

(1910) 10 BOM CK 0001

In the Bombay High Court

Case No : Cross Appeal No"s. 219 and 823 of 1908

Radhabai

APPELLANT

Vs

Ramchandra Vishnu Paranjpe
 Ramchandra Vishnu
Paranjpe Vs Radhabai

RESPONDENT

Date of Decision : 11-10-1910

Acts Referred:

Transfer of Property Act, 1882 — Section 74

Citation : (1911) 13 BOMLR 30

Hon'ble Judges : Rao, J;Batchelor, J

Bench : Division Bench

Judgement

Batchelor, J.—The plaintiff sued as an agriculturist to redeem a mortgage and to recover possession of the mortgaged property on payment of any sum which the Court might find to be still owing to the defendants, the representatives of the original mortgagee. The mortgage was executed in 1863, and the sum secured was Rs. 300. It was admitted that the mortgagee went into possession in 1867 under the decree of the Court, and has since remained in possession.

2. The defendants denied that the plaintiff was an agriculturist within the meaning of the Dekkhan Agriculturists" Relief Act, and claimed that Rs. 1,038-4-11 were due on the mortgage, including a sum of Rs. 380 which the mortgagee had to pay to prior mortgagees before he could go into possession under the decree of 1867.

3. The Court of first instance found that the plaintiff was not an agriculturist, and that, on accounts taken, the mortgagee had already received Rs. 2,549-4-3 from the rents and profits of the mortgaged property it therefore decreed redemption without any further payment, but it made no order for the refund to the plaintiff of the excess payment.

4. The defendants appealed to the District Court, where it was held that the plaintiff was not an agriculturist, and that the defendants were relieved of any

liability to account by reason of the former decree in the suit of 1867. The mortgagee's claim to the Rs. 380 was also refused.

5. Dealing first with the plaintiff's appeal, we have to determine whether the Court below was wrong (1) in holding that the plaintiff is not an agriculturist within the Act, and (2) in holding that the plaintiff's right to have accounts taken from the mortgagee in possession was lost by reason of the decree of 1867.

6. On the first point we have no hesitation in agreeing with the District Judge. The sole ground on which the plaintiff claims to be an agriculturist is that she is the wife of an agriculturist; but that circumstance does not, we think, constitute her an agriculturist within the meaning of the Act. She does not earn her livelihood by agriculture, but by being the wife of her husband he might change his occupation to-morrow, but she would not be affected by the change. It seems to us that she can no more be called an agriculturist because her husband is an agriculturist than she could be called an engineer, or a doctor if her husband happened to follow one of those professions.

7. As to the second point the decree of 1867 is Exhibit 38 in the case. It sets out that the then plaintiff, the mortgagee was suing for possession of the mortgaged land, that is, we infer, for possession under the terms of the mortgage bond; and there was a prayer that, until possession should be delivered over, or until the mortgage money was paid off, interest should be awarded at the rate of 2 per cent. per mensem. The decree then orders that the mortgagor "should pay to the plaintiff (the mortgagee) Rs. 300 and interest, Rs. 27, in respect of his claim. Until payment of the moneys, or until the principal is doubled, interest should be at the rate of 2 per cent. per mensem from 30th July 1867; and until payment of the moneys the land mortgaged, which is asked for in the suit, should be handed over according to the agreement. And the defendant should redeem the land by paying the plaintiff's money." It should be noted that the instrument of mortgage is not produced.

8. The question is whether the term of this decree deprive the mortgagor of a right to accounts in the present suit.

9. For the respondents reliance is placed on *Navlu v. Raghu* ILR(1884) 8 Bom. 303 and *Rambhat v. Ragho Krishna Deshpande* ILR (1892) 16 Bom. 656, it being argued that the case of *Datatraya Ravji v. Anaji Ramchandra* (1886) P.J. 237 is distinguishable on the precise ground on which in the Full Bench decision in *Tani Bagavan v. Hari* ILR (1872) 16 Bom. 656, it was distinguished from *Navlu v. Raghu*, namely that in *Datatraya's* case the decree simply awarded possession of the mortgaged property) whereas here, as in *Tani Bagavan v. Hari*, the decree directs the payment of a certain sum found to be due and enjoins that until that sum is paid, possession is to remain with the mortgagee.

