
(1911) 09 BOM CK 0001
In the Bombay High Court
Case No : Appeal No. 43 of 1910

Bhaiji Shamrao Darekar

APPELLANT

Vs

Hajimiya Mahamad Amin

RESPONDENT

Date of Decision : 15-09-1911

Acts Referred:

Citation : (1912) 14 BOMLR 314

Hon'ble Judges : Hayward, J;Beaman, J;Basil Scott, J

Bench : Full Bench

Judgement

Beaman, J.—All the facts material to be known are that a mortgage was jointly effected by Sakhling and Anapurnabai. Whether these two persons were joint mortgagors, or tenants-in-common, does not appear and, in my opinion, is now immaterial.

2. Subsequently Anapurnabai redeemed alone, without the knowledge of Sakhling. This was in 1882. On the same day she re-mortgaged without the knowledge of Sakhling to the defendants. The actual physical possession was not changed. The old mortgagees are found to have remained in possession as before under the new mortgage, but whether as mortgagees of the previous mortgage or after having attorned to the new mortgagees does not appear.

3. The plaintiff sues as the assignee of the heirs of Sakhling to redeem.

4. According to the decision of Sir Lawrence Jenkins in the case of Vasude v. Balaji ILR (1902) 26 Bom. 500, the effect of the redemption of a mortgage by one of two or more joint or co-mortgagors, is to extinguish the whole equity of redemption. It is true that he expressly declines to decide such a case as this where the redemption was clandestine and without the knowledge of the co-mortgagar. This was in reference to the argument that to do so would be to prejudice co-mortgagors who were no parties to the proceedings of covert redemption. I cannot entertain the slightest doubt, having regard to what was being then urged on behalf of the plaintiff and the context, that this reservation

was limited to the rival contentions, (a) for the plaintiff, that his equity was not, and (?) for the defendant, that it was, extinguished by the redemption. In the case before Jenkins C. J., the redemption was made by one of two co-mortgagors, against both of whom a decree for sale had been obtained by the mortgagee. But the principle of the case as a whole, so far as it goes, is unmistakably clear. Redemption by one of two or more co-mortgagees, extinguishes the entire equity of redemption, and all that survives in the co-mortgagors, who were not co-redeeming mortgagors, is a right to have their proportionate shares of the mortgaged property on paying off their proportionate share of the mortgage-debt, costs, principal and interest, etc. And the mortgagor who redeems has a lien or charge on the shares of his co-mortgagors to that extent, including of course their share of all the expenses legitimately incurred for the purpose of saving the property. This being so, it appears to make little difference in theory whether the co-mortgagors did or did not know of the redemption. For if such redemption has in law the effect of putting an end to the equity, then a new relation is immediately set up as between the one mortgagor who has redeemed and the other mortgagors who have not. The former has a lien on the shares of the latter. He may be in or out of possession. If in, then he holds their shares subject to the charge. And in a subsequent suit to obtain possession by the mortgagors out of possession of their shares, the Court held very emphatically that Article 144 applied, and that as the suit had not been brought within twelve years of the redemption, the co-mortgagors were time-barred. This could only mean one thing, that in the opinion of the learned Chief Justice the possession of the Honor in possession was adverse to his co-mortgagors from the moment of redemption. It is not a case of any person holding adversely to the equity of redemption, which, in spite of *Cholmondeley v. Clinton* (1820) 2 J. & W. 186, and much contained in *Tyrubai's case* ILR (1902) 27 Bom. 43, I think, can be easily shown in every case to be impossible unless expressly made possible by Statute (Article 134). It means only this, that in certain circumstances the equity of redemption is extinguished by operation of law. It has indeed been used up and exhausted. For it is a fundamental principle of the law of mortgage that a mortgage must be redeemed in its entirety, not piecemeal. In the Full Bench decision of *Bhavrao v. Rakhmin* ILR (1898) 23 Bom. 137, it was held with equal clearness and emphasis that when one of several tenants-in-common mortgages, without the knowledge or consent of his co. tenants, the whole or any part of the tenancy-in-common, the possession of the mortgagee going in under his mortgage, is "ownership" from the first moment of taking possession not only against his own mortgagors-but against all the co-tenants who should have been but were not mortgagors. The basis of the reasoning of *Farran C. J.* on this point is too clear to admit of serious dispute. The quality of the possession as between parties contending on the one hand that it was, on the other, that it was not, adverse, is to be determined by the intention of the person possessing. In the case of mortgagees put in under a mortgage, it must always (unless the contrary be shown, which I think it never can) be regarded as adverse alike to the mortgagors and all other persons who might have been but

