before that Court, the legal representatives

were not joined. The legal representatives came in picture only after the death of defendant No. 1 which occurred in 1979. The legal

representatives have been brought on record of this appeal and they are assuming two characters : viz.

(1) are the legal representatives of the deceased having interest in the property and (2) they are also coparceners along with the defendant No. 1,

since deceased and their rights are distinct from those of the defendant No. 1. Law allows them to put in their grievances before the Court

consistent with their character and status. Some defences which the original party could not put can also be put by the legal representatives in case

those defences are consistent with their status. On this point there can be no dispute.

37. I am told that these very legal representatives have already filed Special Civil Suit No. 30 of 1971 and it is pending before the Civil Judge,

Senior Division, Chandrapur and this suit is in respect of the same property. The very legal representatives are challenging the very alienation.

When the legal representatives have already resorted to the remedy available to them under law, the only point that survives for the purpose of this

case is whether this amendment proposed to be made here is necessary at all for the decision of this controversy. The controversy in this case was

whether the transaction entered into by the defendant No. 1 was a sale out and out or whether it was a mortgage. Consequential part of the

controversy was whether the plaintiff was entitled to claim possession of the property in view of his title. The binding nature of this transaction was

never the subject-matter of this controversy, nor was it ever contemplated. By introducing this amendment, the plaintiff now wants a declaration

regarding the binding nature of this transaction against them. This was never a subject-matter of the controversy in this suit. On the other hand, this

adjudication is pending decision in the competent Court and the Court is bound to decide these points at appropriate stage. The only question

which arises at this stage is whether this amendment at such a belated stage when more than 22 years have already been wasted in this litigation

should be allowed. I think that this amendment is not necessary for the purposes of the decision of this controversy. It is true that the legal

representatives of the deceased defendant will be bound by this decree of possession. The apprehension of Mr. Khapre was that on obtaining this

decree for possession they will be ousted by the appellant. He wanted a safeguard and that safeguard was by way of this amendment which would

keep this controversy alive till their claim was finally disposed of. Thus, in fact the purpose of Mr. Khapre appears to be to create shock absorber

rather than to have a definite adjudication. If the plaintiff is really worried about the decree of possession, he has already rights under the common

law and he can pursue those rights. But this purpose of keeping this litigation alive cannot be appreciated particularly when the binding nature of the

transaction cannot be a subject-matter of dispute here. In my opinion, this amendment is not at all necessary for the purposes of this litigation. The

amendment application is, therefore, rejected.

38. In the result, it must be held that the suit of the plaintiff is well within limitation. The transaction embodied in the document in Exh-1D-155 is a

sale and not a mortgage, nor is it a transaction of loan. The original defendant No. 1 has conveyed the title to the , plaintiff and the plaintiff has

become owner and he can claim possession of the property.

39. A small controversy was raised during the course of arguments regarding the valuation of the suit for the purposes of Court-fees. In fact, no

definite plea has been raised. It has been the consistent case of the plaintiff that he has purchased half share in these four fields under Exh-1D-155.

All the sale deeds show that the land has been assessed to land revenue. At one stage the plaintiff did make a grievance that he is claiming a

particular part of the land purchased and that part was not separately assessed. At that stage, the plaintiff did aver that subsequent to the sale, there

was an amicable plan or workout and he claimed relief based on that working plan, but he is now restricting his claim only to half share as

purchased under Exh-1D-155. The description of the property in the plaint is not disputed. Therefore, the valuation for the purposes of the Court-

fee as done by the plaintiff appears to be quite proper within the meaning of Section 7(v) of the Court-fees Act.

40. The plaintiff has also claimed mesne profits prior to the institution of the suit to the tune of Rs. 6,000/-. Defendants Nos. 5 to 9 are the

subsequent purchasers knowing full well that the property was conveyed by the original defendant to the plaintiff. I have already held that the

transfer made by defendant No. 1 in favour of the plaintiff on 27-8-1952 is quite valid. It is a sale and sale only and not a mortgage. The plaintiff is

entitled to possession. The question which arises at this stage is about the quantum of mesne profits. The trial Court has disposed of this matter

mainly on the count that the suit is barred by limitation. In fact, the trial Court did not even discuss the evidence regarding the mesne profits. I have

gone through the record to find out whether this Court can assess the quantum of mesne profits, but it was found that there was no evidence led on

this point. It will not be possible for this Court to determine the mesne profits accrued for three years prior to the date of the institution of this suit.

41. Rule 12(1)(b) of Order XX of the CPC permits the Court for directing an enquiry even in mesne profits which have accrued during the period

prior to the institution of the suit. I would, therefore, direct that the trial Court shall hold an enquiry into the mesne profits accrued prior to the date

of the suit and also after the institution of the suit till the delivery of possession.

42. In the result, the appeal is allowed, the decree passed by the trial Court is hereby set aside and a decree directing a partition of the land

described in para 1 of the plaint is passed. The plaintiff shall be put in possession of half share therein. Enquiry into the mesne profits for the period

of 3 years prior to the date of institution of the suit and also for the period after the institution of the suit till the date of delivery of possession under

Order XX, Rule 12(1)(b) and (c) of the C.P.C. shall also be made. Respondents Nos. 1(A) to 1(1) shall bear the costs of the appellant

throughout in addition to their own.