

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 510 of 2024
 With
 CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
 In
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 CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
 In
 R/SECOND APPEAL NO. 511 of 2024

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HEIRS OF LATE PATEL RAVJIBHAI KANJIBHAI & ORS.
 Versus
 LUHAR BABUBHAI PRABHABHAI & ORS.

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Appearance:

MR UMANG R SHAH for the Appellant(s) No. 1,1.1,1.2,1.3,2,3,4
 MR V Z BHARDA for the Appellant(s) No. 1,1.1,1.2,1.3,2,3,4

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CORAM: HONOURABLE MR. JUSTICE DIVYESH A. JOSHI

Date : 26/11/2024

ORAL ORDER**ORDER IN SECOND APPEAL NO.511 of 2024**

Heard learned advocate, Mr. S.P. Majmudar assisted by learned advocate, Mr. V.Z. Bharda for the appellants.

Learned advocate for the appellants submitted that the appellants herein are the original defendants and the respondents herein are the original defendants in the suit preferred by the respondents herein, which was filed inter alia praying for redemption of mortgage

deed executed by the ancestral of the original defendants. Learned advocate submitted that in fact, there was oral mortgage deed executed between the parties and on the basis of the said oral agreement, entry was mutated in the record of rights and after mutation of the said entry, the appellants are in possession of the said property. Learned advocate submitted that at the time of deciding the suit, the learned Judge has emphasized upon material available on record and presumed that the mortgage deed was usufructuary mortgage deed and as per Article 60 of the Limitation Act, suit for redemption can be preferred. Learned advocate submitted that in fact, there was oral mortgage deed executed between the parties and as stated above, entry to that effect came to be mutated in the record of rights and if the Hon'ble Court would make a cursory glance upon the said deed, in that event, it would be found out that word 'usufructuary' had not been used by the father of the parties at the time of execution of the said deed and at the time of deciding the said suit as well as appeal, both the learned Courts below have presumed about the usufructuary mortgaged deed despite the fact that the fact has not been averred and/or contended in the suit but solely on that ground, the learned Judge has reached to a particular finding, however, the said view adopted by the learned Judge is erroneous.

At this stage, learned advocate has put reliance upon the decision of the Hon'ble Supreme Court in case of **Singh Ram (D) Thr.L.Rs. Vs. Sheo Ram**, reported in

(2014) 9 SCC 185, wherein the Hon'ble Supreme Court has observed that "In cases where distinction in usufructuary mortgagor's right under Section 62 of the T.P.Act has been noted, the right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of montage resulting in extinguishment of right of redemption after 30 days". Learned advocate further submitted that however without considering the facts of the case, the learned Judge dismissed the suit as also appeal preferred by the appellants and as stated above, the view adopted by the learned Judge is contrary to law and evidence available on record. It is, therefore, urged that the present matters requires consideration.

In view of the above submissions canvassed by learned advocates for the parties, the matters require consideration.

Hence, issue **Notice** upon the respondents returnable on 17th January, 2025.

Direct service is permitted.

ORAL IN CA No.1/2024 IN SA No.511/2024

Notice returnable on 17th January, 2025.

Ad-interim relief in terms of Para No.7(B) till next date of hearing.

Direct service is permitted.

ORDER IN SECOND APPEAL NO.510 of 2024

Draft amendment filed in Second Appeal No.510 of 2024 is allowed. To be carried out forthwith.

Notice to respondents returnable on **17th January, 2025.**

Direct service is permitted.

ORAL IN CA No.1/2024 IN SA No.510/2024

Notice returnable on **17th January, 2025.**

Ad-interim relief in terms of Para No.7(B) till next date of hearing.

Direct service is permitted.

Sd/-
(DIVYESH A. JOSHI, J.)

Gautam