

**(1959) 08 BOM CK 0001**

**In the Bombay High Court**

**Case No : Second Appeal No. 759 of 1954**

Namdeo Ganuji Marathe

APPELLANT

Vs

Gangadhar Govind Joshi

RESPONDENT

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**Date of Decision : 05-08-1959**

**Acts Referred:**

Berar Land Revenue Code, 1928 — Section 183

Central Provinces and Berar Relief of Indebtedness Act, 1939 — Section 13

**Citation : (1960) 62 BOMLR 63**

**Hon'ble Judges : Kotval, J;Badkas, J**

**Bench : Division Bench**

**Final Decision : Allowed**

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## **Judgement**

Kotval, J.—This second appeal raises a somewhat difficult question as to the interpretation of Section 183 of the Berar Land Revenue Code and to what extent it is affected by the provisions of Section 13 of the Central Provinces and Berar Relief of Indebtedness Act, (XIV of 1939). So far as we have been able to ascertain, the question is not covered by authority and it is for this reason that my learned brother Badkas J. referred the appeal for decision by a Division Bench.

2. The facts in the case are not seriously in dispute. Respondent No. 2 Kisan and one Dhondu owned field No. 152/4." On April 17, 1937, both these persons mortgaged the field, survey No. 152/4, along with two other fields to respondent No. 1 Gangadhar. It is not in dispute and was admitted before us on behalf of both the parties that of the total land thus mortgaged survey No. 152/4 which is the subject-matter of the present suit for pre-emption forms roughly half the land.

3. The mortgage dated April 17, 1937, was a mortgage with a condition of foreclosure. It was a mortgage for a sum of Rs. 200 with interest at Re. 1-8-0 per cent, per mensem. It appears that the debtors had not made any repayments in satisfaction of the mortgage debt till 1941 in which year one of

the mortgagors viz. Kisan, respondent No. 2, applied to the Debt Relief Court which was then established, for relief in respect of the mortgage debt. The Debt Relief Court accordingly framed a scheme which is exh. D-1. By that scheme which settled debts due to other creditors also, the amount of the mortgage debt was cut down to Rs. 269-5-0 so far as the creditor Gangadhar was concerned, and that amount was made payable in nine installments of Rs. 28 each commencing from March 1, 1942, and the 10th and the last installment was Rs. 17-5-0. The scheme then declared that "the amount payable to the N.A. 1 (Gangadhar) is due under the mortgage by the conditional sale dated 17-4-1937." Even under the scheme, the debtors failed to pay the installments as ordered. They had paid the first seven installments but failed to pay the last three installments. Thus they had paid Rs. 196 and had failed to pay Rs. 73-5-0. The creditor Gangadhar, therefore, applied for the issue of a certificate u/s 13(3) of the Relief of Indebtedness Act and a certificate was granted on May 15, 1951, which was in the following terms:

Whereas two consecutive installments amounting to Rs. 28 and Rs. 17-5-0 and due for payment on 1-3-50 and on 1-3-51 respectively in the case noted above remained in arrears,

I hereby order that the order dated 18-12-41 of the Debt Relief Court of Shri V. H. Shastry, D. R. Court, Malkapur, fixing installments in Case No. 539 of 1940 shall cease to have effect and the balance remaining due shall be recoverable as if a decree and in the case of a mortgage, lien or charge as if a filial decree, had been passed by the Court of Civil Jurisdiction.

4. In terms of this certificate, the creditor moved the civil Court and execution. was taken out on the footing that the certificate dated May 15, 1951, created a judgment-debt and was itself the final decree in a suit for foreclosure. In the execution, the field in suit No. 152/4 of Mouza Wadner was taken possession, of by the creditor Gangadhar. In the original mortgage two other fields, viz. Nos. 187/2 and 178/1 were also mortgaged but in the present suit we are not concerned with them. "We may here state however that it was not disputed, in the present suit that these two fields constituted roughly half the property comprised in the mortgage and field No. 152/4 the other half.

