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**(1972) 01 BOM CK 0001**

**In the Bombay High Court**

**Case No : A.F.A.D. No. 1124 of 1967**

Housabai Vishnu Yadav

APPELLANT

Vs

Kashinath Pandharinath Vanpal and Others

RESPONDENT

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**Date of Decision : 29-01-1972**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 34 Rule 1, 99  
Limitation Act, 1963 — Article 61

**Citation : AIR 1973 Bom 92**

**Hon'ble Judges : Bhole, J**

**Bench : Single Bench**

**Advocate : P.S. Joshi, for the Appellant;**

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**Judgement**

1. One Waman Vithal Kulkarni, the owner of the seven suit properties, which included six fields and a house in the Gaothan at village borgaon in taluka Koregaon of district Satara executed a possessory mortgage deed on 31-7-1894 for a sum of Rs. 325/- in favour of one Vyankoji Sadashiv Khajore. Vyankoji's son Krishnaji executed an assignment of mortgagee's right in the suit properties in favour of Hari Ramchandra Kulkarni on 22-9-1905 in spite of the assignment of the mortgagee rights in all the seven suit properties Hari Ramchandra did not get possession of S.No. 122 and the house at Gaothan at Borgaon, though he was in possession of the other properties. Eknath son of Krishnaji after his father's death filed Civil Suit No. 303 of 1930 against Rangnath Hari Kulkarni, son of assignee Hari Ramchandra for recovery of certain sum. A decree was passed in favour of Eknath. After several execution applications decree-holder Eknath filed again Darkhast no. 537 of 1942 and succeeded in bringing the five properties to sale which were auctioned on 22-1-1946. A sale certificate was also issued after confirmation of the sale on 29-4-1947 in favour of Eknath Krishnaji because he purchased those five properties. Eknath later transferred those five properties to Hansabai Vishnu Yadav, defendant No.1 in the suit with which we are concerned.

2. The plaintiff's case in this suit is that his grandfather Waman Vithal Kulkarni had mortgaged the suit property in favour of Vyankoji, predecessor-in-title of defendants Nos. 2 and 3 and that the mortgagee had enjoyed the usufruct of the mortgaged property and now he is entitled to sue for redemption against these defendants as well as against defendant No.1 who had acquired the mortgagee's rights relating to suit properties later. The contesting defendant here is defendant No.1 . According to her she is the absolute owner of the five properties because she had purchased them from defendant No.2 and the father of defendant No.3. She has further pleaded that she had no knowledge of the previous transaction and that therefore she is a bona fide purchaser for value without notice. It was further contended that the suit was barred by Article 134 of the old Limitation Act and Article 61-B of the new Limitation Act.

3. The learned Civil Judge, Koregaon, district Satara, who tried the suit held that the suit properties were mortgaged by the plaintiff's grandfather Waman in favour of Vyankoji and that although the seven suit properties were given to the mortgagee yet defendant No.1 got only five properties when she purchased the property from Eknath on 25-3-1964. He further held that the suit is within limitation and that defendant No.1 did not prove that she was a bona fide purchaser for value without notice. Accordingly, therefore he partly decreed the suit and ordered that after the plaintiff deposited Rs. 325/- the defendant shall deliver all the documents in her possession or power relating to the mortgaged property to him and that they shall also put the plaintiff in possession of the five properties. There was no order as regards S. No. 122 and the house at Gaohan at Borgaon because the defendants did not obtain possession of the property. This preliminary decree was challenged in the District Court at Satara and the learned District Judge who heard the appeal observed that only one point as regards the necessity of the persons interested in the rights of the mortgagee being impleaded was contended before him. Because the persons who were interested in the rights of the mortgagee had not been impleaded, therefore the suit was liable to be dismissed under Order 34, Rule 1. The learned Judge found against the appellant because no authority had been shown to him to establish the fact that such a suit was liable to be dismissed. Accordingly, therefore, Mr.Athalye, the learned District Judge dismissed the appeal. The only point therefore that arises here for consideration is to see whether the decree passed by the learned District Judge is according to law.

