

(1962) 07 BOM CK 0007

In the Bombay High Court

Case No : Letters Patent Appeal No. 16 of 1960

Bansilal Kanchhedilal and Another

APPELLANT

Vs

Hukumchand Khunnellal and Another

RESPONDENT

Date of Decision : 12-07-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 69, Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 92, Order 34 Rule 5
Co-operative Societies Rules — Rule 27
Transfer of Property Act, 1882 — Section 60, 89, 93

Citation : AIR 1963 Bom 230 : (1962) 64 BOMLR 731 : (1963) ILR (Bom) 45 : (1963) MPLJ 9

Hon'ble Judges : V.G. Wagle, J;D.V. Patel, J

Bench : Division Bench

Advocate : P.P. Deo and V.R. Manohar, for the Appellant; M.R. Bobde and S.R. Mangrulkar, for the Respondent

Judgement

Patel, J.—This is an appeal under Clause (15) of the Letters Patent from the judgment of Badkas, J. The appeal arises under the following circumstances:

The two appellants who were originally judgment debtors were members of the Vidarbha Premier Co-operative Housing Society, Ltd., Nagpur, respondent No. 2. They created a mortgage of their property in favour of respondent No. 2 on 16-10-1950. The amount due under the mortgage was not paid and the matter, was referred to the Registrar of Co-operative Societies under the Cooperative Societies Act, 1912, as applied to Madhya Pradesh. Under Rule 27 of the rules made by the State Government under the Act, the Registrar had authority either to enquire into the matter himself or refer it to arbitration. He decided the matter himself and made an order on 1-5-1957 that the judgment-debtors do pay a sum of Rs. 9,412/6/9 and interest at 12 per cent, per annum from 1-8-1953 till satisfaction of the debt to the respondent Society. He further directed that if he did not pay the amount in cash to the Society, the property mentioned therein shall be brought to sale for satisfaction of the amount, if the money realized by

the state of the mortgaged property proved insufficient and the debt remained unsatisfied, he provided that the Society shall have a right to proceed against the judgment, debtors and their movable and immovable property. The rest of the decree is not material to the present discussion. The judgment-debtors did not pay the amount as directed by the decree of the Registrar and the Society therefore made an application to the Civil Court for recovery of the amount under the decree. In the execution proceedings, the property of the judgment-debtors was brought to sale. The sale was held on 7-4-1958 when the bid was knocked down in favour of respondent No. 1.

2. On 3-5-1958 the judgment-debtors made an application under Order 21, Rule 90 of the CPC for setting aside the sale. On 7-10-1958 at the hearing of this application, the judgment-debtor made an application for a month's time to deposit the decretal amount and expressed their desire to withdraw their application then pending. To this application the decree-holder and the auction-purchaser did not object. The Court therefore granted time for deposit of the amount till 21-11-1958 and the main application under Order 21, Rule 90, was allowed to be withdrawn and was dismissed.

3. A day previous to the date fixed for payment, i.e. on 20-11-1958, the judgment-debtors made an application for acceptance of the deposit of a sum of Rs. 11,326/3/6 towards the mortgage amount and an additional sum of Rs. 1275/- being the commission of the auction-purchaser and prayed for further time for deposit of the balance. This application was rejected by the learned Judge. On the next day, i.e. on 21-11-1958 the learned Advocate appearing on behalf of the judgment-debtors asked for extension of time to which the respondents raised an objection. The request was therefore not granted, and since the application under Order 21, Rule 90, stood dismissed the Court confirmed the sale.

4. Against this judgment the judgment-debtors went in appeal to the District Court. The learned District Judge came to the conclusion that the trial Court was in error in refusing to extend time. He therefore set aside the order made and remanded the matter to the trial Court.

5. Against this order, the auction-purchaser filed an appeal to the High Court. The appeal was heard by Badkas, J. who set aside the order of the District Judge and confirmed the order of the trial Court. The District Judge, in giving relief to the judgment-debtors, had held that the order or decision made by the Registrar was in the nature of a preliminary decree and not a final decree and therefore the judgment-debtors were entitled under the award to deposit the amount at any time before the sale was confirmed. Badkas, J. disagreed with this view. He held that the decision of the Registrar under the rules framed under the Co-operative Societies Act is neither a preliminary decree nor a final decree in terms of the provisions of Order 34 of the Code of Civil Procedure. It is an award, pure and simple, containing adjudication of the rights and liabilities or obligations between the parties and it is enforceable through the machinery of the civil Court

because of the rules made under the Act. It cannot therefore be regarded as a decree. He therefore held that Order 34, Rule 5 of the Code would not apply in the case of an award given under the Act. In the view of the learned Judge a facility is given under Order 34, Rule 5, to a judgment-debtor only when a final decree is passed under Rule 5 and that can only be done when a preliminary decree under Rule 4 is made. He then held that Order 21, Rule 89 also had no application inasmuch as the amount was not deposited within 30 days of the sale as required by that rule, and consequently under Order 21, Rule 92 the sale ought to be confirmed. In the result, he accepted the appeal and set aside the judgment of the District Judge.

