

(1924) 03 BOM CK 0006
In the Bombay High Court

Mahomed Rahimtulla Haji Joosab

APPELLANT

Vs

Esmail Allarakhia

RESPONDENT

Date of Decision : 13-03-1924

Acts Referred:

Citation : (1924) 26 BOMLR 549

Hon'ble Judges : Shaw, J;Salvesen, J;Blanesburgh, J;Ameer Ali, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Salvesen, J.—This is an appeal from a decree of the High Court of Bombay of September 22, 1920, which set aside an order of the Subordinate Judge of Thana, dated October 5, 1918. The appellant derives such title as he has to the property in dispute from the widow of Balabhai, a Mahommedan resident in Bombay. When she sold the property, the widow professed to act for herself and as guardian of her minor children. The transaction was, however, challenged by Banemiya, the only son of Balabhai then surviving, and by others representing the rest of the family, by a suit raised in 1914 in the Thana Court, in which they claimed that the sale by the widow should be set aside in so far as the shares of the son and daughters were concerned. In that suit, which ultimately came to depend before the High Court of Bombay, Banemiya and his co-plaintiffs, on February 26, 1918, obtained a decree against the appellant which is thus expressed:--

The plaintiffs will have six months within which to pay their share, i. e. 10 16th of the Rs. 1,250 and the Us. 1,200, with added interest as directed in the lower Court's judgment. If within six months the plaintiffs pay the sums due from them they are to recover possession of the land in suit. But if within that time the plaintiffs do not pay the sums due from them then the suit to stand dismissed with costs.

2. Prior to the date of this decree Banemiya had, on July 21, 1915, mortgaged

his share of the property to one Dattatraya R. Gandhi, for Rs. 2000. On September 15, 1916, he had sold a five annas share to Narayan, a brother of Gandhi, who in turn transferred it to one Motilal Ratansi. Subsequent to the decree Banemiya contracted, on June 10, 1918, to sell to the respondent all his remaining interest in the property and undertook to obtain an assignment in his favour of the right, title and interest of the heirs of his sister who had died. By these transactions Banemiya, for himself and the other plaintiffs (assuming he was authorised to act for them), deprived himself of all interest in the conditional decree of February 26, 1918. In these circumstances the mortgagee, Dattatraya R. Gandhi, realising that the security which he held over the property would become valueless if the condition specified in the decree was not purified, on August 22, 1918, or four days before the money fell to be paid, presented an application in which on the narrative that Banemiya had failed to pay the sum required and that he estimated the sum at less than Rs. 4000, prayed that the said amount might be ordered to be received for payment to the appellant according to the High Court decree and paid to him. The money was duly deposited in Court and a notice to this effect was signed by Mr. R.B. Gogate, Sub-Judge. No question has been raised as to the sufficiency of the amount to satisfy the appellant's claim nor is it open to doubt that the appellant would have been entitled to uplift the whole sum of Rs. 4,000 or as much of it as represented the Rs. 1,250 and Rs. 1,200 with added interest which formed a first charge on the shares of Banemiya and his sister.

3. The appellant, however, made no application for payment to him of the sum deposited. Instead of doing so he entered into an agreement dated October 3, 1918, with the two brothers Gandhi, the substance of which was that in consideration of Rs. 5,000 paid by the appellant to them, they agreed to withdraw the application under which the Rs. 4,000 had been deposited and to claim the return of the said sum to the depositor. In terms of this agreement, an application in the name of Gandhi was duly lodged on October 4, 1918, in the Court of the First Class Sub-Judge at Thana. The applicant prayed for the return of the deposit made by him on the ostensible ground that as the amount of his mortgage had been repaid there was now no possibility of his being involved in loss. The application was opposed by the respondent. He maintained that the payment made by Gandhi had fulfilled the condition in the decree, and offered to pay the amount of Rs. 4,000 to the appellant on the footing that such payment should be treated as equivalent to the payment made by Gandhi. The Sub-Judge overruled the respondent's contentions and allowed Gandhi to take back the money and it was, in fact, uplifted by him. The respondent thereupon appealed to the High Court, which set aside the order granting leave to Gandhi to take back his money and allowed respondent an opportunity of paying the money within a specified short period such payment to be treated as within the period of six months allowed by the decree of February 26, 1918.

4. Various contentions were put forward by the appellant in support of his appeal from this order: (1) He contended that on a sound construction of the decree the

sum that was provided to be paid by the plaintiffs in that suit fell to be paid to the appellant and that a deposit in Court did not satisfy the condition in the decree. Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the appellant in person, which he accepted, it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition. (2) It was contended that a deposit made by another than a party to the suit did not satisfy the condition, and that the mortgagee, who was not a party, had no right in a question with the appellant to make the deposit. Their Lordships agree with the learned Judges of the High Court in rejecting this argument for the reasons they state. They are further of opinion that the mortgagee had an absolute right in the protection of his own property to make the deposit and so prevent his security from becoming valueless. To the extent of the value of his mortgage granted by the plaintiffs in his favour he had acquired their rights, and the mortgage-deed expressly authorises him to charge on the mortgage property any expenses which the mortgagee might be required to make for his protection.

5. Lastly, it was contended that the mortgagee had an absolute right to withdraw the deposit. If no other interests were in question but those of the mortgagee and the appellant this would no doubt have been the case. But it cannot be overlooked that the real object of the application for the withdrawal was to defeat the claims of the respondent who was the only other person that had an interest in the condition expressed in the decree being satisfied. Their Lordships think that the benefit of the deposit having been made before the expiry of the time limit necessarily inured to all parties having an interest in the condition being purified. The legitimate interest of the appellant was to obtain payment of the sums to which he was preferably entitled and this was secured to him by the deposit. Just as the plaintiffs' suit would have stood dismissed if the deposit had not been made, so equally the decree provided that if the sums in question were paid the plaintiffs were to recover possession of the land in suit. The respondent in virtue of the agreement of June 10, 1918, of which he subsequently obtained a decree of specific implement, is now in right of this decree and entitled to enforce it against the appellant. As, however, the money deposited by Dattatraya had been actually uplifted by him before the order of the High Court was made, the condition which the Court imposed on the respondent appeared to be the only method by which the position which had been inverted by the appellant's act on could be restored so as to do justice between the parties. Their Lordships are accordingly of opinion that the decision of the High Court was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.