
(1935) 08 BOM CK 0001
In the Bombay High Court
Case No : Appeal No. 16 of 1934

Pitambar Khemji Gujar

APPELLANT

Vs

Rajaram Shahajirao Surbarao Mahamunkar

RESPONDENT

Date of Decision : 09-08-1935

Acts Referred:

Registration Act, 1908 — Section 17(1)(b)

Citation : AIR 1936 Bom 175 : (1936) 38 BOMLR 205

Hon'ble Judges : N.J. Wadia, J; John Beaumont, J

Bench : Division Bench

Final Decision : Allowed

Judgement

John Beaumont, Kt., C.J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Divatia. The plaintiff had sued to redeem a mortgage under-s. 15 D of the Dekkhan Agriculturists' Relief Act. The mortgage was made in 1875 by the plaintiff's brother to the predecessor-in-title of the defendants. The plaintiff's brother executed the mortgage as the manager of the joint family, and as the plaintiff was suing to redeem the mortgage, he necessarily admitted the validity of the mortgage which indeed he could not have challenged in a suit u/s 15 D of the Dekkhan Agriculturists' Relief " Act. Then in 1877, two years after the mortgage, the plaintiff's brother sold the equity of redemption to the mortgagee for Rs. 20. The trial Judge held that, there being no evidence that that sale was for legal necessity, the plaintiff was not bound by it and the sale only affected the half share of the plaintiff's- brother in the equity of redemption. In appeal the learned Judge differed from that portion of the decision and held that the sale comprised the whole interest in the equity of redemption.

2. In second appeal Mr. Justice Divatia held that the conveyance of the equity of redemption required registration, and not having been registered could not be given in evidence, and therefore the mortgage was a subsisting mortgage. I am unable to agree with that view of the learned Judge. The sale of the equity of

redemption being for less than Rs. 100, prima facie the document does not pass an interest in Immovable property of the value of Rs. 100 or upwards, and does not therefore require registration u/s 17 (I) (b) of the Indian Registration Act. But the learned Judge held that the effect of the conveyance was to extinguish the mortgage which was for more than Rs. 100, and therefore the conveyance of the equity of redemption amounted to the extinguishment of an interest in Immovable property of a greater value than Rs. 100. In my opinion that view involves some misconception. The rights of the mortgagee were not extinguished or released by the conveyance of the equity of redemption; they were merely enlarged. Prior to the conveyance of the equity of redemption the mortgagee was the legal owner with a right to possession, but he was liable to be redeemed. After the conveyance of the equity of redemption he remained the legal owner with a right to possession, but free from the liability to be redeemed. That is to say, his interest was enlarged from a defeasible to an indefeasible interest. The learned Judge refused to follow a decision of the Punjab Chief Court in *Pir Bakhsh v. Mangal & Lehna* (1891) P.R. No. 16 of 1892, which is referred to in the latest edition of Sir Dinshah Mulla's book on the Indian Registration Act, Third Edition, at p. 47, and he followed a decision of the Calcutta High Court in *Barsik Nandi Mandal v. Gurudas Pal* (1927) 46 C.L.J. 573. The Calcutta Court seems to have held that a conveyance of the equity of redemption which included "a release of the mortgagor's liability under the mortgage required registration because the mortgage debt was for more than Rs. 100, though the consideration for the conveyance was less than Rs. 100. I do not follow how a release of the personal liability of the mortgagor can be held to be an extinguishment of any interest in an Immovable property; it seems to me to be merely an extinguishment of a personal liability. In my opinion the view taken by the learned Judge in second appeal was wrong and the document did not require registration and can be given in evidence.

3. Then the next question is one on which the trial Court and the appellate Court differed, viz. as to whether the equity of redemption covered more than the half share of the plaintiff. As I have pointed out, it is clear that the plaintiff had acknowledged the right of his brother to create the mortgage. There is no evidence as to whether the plaintiff was aware of the sale of the equity of redemption in 1877. If he was not, he would no doubt be entitled to challenge the sale though not in a suit under the *Dekkan Agriculturists' Relief Act*; but I think that at this distance of time, the plaintiff having waited fifty years before bringing this suit, we cannot assume in his favour that he had no knowledge of the conveyance of the equity of redemption. That view is supported by a decision of this Court in *Krishnaji Sonji Gawade Vs. Sadanand Mahadev Thakur*, .

4. In my opinion the decision of the lower appellate Court was right and this appeal must be allowed and the plaintiff's suit dismissed with costs throughout. Appeal allowed with costs.

N.J. Wadia, J.

5. I agree.