6. Now, before we consider the question on the actual wordings of the Co-operative Societies Act and Order 34, Rule 5 of the Code of Civil Procedure, it is necessary to consider when and in what circumstances the rights of a mortgagor to redeem his property are extinguished. Before 1929 the provisions which are now incorporated under Order 34 were part of the Transfer of Property Act. Sections 89 and 93 of the Act provided that in the case of decrees for sale on making the order of sale the right of redemption was extinguished. After the amendment, Section 60 provides for the rights and liabilities of the mortgagor and says that the mortgagor has a right of redemption after the mortgage money becomes due and provides that it is available to him unless it has been extinguished by the act of parties or by a decree of the Court. It would appear that, the decree as such would extinguish the right only in cases where a foreclosure decree is made or the extinction of the rights as provided in a redemption decree after a certain time. In other cases, until the property is sold off and passes out of the control of the judgment-debtor and the Court by confirmation of the sale, the right, it appears, would not be extinguished. In spite of Section 89, the Courts gave relief either u/s 310-A or Section 291 of the CPC of 1882 corresponding to Order 21, Rule 89, or Order 21, Rule 69. Apparently, it was realized that Section 89 did not lay down the correct law and therefore it was not included in the new amendments in 1929. The fundamental law of mortgages is stated in *Drake v. Mitchel*, (1803) 3 P&H 251 that a decree for sale is but a judgment on the debt and though the debt merges in the judgment the collateral security of the mortgage does not merge. The Privy Council in *Sukhi v. Ghulam Safdar, Khan*, 48 Ind App 465: AIR 1922 PC 2 held that the effect of the omission was that the law remained the same as it was before the passing of the Transfer of Property Act. In *Badrudin v. Sitaram*, 32 Bom LR 933: AIR 1930 Bom 401 relying on this principle it was held that a decree for sale obtained by a mortgagee before the Transfer of Property Act came into force which remained unexecuted did not bar a subsequent suit by the mortgagor instituted within the period of redemption to redeem the mortgage. It was observed at p. 941 (of Bom LR) : (at p. 405 of AIR) while considering the effect of the decisions:

"But in cases where the mortgagee has not effectively brought the mortgaged property to sale under his decree for sale and has not obtained an order enabling him to foreclose the mortgage and has continued in possession of the property, a

fresh suit for redemption would be competent to the mortgagor or his successor in interest."

We may also refer to the case in *Krishnaji v. Mahadeo Vinayak*, ILR 25 Bom 104 where in spite of the existence of Section 89, relief u/s 310-A of the CPC was given to the judgment-debtor. Ranade, J. there observed:

"The mortgagors and persons claiming under them are the very persons who need most the relief intended to be conferred on judgment-debtors, and any other construction will defeat the main object of the legislation, which permits redemption even after sale in the case of those who are prepared to make full compensation to the creditor."

In pursuance of these principles, the Allahabad High Court in *Syed Shah Mahdi Hasan Vs. Syed Ismail Hasan and Others*, held that the effect of the repeal of Section 89 was that the right of redemption was not extinguished by the decree for sale but by the sale.

7. The main and the essential question is whether the right of redemption of the mortgagor was extinguished in the present case. It is argued on behalf of the appellants that Order 34, Rule 5, must apply to the present case since Rule 33 of the rules made under the Co-operative Societies Act provides that the decision of the Registrar shall be executed as a decree. On the other hand, Mr. Bobde argues that merely because it is provided that it should be executed as a decree, it does not become a decree and therefore Order 34, Rule 5, cannot apply. He also contends that by the very wording of Rule 5 of Order 34, unless there is a preliminary decree under Rule 4 and a final decree under Sub-rule (3) of Rule 5, Sub-rule (1) of Rule 5 can have no application. True it is that in *Nanjappa v. Sreeranga*, AIR 1945 Mad 422 in the case of an agreement u/s 14 of the Madras Debt Conciliation Act, 1936, the Court applied the provisions of Order 34, Rule 5, and the learned Chief Justice observed:

"In an ordinary mortgage suit there must be a preliminary decree, but we have here, by the operation of the Debt Conciliation Act, what is in effect a final mortgage decree without there being a preliminary decree and we think that Order 34, Rule 5 applies. It would indeed be most unjust if the mortgagor were precluded from redeeming his property and that is what the respondent wants."

