

(1928) 12 BOM CK 0005
In the Bombay High Court
Case No : Second Appeal No. 504 of 1924

Krishnaji Vinayak Belapurkar

APPELLANT

Vs

Motilal Magandas Gujarati

RESPONDENT

Date of Decision : 05-12-1928

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : (1929) 31 BOMLR 476

Hon'ble Judges : Patkar, J;Murphy, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Patkar, J.—[His Lordship, after stating facts, proceeded:] The first contention on behalf of the defendants-appellants is that the plaintiff had no right to sue at the date of the institution of the suit, and that the learned Subordinate Judge having refused the application of defendant No. 9, Exhibit 122, to be made a plaintiff, erred in making defendant No. 9 a plaintiff at the time when he passed the decree, and reliance is placed on the cases of Parmanand Misr v. Sahib Ali ILR (1889) All 438. Bhanu v. Kashinath ILR (1895) 20 Bom. 537. and Sayad Abdul Hak v. Gulam Jilani ILR (1895) 20 Bom. 677.

2. It was held in Bhanu v. Kishinath ILR (1895) 20 Bom. 537. that if the plaintiff at the time he brings his suit has no interest in the subject-matter thereof, the joinder of a person as co-plaintiff who has an interest cannot alter the plaintiff's position or confer on him any right of suit, A similar view was taken in Sayad Abdul Hale v. Gulam Jilani ILR (1895) 20 Bom 677. This view is not accepted by the Madras High Court in Krishna Boi v. The Collector and Government Agent, Tanjore ILR (1907) Mad. 419. and is opposed to the view taken of a similar rule, Order XVI, Rule 2, of the English Rules, in Hughes v. Pump House Hotel Company [1902] 2 K.B. 486. The case of Parmanand Misr v. Sahib Ali I L.R. (1889) All. 438 does not bear on the question of the joinder of a party as an additional plaintiff. The facts, however, in the above two Bombay cases were quite different from the

present case. It cannot be said that the plaintiff in this case had no right of action at the time the suit was brought. The sale-deed was passed in his favour by defendant No. 8 as guardian on behalf of her son, defendant No. 9, who was described as a minor in the sale-deed. The learned Subordinate Judge, however, held that defendant No. 9 was major at; the date of the sale-deed. There is no finding by the lower appellate Court on this point, It appears that, after the institution of the suit, defendant No. 9 filed a suit against the plaintiff to set aside the sale-deed on February 7, 1921, which ended in a compromise, Exhibit 105, on September 7, 1922, under which the defendant admitted the plaintiff's right to the sale-deed passed by his guardian during his minority. One of the houses, No. 158, was to be retained by defendant No. 9, and the other house No. 174 was to be retained by the present plaintiff, and defendant No. 9 was to receive from the present plaintiff a sum of Rs. 2,000, Defendant No. 9 gave his consent to the sale-deed and had no grievance in connection therewith. After this compromise defendant No. 9 made an application, Exhibit 122, to be made a plaintiff. The learned Subordinate Judge, however, rejected his application but ordered his name to be joined as a plaintiff when passing the decree in favour of the plaintiff" and defendant No. 9 Apparently under the sale-deed the plaintiff had a right to sue for redemption of the mortgage. In *Nuri Mian v. Ambica Singh* I.L.R (1916) Cal. 47. it was held that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution, but where it is shown that the original relief claimed has by reason of subsequent change of Circumstances, become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order! to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This Court has also accepted the view that the Court can even in appeal take into consideration events subsequent to the decree: see *Shankerbhai Manorbhai v. Motilal Ramdas* ILR (1924) 49 Bom. 118 26 Bom. L.R. 1217. *Rustomji v. Sheth Purshotamdas* ILR (1901) 25 Bom. 606 and *Sakharam Mahadev Dange v. Hari Krishna Dange* ILR (1881) 6 Bom. 113. The effect of the compromise decree between the plaintiff and defendant No. 9 is that the plaintiff and defendant No. 9 are both entitled to the equity of redemption and the decree passed by the Subordinate Judge allowing redemption in favour of the plaintiff and defendant No. 9 seems unobjectionable. It was held by the Privy Council, in *Rani Mewa Kuwar v. Rani Hulas Kuwar* (1874) L.R. 1 L.A. 157 that the compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. It cannot, therefore, be said that the plaintiff had no right or title at the date of the institution of the suit. Defendant No. 9i was the only person interested in objecting to the sale-deed passed by his mother, and he entered into a compromise with the plaintiff and both of them have been awarded the right to redeem the mortgage. The decree would, therefore, be binding not only as against the plaintiff but also against defendant No. 9. The power is to add a