5. As a result of these transactions culminating in the delivery of possession, the appellant-plaintiff filed the present suit claiming pre-emption of survey No. 152/4. According to the plaintiff, he was a co-occupant of survey No. 152. It appears that in the first instance, only the creditor Gangadhar was made a defendant in the suit but later on during the pendency of the appeal before the Additional District Judge, Khamgaon, the debtor Kisan was also joined in the proceedings, though he was not a defendant before the trial Court.

6. The-trial Court granted pre-emption and decreed the plaintiff's claim. The trial Court held that the market value of the field was Rs. 2,000. It held that the certificate granted by the Deputy Commissioner u/s 13(3) was a valid certificate

and amounted to a final decree for foreclosure and that, therefore, the plaintiff in the suit had a right of pre-emption. One of the points raised before the trial Court was whether the pre-emptor should pay Rs. 2,000 which was the, market value of the field as found by the trial Court, or whether the pre-emptor should be asked to pay the amount for which the fields were foreclosed, namely, the amount of Rs. 45-5-0. On this question, the trial Court held that the pre-emptor should be asked to pay the amount due at the foot of the so-called final decree for foreclosure, namely, the amount due upon the certificate granted by the Deputy Commissioner, that is to say, the sum of Rs. 45-5-0. Since the field sought to be pre-empted constituted half the total property foreclosed, the plaintiff was asked to pay half of Rs. 45-5-0, i.e. Rs. 22-11-0.

7. When the matter came before the appellate Court, it confirmed the findings of the trial Court as to the price payable but it took the view that the certificate granted under s. 13(3) was invalid for certain reasons with which we are not concerned, and that, therefore, no final decree for foreclosure could have "been passed nor could be deemed to have been passed. It dismissed the plaintiff's suit.

8. In second appeal before my learned brother Badkas J. the plaintiff-pre-emptor challenged the finding that he had no right of pre-emption whatsoever; and so far as that part of his case is concerned, my learned brother has clearly given a finding that the certificate was validly issued and that there had been a foreclosure decree, and that, therefore, the plaintiff was entitled to pre-empt. But it was upon the other contention raised before my learned brother as to the proper amount payable by the plaintiff-pre-emptor that an important and somewhat- difficult question arose, and the appeal was referred to this Bench.

9. The provisions in the Berar Land Revenue Code governing pre-emption in case of foreclosure are contained in Sections 177, 182 and 183. The provisions contemplate two cases: (i) where the mortgagee obtaining a final decree for foreclosure gives notice; and (ii) where he does not give notice. In a case where he gives notice, Section 177(i) prescribes that he shall give notice intimating the extent of the interest foreclosed and the amount declared due by the final decree, and upon such notice being received, under Sub-section (2) of Section 177 the other occupant in the survey number may within two months from the service of notice, deposit with the Tahsildar the amount specified therein, and upon such deposit shall have the right to purchase the interest foreclosed

at a price which shall comprise the amount deposited together with the interest on the principal sum secured by the mortgage, at the rate specified in the mortgage deed, from the date of the notice to the date of the deposit.

Section 181 then lays down that a notice given and a deposit made u/s 176 or 177 shall be deemed to be a valid contract for the sale and purchase of the right concerned) and may be enforced by either of the parties thereto, by a suit for specific performance by the party giving the notice, or by a suit for pre-emption

by the party making the deposit. Then follow the important provisions of Sections 182(1) and 183 over which much controversy ranged before us. The relevant portions of these sections run as follows:

182. (1) In addition to the rights conferred by Sections 176, 177 and 178, the rights of pre-emption of an occupant in a survey number shall include the right to pre-empt for a fair consideration, and such occupant may sue to enforce such right on the following grounds:-

(a) in the case of a proposed sale u/s 176 that the price stated in the notice was not fixed in good faith;

(b) in the case of foreclosure u/s 177, that the amount stated in the notice was not due by the terms of the final decree, or that it exceeds the market value of the interest foreclosed;

(c) in the case of a usufructuary mortgage or lease u/s 178, that the principal amount, or the premium, or the rent stated in the notice was not fixed in good faith...

183. (1) When an occupant in a survey number transfers his interest or any portion thereof by any of the transfers contemplated in Sections 176 and 178, or suffers a final decree for foreclosure as contemplated in Section 177 to be passed against him, and no notice has been given as required by these sections, the other occupants in the survey number shall have a right to pre-empt the interest transferred.