were not mortgagors. The reasoning summarily brushes aside all considerations touching the knowledge of the co-mortgagors and to that extent seems to me to make a large advance on the old and well settled rule that in the case of tenants-in-common, one cannot be excluded unless the act amounts in law to an ouster, in which this much has, I think, always held to be included, that he must know of it. In Tarubafs case, while agreeing with the conclusion, I must dissent from a great part of the judgment in which it seems to be held, that had the original mortgagor known of what was being done, his equity of redemption would have been barred. I cannot bring myself to assent to the necessary premiss, that the wholly unauthorized act of volunteers, who were no parties to the mortgage, could in any circumstances start a period of possession adverse to the equity of redemption, or indeed that any physical possession by anybody could in any circumstances be adverse to an incorporeal right vested exclusively in the mortgagor and never passing from him (except by his own will and act). If a third person steps in and redeems my mortgage, why need I raise a protest ? He had no right to do it, and his act appears to me to be in law a mere nullity so far as the equity of redemption is concerned; it goes no further than to substitute him for the original mortgagee (if so far) and leave him as much exposed as the former to be redeemed.

5. Applying the principles of the two cases I first mentioned to the facts before us, the result would be this. In 1882 when Anapurnabai redeemed without the knowledge of Sakhling, the equity of redemption, of which Sakhling then had half, was extinguished and Anapurnabai held the land as tenant-in-common with Sakhling plus a charge on his half for his half share of the mortgage-debt, costs, principal and interest. That charge she could only enforce within twelve years, but being in possession, her possession as lienor would, in my opinion, be clearly adverse to Sakhling. I can give no other meaning to the decision of Sir Lawrence Jenkins, nor can I believe that he overlooked so obvious an argument as that while Article 132 restricts the period within which a person having a charge may enforce it, it does not comprise a case in which the person having the charge is in actual possession. The argument is that if that be so, then the person liable to the charge may, if the person entitled to it has not sued to enforce it within twelve years (having been in possession all that time), recover on the first day of the thirteenth year, without paying a penny of the charge for which he was liable during those twelve years. The fact that Jenkins C. J. without even adverting to such a contention, dismissed the plaintiff's suit, is, I think, a sufficient answer. The rights of persons standing in such relations appear to me to be reciprocal, just as the rights of mortgagor and mortgagee are reciprocal. The Article is framed as it is because ordinarily the person having the charge is out of possession, and so the possession of the person owing the charge is treated as adverse. A fortiori I should have thought when the person having the charge is in possession, that possession must be adverse to the person who owes it: so that when no steps have been taken either to pay off, or enforce the charge during twelve years, the case naturally falls under the general principle of Article 144.

That appears to me to be the law governing this case. In 1882 Anapurnabai redeemed, and there was an end of Sakhling's equity of redemption. The same day she mortgaged to the defendants, and their possession, according to Farran C. J.'s judgment, immediately became adverse to her and Sakhling equally. This suit, therefore, since the plaintiff cannot rely on any fraction of the equity of redemption having survived in Sakhling (which was the ground of his claim) has long since been barred by limitation: and no question as to whether Sakhling knew that he was excluded arises.

6. The validity of this conclusion rests upon a chain of reasoning, in which one link needs strengthening. It is not clear from the findings of the Courts below whether the mortgagees of Anapurnabai really obtained possession. The original mortgagees are said to have been in ostensible possession, but I have assumed that what was meant was that they attorned to the mortgagees under the mortgage executed by Anapurnabai to the defendants. Unless this were so, there would have been no possession adverse or otherwise to be reckoned with in the defendants. But if the defendants really did obtain possession under the mortgage of 1882, then I feel that there is no escape whatever from the effect of the judgment of the Full Bench and that the knowledge of the predecessors-in-title of the plaintiff becomes entirely immaterial. I have ventured to doubt whether that is a correct interpretation of the law, but there can, in my opinion, be no doubt at all, that it is what was ruled by the Full Bench and therefore binding on us. I would, therefore, remand an issue to the lower Court to be tried, " Did the defendants obtain possession under their mortgage of 1882 ?" and if that be found in the affirmative, I would reverse the decree of the Court below and dismiss this suit: if in the negative, then I would confirm the decree of the lower appellate Court.

Hayward, J.