party under Order I, Rule 10, can be exercised at any stage of the suit and the exercise of this power could not be restricted in cases when justice requires a joinder of parties, even at a late stage. The order of the Subordinate Judge joining defendant No. 9 as a plaintiff at the time of the decree is not, therefore, opposed to the provisions of Order I, Rule 10, though I think that the learned Subordinate Judge would have exercised a wise discretion if he had acceded to the application made by defendant No. 9 at an earlier stage.

3. The next point urged on behalf of the appellants is that by virtue of the compromise there was a transfer of property in favour of the plaintiff by defendant No. 9 during the pendency of the suit which was invalid u/s 52 of the Transfer of Property Act, and reliance is placed on the decision in *Ishwar Lingo Desai Vs. Dattu Gopal Desai*. In that case, there was a partition effected in the family of the mortgagee while the suit for redemption by the mortgagor was pending, and it was held that the right of redemption of the plaintiff-mortgagor could not be affected by the transfer made by the members of the mortgagee's family during the pendency of the suit for redemption. In the present case, there was no transfer during the pendency of the suit, The transfer in favour of the plaintiff was anterior to the suit but by virtue of the compromise the validity of the sale-deed was accepted by defendant No. 9, the person entitled to dispute its validity. The compromise recognised partially the title of the plaintiff to institute the suit for redemption. Assuming, however, that the compromise decree effected a transfer of property, it would not in any way affect the right of the defendants-mortgagees, for defendant No. 9 has been made a plaintiff in the case and the decree passed in the suit would be binding on both the plaintiff and defendant No. 9, and if any amount had been decreed as due on account of the mortgage, both the plaintiff and defendant No. 9 would have been bound to pay that amount. The rights established by the consent decree between the plaintiff and defendant No. 9 would in any event have been subservient to the rights of the defendants-mortgagees, and would not, in any way, have affected their right to recover the money on the mortgage. We think, therefore, that Section 52 of the Transfer of Property Act does not apply to the facts of the present case.

4. [His Lordship then went into the question whether the mortgage in favour of Jakhade was benami and concluded:] We, however, do not accept the finding of both the Courts that the mortgage in favour of Jakhade was not benami for Vinayak, the father of defendants, and we leave the parties to establish their rights, if any, in a subsequent litigation.

5. The last point urged on behalf of the appellants relates to the accounts taken by the lower Court. The mortgagors were entitled not only to possession but also to an account of the surplus profits from the date the mortgage amount was paid off: see Order XXXIV, Rule 9, Civil Procedure Code, and *Kachu v. Lakehmansing* ILR (1900) 25 Bom. 115 2 Bom. L.R. 781. It is urged, however, on behalf of the appellants that the learned Subordinate Judge had no jurisdiction to pass a decree for Rs. 6,920-8-0 in favour of the plaintiff and defendant No. 9 as it exceeded the

pecuniary jurisdiction of the Subordinate Judge. The jurisdiction of the Subordinate Judge depends on the valuation of the claim as made in the plaint, and especially in a suit for accounts, the jurisdiction for more than five thousand rupees is found on taking accounts that a sum of more than five thousand rupees is due: see *Shamrav Pandoji v. Niloji Ramaji* ILR (1886) 10 Bom. 200. *Ramohandra Baba Sathe v. Janardan Apaji* ILR (1889) 16 Bom. 19. and *Ambadas Harirao Karante Vs. Vishnu Govind Boramanikar*, .