(2) Such right may be enforced by civil suit, and in all such cases the court shall have power to examine the transaction and fix a fair consideration for the interest to be pre-empted.

Having regard to the authorities placed before us, the meaning of the words "fair consideration" is now settled. The "fair consideration" contemplated not only in Section 182(4) but also in Section 183(2) of the Code is not the same as the market value. The market value though not the criterion, is however relevant in determining the fair consideration. Prima facie, the market value is the fair consideration u/s 183(2). It follows, therefore, that it is for the party alleging that it is not so to plead and prove that there are circumstances to suggest that is not the fair consideration. This is the view consistently taken in all the authorities vide *Amirkhan v. Shankar* AIR [1925] Nag. 194, *Namdeo v. Kesheo* [1937] Nag. 469, *Sheolal v. Yedu* [1942] Nag. 584, and *Maruti v. Amrit* [1950] Nag. 39.

10. Mr. Jakatdar relied upon the provisions of Section 182(i)(b). He emphasised the opening words of Sub-section (1) of Section 182, namely, "in addition to the rights conferred by Sections 176, 177 and 178", and urged that the right given by Section 182(7) was in addition to the right given by Section 177(7) and, therefore, even where no notice was given, he would only have to pay the amount of the final decree for foreclosure (in this case half of Rs. 45-5-0) and

not the market value (in this case Rs. 2,000) as found by the trial Court.

11. In our opinion Section 182(1)(b) is not applicable in the instant case, because Section 182(1)(b) contemplates a case only where notice has been given in terms of Section 177 and the second clause of Section 182(1)(b) "or that it exceeds the market value of the interest foreclosed" is also governed by the opening words contemplating the giving of a notice. The only section which deals with the case where no notice has been given is Section 183 and there the amount payable for preemption is "the fair consideration for the interest to be pre-empted."

12. There then remains the further question as to what was the interest to be pre-empted in the present case having regard to the provisions of Section 183(2). The power given to the Court is not merely to fix a fair consideration but it is the power "to examine the transaction and fix a fair consideration for the interest to be pre-empted". Now, these words "examine the transaction" were considered by Mr. Justice Bose, as he then was, in *Namdeo v. Kesheo* where he observed (p. 473) :

Then again, what can the words "examine the transaction" mean except that the Court is to determine the nature of the interest sought to be pre-empted and apply the principles enumerated in Section 182(1)(b)? If the market value is all that had to be ascertained, an examination of, the transaction would be unnecessary.

Therefore, the primary duty of the Court is to examine the transaction and that can only mean that we must ascertain the nature of the interest sought to be pre-empted, and allow any deductions legally permissible.

13. Applying this principle we ask ourselves: what was the fair consideration in the instant case? Now, the amount due under the mortgage as it originally stood was Rs. 200 with interest at Re. 1-8-0 per cent. per month. On the date on which the scheme of the Debt Relief Court was framed, i.e. December 18, 1941, it is not disputed that the amount must have been considerably more than the amount which the Debt Relief Court found due to the creditor Gangadhar. The Debt Relief Court found only Rs. 260-5-0 due to the creditor. Out of this amount the debtor paid seven installments of Rs. "28 each. Thus he paid in all Rs. 196 to the creditor Gangadhar. Now, subject to what we have stated below as to the market value of the field the trial Court found that the market value was Rs. 2,000. What then was the value of the interest to be pre-empted? So far as the creditor is concerned, upon the findings of the trial Court, the field was worth Rs. 2,000 to him. But out of those Rs. 2,000 he had already recouped himself to the extent of Rs. 196. Therefore, to him the real value could only be Rs. 1,804. Since the duty of the Court under law is to examine the transaction and fix a fair consideration for the interest to be pre-empted, the examination of the transaction in the light of the above facts can lead to this conclusion and to no other. If we were to fix Rs. 2,000 as the price for pre-emption, the creditor would

not only be getting that sum of Rs. 2,000 but would also be pocketing Rs. 196 paid to him by the debtor and, therefore, he would be actually getting Rs. 2,196 which would not be the fair consideration for the interest to the pre-empted. We, therefore, conclude that the proper price for pre-emption which should have been fixed upon the findings of the trial Court that the market value of the field was Rs. 2,000 would be Rs. 1,804.

