

**(1995) 03 BOM CK 0065**

**In the Bombay High Court**

**Case No : Second Appeal No. 369 of 1986**

Vasant Pandu alias Pandurang Birwatkar

APPELLANT

Vs

Shankar Dhondu Ghole and Another

RESPONDENT

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**Date of Decision : 29-03-1995**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 10A  
Transfer of Property Act, 1882 — Section 58

**Citation :** (1995) 4 BomCR 40 : (1995) 97 BOMLR 264 : (1995) 2 CivCC 549 :  
(1995) 2 MhLj 471

**Hon'ble Judges :** M.L. Dudhat, J

**Bench :** Single Bench

**Advocate :** A.H. Palekar, for M.V. Sali, for the Appellant; S.G. Karandikar, for  
G.B. Karandikar, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

M.L. Dudhat, J.—This second appeal is preferred against the Judgment and decree passed by the District Judge, Ratnagiri, in Civil Appeal No. 122 of 1982 dated 7th December, 1985 whereby the District Judge allowed the appeal preferred by the original defendant No.1-present respondent No.1 and dismissed the suit filed by the original plaintiffs-present appellants.

2. The appellants in this case have filed the suit against the respondents being Regular Civil Suit No. 18 of 1980 for redemption of mortgage. The suit property is an agricultural land bearing Survey No. 135, Hissa No. 14 admeasuring about 2 acres and 15 gunthas and Survey No. 141, Hissa No. 12, admeasuring 0-17 gunthas situated at village Ayaini, Taluka Khed, District Ratnagiri. It was contended on behalf of the plaintiffs that on 20th March, 1961 vide Exh. 34 he mortgaged the suit property with defendant No. 1 for a consideration of Rs. 200/-. The plaintiffs further contended that though the said transaction was a mortgage, in the document which was registered it is averred that the suit property was sold by the plaintiffs to defendant No. 1 on 20th March, 1961 and

there was a condition in the said document that the plaintiffs are entitled to get the suit property retransferred in their name on payment of amount of Rs. 200/- within ten years from the date of the execution of the said mortgage document. Failure on the part of defendant No. 1 to retransfer the said suit property in the name of the plaintiffs when they showed their willingness to pay the amount of Rs. 200/- by their notice dated 10th February, 1980, the plaintiffs have filed the suit on 25th April, 1980 being Civil Suit No. 18 of 1980 before the Civil Judge, J.D., Khed, Dist. Ratnagiri.

3. On the other hand, it was contended on behalf of the defendants that by the sale deed, Exh. 34 dated 20th March, 1961 the plaintiffs sold the said property absolutely to the defendants. However, taking into consideration the near relationship, the defendants in the said agreement also agreed to reconvey the said property in the name of the plaintiffs if they showed willingness to return the amount of Rs. 200/- within ten years from the execution of the sale deed, Exh. 34 i.e. on or before 21st March, 1971. According to the defendants since the said document was absolute sale and since the plaintiffs failed to repay the said amount mentioned in the sale deed on or before 20th March, 1971, the said sale has become absolute and, therefore, the suit as filed by the plaintiffs is liable to be dismissed.

4. The trial Court by its Judgment and decree dated 26th July, 1982 passed the decree of redemption in respect of the suit property in favour of the plaintiffs. Against the said decision of the trial Court the defendants preferred appeal being Civil Appeal No. 122 of 1982 before the District Judge, Ratnagiri and the District Judge, Ratnagiri, allowed the said appeal and reversed the judgment and decree passed by the trial Court and dismissed the suit filed by the plaintiffs-the present appellants. Against the aforesaid decision dated 7th December, 1985 given by the District Judge in Civil Appeal No. 122 of 1982 the plaintiffs have preferred this second appeal.

5. Shri Arun Palekar, learned Counsel for the appellants, mainly argued on two law points. Firstly, he contended that plaintiff No. 2 mother of plaintiff No. 1 expired on 31-10-1985 when the appeal before the lower Appellate Court was pending and admittedly the original defendants failed to bring heirs of the said Smt. Kashibai plaintiff No. 2 on record and the lower Appellate Court allowed the appeal on 7-12-1985 when in fact the appeal ought to have been dismissed as the same was abated. Secondly, Shri Palekar argued that since Exh. 34 incorporates the term of repurchase within 10 years, the lower Appellate Court ought to have taken into consideration these circumstances and ought to have come to the conclusion that the document at Exh. 34 was a mortgage and not a sale.