4. The first point that is contended by Mr.Joshi, the learned Advocate for the appellant is that the suit is not maintainable under Order 34, Rule I of the CPC because Hari Ramchandra Kulkarni or his legal representatives were not made parties to the suit. Defendants Nos. 2 to 5 only represented Krishnaji and it is, therefore, argued that the suit is bad for non-joinder of necessary parties and accordingly it should be dismissed. We have seen that originally Waman Vithal mortgaged the suit property in favour of Vyankoji and Vyankoji's son Krishnaji assigned the mortgagee's rights in favour of Hari Ramchandra Kulkarni, Later Krishnaji's son Eknath got a decree and succeeded in bringing the suit properties

of Ranganath Hari, son of the assignee, to sale. It is, therefore, argued that because the heirs of Hari Ramchandra are not the parties to the suit, therefore the suit is not maintainable. Order 34, Rule 1, provides :

"Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

It, therefore, appears from this Order that all the persons interested in the mortgage-security either primarily as mortgagees or derivatively by the operation of law or by voluntary alienation as the transferee of the security or debt should be made parties to a suit relating to a mortgage. If not joined as plaintiffs they should be joined as defendants. The word "interest" in this rule includes also equitable interest. But the point is if all these persons who are interested in the mortgage-security were not made parties, what will be the consequences? Now this Order 34, Rule 1 is naturally subject to O. 1, R. 9, of the Civil Procedure Code. Order 1, Rule 9 provides that no suit shall be defeated by reason of non-joinder of parties and under Order 1, Rule 10 of the Court has power to add parties at any stage of the suit. But u/s 99 of the CPC no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties which includes also non-joinder unless it affects the merits of the case of the jurisdiction of the Court. The result, therefore, is that no suit relating to a mortgage should be dismissed by reason of non-joinder of parties unless the parties are necessary parties and the non-joinder affects the merits of the case. If the plaintiff refuses to add them as parties when objection to non-joinder is taken, that may be another ground. But if the parties are merely proper parties as distinguished from necessary parties, the Court may, though the plaintiff refuses to add them as parties, proceed under Order 1, Rule 9 to deal with the matter in controversy so far as regards the rights and interest of the parties before it. Now the appellant had not raised this contention which is now raised by Mr.Joshi at any time before and for the first time it was raised before the 1st appellate Court. The non-joinder of legal representatives of Hari Ramchandra, does not also affect the merits of the case.

5. Therefore this suit cannot be said to be untenable for non-joinder of legal representatives of Hari Ramchandra firstly because they are not necessary parties as they cease to have any interest in the mortgage-security and secondly because their absence does not affect the merits of the case of the jurisdiction of the Court. This suit, therefore, cannot be defeated by reason of the non-joinder of the parties. In this view of the matter, therefore the contention of Mr.Joshi is without substance.

6. It is then contended by Mr.Joshi that the suit is barred by limitation under Article 61 (b) of the new Limitation Act. Under Article 61 (b) a suit by a mortgagor to recover possession of the immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration can be filed only within 12 years from the time when the transfer becomes known to the

plaintiff. It is argued that the plaintiff and his predecessor-in-title were aware of the assignment passed by the mortgagee in favour of Hari Ramchandra Kulkarni in the year 1905 and that they were also aware of the fact that the suit properties were purchased by Eknath Krishnaji in the auction sale in 1947. If that is so, then according to Mr.Joshi the suit is barred under Article 61 (b). Now what was assigned by Vyankoji son of Krishnaji, the first mortgagee, was the mortgagee's rights. They were assigned in 1905 in favour of Hari Ramchandra Kulkarni. Thereafter Krishnaji's son Eknath got a decree against the son of the assignee, Hari Ramchandra and purchased the suit properties in the auction sale. In turn Eknath transferred those rights in favour of defendant No.1. The point, therefore, that arises here for consideration is whether such a transfer would come within the purview of Article 61 (b) of the new Limitation Act. We have seen that Eknath had purchased the properties from the assignee and the assignee had got only the mortgagee's right and therefore the purchase was only of the mortgagee's rights in respect of the five properties. These transfers also expressly purported to have transferred nothing more than the mortgagee's rights. If that is so, that is not the nature of interest that is not the nature of interest that is contemplated in Article 61 (b).

7. What are the transfers that are the intended by Article 61 (b). The real test to find the intention would be, did the transferee ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it. This question, therefore, is whether the transferee from the mortgagee took absolute interest or only mortgaged interest in it. So far as the facts and circumstances of our case are concerned, the transfer was only of assignee's interest and not absolute interest. Article 61 (b) of the new Limitation Act therefore cannot be said to be applicable for such restricted title. If the transferee does not profess or intend to take the transfer of an absolute interest or anything more than the qualified interest which the transferor is competent to alienate, there is no occasion for the article to apply. In this view of the matter therefore the contention of Mr.Joshi is without substance.

8. It is then contended by Mr.Joshi that the appellant-defendant is a bona fide purchaser for value without notice. This contention also in my view is without substance because there is ample evidence to show that the interest was of mortgagee's rights and the learned Civil Judge has abundantly made it clear in his finding. It cannot therefore be said that she was a bona fide purchaser for value without notice. This contention also cannot be sustained.

9. For the aforesaid reasons therefore this appeal is dismissed. Nor order as to costs.

10. Appeal dismissed.