And they gave relief under that rule. With respect, for the reasons which we have mentioned above, we agree that even if by its wording Order 34, Rule 5, may not apply to a given case, its principles ought to be applied and it cannot make any difference in principle whether the sale is held in pursuance of a compromise decree which does not fall within that rule or of a decision or order of a tribunal which is or is not to be regarded as a decree. "The fundamental principle is that before the mortgagor can be prevented from making the payment and redeeming the property his right, must have come to an end, and that cannot come to an end unless his title to the property is lost by the confirmation of the sale.

8. In this view of the matter, the cases considered by the learned Judge on the question as to whether such an order is executable by itself and amounts to a preliminary decree or a final decree do not have any relevance. On behalf of the respondents Mr. Bobde invited our attention to the decision in Punjab National Bank Ltd. Lyallpur v. Thakar Das Mathra Das, AIR 1930 Lah 116, Mam Chand v. Roshanlal, ILR 14 Lah 243: AIR 1933 Lah 48; and Nripendranath Chatterjee and Others Vs. Jhumak Mandar and Others, P> In AIR 1930 Lah 116, the Court was called upon to execute an award decree which could not be executed in accordance with the provisions of Order 34, and in answer to a contention that the decree merely amounted to a preliminary decree and was not executable, the learned Judge observed that the provisions of Order 34, Rule 4 did not apply to the case.

In ILR 14 Lah 243: AIR 1933 Lah 48 the only question was whether a decree for sale of mortgaged properties extinguished the rights under the mortgage and arose out of an order directing rateable distribution out of the sale proceeds. The Court held that a decree which directs the realization of the decretal amount from the hypothecated property and, if insufficient, makes the defendant remain personally liable, is a mortgage-decree.

In Nripendranath Chatterjee and Others Vs. Jhumak Mandar and Others, again the question was similar to the one in the Lahore case, and it was held that an award decree could be executed without applying for a final decree. It is clear that in none of these cases the question which arose in the present case fell to be considered. These decisions are not in conflict with the principle which we are applying.

9. It was then contended on behalf of the respondents that in the present case the order made on 7-10-1958 was a consent order, with the consequence that the judgment-debtors, when they applied for time for a month to make the deposit, waived all their other statutory rights and cannot now fall back upon them having failed to make the deposit within the time granted; in other words, it raises a plea of waiver. For such a plea there must be a proper pleading and sufficient evidence to found it. In the first place, the judgment-debtor must know his rights and then only the question of waiver could arise.

Apart from this fundamental objection to the contention, from the order reproduced from the order-sheet, it is difficult to hold that there was the contract or agreement as such. The order shows that the judgment-debtors merely asked for a month's time expressing their willingness to withdraw their application under Order 21, Rule 90 and the decree-holder and the auction-purchaser had no objection. That is far from an agreement which gives rise to a waiver.

10. It is then argued by the learned counsel that in the present case after the application made by the judgment debtors, the learned Judge confirmed the sale and therefore in any case even under the principle decided by us, the mortgagors could not make the deposit. This overlooks the fact that an appeal had been filed

from the order Which rejected their application, and if the Court finds that their application was wrongly rejected, then the order made on the rejection of the application also must fall to the ground.

In the present case, if the mortgagors had the right and the Court had jurisdiction to give the adjournment, then the appellate Court would be entitled to consider whether or not the refusal of the adjournment was properly made. In appeal, the Court set aside that order of confirmation and it is thereafter that the whole amount due has been paid along with the commission of the auction-purchaser. Even on the day before the learned Judge confirmed the sale after refusing the application for adjournment, the judgment-debtors had made an application to permit them to deposit Rs. 11,326/3/ plus a sum of Rs. 1,275/- for the auction-purchase. It is clear therefore that only a very small amount, if at all, remained due to the mortgagee and for that amount the mortgagors asked for further time. In the circumstances of the case, it appears to us that the learned Judge was not justified in rejecting this application and the discretion was erroneously exercised. The confirmation of the sale therefore falls to the ground and the argument therefore also does not help the respondents.

11. We accordingly set aside the order made by Badkas, J. We understand that the amount is stilling in deposit in the trial Court after the appellate Court's order. We accordingly set aside the order made in second appeal and the order of confirmation made by the learned trial Judge on 21-11-1958. The amount lying in deposit may be withdrawn by the decree-holder mortgagee and by the auction purchaser. If on making up the accounts, the Court finds that any additional amount is to be deposited, the Court will give reasonable time to the judgment debtors to make the deposit. Looking to the circumstances of the case, there will be no order as to costs.

12. Order accordingly.