

(1921) 08 BOM CK 0014

In the Bombay High Court

Case No : Second Appeal No. 644 of 1920

Bhimrao Nagojirao Patankar

APPELLANT

Vs

Sakharam Sabaji Kantik

RESPONDENT

Date of Decision : 23-08-1921

Acts Referred:

Citation : (1921) 23 BOMLR 1268

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

Bench : Division Bench

Final Decision : Allowed

Judgement

Norman Macleod, Kt., C.J.—The plaintiff sued to redeem and recover possession of the plaint land which was mortgaged by his grandfather to the defendant's ancestor by a mortgage dated 17th March 1859. The plaintiff admits that at the same time as the mortgage another document was executed purporting to lease the land to the mortgagee on a permanent tenure on condition that the lessee paid a fixed rent of Rs. 70. The defendant pleaded that he was a mortgagee not of the land in suit, but merely of the fixed rent payable to plaintiff as his landlord, he being Mirasdar of the land of long standing.

2. Both the lower Courts have decided on that point in favour of the defendant and have passed a preliminary decree to the effect that if the plaintiff pays into Court Rs. 1501 (there is a misprint right through in the print "150" for "1501") within six months from the date of the decree, the plaintiff should be entitled to claim payment of the annual rent of Rs. 70 year by year from the defendant.

3. The question is what is the true effect to be given to the documents, Exhibits 45 and 46, which were executed at the same time on the 17th March 1859. No doubt if we look merely at what is stated in those documents, the mortgagor first purported to lease to the mortgagee the suit land at an annual rent of Rs. 70 on Mirasi tenure. Then by Exhibit 4 the purported to mortgage, not the land, but the annual rent which was secured by Exhibit 45. Before these documents were

executed the mortgagor was the owner of the land, and as we read the documents, their real effect was that the mortgagee got the land as security for the loan, and at the same time obtained a contract from the mortgagor that he, the mortgagee, should be a permanent tenant of the land paying an yearly rent of Rs. 70. The mortgagee, therefore, obtained a contract whereby the mortgagor lost the right to get back his property on repaying the loan, so that it must be admitted that that contract constituted a clog on the equity of redemption. If the mortgagee had got a contract for the sale of the land, undoubtedly a Court of Equity would not allow him to take advantage of that contract (see *Samuel v. Jarrah Timber and Wood Paving Corporation*. [1904] A.C. 323. It seems to us there is very little difference between a contract by the mortgagee to buy the mortgaged premises out and out for a consideration, and a contract by a mortgagee to take the premises on a permanent tenure at a fixed rent, which in effect makes him the owner of the premises, the consideration being satisfied by deferred payments.

4. It has been strenuously argued that what is mortgaged is not the suit land but merely the right to recover the rent secured by the permanent lease. But we do not think that the Court will be so blind to the real effect of these documents, Exhibits 45 and 46, that it should refuse to apply the principle of equity which, as has been pointed out by Lord Halsbury in the case we have referred to, has been applied by the Courts for certainly more than a century. The learned appellate Judge, in refusing to apply this principle of equity, says :

The lease and the mortgage were not treated as parts of the same arrangement. In the words of Lord Halsbury quoted above "If a day had intervened between the two parts of the arrangement the part of the bargain (impeached as a clog) would have been perfectly good and capable of being enforced." If so, I do not see why it should fail if the period intervening be a few minutes instead of a "day.

5. If that argument were to prevail then the principle of equity could never be applied at all. It is the plain fact that these two documents were parts of the same transaction which enables us to apply the principle of equity; and we need not consider what our decision would have been if the lease had been executed a day or two previously to the mortgage. In our opinion, therefore, the appeal must succeed, and the plaintiff must be held entitled to redeem. We pass a preliminary decree to the effect that if the plaintiff pays into Court Rs. 1,501 within six months from the date these proceedings reach the lower Court, he will be entitled to ask the Court to pass a final decree for possession. No order as to costs throughout.