

(1928) 12 BOM CK 0019
In the Bombay High Court

Keshavrao Vasant Rao Vijaykar

APPELLANT

Vs

Nanabhai Sadanand

RESPONDENT

Date of Decision : 17-12-1928

Acts Referred:

Citation : (1929) 31 BOMLR 696

Hon'ble Judges : Salvesen, J; John Wallis, J; Atkin, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

John Wallis, J.—This case under appeal raised a question of some difficulty with regard to the practice as to decrees in foreclosure suits filed in the High Court of Judicature at Bombay in its ordinary original civil jurisdiction. That original jurisdiction was inherited from the Supreme Court which in the exercise of the equitable jurisdiction conferred upon it by its charter presumably followed the chancery practice in foreclosure suits in England. Under that practice, though the decree is absolute in form and directs the property to be foreclosed on failure to pay on or before the day fixed in the decree, a further application is necessary in order to bar finally the mortgagor's right to redeem. In 1859 the CPC was enacted, and in 1861 by the High Courts Act, 1861, and the letters patent issued pursuant thereto, the original jurisdiction of the Supreme Court was transferred to the new High Court. It is not suggested that there were any rules dealing with this matter inherited from the old Supreme Court or made by the High Court itself under its statutory rule making power, and in these circumstances there would seem to have been some uncertainty as to whether the English practice was still to be followed, or it was open to the mortgagee to apply under the CPC for execution of the foreclosure decree which was absolute in form in the same way as for execution of any other decree. The evidence in the present case shows that there was some uncertainty as to the effect of the appellate decree of 175, with which the Courts are concerned in this case, when it came before the Court two years later in a subsequent suit and, as will be seen, this question was

then made the subject of an issue, as to which the finding, if any, has not been recorded.

2. When the question arose in the suit in which this appeal has been filed Kemp J., the trial Judge, was of opinion that it depended on the form of the decree in O. Section 259 of 1875, in which Sadanand, hereafter referred to as the mortgagee, was plaintiff, and Atmaram, an executor under a will, hereinafter referred to as the mortgagor, was defendant, and the learned Judge came to the conclusion that the decree was a final one and that it had not been shown that when it was passed the law of procedure then applying required a further application to give it finality. As to this, Macleod C.J. observed in his judgment on appeal that the most that could be said was that in 1875, at the time the decree was passed, it was probably the practice to foreclose by proceeding in execution (that is under the Civil Procedure Code) instead of obtaining an order absolute. He was of opinion that, though the forms used for mortgage decrees in the Bombay High Court were the same as were used according to English practice for decrees nisi, there was no regular practice as to the course to be followed by the mortgagee when default occurred in the payment of principal, interest and costs within the time allowed. Coyajee J., the other Judge, agreed with the trial Judge that before 1880 it was not the practice of the Court upon non-payment of the money at the time prescribed, to require the mortgagee to obtain an order for foreclosure absolute against the person or persons in default, but it was open to him to foreclose by proceedings in execution.

3. As is well known this matter was settled by the Transfer of Property Act of 1882, which was applied to Bombay in 1894, and is now regulated by the CPC of 1908.

4. In their Lordships' opinion it is unnecessary to consider this question, because, the lower Courts were right in deciding that in either view the representatives or assignees of the mortgagor are not entitled to redeem in this suit which was instituted on June 20, 1921, nearly forty-six years after the decree for foreclosure. That decree of July 15, 1875, ordered:?

that upon the said defendant paying to the plaintiff" the said principal interest and costs within six calendar months after the date of this decree the plaintiff do reconvey the premises comprised in the said mortgage deeds free and clear from all incumbrances done by him or any person claiming by from or under him and deliver up all deeds and writings in his custody or power relating thereto to the said defendant but on defendant failing to pay to the plaintiff what shall be due for principal interest and costs as aforesaid by the time aforesaid the defendant doth from thenceforth stand absolutely debarred and foreclosed of and from Equity of Redemption of in and to the said mortgaged premises.

5. It was therefore a foreclosure decree in the English form. The mortgage covered two properties which have been referred to as the Girgaum and the Mahim properties. The Girgaum properties consisted of chawls or tenement

blocks in Bombay which the mortgagor was under notice from the Bombay Municipality to repair or rebuild. It is common ground that not being in a position to find the necessary funds he gave up possession to the mortgagee in December 1875, before the expiry of the six months allowed for payment in the mortgage decree. The plaintiff's case is that the defendant was to hold them as mortgagee in possession, adding the costs of repairs to the mortgage debt, whereas the defendant's case is that in consideration of surrendering these properties the mortgagor was allowed an additional period of six months for redemption. However this may be, the mortgagee and those claiming through him remained in unchallenged possession for forty-five years until this suit was instituted, and expended large sums in improving and rebuilding. The mortgagor had executed the mortgage in his capacity of executor, and in 1834 his action was challenged by the beneficiaries, in O. Section 428 of 1881. In paragraph 5 of his written statement in this suit he himself stated that almost all the immovable properties "had been incumbered by the testator and could not be and were not redeemed, but on the contrary they were sold or taken possession of by the mortgagees in liquidation of their respective claims under decrees of this Honourable Court," This admission covered the properties now in suit.

6. As the learned Chief Justice has observed, when the Girgaum properties were surrendered to the mortgages Atmaram, the mortgagor had no hope of redeeming them in a further six months or at all, and in these circumstances both the learned judges arrived, in their Lordships' opinion rightly, at the conclusion that, as Coyajee J. puts it, he acquiesced in the position that the mortgagee was entitled to hold them as his own and that it was no longer necessary for the latter to execute the foreclosure decree.

7. The facts as to the Mahim property are different. On July 23, 1877, the mortgagee obtained an order on a summons which was unopposed that the decree of July 15, 1875, should be executed by putting the mortgagee in possession of the Mahim properties. When, however, the mortgagee applied for a warrant ordering the Sheriff to put him in possession, Green J., who had made the order, and appears to have felt some doubt whether the mortgagee was entitled to be put in possession in execution of the decree of July 15, 1875, refused to sign the order, and directed him to file a suit if he wished to get possession of the property. He accordingly filed O. Section 69 of 1877. The defendant mortgagor in his written statement pleaded, paragraph 7, that he had not appeared to show cause against the order to give up possession, "but delivered up possession to the plaintiff (the mortgagee of the Mahim property) who thereupon took possession thereof and has since been and still is in possession thereof, and of the rents and profits issuing there out."

8. The first of the issues framed in that suit was, "Whether the final decree for foreclosure not having been drawn up, the plaintiff has any title to institute this suit?" The judgment, which may have been oral, according to the English practice observed on the original side, has not been exhibited, so that we do not know

the finding but the suit was dismissed. Having regard to the written statement of the mortgagor and the fact that no further attempt was made to redeem these properties for over forty years, the Courts below, in their Lordships' opinion, were fully justified in arriving at the conclusion that the Mahim properties were surrendered to the mortgagee in execution of the mortgage decree.

9. Even if these defences had failed, the plaintiff would still have had to meet the further difficulty that according to the English practice, a mortgagor seeking to redeem after a foreclosure decree is bound to do so within a reasonable time, and is not entitled to wait for more than forty-five years.

10. For these reasons the appeal fails in their Lordships' opinion and should be dismissed with costs, and they will humbly advise His Majesty accordingly.