
(1922) 06 BOM CK 0013
In the Bombay High Court
Case No : Second Appeal No. 510 of 1921

Ganesh Moreshwar Joshi

APPELLANT

Vs

Vasudeo Vithal Paranjpe

RESPONDENT

Date of Decision : 22-06-1922

Acts Referred:

Transfer of Property Act, 1882 — Section 60

Citation : (1922) 24 BOMLR 911

Hon'ble Judges : Lallubhai Shah, J;Crump, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Lallubhai Shah, Acting C.J.

1. It is necessary to state briefly the facts which have given rise to this second appeal. Certain property belonging to one Bapat, which may be described as the Kelghar property, was mortgaged by him to Paranjpe in 1890, Subsequently in February 1900 Bapat mortgaged the same property to the present plaintiffs (Joshi brothers) for Rs. 2,000, which included the sum of Rs. 1,200 to be paid by the Joshis to Paranjpe in respect of the first mortgage. The present plaintiffs mortgaged certain properties belonging to them and their interest as mortgagees in the Kelghar property for Rs. 4,000 to Paranjpe in April, 1900. The consideration was stated in detail, as including the sum of Rs. 1186-1-6, which was mentioned as being the amount due to Paranjpe under the mortgage by Bapat to him. This mortgage was renewed in 1906 in the same terms. In 1903 the Kelghar property was sold in execution of a money decree against Bapat and purchased by the Rodes; but it was subject to the mortgage of 1900 in favour of the Joshis. The Rodes filed suit No. 131 of 1904 against the Joshis and Paranjpe for a declaration that the said mortgage was "colourable, unreal and without valuable consideration" and for a declaration that the property of Bapat was liable to be sold free from that mortgage. The suit was brought in that form as the property was already declared subject to that mortgage in miscellaneous

proceedings before the suit. That suit was dismissed in the first instance, but in appeal (No. 292 of 1905) it was held that the mortgage was colourable and unreal and without consideration; and that defendants Nos. 5 and 6 (i.e. the Paranjpes) were entitled to a charge of Rs. 1186-1-6 in respect of the earlier mortgage by Bapat in their favour. Accordingly a decree was passed declaring the property in that suit (i.e. the Kelghar property) subject to that charge in favour of the Paranjpes and that the mortgage in favour of the Joshis by Bapat was not binding upon the plaintiffs in that suit. This decree was affirmed by the High Court in *Ganesh v. Purshottam* ILR (1908) 33 Bom. 311; 11 Bom. L.R. 26. Subsequently the Rodes filed another suit in 1909 to recover possession of the Kelghar property on the title acquired by them at the Court-sale against the Joshis and Paranjpe. The claim for possession was allowed ultimately by the appeal Court; it is relevant to note that it was held in that litigation that the finding as to the true nature of the mortgage of February 1900 in the suit of 1904 was *res judicata* against them.

2. The Joshis filed the present suit against their mortgagee (Paranjpe) in 1917 for redemption of the mortgage of 1906. In the plaint they described all the mortgaged properties including their interest as mortgagees in the Kelghar property and stated the facts preceding the suit. They prayed for accounts under the Dekkhan Agriculturists' Relief Act, and further prayed that in taking accounts the property at Kelghar and the amount of Rs. 1186-1-6 should be excluded. The defendant filed a written statement in which the above facts were stated but the effect thereof was contested. The trial Court found the first three issues in favour of the defendant and recorded no findings on the remaining issues. It held that the eight annas Khoti takshim of Kelghar required to be included in the present suit, that the Rodes were necessary parties, and that by the judgment in Appeal No. 292 of 1905, confirmed by the High Court in Second Appeal No. 186 of 1907, the defendant was not deprived of his right to claim Rs. 1186-1-6 with interest from the plaintiffs.

3. The suit was dismissed as the plaintiffs refused to include the Kelghar property in the suit and to join the Rodes as parties. The plaintiffs appealed; but the same view was taken by the learned Judge, who affirmed the decree of the trial Court.

4. In the appeal before us it is contended that the lower Courts are wrong in holding that the inclusion of the Kelghar property and the non-joinder of the Rodes as parties are necessary steps. It is urged on behalf of the respondents that that view is right.

5. It seems to me, on a consideration of the arguments and of the plaint, that the suit is properly framed. It is really a suit for the redemption of the whole mortgage. The plaintiffs seek to establish that a part of the mortgage debt should be excluded from the accounts on certain grounds. That is a question to be decided in the suit between the parties on its merits, on the terms of the mortgage bond and in the light of the subsequent events with reference to the mortgage by Bapat in favour of the present plaintiffs; but the suit is one for the

redemption of the whole mortgage, treating the mortgage debt as one entire debt.

