

(1930) 04 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal No. 71 of 1927

Nilkanth Balwant Natu and others

APPELLANT

Vs

Vidya Narasinh Bharathi Swami

RESPONDENT

Date of Decision : 01-04-1930

Acts Referred:

Citation : (1930) AIR(PC) 188

Hon'ble Judges : Lancelot Sanderson, Russell of Killowen, Lords Blanesburgh, JJ.

Advocate : Raikes, Parikh, L.De Gruyther, W.R. Jardine, A.M. Dunne, for the Appearing Parties.

Judgement

Sir Lancelot Sanderson, J.

The first appeal is by the plaintiffs in the suit, and the cross-appeal is by the second defendant, Vidya Narasinh Bharati Guru.

The plaintiffs brought the suit in the Court of the Subordinate Judge at Satara, as successors in title to one Balaji Narayan Natu, who was the mortgagee under certain mortgage-deeds specified in the plaint, and executed between the years 1840 and 1844.

The mortgages were made by Vidya Shankar Bharati, who is deceased.

Defendants 1 and 2 were rival claimants to the office of Jagad Guru of the Sankeshwar and Karvir Math, and each of them claimed to be the sole successor of the mortgagor.

Respondent 1 is the legal representative of the first defendant.

The cross-appeal presented by defendant 2 is with reference to mortgaged properties situated in Kolhapur district and is based upon the allegation that the Satara Court had no jurisdiction to entertain the suit with regard to the said properties in Kolhapur, which lie outside British India.

The appeal is against a decree dated 12th February 1924, of the High Court of

Bombay, in Appeal No. 146 of 1919, which varied a decree of the learned Subordinate Judge of Satara, dated 21st July 1919.

The cross-appeal is against the said decree of the High Court and another decree of the said High Court of the same date, in Appeal 169 of 1920 whereby the appeal of defendant 2 was dismissed with costs.

The properties, in respect of which relief is now sought by the plaintiffs, are situated in Satara, Belgaum and Kolhapur.

Satara and Belgaum are, and Kolhapur is not, within British India.

It will be convenient to deal first with the question relating to the properties in the Kolhapur district and the cross-appeal.

The learned Subordinate Judge among other issues settled the following :

"(1) Did the mortgagor consolidate by his conduct or agreement all the mortgages together and is he estopped from contending that the several bonds are not a charge on the entirety of the property but only on property covered respectively by each ?

""(2) Whether one suit can lie in this Court on different causes of action arising in different jurisdictions in respect of different bonds relating to different properties."

The learned Subordinate Judge tried as preliminary the first two issues and, deciding each of them against the plaintiffs, dismissed the suit on 4th December 1913, but the High Court on 7th June 1918, reversed his decree, holding on issue 1 that there were stipulations in the mortgages which amounted to an agreement that the principle of consolidation should apply to them and on issue 2, that the Satara Court had jurisdiction to entertain the suit, under S. 17 of the Code as relating to properties situated within the jurisdiction of any Courts.

The preliminary decree was set aside and the case was remanded to the Court of the Subordinate Judge for disposal.

The learned Subordinate Judge tried the remaining issues; he made an order for the appointment of a commissioner and on the return of the report he made a decree in favour of the plaintiffs for Rs. 3,31,882-0-8, and for recovery of possession of the mortgaged properties situated in Kolhapur.

On appeal the High Court amended the decree of the learned Subordinate Judge by giving liberty to the plaintiffs to bring to sale the mortgaged properties in the Kolhapur State and by giving certain directions as to interest.

The section of the Civil Procedure Code, 1908, on which the High Court relied, as giving jurisdiction to the learned Subordinate Judge of Satara with respect to the mortgaged properties in Kolhapur is S.17.

The plaintiffs in the suit, among other matters, prayed for foreclosure or sale of

the mortgaged property; it is therefore necessary to refer to the provisions of S.16(c) of the Code, which are as follows:

"Subject to the pecuniary or other limitations prescribed by law, suits for foreclosure sale or redemption in the case of a mortgage of or charge upon immovable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situated."

There is a proviso which does not affect the present case: and the "Explanation" is as follows: "In this section "property" means property situated in British India".

The terms of S.17 are as follows:

"17. Where a suit is to obtain relief respecting, or compensation for wrong to immovable property situated within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situated:

"Provided that in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court."