14. Mr. Jakatdar then raised two other contentions. He relied upon a passage from the judgment of Mr. Justice Bose in *Namdeo v. Kesheo* which is as follows (p. 473) :

Now, what happens when the notice contemplated by Section 177 is given in the case of a mortgage by conditional sale? The other occupants are given an opportunity to pre-empt at a price which comprises the amount declared to be due by the final, decree together with interest on the principal sum secured by the mortgage at the rate specified in the mortgage-deed from the date of the notice to the date of the deposit. If this sum exceeds the market value then the matter can be brought before the Courts u/s 182(1)(b) in the same way as in the case of a sale. But if it does not, then pre-emption can be at this particular price. Why should the pre-emptor be placed in a worse position because the mortgagee fails to carry out the provisions of Section 177 and omits to give the notice mentioned there?

Mr. Jakatdar contended on the strength of the above passage that where the amount of the final decree is less than the market value, then the pre-emption price ought to be the amount of the decree and not the market value. In the first place, in the passage quoted above, Mr. Justice Bose was not contemplating a case u/s 183(2) at all but a case where notice has been given. But apart from this, that case is also distinguishable for the reason that there no question of the scaling down of the mortgage-debt by the Debt Relief Court ever arose or fell to be considered. That is a peculiar and distinguishing feature of the present case. Here what has happened is that by invoking the provisions of the C.P. and Berar Relief of Indebtedness Act, the debtor was enabled to scale down the amount of the debt due from him to the creditor and the final decree for foreclosure was not the usual final decree passed tinder Order XXXIV of the CPC but was only a decree which was deemed to be a decree for foreclosure in terms of Section 13(5) of the Relief of Indebtedness Act. What in those circumstances should be a fair consideration was never the question before Mr. Justice Bose.

15. The other contention which Mr. Jakatdar urged was that the finding itself that Rs. 2,000 was the fair market price of the field in suit is incorrect. Now, in this respect, it was pointed out by him and rightly, that the first appellate Court has unfortunately given no finding. Possibly the appellate Judge did not give that finding because he took the view that the plaintiff-pre-emptor was not entitled to pre-empt at all.

16. In view of this and since the question has been raised, we have gone through

the evidence and considered the finding of the trial Court on this point given in paras. 9 to 16 of its judgment. The trial Court relied upon the evidence of several transactions. They are Exh. D-3, a transaction of 1943, proved by Namdeo (D.W. 2) ; Exh. D-5, a transaction of 1947, proved by Kashiram (D.W. 4) ; Exh. D-6, a transaction of 1948, proved by Chango (D.W. 5) ; Exh. D-7, a transaction dated December 3, 1951, proved by Supda Totaram; and Exh. D-4 and Exh. D-8, both of 1950. For want of any better evidence or any other standard of assessment, the trial Court took an average of the rates per acre proved by these transactions and allowing for the increase in rates between 1943 and 1951, came to the conclusion that the market price of the suit property was at least Rs. 2,000. We can see nothing wrong with the appreciation of that evidence by the trial Court or the conclusion to which it came upon the evidence. In all matters of valuation, the Court has to make an estimate, and having regard to the circumstances here, it seems to us that it was a very reasonable estimate which the trial Court made. On behalf of the plaintiff no evidence was given on the question and, therefore, the trial Court could not but accept the evidence tendered on behalf of the defendant. Apart from this, the defendant examined the plaintiff himself as his witness and even the plaintiff Namdeo admitted in para. 4 of his evidence:

Last year the suit field was worth Rs. 1,200 to 1,300. The said is low value because the field in suit was fallow.

Having regard to this evidence, it is clear that the estimate of Rs. 2,000 as fair consideration of the field in 1951 was by no means an incorrect valuation. We have no hesitation in confirming the finding of the trial Court that the fair market value of the field in suit was Rs. 2,000.

17. Upon this finding and the findings reached by my learned brother in his judgment dated July 4, 1958, we will have to set aside the judgments and decrees of the Courts below and order that the plaintiff in the suit is entitled to pre-emption upon payment of Rs. 1,804 as the price of the field.

