

(1921) 03 BOM CK 0007

In the Bombay High Court

Case No : Second Appeal No. 375 of 1919

Abdul Rajak Allisha Mulani

APPELLANT

Vs

Vaman Ganesh Padlikar

RESPONDENT

Date of Decision : 03-03-1921

Acts Referred:

Citation : AIR 1921 Bom 284 : (1921) 23 BOMLR 593

Hon'ble Judges : Shah, J; Norman Macleod, J

Bench : Division Bench

Judgement

Norman Macleod, Kt., C.J.—The plaintiff sued to redeem the suit property and recover possession alleging that it was mortgaged with the defendant in 1874. The defendant resisted the claim for redemption, on the strength of a decree passed in Suit No. 480 of 1881, which was a suit by the mortgagor to redeem, in which the following decree was passed:—

The plaintiff should pay to the defendant Rs. 400 with interest at the rate of eight annas per cent, per mensem by annual instalments of Rs. 50 each from 31st March 1884. If the plaintiff were to pay more than Rs. 50 the defendant should not refuse to accept the same. In case the plaintiff fails to pay any instalment the defendant should take the land in his possession and receive the produce of the land in lieu of interest on the remaining amount and Government assessment; and on the plaintiff paying the principal amount at the end of any fasli year the land belonging to the plaintiff should be returned to him.

2. This case belongs to that numerous class of cases in which the question arises whether the mortgagor is in effect bringing a suit to execute a previous redemption decree, or whether he is seeking to exercise the right to redeem, as a right which was reserved to him by the previous decree. On the authority of Hari Ravji Ckiplunkar v. Shapurji Hormasji Shet I.L.R.(1886) Bom. 461, P.C. if the suit must be treated as a suit claiming a right to execute the previous decree, then undoubtedly it must be dismissed. But if it comes within the Full Bench decision of this Court in Tani Bagavan v. Hari bin Bhavani I.L.R (1887) Bom.

659n, F.B. then the plaintiff is entitled to succeed. The decision must depend entirely on the nature of the decree in the previous suit; and the difficulty in reconciling the various decisions lies in the fact that the terms of the previous decree will generally vary, and further the decision of the question may depend upon whether the previous suit had been brought by the mortgagor or the mortgagee. In *Tani Bagavan v. Hari bin Bkavani*, the previous decree had been obtained by the mortgigee to this effect;?

The order is that the defondant do pay to the plaintiff Rs. 396-10-0 in respect of the bond, and if it be not paid, then the mortgaged land, given as security, is to be given into the possession .of the plaintiff until the sum due be discharged.

3. Mr. Justice Farran, in giving the decision of the Full Bench, said:

In *Rarji Shivrum Joshi v. Kaluram* (1873) 12 B.H.U.R. 160, a Full Bench of this Court decided that the tiling of a redemption suit like the present was the proper course for a. mortgagor to adopt who desired to avail himself of the right to redeem reserved to him by such a decree as the one before us. All that the Court in such redemption suit is at liberty to do is to construe the decree In the former suit, to ascertain its intention from the expressions contained in it, AbdulBa. UK and td give effect to that Intention when ho ascertained. In construing the above decree we do not find in it any substantial difference to distinguish it from the decrees which the Court had to consider in *Navlu v. Raghu*. I.L.R (1984) Bom 303. and *Tatya Vithoji v. Bapu Balaji* (1983) ILR 7 Bom. 330. ...We consider that the decrees in those cases were correctly construed.

4. It seems to me that in the decree in Suit No. 480 of 1881 the right to redeem was reserved, and that the plaintiff is now entitled to are for redemption. I would, therefore allow the appeal. The decree must be set aside, and the case must be remanded to the trial Court to be heard on the merits. The respondent No. 1 to pay the costs of the appellants up to date.

Shah, J.

5. I agree.