The High Court decided that the words "respecting immovable property" are wide enough to cover suits for foreclosure, sale or redemption in the case of mortgages or charges upon immovable property mentioned in S.16 (c), and that S.17 is supplementary to S.16 and in order to prevent multiplicity of suit.

Their Lordships agree with the learned Judges' decision that the words "a suit to obtain relief respecting immovable property", are wide enough to cover the suit in the present case, which included prayers for foreclosure or sale of the mortgaged property: but that does not conclude the matter.

The question remains whether the words "situated within the jurisdiction of different Courts" does not limit the operation of the section to suits to obtain relief respecting immovable property situated within the jurisdiction of different Courts within British India.

The preamble to the Civil Procedure Code recites that it is expedient to consolidate and amend the laws relating to the procedure of Civil Judicature, and S.1 (3) provides as follows:

"This section and Ss.155 to 158 extend to the whole of British India; the rest of the code extends to the whole of British India, except the scheduled districts.

The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India, and their Lordships are of opinion that the words in S. 17 "within the jurisdiction of different Courts" must mean within the jurisdiction of different Courts to which the Code applies, that is to say, Courts in

British India. This is accordance with the decision of the Judicial Committee in *Setrucherla Ramabhadraraju v. Maharaja of Jeypore*, AIR 1919 PC 150 =42 Mad

813=46 IA 151 (at p. 157 of I. A.). Inasmuch as the properties in Kolhapur are not within the jurisdiction of any Court in British India, the learned Subordinate Judge of Satara had no jurisdiction to try the suit, so far as it related to the mortgaged properties situated in Kolhapur.

The learned Judge had jurisdiction to try the suit so far as it related to the mortgaged properties situated in Satara; and, inasmuch as the mortgaged properties in Belgaum are within the jurisdiction of a different Court in British India, he had jurisdiction to deal with those properties also.

The result therefore is that the cross-appeal of defendant 2 must succeed; and the decrees of the Courts in India, so far as they relate to the properties situated in Kolhapur, must be set aside. The question of costs will be dealt with at a later stage.

The plaintiffs' appeal relates to the mortgaged properties situated in Satara and Belgaum.

Both Courts in India rejected their claim in respect of these properties.

It was alleged on behalf of the defendants that the properties comprised in the mortgages were Dewasthan or Saranjam and not liable to be mortgaged. Both the Courts in India have decided against the defendants in respect of this contention, and their Lordships see no reason for doubting the correctness of that decision.

The learned Subordinate Judge held that the plaintiffs were not entitled to an order for sale of the properties in Satara and Belgaum, and further that the plaintiffs' claim for possession of these properties was not brought in time.

The learned Judges of the High Court held that there was nothing in the mortgages to exclude the right of sale given by S.15, Bombay Regulation 5 of 1827, but they came to the conclusion that the properties in British territory were given back to the mortgagors before 1860 and that no steps were taken to recover possession until the present suit was filed. They thought that the proper presumption was that the parties agreed that the security of the above mentioned properties should be given up, and that the Kolhapur properties only should be considered a security for the debts.

As already stated, the High Court made a decree that the plaintiffs were entitled to bring the properties in Kolhapur to sale but the decree gave the plaintiffs no relief in respect of the mortgaged properties situated in Satara and Belgaum.

It is against that part of the decree that the plaintiffs' appeal is directed.

Ex. 38, which is a translation of the mortgage deed of 15th July 1840, may be taken as a specimen of the mortgages. It was made between Vidya Shankar Bharati, the mortgagor, and Balaji Narayan Natu, the mortgagee.. It recited that Rs. 20,000 had been borrowed for the expenses of the Sansthan; that it had been agreed to pay interest thereon at the rate of twelve annas per cent per

mensem without remission; that for the repayment of the debt the four Inam villages of the Sansthan therein specified were mortgaged.

The total revenue of the four villages, Rs. 4,300, made up of Rs. 2,700 in Shambhu Pirkhani (coin) and Rs. 1,600 in Panhali (coin), was assigned in mortgage. The deed contained certain clauses as to management, of which the following are relevant :

?An account of the debt duo to you i. e., of the principal borrowed and interest will be made on the 1st of Ashad Vad (latter half) and after deducting the Vasul (collection) of the villages that may have been applied towards the debt, we shall approve and pass the account of balance that may be found due and affix our seal thereto. Even if we fail to pass the account yet we shall get the said villages released after clearing off the total amount of balances found due every year . . .

