
(1976) 02 BOM CK 0033
In the Bombay High Court
Case No : A.F.O. No. 228 of 1973

Dattatraya Mahadeo Virnodkar and Others	APPELLANT
Vs	
Shripad Hari Walke and Others	RESPONDENT

Date of Decision : 03-02-1976

Acts Referred:

Transfer of Property Act, 1882 — Section 111, 91

Citation : AIR 1976 Bom 398

Hon'ble Judges : Dighe, J

Bench : Single Bench

Advocate : K.J. Abhyankar, for the Appellant; D.M. Rane, for the Respondent

Judgement

1. This appeal arises from a suit originally filed by the respondent-plaintiff Shripad Hari Walke against Vishnu Ganesh Walke and others for redeeming the property described in the Plaint, which consists of one-third share in the house situated in Survey No. 82/2 Ubhya Bajar and entire share in another house situated in Survey No. 48/1 (Khaskilwada Bajar property) together with a Padvi attached to it. It appears that the property was mortgaged in favour of one Vishnu Ganesh Walke on 5-6-1915 by Narayan Laxman Walke on 5-6-1915 by Narayan Laxman Walke. Defendants Nos. 1 to 3 are the sons of the mortgage Vishnu Ganesh Walke. The other defendants have obtained interest of Narayan because in a Small Cause Suit there was a decree at the instance of one Mhapsekar. In Darkhast No 924 of 1922-23, right, title and interest of Narayan were sold in auction through Court and one Subhedar happened to be the purchaser of that interest on 30-1-1926. Subhedar was put in possession by Court. It was a symbolical possession because it appears that there were tenants. On 15-12-1937 Subhedar assigned his interest to one Dhuri. Defendants No. 4, 5 and 6 are claiming through this Dhuri. This is as far as the defendants are concerned. As regards the mortgagor Narayan, it appears that the entire property originally belonged to his father Laxman Walks. Narayan had three brothers by name Har, Dattaram and Shantaram. The present plaintiff Shripad

Hari Walke is the son of Hari Laxman Walke. It appears that on 19-10-1896 Narayan Laxman Walke sold this undivided 1/4th interest in the joint family to Hari Laxman Walke. Hari thus became the owner of one-half share. On 5-5-1896 Narayan Laxman Walke sold this undivided 1/4th interest in the joint family to Hari Walke gifted all his interest in favour of Dattaram and Shantaram, his brothers. Therefore, Dattaram and Shantaram became full owners of the family property. On the same day, i.e. on 5-5-1898, both these brothers executed a document of permanent lease (Ex. 76) in favour of Narayan Laxman Walke. As that document, (Ex. 76) Now stands it appears that only Padvī in front of house situated in Survey No. 48/1 and adjacent open space was leased to Narayan Laxman Walke. Subsequently Shantaram died, and it is on record that on 27-2-1950 Dattaram gifted all his interest in favour of Narayan Laxman Walke. In 1915, however, Narayan has purported to mortgage one-third share in the house in Survey No. 82/2 and entire other house in Survey No. 48/1. The Padvī which he had received in his character as a permanent lessee, also came to be mortgaged. Nobody is disputing this mortgage before the Court. But the dispute relates to the capacity of the present plaintiff Shripad Hari to ask for redemption. The learned trial Judge came to the conclusion that since the equity of redemption belonging to Narayan Laxman Walke came to be sold by the Court in an execution of the decree obtained by Mhapsekar, nothing remained with Hari or with Kar's son, and as such, he had no present right to redeem the property. The suit came to be dismissed.

2. The learned Appellate Judge, however, came to a different conclusion. According to him, by reason of the permanent lease in favour of Narayan Laxman Walke on 5-5-1898 he had obtained interest in the property which devolved upon Hari, and as such, he could redeem the disputed mortgage of 5-6-1915. The Appellate Judge relied upon a decision in "Venkatesh Krishna Khasbag v. Bhujaballi Annappa Gargatti ILR (1933) Bom 194 : AIR 1933 Bom 97 which lays down that a landlord is entitled to redeem a mortgage effected by his permanent tenant who dies leaving no heirs, as he is a person having an interest in the land leased to the tenant u/s 91 of the Transfer of Property Act.

3. It appears from the judgment of the lower Appellate Court that he was influenced by the recitals in the lease deed, which indicated that there was no right to alienate the lease property, and in case there was any such transfer, the lease would be taken as void. Since there was actual alienation, the learned Judge felt that the clause of forfeiture applied, and as such the rights reverted to the lessors. It appears that it is in this connection that the learned Judge had come to the conclusion that the present plaintiff who is the successor-in-title from Dattaram and Shantaram has the interest in the mortgaged property as contemplated by Section 91 of the Transfer of Property Act.

4. It was rightly pointed out by Mr. Abhyankar on behalf of the appellants that there cannot be any automatic resumption, although there was a clause of forfeiture. He invited my attention to sub-section (g) of Section 111 of the

Transfer of Property Act, 1882, which speaks of the determination of lease. The law is well-settled as could be seen from the commentary at page 748 of the Mulla's Transfer of Property Act (6th Edition, 1973), that even if there is a proviso for re-entry, it only gives the lessor the option to determine the lease. In other words, there is no ipso facto resumption but the lessor must exercise his right to determine the lease. Even if the condition makes the lease void on its breach, it is voidable and not void. the lease with which we are concerned does not provide for re-entry though it does say that lease would become void. The clause, however, will have to be understood as making it a voidable lease on the grounds stated in the recitals, namely, the alienation at the hands of the lessee. There is no evidence to suggest that any such right to determine lease for forfeiture was exercised. The finding arrived at by the learned Appellate Judge, depending upon observations regarding such forfeiture would thus look erroneous.

