

(1955) 09 BOM CK 0086**Bombay High Court****Case No:** A.F.A.D. No. 398 of 1953

Hamappa Sangappa

APPELLANT

Vs

Ramangouda Kenchangouda
and Others

RESPONDENT

Date of Decision: Sept. 27, 1955**Acts Referred:**

- Transfer of Property Act, 1882 - Section 58, 63A, 63A(2), 72, 8

Citation: AIR 1956 Bom 575**Hon'ble Judges:** Shah, J**Bench:** Single Bench**Advocate:** N.M. Hungund, for the Appellant; K.G. Datar, for the Respondent**Judgement**

1. Two questions arise in this second appeal (i) Whether by Ex. 53 a mortgage was intended to be created, & (ii) whether the defendants as mortgagees are entitled to the value of improvements or to add the amount alleged to be spent for the improvements to the mortgage money.

The plaintiff Hanmappa Sangappa by deed Ex. 53, dated 1-8-1921, which was styled as "Mudat Kharedi Khat" created certain rights in land belonging to him in favour of Kenchangouda Ramangouda Patil father of the defendants. The relevant part of the document Ex. 53 is as follows: "I have taken from you a cash amount of Rs. 700/- for the necessity of my family. For this amount I have passed a conditional (Mudat) sale deed for ten years from today in respect of Pot Hissa No. 4 entry No, 112, measuring acres 9-3, assessment Rs. 6-10-0 this whole land called "Lakkavan Gadibhola" out of patilki Inam land bearing R.S. No. 66 which is of my ownership and in my Wahiwat situate in the village of Halerolli, Taluka Bagewadi, District Bijapur and have given it into your possession today only.

"As you are my bhauband I have given this Patilki Vatani Inam (land) together with all kinds of trees therein, into your possession. If your principal (ain) amount of Rs.

700/- is paid within the time limit you should pass a deed of reconveyance.

In case the amount is not paid in time this sale itself should be treated as an out and out (sale) and you should make wahiwat of and enjoy it as owner as you like from generation to generation. Full ownership vests in you without there being absolutely any right of inheritance either of mine or of my heirs to the estate".

2. The plaintiff alleges that this document created a mortgage. The defendants contended that it was a sale with a condition of re-purchase, and the right of repurchase not having been exercised after the expiry of ten years within the period of limitation provided for specific performance of agreements to sell the Immovable property, the defendants had become absolute owners of the suit property.

The learned trial Judge held that the document Ex. 53 created a mortgage, and on that footing he directed accounts to be taken u/s 15D, D. A. R. Act and found that an amount of Rs. 700/- was due. In appeal to the District Court at Bijapur the learned District Judge held that the document Ex. 53 evidenced a sale with a condition of repurchase.

He therefore held that the plaintiff was not entitled to claim accounts on the footing that the deed Ex. 53 created a mortgage and to claim possession of the property conveyed thereby. Now it is elementary law that a document must be construed according to its terms and without any preconceived notions. It is singular to find in this document that even though the document is described as "Mudat Kharedi Khat" or as a conditional sale deed, there is no covenant or recital in the document whereby the property can be said to have been conveyed by the plaintiff to the defendants.

The recitals in the document in substance state that the plaintiff had borrowed Rs. 700/- from Kenchangouda, and that he had in consideration thereof given property belonging to him into the possession of Kenchangouda. It is then recited that if the amount of Rs. 700/- which was borrowed was not repaid within ten years, Kenchangouda on the expiry of those ten years was to be the absolute owner of the property.

It is evident that, there is no habendum clause in this deed under which the property can be regarded as conveyed to Kenchangouda. It is true that the document appears to have been drawn up by a village scribe and precision may not be expected in drafting the document.

But giving full weight even to that circumstance I am unable to hold that it was intended by the plaintiff absolutely to convey the property to Kenchangouda merely reserving a right to obtain re- conveyance on payment of Rs. 700/- within ten years. The first circumstance which is evident from the language of the document is that the plaintiff says that he had taken (borrowed) Rs. 700/- from Kenchangouda. That amount is described as "Ain" or principal. Further the document in terms makes

Kenchangouda the owner of the property on the expiry of ten years, and not before.

The reason for delivering possession of the property to Kenchangouda is that Rs. 700/- have been taken or "borrowed" by the plaintiff from Kenchangouda. These recitals clearly indicate that the transaction intended to be effected by Ex. 53 was a mortgage, and not a sale. I am therefore unable to agree with the view of the learned District Judge that by this deed Ex. 53, the plaintiff intended to sell the property to Kenchangouda.

3. It was the case of the defendants that an amount of Rs. 400/- was spent by them for removal of weeds, and that the removal of weeds amounted to an improvement and they were entitled to credit for the amount spent by them in taking account of the mortgage dues. The learned trial Judge held that "removal of weeds" was not an improvement of a permanent nature, and therefore the defendants were not entitled to be credited with the amount of Rs. 400/- which they had spent for removing the weeds.

The learned appellate Judge did not independently apply his mind to this contention. It is true that in considering the question, whether the transaction evidenced by the deed Ex. 53 was or was not a mortgage, he observed that there was evidence to show that the defendants had removed weeds and put up Bandh about the year 1945-46 and had spent Rs. 400/-.

He observed that on this point Sangappa the witness for the defendants, had not been cross examined, and he held that the defendants, if they were mere mortgagees, would not have improved the land, and that was, in the view of the learned appellate Judge, an indication that the transaction was not in the nature of a mortgage.

4. Section 63A, Transfer of Property Act provides that a mortgagee is entitled to the amount spent by him for improvements to the mortgaged property only in the eventuality mentioned in Sub-section (2) of the Section. Sub-section (2) of Section 63A in so far as it is material provides

"where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall in the absence of a contract to the contrary be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of nine per cent, per annum, and the profits, if any accruing by reason of the improvement shall be credited to the mortgagor". The mortgagee has not claimed that he improved the property in the circumstances mentioned in Sub-section (2) of Section 63A.

5. Section 72 Transfer of Property Act enables a mortgagee to spend such money as is necessary when he is in possession of property in certain circumstances; and Clause (b) provides that he may spend money for preservation of the mortgaged property from destruction, forfeiture or sale, and if he has spent money being in possession of the property, for any of the purposes specified in Section 72, the mortgagee is entitled to add the amount spent to the principal amount at the rate of interest payable on the principal.

6. It cannot be said that the removal of weeds was necessary for preservation of the mortgaged property from destruction, forfeiture or sale". In any event the amount spent by the mortgagee in possession for preservation of the mortgaged property can be added to the mortgage amount unless the mortgager has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

It is not the case of the defendants that the plaintiff was ever called upon to preserve the property and he failed to take proper and timely steps to preserve the property. In that view of the case the decree passed by the trial Court will have to be restored.

7. The appeal is allowed, the decree passed by the District Court is set aside, and the decree passed by the trial Court is restored with costs in this Court and in the District Court.

8. Appeal allowed.