18. There then remain the cross-objections filed on behalf of both the respondents. In our opinion, so far as respondent No. 2 Kisan, the debtor, is concerned, he has no locus standi in the present case. He was not a party to the suit. He was joined only at the stage of first appeal and is obviously trying to support his creditor in getting as large a price as possible for the field which is lost to him. Respondent No. 1, the creditor Gangadhar, has urged that the decree or the so-called decree in the present case was not a final decree for foreclosure contemplated u/s 183 of the Berar Land Revenue Code. The argument is founded upon the provisions of Section 13(5) of the Relief of Indebtedness Act which runs as follows:

If an installment or part thereof is certified as irrecoverable under Sub-section (2) or if two consecutive installments remain in arrears the Deputy Commissioner, on the application of the creditor, shall pass an order that the order of Debt Relief Court fixing installments shall cease to have effect, and the

balance remaining due shall be recoverable as if a decree, and in the case of a mortgage, lien or charge as if a final decree, had been passed by a court of civil jurisdiction.

The argument is that when a scheme is framed by the Debt Relief Court and the debtor does not pay in terms of that scheme and the creditor applies for the issue of a certificate, the certificate granted is merely deemed to be a final decree by virtue of the form which is prescribed under the Act and in terms of which the certificate issues. It is not in fact a decree or final decree for foreclosure as contemplated by Order XXXIV of the CPC and cannot, therefore, be put in execution "proprio vigore". In fact it was pointed out that the certificate issued in the instant case which we have reproduced above merely copies the entire form and does not even state in terms that the installments fixed by the Debt Relief Court shall be recoverable as if it was a final decree for foreclosure.

19. A similar certificate was issued in a case decided in *Kamlu v. Eknath* [1947] Nag. 838, and Mr. Justice Bose rejected the argument holding that the latter part of the certificate referring to any other decree or charge was a superfluity and should be ignored. He observed (p. 843) :

...It is evident that Section 13(3) has not been happily worded, but in my view all that it requires the Deputy Commissioner to do is to issue the certificate. Once he does that then the law comes into operation and he has nothing further to do. It is the law which directs that the claim shall be enforced as if a decree had been passed. It does not matter whether the Deputy Commissioner says this or not. That is not for him. That being the case, and there being a certificate here and a mortgage, we have to enforce this mortgage according to its terms and regard the matter as if a decree in terms of the mortgage had been passed.

20. Nothing moreover turns upon the words "as if a decree, and in the case of a mortgage, lien or charge as if a final decree, had been passed by a court of civil jurisdiction" in Sub-section (3) of Section 13. No doubt, the Sub-section creates a fiction in so far as it enjoins upon the Court to consider something which is not a decree as a decree. But at the same time, it seems to us that the injunction is clear that we are to give effect to the so-called decree or what is deemed to be a decree as if it were a final decree for foreclosure and to annex to it all the incidents and legal consequences which normally attach to a final decree for foreclosure under Order XXXIV of the Code of Civil Procedures Therefore, upon the issue of the certificate and upon the authority of the case in. *Kamlu v. Eknath* (cit. sup.) we must hold that the certificate issued by the Debt Relief Court on May 15, 1951, has to be given effect to by the civil Court as if a final decree for foreclosure had been passed in terms of the mortgage-deed. "We may also observe that the creditor took full advantage of this position himself and has indeed executed the decree and taken possession under the decree and it does not lie in his mouth now to raise such a contention.

21. We allow the appeal, decree the plaintiff's claim and order that he shall

deposit Rs. 1,804 less the costs ordered in this judgment by December 20, 1959, and on his depositing that amount the suit field shall vest in him and the defendant Kisan who is in possession today shall put him in possession thereof. In case the plaintiff fails to deposit the said amount, his suit shall stand dismissed with costs and in that event the plaintiff shall bear the full costs of the defendant. A decree in terms of Order XX, Rule 14, of the CPC and in terms of the directions given above shall be drawn up. Respondent No. 1 Gangadhar shall pay the costs of the plaintiff-appellant throughout. The cross-objections are dismissed. The costs of the cross-objections shall be as incurred.