7. The lower appellate Court has not recorded its findings with that precision which is desirable, but it appears to have held that the property in suit belonged originally to the first cousins Sakhling and Babling, and was mortgaged with possession to Bajirao in 1866, after Babling's death, by Sakhling and Anapurna, the mother of Babling; that whether the property in suit was originally owned as joint family property or as a tenancy-in-common by Sakhling and Babling, it became, by adverse possession consequent on the Mortgage, a tenancy-in-common in the hands of Sakhling's heirs and of Anapurna; that the property in suit was redeemed from the heirs of Bajirao and re-mortgaged with possession to the father of defendants 1 to 3 in 1882 without the knowledge of Sakhling's heirs by Anapurna; that the heirs of Bajirao nevertheless remained in possession professedly as the tenants of the defendants 1 to 3 but not so as to affect Sakhling's heirs with knowledge of exclusion or adverse possession by Anapurna; that Sakhling's heirs included Ganling, one of the vendors of plaintiff, who had thus obtained a subsisting interest in the equity of redemption and was entitled to redeem the property from the defendants 1 to 3.

8. The lower appellate Court has, in my opinion, come to a correct conclusion. The effect of the redemption by Anapurna s was to place her in the position of a lienor with regard to her co-tenants Sakhling's heirs, and had Anapurna thereafter held the property exclusively as her own to the knowledge of Sakhling's heirs, she would, no doubt, have obtained exclusive title by adverse possession as indicated in the cases of Ramchandra v. Sadashiv ILR (1886) 11 Bom. 422 and Vasudev v. Balaji ILR (1902) 26 Bom. 500. But it has been contended that even without knowledge Sakhling's heirs must be held to have lost their title by the adverse possession of Anapurna's mortgagees on the strength of the Full Bench decision in Bhavrao v. Rakhmin ILR (1898) 23 Bom. 137. What was, however, decided in that case was that knowledge of the true owner's title did not prevent the mortgagees obtaining by adverse possession complete title as mortgagees. No question was there raised as to the true owner's knowledge of the adverse possession of the mortgagees. This question has been exhaustively discussed in the case of Tarubai v. Venkatrao ILR (1902) 27 Bom. 43 where it has been shown that without knowledge or circumstance that could have given knowledge to the true owner there could be no adverse possession on the part of the mortgagees. Reference can also be made to the case of Purshottam v. Sagaji ILR (1903) 28 Bom. 87.

9. The lower appellate Court's decision ought, therefore, in my opinion, to be confirmed and this appeal dismissed with costs.

10. OWING to this difference in opinion, the following question of law was referred to the third Judge.

Whether a co-mortgagor can lose his equity of redemption by adverse possession of his co-mortgagor who has, without his knowledge and without circumstances that could have given knowledge, redeemed the mortgage and , re-mortgaged the property to other mortgagees.

Basil Scott, C.J.

11. The question is whether the interest of Anapurnabai has been for over twelve years adverse to the plaintiff.

12. Anapurnabai in 1882 redeemed from one Bajirao or his representatives certain outstanding mortgages, and the plaintiff or those under whom he claims as co-mortgagors with Anapurnabai, became entitled, as soon as they should pay their share of the redemption money, to enjoy the property jointly with her. A short time after redeeming the mortgages, Anapurnabai mortgaged the property to the first and second defendants by Exhibit 21, and it may be assumed, for the purpose of this judgment, that the first and second defendants have been in possession as mortgagees since that time, and have leased out the property to the descendants of Bajirao, the redeemed mortgagees. The lower Court finds as a fact that no knowledge of exclusion or adverse possession by Anapurnabai can be imputed to the plaintiffs vendors. So long as Anapurnabai took no step to assert a title against the plaintiff or those under whom he claimed in such a

manner as to challenge their right to redeem their interest from her, the possession of Anapurnabai and her mortgagees would not be adverse to the plaintiff or his predecessors-in-title, except in so far as the mortgagees might set up a limited title under Article 134 of the Limitation Act. There is ample authority for this proposition, the Bombay cases being Ramchandra Yashvant Sirpotdar v. Sadashiv Abaji Sirpotdar ILR (1886) 11 Bom. 422; Bhatrudin v. Shekh Ismail ILR (1887) 11 Bom. 425; Faki Abas valad Faki Ahmed Mulnaji v. Faki Nurudin valad Faki Mohidin Mulnaji ILR (1891) 16 Bom. 191; and Vithal v. Dinkarrao (1901) 3 BOM L.R. 685.

13. Shortly stated the possession of joint property by one co-sharer does not constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of a hostile title by the former.

14. On behalf of the appellants reliance has been placed upon the judgment of this Court in Vasudev v. Balaji ILR (1902) 26 Bom. 500. That judgment expresses approval of three of the Bombay cases above referred to, but the finding of the District Court was accepted that there had, in fact, been twelve years' adverse possession on the part of the redeeming co-mortgagor. It cannot, therefore, be taken as an authority in support of the appellants' case.

15. I am, therefore, of opinion, that the judgment of the Assistant Judge was correct, and that his order must be affirmed and the appeal dismissed with costs.