6. As against this, Shri S.G. Karandikar, learned Counsel for the respondent original defendants, contended that in view of the provisions of CPC as interpreted by the Supreme Court and this High Court the appeal before the lower Appellate Court was not abated due to the death of Smt. Kashibai plaintiff

No. 2 on 31-10-1985 and also contended that as per the terms and conditions of Exh. 34 the document was out and out sale with the condition to purchase and, therefore, the lower Appellate Court was justified in allowing the appeal and dismissing the suit of the appellants-plaintiffs.

7. As regards the points of abatement admittedly the trial Court passed the decree against the defendants on 26th July, 1982 against which they preferred Civil Appeal No. 122 of 1982 before the District Judge, Ratnagiri on 18-8-1982. During the pendency of the said appeal on 31-10-1985 Kashibai plaintiff No. 2 expired and the appellant failed to bring heirs of deceased Kashibai plaintiff No. 2 on record. Thereafter the said appeal filed by the defendant was decided on 7th December, 1985. Relying on the aforesaid facts Shri Palekar, learned Counsel for the appellants, contended that the appeal against plaintiff No.2 got abated and since plaintiff No. 1 and plaintiff No. 2 were the joint owners of the property, in view of the said abatement the suit against plaintiff No. 1 should also fail. To strengthen the aforesaid argument Shri Palekar relied on two decisions of the Supreme Court viz., *The State of Punjab Vs. Nathu Ram*, and *Babu Sukhram Singh v. Ram Dular Singh* AIR 1973 S.C. 204. As per the ratio laid down by the aforesaid two decisions of the Supreme Court, where a joint claim against several defendants is made in the suit and during the pendency of the appeal by the plaintiff some of the defendants die and no separate claim is made against any of the defendants in the appeal, failure of the plaintiff to bring on record the representatives of the deceased result in abatement of the appeal into. However, the question in this case is as to whether the right to sue survives and was represented properly by plaintiff No. 1 and secondly since the death has taken place on 31-10-1985 much after the amendment of the Civil Procedure Code, more particularly Order XXII, Rule 10-A (which was introduced with effect from 1-2-1977) what is the effect of the amended provision more particularly Rule 10-A of order XXII of the C.P.C.

8. Shri Karandikar, learned Counsel for the respondents, contended that when Kashibai plaintiff No. 2 died on 31-10-1985, plaintiff No. 1 her sole legal representative was already on record in his own capacity as plaintiff No.1 and, therefore, the appeal filed before the District Judge did not abate even though no application was made to bring the heirs on record. To support the aforesaid proposition, Shri Karandikar firstly relied upon the case of *Mahabir Prasad Vs. Jage Ram and Others*, , head-note B, more particularly para 6. In the aforesaid decision, the Supreme Court held that when the respondent in appeal dies and one of his legal representative is already on record in another capacity, the appeal does not abate even though no application is made to bring heirs on record. According to the Supreme Court in such case what is necessary is that legal representative of the deceased should file application stating that he is also on record and legal representative of the deceased but in any case and in the facts and circumstances of such case appeal shall not abate.

9. Shri Karandikar, also relied on the ratio decided in the case of *Mohammed Arif*

v. Allah Rabbul Alamin AIR 1982, S.C. 948. In the short Judgment given by the Supreme Court it is held that if the party already on record sufficiently represents the property of the deceased respondent then there is no necessity of application to bring him as a legal representative of the deceased on record. By relying on the aforesaid ratio it is contended on behalf of the defendants that on the death of Kashibai plaintiff No. 2 plaintiff No. 1-her son who was already on record as respondent No. 1 in the lower Appellate Court was the only sole legal representative of the deceased plaintiff No. 2 and, therefore, in view of the observations of the Supreme Court as mentioned aforesaid, plaintiff No.1 who was already on record sufficiently represented the property of the deceased and, therefore, there is no question of any abatement of the appeal as contended on behalf of the plaintiff-appellants.

10. Shri Karandikar also relied on the observations of the Supreme Court in the case of Collector of 24 Parganas and Others Vs. Lalith Mohan Mullick and Others, . In the said case the Supreme Court held that when the appeal was decided on merit by the Supreme Court and some of the respondents died during the pendency of the appeal since their estate was sufficiently represented, the plea that the appeal had abated and the Judgment on merits needs to be set aside is untenable.

