(1926) 01 BOM CK 0005

In the Bombay High Court

Narayan Nanajee Gayadhani and Others APPELLANT

Vs

Ganesh Trimbak Gayadhani RESPONDENT

Date of Decision : 25-01-1926

Acts Referred:
Transfer of Property Act, 1882 — Section 51

Citation : AIR 1926 Bom 599

Hon'ble Judges : Marten, J;Madgavkar, J

Bench : Full Bench

Judgement

Marten, J.—(After dealing with certain preliminary matter not material to the report his Lordship proceeded) : Next, turning to the main point, this is whether the mortgagees can debit the mortgagor with the whole or some portion of the alleged improvements which they have effected by re-building the property. Now, one difficulty in this case is that the original mortgage in 1851 was not of the entire property. It was only of one fourth of a particular property. But, in 1914, the defendants, who were then the mortgagees of this one quarter and the absolute owners of the remaining three quarters, pulled down the whole building and erected a new building consisting of a ground floor and three upper floors. Before us, it is not, I think, contended that the mortgagor can recover his share of this building without allowing for some portion, at any rate, of the expenditure by the mortgagees on the new building. But undoubtedly, the quantum is in dispute and to some degree also the principles on which any relief should be granted.

2. The appellant-mortgagees refer to Section 51 of the Transfer of Property Act and claim that that section applies. It is said, on the other hand, that they could not have believed in their absolute ownership in good faith inasmuch as they had pleaded in the above suit that they were only mortgagees. But, when one comes to look at the decree in the 1907 suit, it is reasonably clear, I think, that the Judge considered that the mortgage was either too old to be considered as a chose-in-action or else that the mortgagor''s heirs and legal representatives had

by their conduct and acquiescence renounced or lost their right to redeem. Consequently, he held that the defendants were not mortgagees as they claimed, but were absolute owners, and that consequently the then suit, which was for a partition by one of the three sons of the original mortgagee Laxman, could be maintained. Accordingly, the learned Judge directed that the plaint houses were to be divided into three parts, and that one of them was to be given to the then plaintiff, and the partition was to be effected under the Partition Act.

3. This, I take it, could only have been done on the basis that the alleged mortgagees were really the absolute owners of the present suit property. No doubt, that partition was not binding on the mortgagor, because he was not a party to it. But it was clearly not a collusive suit, and, under the circumstances, it seems to me that the present defendants, having regard to that decision of the Court, which, we are told, was affirmed by the High Court, would be entitled to consider that they were the absolute owners of the property. No doubt, in view of the present suit that opinion of theirs was wrong, but I am only dealing with their position in 1914 u/s 51 of the Transfer of Property Act. Accordingly, I would hold that they believed in good faith that they were absolutely entitled to the property. I. accordingly, agree with the finding of the trial Court at page 9, line 48, "Good faith can be attributed to defendants'' conduct."

4. The next point is, whether, under that section, the option lies with the mortgagor or the mortgagee. In our judgment, the option rests with the mortgagor as to whether he will pay the value of the estimated improvement on the one hand, or on the other hand "sell his interest to the transferee at the then market value thereof irrespective of the value of the improvement." That view was the one adopted by the majority of the Bench in Ramanathan v. Ranganathan [1917] 40 Mad. 1134. At page 1144 Mr. Justice Seshagiri Ayyar says:

Under the Transfer of Property Act there is no question that the option should be given to the transfer or to elect either to convey the property validly or to pay compensation.

5. At p. 1160 Sadasiva Ayyar, J., says:

I agree with Seshagiri Ayyar, J., that the option is with A, the person entitled to eviction, in this case, the plaintiffs.

6. The mortgagor by his pleader states that he elects to exercise the first option, viz., "to have the value of the improvement estimated and paid or secured to the" mortgagee. But he complains that the learned Judge has put the value off the improvement at too high a sum Now, that is largely, if not entirely, a. question of fact. (His Lordship, after dealing with other matters concluded by dismissing the appeal and the cross-objections.)

Madgavkar, J.

7. (After dealing with certain preliminary matter his Lordship proceeded.) The

next contention of the defendants with regard to Section 51 of the Transfer of Property Act deserves more serious consideration. It appears from the judgment in Suit No. 39 of 1907 that the learned Subordinate Judge inclined to the view in that suit that the mortgagor''s rights to redeem were barred. In 1914, when the appellants erected their building, they might have been under the impression that these rights were so barred, notwithstanding their unfortunate defence and attempt to save that bar of limitation. But, even conceding that they acted in good faith within the meaning of Section 51, as laid down in Ramanathan v. Ranganathan [1917] 40 Mad. 1134, the course of action pursued by the appellants does not fall within that section. The construction of that section, for which the appellants contend. is that under that section it is the transferee who has the right to exercise the option, and to remain in possession. This construction is, in my opinion, incorrect. The wording of that section may be capable of improvement. But, even as it is actually worded, it protects the bona fide transferees, such as the appellants in the case, from eviction, without any compensation, by conferring upon them a certain right. That right is to call upon the person with a better title to exercise the option laid down in the section. In the present case, as it happens, the lower Court gave the respondent the option of paying for the improvements to the mortgagee or of obtaining possession after demolition, and he has chosen the former, which is in fact the fist option u/s 51. That section, therefore, does not improve the position of the appellants as against the decree of the first appellate Court. (The rest of the judgment is not material to. the report).