6. It is further urged that on taking accounts interest on the surplus amount ought to have been awarded not from the date of the payment of the mortgage but from the date of the suit, and reliance is placed on the decision in case of *Janoji v. Janoji* ILR (1882) 7 Bom. 185. The case of *Janoji v. Janoji* ILR (1882) 7 Bom. 185. has been commented upon by Telang J. in *Haji Abdul Rahman v. Haji Noor Mahomed* ILR (1891) 16 Bom. 141. where the learned Judge has referred to the change in the new edition of Seton on Decrees where it is said that a mortgagee in possession who holds over after he has been paid his debt and all arrears of interest will be charged with the excess received and interest at four per cent. on the balance. It is urged that in that case the mortgagee sold the mortgaged property under his power of sale and knew that the mortgage amount was paid, and that he was bound to refund the surplus money remaining in his hand, but in the present case, until the account was taken, it was not ascertained when the mortgage amount was paid off and that it would be equitable to charge interest only from the date of the suit. Fisher in his *Law of Mortgage*, para 1810, page 911, lays down as follows;—“The mortgagee in possession who holds over after payment of everything due to him will be charged with subsequent receipts and interest from the date was paid with annual rests.” See *Ashworth v. Lord* (1887) 36 Ch. D. 545. The same view is expressed in the *Halsbury’s Laws of England*, Vol. XXXI, Paragraph 402, pages 220-221; and Coote on Mortgages, 9th Edition, P. 1235. We think, therefore, that the interest was rightly calculated from the date when the mortgage amount was paid.

7. It is further urged that four per cent, or at the most six per cent. ought to have been awarded as the rate of interest. The lower Court has awarded interest at the rate of nine per cent. which was provided for in the mortgage bond as interest on the mortgage amount, We do not think we should interfere with the discretion of the lower Court in awarding the rate of Patkar J. interest.

8. On these grounds we think that the decree of the lower appellate Court is correct and this appeal must be dismissed with costs.

Murphy, J.

9. [His Lordship, after dealing with the facts of the case, observed:] It is true that in the case of a plaintiff who has no title when he institutes the suit, even the addition as a co-plaintiff of one who has such title, confers no right on the plaintiff who lacks it. This view has been taken by this Court in the case of *Sayad Abdul Hah v. Gulam Jilani* ILR (1895) 20 Bom. 677. though the Madras High

Court has not acceded to it. But it can hardly be said that in this suit the original plaintiff had no title? he had a clouded or disputed one, which he cleared in the course of the suit by means of the compromise decree, and this Court has held that, though in the ordinary way the decree should decide the parties' rights as they were at the institution of the suit, yet events occurring in the course of the litigation, where their recognition is in the interest of justice, or would avoid further litigation, should not be ignored: Shankerbhai Manorbhai v. Motilal Ramdas ILR (1924) 49 Bom 118: 26 Bom. L.R. 1217.

10. Since plaintiff's title has been cleared and there is no further dispute on the point between him and the original defendant No. 9, I agree that defendants Nos. 1-3, whose only interest is the repayment of their mortgage amount, cannot be allowed to defeat the claim on this ground, As to defendant No. 9's belated transfer to the plaintiff's side, it clearly would have been better to have made this change when it was applied for, but the power can, under Order I, Rule 9, be exercised at any stage of a case.

11. The second main contention is that the compromise between plaintiff and defendant No. 9 effected during the pendency of the suit, offends against Section 52 of the Transfer of Property Act. I think the question really turns on whether the other side's rights are affected by such a transfer. In the case relied on, Ishwar Lingo Desai Vs. Dattu Gopal Desai, . the transfer was a partition in the mortgagee family. Here, if there was a transfer, it did not affect the mortgagees, for their only interest was to be redeemed. But as pointed out by my learned brother Patkajr J. it is doubtful if there really was a transfer. What occurred was an arrangement by which defendant No. 9 withdrew his objections to the validity of this sale-deed. I do not think Section 52 affects this transaction. [After considering whether the second mortgage of 1898 was or was not benami in the name of Jakhade, His Lordship proceeded :]

12. The last objection taken to the lower Court's decree is on the point of the amount found overpaid. The suit was tried by a Second Class Subordinate Judge and the decree made by the District Judge exceeds his jurisdiction of Rs. 5,000; but there are numerous authorities to the effect that, if in taking accounts the sum found due is greater than the maximum jurisdiction of the trying Court, its power to pass such a decree is not thereby affected.

13. For these, and the further reasons given in the judgment just delivered by my learned brother Patkar J., I agree that the decree does not need amendment on the point of interest, and that what is given is reasonable. The lower Court's decree must, therefore, be affirmed and the appeal be dismissed with costs.