Within one month after the closing of the year, the accounts in respect of the villages should be got prepared by the Patil Kulkarni and submitted to the Huzur. The same will be examined and passed within one month. If any additional Vasul (revenue) be received by you, the same shall be entered towards the repayment of the debt at the time of the passing of the accounts by confrontation with your karkun (clerk). You will have nothing to do with any difference after two months subsequent to the passing of the account . . .

If we can manage to get money from other sources for the repayment of your debt, you should accept the amount when we pay it and release the villages. If, in the year in which we pay the money, it is paid within a month after the expiry of that year, the amount of remuneration stated above will be given proportionately; and if the amount is paid after one month, the amount of remuneration for the whole year will be given."

The other mortgages are to the same effect, and this appeal was argued by both sides on the assumption that the mortgages were consolidated, as held by the High Court, and that the debts due under all the mortgage deeds were a charge upon all the properties.

There is no doubt that the mortgagee, or his successors-in-title went into possession of the mortgaged properties and received the rents and profits arising therefrom. It has, however, been established that after 1859 the mortgagee did not collect the rents and profits of the mortgaged properties which are in Satara and Belgaum.

It was alleged by the defendants that there was an actual adjustment between the parties in 1849 or 1850 to the effect that a sum of Rs. 1,32,000 should be paid without interest in full settlement of the mortgage debts, that the mortgage deeds were cancelled and that in pursuance of the said adjustment the mortgagee gave up his possession of the mortgaged properties in British India.

The Courts in India held that the above mentioned allegation was not proved, and no reliance was placed upon it at the hearing of this appeal.

Their Lordships are unable to agree with the decision of the High Court, that the parties agreed that the security of the mortgaged properties in British India should be given up and that the mortgaged properties in Kolhapur only should be considered as security for the debt.

The learned Judges came to that conclusion, holding that a presumption to the above mentioned effect was raised on the facts.

The two facts relied upon were that before 1860 the properties in British territory were given back to the mortgagors and no steps were taken to recover possession until the suit was filed.

In the first place, in their Lordships' opinion there is no evidence to justify the finding that the said properties were given back if by these words the learned Judges meant a re-transfer of the properties. The mortgage deeds were not cancelled. They remained with the mortgagee or his successors, and they were produced and proved by the plaintiffs at the trial. There is no evidence of any surrender of the plaintiffs' rights except the fact that after 1859 the plaintiffs or their predecessor ceased to receive the rents and profits of the mortgaged properties situated in Satara and Belgaum.

In the second place, even if the facts relied upon by the learned Judges are sufficient to raise the presumption to which they referred, they are consistent with other presumptions, which may be said to be just as reasonable as that on which the learned Judges founded their judgment. As, for instance, the learned Subordinate Judge thought it was quite reasonable to adopt the suggestion that the mortgagor being the spiritual guru of the mortgagee, the mortgagee might have given up the possession of the villages in British territory to enable the mortgagor to maintain the establishment and meet the expenses of the Sansthan without in any way intending to give up his rights as mortgagee or to abandon his remedies, if and when he desired to enforce them.

It is not necessary to deal with this part of the case at any length, as it was not seriously argued that the judgment of the High Court could be supported on the above-mentioned ground.

The main ground, on which the defendant-respondents relied at the hearing before the Board, was that the mortgages were usufructuary mortgages and that if the mortgagee was not in possession his only right was to be placed in possession or to sue to recover the money from the mortgagor personally by reason of his breach of contract to place the mortgagee in possession, and that the plaintiffs were not entitled to an order for sale of the mortgaged properties.

The provisions regulating the rights of the parties under the mortgages in suit are contained in the Bombay Regn. 5 of 1827.

Chapter 5 of the said regulation is headed "of the disposal of property mortgaged or pledged." The chapter consists of one section, viz S.15, which is as follows :

First. - When a creditor is placed in possession of property by mortgage or otherwise, as security for a debt, his claim over such property shall in the absence of other special agreement, constitute his sole security for payment of the debt, or such part of it as the said property may have been given in security for, and interest thereon is to be considered as included in the said security.

Second. - If the property yield profit, and no stipulation has been made respecting the disposal of the said profit, or payment of interest on the debt, the profit shall be considered as equivalent for the interest.