6. I do not think that the inclusion of the Kelghar property in the suit is a matter of any practical importance on the facts of this case. It has been referred to in the plaint, and all the necessary facts relating thereto have been stated. If it were absolutely necessary to include it in the suit, it may be treated as having been so included. Mr. Coyajee for the plaintiffs concedes that if necessary it may be so treated. But he contends that its inclusion is wholly unnecessary: and I think that that contention ought to be allowed. It must be remembered that the mortgage in suit includes the interest of the Joshis as mortgagees in the Kelghar property. It is clear that as regards the Kelghar property, the transaction in suit is a mortgage by a mortgagee of his interest in that property. The existence of that property depends necessarily upon the rights of the plaintiffs as mortgagees in that property. But it has been effectively determined as between the owner and the mortgagees that the mortgage was not real and that practically it had no existence. That adjudication was made in a suit to which the derivative mortgagee was a party. The derivative mortgagee derives his title from the mortgagee, and if the mortgagee is proved to have no interest as a mortgagee as against the mortgagor (the owner), I do not understand how the derivative mortgagee can now contend that the property (i.e. his mortgagor's interest as mortgagee) should be brought in the suit as part of the property mortgaged to him. The parties to the present suit, the mortgagee and his sub-mortgagee are bound by the finding that the present plaintiffs have no interest as mortgagees in the Kelghar property. The fact of their being in possession of the Khoti takshim of the village or a part of it, is disputed. The lower Courts have placed some reliance upon this fact. Even if it be a fact it does not appear to me to affect the question. The plaintiffs have stated in the plaint the fact that their interest as mortgagee is found to be non-existent. I do not see how the omission to include the Kelghar property (i.e. the plaintiffs' mortgage right therein, which is found not to exist) can be treated as any transgression of the rule that the mortgage should not be split up. This rule is stated in the last para of Section 60 of the Transfer of Property Act. I am unable to hold that the omission to bring the Kelghar property, by which the mortgage right of the plaintiffs therein is meant, can be held to contravene in any sense the terms of the last clause of Section 60. The mortgagors here seek to redeem the whole mortgage, and have to pay the whole of the amount, which may be found due on taking accounts under the Dekkhan Agriculturists' Relief Act, before they can redeem the whole of the property mortgaged, i.e., all the property except the mortgage right in the Kelghar property, which was supposed to have been in existence at the time of their mortgage to Paranjpe but which has been subsequently found to have never been in existence really.

7. In this view of the matter, the question of the non-joinder of the Rodes does not arise. But I may point out that in a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a necessary party, though he may be a

proper party. The following note in Seton on Decrees, p. 2011 (7th Edition), is in point:—"The original mortgagee may redeem the derivative mortgagee and the latter may foreclose the original mortgagee without making the original mortgagor a party."

8. This view was accepted by this Court in Someshwar Amratlal Vs. Naranbhai Jorabhai, which was a case of the sub-mortgagee suing his mortgagor (i.e. the original mortgagee) without joining the original mortgagor as a party. The same view is taken in Ram Shankar Lal v. Ganesh Prasad ILR (1907) All. 385.

9. As regards the third point which has been decided by the lower Courts as to Rs. 1186-1-6, it is true that it is not res judicata. It is clear that the question as to the plaintiffs' liability to pay the sum to the defendant in spite of the fact that the mortgage in their favour of the Kelghar property was a sham and colourable transaction could not have been and has not been decided in the previous suits between the Rodes and the parties to the present litigation. But that is all, we think, that is decided by the lower Courts. We are not called upon to express any opinion, and we express none, as to the merits of the defendant's contention that he is entitled to recover that amount on the terms of the mortgage bond in suit. That will have to be considered by the trial Court when the question as to the amount due to the defendant under the mortgage according to the terms of the bond and the Dekkhan Agriculturists' Relief Act is dealt with by the Court.

10. As there has been some confusion in the argument as to this sum of Rs. 1186-1-6, which originally represented the mortgage amount under the first mortgage by Bapat to Paranjpe, it is desirable to point out that it appears from the judgment in Appeal No. 292 of 1904 that the charge of Rs. 1185-1-6 was declared in favour of Paranjpe as representing the amount of the mortgage, to him by Bapat, and not on account of the subsequent transactions between (a) Bapat and the plaintiffs, and (b) the plaintiffs and Paranjpe. Only the amount was taken as settled on account of its having been mentioned in the subsequent mortgages.

11. I would, therefore, allow the appeal, reverse the decree of the lower appellate Court and remand the suit to the trial Court for disposal on the merits. The plaintiffs are entitled to the costs here and in the lower appellate Court. The costs in the trial Court to be costs in the suit.

Crump, J.

12. I agree.