11. There are similar observations made by this Court in Krishnakant Dattaram Pathare Vs. Deputy Charity Commissioner, Greater Bombay Region, Bombay and others, , more particularly in para 8. From the ratio of the cases of the Supreme Court and this High Court as discussed above, it is clear that since in the present case plaintiff No.1 was already (sic.) in the appeal filed before the District Judge and after the death of plaintiff No. 2, was the sole legal representative of plaintiff No. 2, the appeal did not abate as the estate of plaintiff No. 2 the deceased was properly and effectively represented by plaintiff No. 1.

12. We have to consider one more legal aspect in this case and that is as regards the effect of the amendment by which Order XXII, Rule 10-A was inserted with effect from 1-2-1977. By the aforesaid amendment mandatory duty is cast on the pleader appearing on behalf of the deceased to bring the death of party in the suit and appeal to the notice of the Court and thereupon the Court shall give the notice of death to the other party who should take steps to bring the legal representative on record. In this case admittedly after the death of plaintiff No. 2 on 31-10-1985 pleader or Advocate appearing on behalf of the plaintiff has not followed the aforesaid mandatory requirement and, therefore, the defendants-appellants in the lower Appellate Court were unaware about the death of plaintiff No. 2. If the aforesaid fact of death of plaintiff No. 2 would have been reported to the Court, the Court would have given the notice to the defendants who would have made application for bringing the heirs on record. Since the Advocate on behalf of the plaintiffs failed to follow the mandatory requirement under Rule 10-A of Order XXII of the C.P.C., in my opinion the plaintiffs cannot argue the point of abatement. In view of this argument advanced on behalf of the appellants-

plaintiffs that the appeal got abated before the lower Appellate Court due to the death of Kashibai is rejected.

13. The next question to be decided in this appeal is as to whether the registered document, Exh. 34 dated 20-3-1961 is out and out sale with a condition of repurchase within 10 years or is a mortgage. In the present case Exh. 34 the document relied on by both the parties to support their contentions refers to the fact that by the said document the suit property is absolutely transferred by the plaintiffs to the defendants. However, in the said document there is one recital to the effect that if within 10 years from the date of the execution of the said document the plaintiffs return the total amount of consideration he received under the agreement i.e. Rs. 200 the defendants agreed to transfer the said property in favour of the plaintiffs. Therefore, in this case the Court has to read the document as a whole and gather the intention of the parties. If after reading the document as a whole the Court comes to the conclusion that by the said document the plaintiffs sold the suit land absolutely to the defendants and only concession is given to the plaintiffs to repurchase the said property if they return the amount they have received under this sale within 10 years, then the said document will be construed as a document of sale with the condition to repurchase. However, on the other hand if the Court comes to the conclusion that there is a sort or relationship of creditor and debtor between the defendants and plaintiffs and the property was transferred by way of security, then in that event the document, Exh. 34 shall be termed as mortgage. In the present case after going through the terms of the document, Exh. 34 the lower Appellate Court came to the conclusion that the document, Exh. 34 is a sale and not mortgage. The title of the said document, Exh. 34 to the effect that this is a sale deed for amount of Rs. 200/-, the averment in the said document to the effect that the land described in the document is sold to the defendants, the averments to the effect that the suit property is sold to the defendants and actual possession is handed over to the defendants and that the defendants and their heirs are entitled to use it as their own property by the said document and lastly the averment to the effect that in case any legal complication or objection arises in respect of the suit land, the same shall be removed by the plaintiffs, clearly show that the transaction entered into vide Exh. 34 was out and out sale. It is true that lastly it is stated in the said document that in the event the plaintiffs pay the amount which they received under the sale deed within 10 years from the execution of the sale deed, the defendants agreed to resell the said property to the plaintiffs. However, taking into consideration the clear averments made in the document to the effect that the property is out and out sold by the plaintiffs to the defendants it appears that in view of the near relationship of the parties, the defendants agreed to resell the said property on the plaintiffs paying the amount which they have received under the sale deed within 10 years from the execution of the sale deed. This being proper construction of the document after reading the document, Exh. 34, as a whole, I do not see any reason to interfere with the said finding given by the lower Appellate Court, in this second appeal.

14. Hence, this second appeal is dismissed with no order as to costs.