
(1926) 06 BOM CK 0036
In the Bombay High Court

Moru Narushet Gujar and Others

APPELLANT

Vs

Gangabai Ramchandra Lilachand and Others

RESPONDENT

Date of Decision : 18-06-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : AIR 1927 Bom 32

Hon'ble Judges : Shah, J;Percival, J

Bench : Full Bench

Judgement

Shah, J.—The facts, which have given. rise to this appeal, are briefly these : The plaintiffs sued the defendants in this case in 1912 to recover possession of S. No. 87, plot No. 1, or such portion thereof, as they may be found entitled to, with mesne profits ; or, in the alternative, for redemption of certain mortgages referred to in the plaint. On. March 26, the following decree was passed by the trial Court:

Plaintiff to pay into Court the amount due to Defendant No. 2 Rs. 420 within six months, of this date. On such payment they are to recover S. No. 87, plot No. 1, in suit. In cash of default they shall be debarred from all right to redeem the property, The usual preliminary decree for redemption to be drawn up with the necessary changes as indicated.

2. Defendant No. 2 appealed to the District Court of Thana. That appeal was allowed, the decree of the trial Court was reversed, and the plaintiff's suit was dismissed with all costs on the plaintiffs by the Assistant Judge who heard the appeal. Prom that decree the plaintiffs appealed to the High Court. For the reasons given in the judgment in Moru Narsu Gujar Vs. Hasan Fattekhan Jummal, , the High Court set aside the decree of the lower appellate Court and restored that of the trial Court with costs in the lower appellate Court and the High Court on the defendants.

3. It may be mentioned that, in pursuance of the decree of the trial Court, the

plaintiff's had deposited the decretal amount in Court on April 2, 1914, and had taken possession of the land on June 19, 1914. But, after the preliminary decree of the trial Court was reversed in appeal on February 29, 1916, the successful appellant re-obtained possession of the lands in suit, and it appears that in 1917 the money deposited in Court was returned to the plaintiffs.

3. On July 23, 1921, the plaintiff's filed the present darkhast claiming possession of the lands and deposited the amount of Rs. 420 along with the darkhast. They prayed for extension of time, if necessary, for the payment of the amount under the decree. The Defendant No. 2 contended that, as the sum of Sections 420 was not paid into Court within six months from the date of the High Court decree, the plaintiff's right to redeem was extinguished ; that the plaintiffs never applied to have the time fixed for payment of the decretal amount into Court extended by that Court ; that Defendant No. 2 was not bound to have the foreclosure order confirmed by the Court, and that the plaintiffs' right to redeem was barred, even though there was no final decree passed in favour of Defendant No. 2 in consequence of the non-payment of the decretal amount.

4. Several issues were raised by the Court of first instance dealing with the darkhast. That Court held that the right of redemption could not be barred unless and until the mortgagee obtained the final decree in his favour. It also held that it was proper under the circumstances to extend the period fixed for paying the redemption money, and, accordingly, extended the time to the date on which the amount was deposited in Court, i.e. up to July 23, 1921. The Court further held that the plaintiffs could ask for the extension of time as also for having the final decree at the same time. It held that the plaintiffs' application for the final decree was not barred by limitation. This last finding on the question of limitation related to the contention of the defendant that the application made in January 1923 for amendment of the darkhast of July 23, 1921, for passing the final decree was barred as having been made more than three years after the expiration of the period of six months allowed for payment under the decree of the High Court. Accordingly, the Court of first instance ordered, on August 29, 1923, that, as the plaintiffs-mortgagors had paid into Court the sum fixed for redemption of the mortgage, they were entitled to a final decree for possession.

5. From this decree Defendant No. 2 appealed to the District Court of Thana Two points were urged before that Court in support of the appeal : first, that the mortgagors not having deposited the redemption amount within six months of the High Court decree, they had lost the right of claiming possession of the lands ; and, secondly, that the mortgagors not having applied to have the preliminary decree made final within three years of the High Court decree, they could not proceed with the darkhast at all. The learned District Judge who heard the appeal came to the conclusion that the time for payment was properly extended by the Court of first instance, and held the payment made by the plaintiffs to be proper in view of his order for extension of time up to the date on which the payment was made. The learned District Judge, however, was of

opinion that as the application for making the decree final was made more than three years after the date of the High Court decree under execution, that application was time-barred, and that, as the making of the final decree was essential according to law, there was no decree for possession which the plaintiffs could execute. On that basis he allowed the appeal and dismissed the darkhast. The net result was that the plaintiffs-mortgagors, who had been attempting to redeem the property since 1912, found themselves foiled in their attempt to get the property, though they had once in fact paid the amount in Court, and had ultimately to withdraw it, and were apparently willing to pay the amount on this occasion, and had in fact paid it.

6. From this order of the learned District Judge with reference to the darkhast, the plaintiffs have filed two separate appeals. The question in the principal appeal is whether the application for making the decree final is time-barred.

7. It may be mentioned that when the High Court restored the preliminary redemption decree passed by the trial Court, the money became payable under that preliminary decree within six months from the date of the High Court decree, subject to the Court postponing the day fixed for payment from time to time under the proviso to Rule 8 of Order 34. Under Rule 8, Sub-rule (1), it is clear that where, on or before the day fixed, the plaintiff pays into Court the amount declared due to the mortgagee, the Court shall pass a decree ordering the defendant to deliver up the document, to re-transfer the mortgaged property, if so required, and if necessary to put the plaintiff in possession of the property. Where such payment is not so made, it is open to the mortgagee to apply for a final decree debarring the plaintiff from all right to redeem the mortgaged property under Sub-rule (2) of the same rule.