5. However, the ultimate finding need not be disturbed. A close look at the decision in Venkatesh v. Bhujaballi AIR 1933 Bom 97 (supra) would show the circumstances in which the landlord having a permanent lease would have the right to redeem the property mortgaged by the lessee. It does appear that in the head-note and in the observations, the background of the permanent tenant dying leaving no heirs has been mentioned, but that was for purposes of contrasting the case relied upon by the lower Court there, viz., Sonet Kooer v. Himmuto Bahadoor ILR (1876) Cal 391, where the question was whether on the failure of heirs of grantee of an absolute hereditary mokurrari tenure, the Zamindar or the Crown takes by escheat, and it was held that where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it.

6. The ratio of the case is very well put at page 199 where the observations are:-

"There is a distinction made in Section 91 of the Transfer to Property Act between a person who is entitled to an interest in the mortgaged property and a person who is entitled to an interest in the equity of redemption, and though the landlord may not be entitled to the interest in the equity of redemption so far as the permanent tenant's right is concerned, it cannot be said that the landlord has no interest in the property mortgaged. The property mortgaged is the house together with the land. The landlord is the owner of the land and has carved out of his ownership a certain portion, viz., his right of enjoyment which he has transferred to the permanent tenant which could be determined in certain circumstances and the property would revert to the landlord."

In supporting this, it is further observed as follows:-

"If the landlord carves out an absolute transferable interest in favour of a permanent tenant which under no circumstances would revert to the landlord, it would be difficult to hold that the landlord would have right to redeem the mortgage effected by the tenant, but if on the other hand the interest carved out

would revert to the landlord under certain circumstances, e.g., non-payment of rent, or denial of landlord's title the landlord would have sufficient interest to redeem such a mortgage."

Thus, the test applied is of finding out whether there is absolute transfer so that nothing remained with the landlord or whether he has carved out the interest so that some residuary interest remains in the landlord which could attract the words used in Section 91 of the Transfer of Property Act. That is why at page 200. Justice Patkar has said that the landlord, even in the case of a permanent tenancy, has an interest in the mortgaged property, and would be entitled to redeem u/s 91 of the Transfer of Property Act.

7. The same principle is also well put by the other Judge, Justice Murphy, concurring with Justice Patkar. The relevant observations are at page 201:-

"If, as in the Privy Council case, the inferior holding has been carved out of and permanently separated from the superior one, so that it can only revert to the superior holder by inheritance or a purchase, he can, I think, have no interest left in it, and cannot redeem the permanent tenants' mortgage. If, on the other hand, he can resume in certain contingencies, for failure to pay rent or denial of title, he appears to me to retain some interest in the inferior holding, and in that case can, I Judge, redeem."

8. During the course of judgment it has been noticed that the permanent tenant is entitled to redeem a mortgage be a converse proposition of the same. In this connection my attention was drawn by Mr. Abhyankar to the two decisions reported in: *Gafur Usman v. Sakham* 41 Bom LR 1199 : AIR 1940 Bom 15 and yet another case in *Sakham and Others Vs. Pandurang Raghunath and Others*, . The former case, namely 41 Bom LR 1199 : AIR 1940 Bom 15 deals with the property which was non-transferable without the consent of Khot. There was a mortgage with possession by permanent tenant and subsequent sale of equity of redemption without the consent of Khot. The suit was by purchaser of equity of redemption against the assignees of mortgage for redemption and possession. thus when the permanent tenant had mortgaged the lands, it was said that the plaintiff must be deemed to have some interest in the land within the meaning Section 91 of the Transfer of Property Act.

9. In the other case, i.e. *Sakham and Others Vs. Pandurang Raghunath and Others*, a distinction has been made regarding this recognised right of the tenant to redeem the property. Relevant observations are:-

"It is necessary to distinguish between permanent tenants who were on the land prior to the mortgage and those who have come on the land subsequent to the mortgage. In the first case their rights are not affected by the mortgage and, therefore, they cannot be said to have such an interest in the property mortgaged as would entitle them to sue for redemption u/s 91 of the Act. In the second case their rights have come into existence during the subsistence of the mortgage itself and they would, therefore, be entitled to claim a right to redeem

the mortgage."

10. I think, however, we are not concerned with these implications of converse propositions. Proposition that is obtainable from ILR 57 Bom 194 : AIR 1933 Bom 97 is very clear that if a person who created the lease has carved out his interest and when there is no full transfer, he could be taken as having sufficient interest as understood by Section 91 of the Transfer of Property Act to get a right to redeem the mortgage created by the lessee. I think, therefore, that the finding arrived at by the lower Appellate Court cannot be disturbed, and hence the following order is passed.

ORDER

Appeal is dismissed with costs.

11. Appeal dismissed.