10. We think that this contention must be conceded, and that so far the present case does fall outside the ruling in *Datatraya v. Anaji*. But it still remains to consider whether in other respects it can be brought within *Navlu v. Raghu* and

the cases which followed that decision and which are, whether we agree with them or not, binding upon us.

11. We entirely concur in what was said by Farran J. in *Tani Bagavan v. Hari* as to the manner in which such a case as this should be approached. In such a suit, said that learned Judge, "all that the Court is at liberty to do is to construe the decree in the former suit, to ascertain its intention from the expressions contained in it, and to give effect to that intention when so ascertained." We must, therefore, be guided primarily by the actual terms of the particular decree of 1867, and for that reason we have set them out in full. Among those terms is a provision for future interest, which at once distinguishes this decree from the decrees considered in the cases cited for the respondents and shows that the relation of mortgagor and mortgagee was intended to continue. The decree on its face contemplates the taking of an account in the future to ascertain the amount of accrued interest due to the mortgagee, and, since the remedies between the parties are mutual, that implies that an account be taken also of rents and profits debit-able to the mortgagee. It may be observed further that, under the decree, possession is to be delivered to the mortgagee "according to the agreement," that is, we understand, according to the mortgage agreement, so that this provision also negatives the theory that the decree was intended to act as a foreclosure decree or to extinguish the contractual relation between the parties. This point is made still clearer by the order that the mortgagor should, that is, should at some future date, redeem the property by paying the sum due; and we can only read these words as contemplating a future suit to redeem on payment of such sum as may then be found to be due. We are, therefore, of opinion that the decree did not supersede the contractual relation, to employ the language of West J. in *Navlu v. Raghu*, but by putting the mortgagee into possession merely carried out the terms of the contract, which for the rest it preserved and kept alive.

12. There was no foreclosure either in fact or in intention, and it was in his capacity as mortgagee, entitled by the contract to possession, that the defendant's predecessor was put into possession by the Court's decree. The facts thus resemble those which were before the Judicial Committee in *Sri Raja Papamma Rao v. Sri Vira Pratapa H.V. Ramchandra Razu*, ILR (1896) Mad. 249 where their Lordships say, in language which appears appropriate to the present suit:—"It is sufficient that the mortgagee, not being entitled to foreclosure and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession "as provided in the terms of the bond" ... and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee thereupon became mortgagee in possession; and as such he must submit to be redeemed."

13. If the above decision is in point, it is manifest that it cannot be displaced by any ruling of this Court, and that would be sufficient answer to Mr. Khare's

reference to the unreported case of Valabh Krishna v. Natha, Second appeal No. 568 of 1901. There, moreover, the Court observed that "as redemption could be only on the terms expressed in the decree, the taking of accounts is beside the question."the decree then in question is not now before us, but we infer from the words cited that it contained a clause definitely negative the taking of accounts in future; in the decree with which we are concerned there is no such provision.

14. On these grounds we hold that the Subordinate Judge was right in allowing accounts to be taken; and since the mortgagor did not appeal against the order absolving the mortgagee from liability for any surplus receipts over and above the sum necessary for redemption, we cannot now impose any further liability in that respect.

15. It is clear also that the Subordinate Judge was right in allowing the mortgagee credit for the Rs. 380 which he paid to the prior mortgagees in order to obtain possession. Under s. 74 of the Transfer of Property Act the mortgagee was entitled to redeem the earlier encumbrance.

16. For these reasons we reverse the decree of the District Judge and restore that of the Subordinate Judge.