8. In the present case the mortgagee never made any application for a final decree in his favour when no payment was made within six months under the decree of the High Court, with the result that there was no final decree at the date of the darkhast in favour of the mortgagee debarring the mortgagors from redeeming the property. The application for extension of time under the proviso to Rule 8 of Order 34 was made within three years from the date of the decree of the High Court and a fortiori within three years after the expiry of six months from the date of the decree. The Court considered the question as to whether the time for payment should be extended under the circumstances. That Court in fact extended the time for payment up to the date of actual payment ; and the lower appellate Court has agreed with the first Court as regards the propriety of extending the time for payment. When once we have an order extending the time for payment and the payment in fact is made on or before the date thus fixed, it seems to me that the mortgagors are entitled to a final decree as provided by Rule 8 of Order 34. It is not clear that any separate application by the plaintiff for the final decree is essential. The words " on application made in that behalf by the defendant " occurring in Sub-rule (2) of Rule 8 are not to be found in Sub-rule (1). But it is provided that where, on or before the day fixed,

the plaintiff pays into Court the amount declared due, the Court shall pass a final decree. It seems to me that where the time is extended and the payment is made within that extended time, the mortgagor must be taken to have paid into Court the amount declared due on the day fixed within the meaning of this rule ; and it is possible that the Legislature intended that where the payment was made by the mortgagor, the application for making the decree final was necessarily implied, and that, therefore, the words as to application to be found in Sub-rule (2) were not considered necessary in Sub-rule (1).

9. Assuming, however, that an application was necessary, it is not suggested in the present case that the formal application for amendment of the original darkhast with a view to get the final decree was not made within three years from the date on which the plaintiffs paid the amount into Court on the day ultimately fixed for payment. It is clear that the application made in 1923 for the amendment of the darkhast so as to make it an application for a final decree was within three years from the date ultimately fixed for payment. Where the time for payment has been extended under the proviso to Rule 8 of Order 34, with reference to a preliminary decree passed under Rule 7 of Order 34, if any application is necessary by the plaintiff for a final decree, the period of limitation for that application would begin to run from the time the right to apply accrues under Article 181 of Schedule 1 of the Indian Limitation Act, which would mean the date on which the payment is properly made under the decree i.e., on the date originally fixed, or such date as may be finally fixed under the proviso to Rule 8 of Order 34. Even if the time were to be calculated in this case from the expiration of the period of six months after the date of the decree, it seems to me that there would be no ground for holding the application time-barred. The application, which was formally made in 1923, was really involved in the application for possession of the property on payment of the decretal amount in July 1921. And it seems to me to be obvious that once the payment in July 1921 is recognized as a payment properly made within the time extended by the Court, the right of the plaintiffs to a final decree follows as a matter of course under Rule 8 of Order 34 having regard to the facts of this case.

10. I may mention that the learned Counsel for the respondents realizing this position under the rules relating to the preliminary and final decrees in redemption suits, sought to support the decree of the District Court by contending that the time for payment should not have been extended ; but he did not contend that, if the order extending the time is accepted, there is any objection as to limitation to the final decree being passed. It is doubtful whether it is open to the mortgagee respondent to contend in second appeal that the time should not have been extended. In the first place, under Order 43, Rule 1, Clause (o), an order refusing to extend time is appealable as an order and not as an order in execution, which indicates that all proceedings with reference to a preliminary decree after the preliminary decree and before the final decree are not necessarily proceedings in execution, so as to make all orders appealable as orders in execution. Further, the ratio decidendi in *Harjivan v. Gajanan* A.I.R

1923 Bom. 420 would show that the proceedings after the preliminary decree and prior to the final decree are not to be treated as proceedings in execution. That case related to a preliminary and final decree under Rules 4 and 5 of Order 34 ; and its reasoning may apply to similar decrees under Rules 7 and 8. But it may be said that the final decree would be appealable and where the time is extended and the final decree is based upon such extension of time, it may be possible to object to it in appeal as a stop leading to the final decree. I do not desire to pursue this point any further as it has not been raised, in argument; nor do I desire to decide it. Assuming that it is open to the respondents to raise it, I have no hesitation in holding that, under the circumstances, the time for payment has been rightly extended by the lower Courts.

11. In this view of the matter it is not necessary to consider the farther point raised by the appellants that the darkhast should really be treated as an application for restitution u/s 144 of the Code of Civil Procedure, the preliminary decree passed by the trial Court having been executed once, though it is difficult to see how it could make any difference in the procedure as to the final decree in a redemption suit. It is satisfactory to find that we are able in these proceedings to pass the final decree. If the matter had to be left where the order under appeal left it, the position would have been anomalous and unsatisfactory. Until the final decree is made under Sub-rule (2) of Rule 8 of Order 34 the relationship of mortgagor and mortgagee could not be extinguished ; and so long as that relationship subsists it may be open to the mortgagors to file a second redemption suit, having regard to the ratio decidendi in *Bantji v. Pandharinath* [1919] 43 Bom. 434.

12. I would, therefore, allow this appeal, set aside the order made by the lower appellate Court, and restore the order of the Court of first instance directing a final decree of redemption to be passed, subject to the proviso that in the order directing possession of the mortgaged lands to the plaintiff's there will be no reference to the date which has already expired. The plaintiffs to have their costs in this Court and the lower appellate Court from the defendants.

13. As regards the mesne profits claimed in the other appeal, it seems to me that, until the final decree is made in favour of the mortgagor, the possession of the mortgagee is not wrongful, and that the plaintiffs are not entitled to any mesne profits up to that date. I think, however, that they would be entitled to mesne profits thereafter. I would, therefore, allow mesne profits from this date until delivery of possession or the expiration of three years from the date of decree whichever event first occurs. The Court of first instance to determine these mesne profits under Order 20, Rule 12, Clause (c).

14. Each party to bear his own costs of this appeal.

Percival, J.

15. I agree.