Third. - In the absence of any special agreement or recognized law or usage to the contrary, either party may, at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner."

Their Lordships are of opinion that the learned Judges of the High Court were right in holding that S.15 (3) of the Regulation is applicable to the mortgages in suit. That subsection, in their Lordships' opinion is not limited to the case where the creditor has been placed in possession and remains in possession.

The chapter purports to deal with the disposal of property mortgaged, and in their Lordships' opinion the terms of S.15 (3) are general and wide enough to cover the mortgages now in suit, and the property thereby charged.

The plaintiffs, therefore, were entitled by the institution of a civil suit to cause the property to be applied to the liquidation of their debt, or in other words to bring a suit for the sale of the properties, unless it could be shown that there was a special agreement or recognized law or usage to the contrary.

There is no suggestion that there is any law or usage to the contrary, and their Lordships are of opinion that there is no evidence of any special agreement to the contrary either in the terms of the mortgages or otherwise.

Consequently, the rights of the plaintiffs under the mortgages being still in existence, and the moneys being due, the plaintiffs, subject to the question of limitation, are entitled to an order for sale of the mortgaged properties situated in Satara and Belgaum.

The question remains whether the plaintiffs' suit is out of time.

It was argued on behalf of the defendants that the cause of action arose in 1859 or 1860, when the plaintiffs' predecessor ceased to be in possession of the mortgaged properties in Satara and Belgaum : that the Limitation Act 14 of 1859 was then in force and that by reason of S.1 (16) the suit was out of time, inasmuch as it should have been brought within the period of six years from the time the cause of action arose.

Reliance also was placed upon Art.132, Lim. Act, 1871, by which it is provided that a suit to enforce payment of money charged upon immovable property must be brought within 12 years from the time when the money sued for becomes

due. This section is in similar terms to Art.132, Lim. Act, 1908.

Their Lordships are not able to accept the defendants' contention in this respect.

In the first place the plaintiffs or their predecessor were not bound by the terms of the mortgages to enter into possession of the mortgaged properties and to apply the rents and profits thereof towards the payment of the debt, though they had power so to do, and the mere fact that the mortgagee permitted the mortgagor to receive the rents and profits in and from 1860 did not give rise to a cause of action.

In the second place there was no specific time fixed for the payment of the debt and their Lordships are of opinion on the facts of this case that the money did not become due and the cause of action did not arise until demand for the payment of the mortgage debt was made by the mortgagee and it was refused by the mortgagor.

Their Lordships' attention has not been drawn to any evidence of any such demand and refusal prior to the institution of this suit, and the filing of the written statements by the defendants.

Consequently they are of opinion that the suit was not barred by limitation.

The appeal of the plaintiffs, therefore, must be allowed so far as the mortgaged properties in Satara and Belgaum are concerned.

The decree of the High Court in Nil Kant Balwant v. Vidyashankar Bharati, AIR 1924 Bom. 387, should be set aside and a decree made in the suit in favour of the plaintiffs against the defendants for the sum of Rs.331,822-0-8 and interest thereon at the rate of 12 annas per cent per mensem from the date of suit until realization, and for the balance of costs, if any, hereinafter mentioned, with a direction that the sums are to be paid within six months of the date on which the order of His Majesty in Council is received by the Court of the Subordinate Judge, and that in default the plaintiffs will be entitled to bring to sale the mortgaged properties situate in Satara and Belgaum.

As already stated the cross-appeal must succeed. Consequently the decree of the High Court dated 12th February 1924, in Appeal No. 169 of 1920, must be set aside.

The position is that the plaintiffs have succeeded in their appeal so far as the mortgaged properties in Satara and Belgaum are concerned, but the cross-appeal, which concerns the mortgaged property in Kolhapur, has succeeded, and the plaintiffs consequently have failed to hold the decree in their favour in respect of the property in Kolhapur.

In their Lordships' opinion the order as to costs should be that the cross-appeal be allowed with costs, that the plaintiffs' appeal be allowed to the extent already stated and that the plaintiffs are entitled to one-half of their costs on their appeal to His Majesty in Council, and in both the Courts in India that the costs of the

cross-appeal be set off against the costs thus awarded to the plaintiffs and that the balance, if any, be added to or deducted from their above-mentioned mortgage debt as the event may require.

Their Lordships will humbly advise His Majesty accordingly.