
(1933) 12 BOM CK 0012

In the Bombay High Court

Case No : Letters Patent Appeal No. 33 of 1931

Sakharam Shivram Mahadik

APPELLANT

Vs

Dhaktojirao Shripatrao Kadam

RESPONDENT

Date of Decision : 04-12-1933

Acts Referred:

Dekkhan Agriculturists Relief Act, 1879 — Section 12
Transfer of Property Act, 1882 — Section 76

Citation : AIR 1934 Bom 321 : (1934) 36 BOMLR 633 : (1934) ILR (Bom) 472 : 152 Ind. Cas. 434

Hon'ble Judges : Murphy, J;Divatia, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Murphy, J.—The plaintiff sued for an account of a mortgage with possession executed on April 16, 1918, the consideration being Rs. 2,940. The Courts below have found that nothing is now due on it.

2. The transactions between the parties were investigated under the Dekkhan Agriculturists' Relief Act, Section 13, and were found to go back to a mortgage of 1891, which was for Rs. 1,500, and accounts were taken on this basis. Both the mortgages were with possession, the rent being agreed to be taken in lieu of interest by the mortgagee. There were accounts from 1891 to 1906-07, but for the period after that none were produced.

3. The learned Subordinate Judge's finding was that the mortgagee got as rent in kind two khandis and twelve and a half maunds of paddy from 1891 to 1897; two khandis and twelve maunds from 1898 to 1904, and two khandis and five maunds from 1905 to 1917, but that he should have got five khandis, one maund and eight payalis of paddy with some maunds of nagli and sheaves of fodder and a cash payment of Rs. 16-10-8 from 1891 to 1917, and four khandis, two maunds and eight payalis of paddy from 1918 onwards.

4. The accounts were taken on this basis calculating nine per cent. as fair interest, and since the return was in kind, adopting an arbitrary rate of grain to the rupee, ranging from ten payalis to five payalis for different years.

5. The learned Subordinate Judge's view was that though an account is to be taken under the Dekkhan Agriculturists' Relief Act, this does not affect the provisions of Section 76, Clauses (a) and (b), of the Transfer of Property Act, the mortgagee being bound to manage the property as a person of ordinary prudence would if it were his own, and to use his best endeavours to collect the rents and profits.

6. On the facts, it appears that a person called Bhaurao was the lessee for a good many of the years in question. He was a relation of the family, and the learned Subordinate Judge thought that the mortgagee rented the property to him on a rent just enough to meet his demand of interest, regardless of the duties cast on him by the law, to make the best of the property in his possession, and that in this manner damage had been caused to the interests of the mortgagor.

7. This conclusion was reached after discussing some evidence to show what would be a fair rent; but, as the learned Subordinate Judge's judgment shows, it is principally the evidence of the plaintiff and as to what he has been able to get since he went into possession, and not evidence as to what rents were obtainable in 1891, as compared with 1918, it being a historical fact that prices were low in 1891, and high after the War in 1918, and that rents follow the course of prices.

8. As to prices the learned Subordinate Judge thought that the evidence showed that paddy fetched ten payalis to the rupee in 1891, and at the date of judgment five payalis. He has consequently found that the rate was ten payalis from 1891 to 1898, nine, from 1899 to 1902, eight, from 1903 to 1908, seven, from 1909 to 1913, six, from 1914 to 1918, and five payalis from 1919 to date of suit. It is a kind of "Jantri " or scale which has been drawn up arbitrarily, and not even an average, or mean.

9. These are the lines on which accounts have been taken under the Dekkhan Agriculturists' Relief Act.

10. As already mentioned, the ratio decidendi was the application of Section 76 of the Transfer of Property Act to the mortgage. There was some argument as to whether Section 76(b) applied or not, since by Section 77, Sub-section (b) is excepted where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal. The point was not, in our opinion, material, for if Section 76 applies at all, Clause (a), to the effect that the mortgagee must manage the property as a person of ordinary prudence would manage it if it were his own, would apply. But the main question is whether Section 76 of the Transfer of Property Act applies. The facts are that there is a

special Act, the Dekkhan Agriculturists' Relief Act, regulating the relations between impoverished and indebted agriculturists and their creditors, while the general Act, the Transfer of Property Act, prescribes those between mortgagors and mortgagees generally, and for circumstances where the special Act does not lay down exceptions to the general rule. Under the Dekkhan Agriculturists' Relief Act the relations between the mortgagor and the mortgagee, as settled between themselves, are practically set aside, and the Court is directed to go into the history of the transactions between them, to calculate debits and credits according to the rules in the special Act, and to set aside certain kinds of contracts, such as the one in this case, that the profits are to be taken in lieu of interest. It seems to us difficult to reconcile this complete setting aside of the original contractual relations between the parties, with the rules of the general law, which would apply had not the special Act dealt with the particular case, and we think that in the circumstances Section 76 does not apply to this case. If it does not, and we are right in so thinking, then what applies are Sections 13 and 13A of the Dekkhan Agriculturists' Relief Act.

11. Section 12 of the Dekkhan Agriculturists' Relief Act requires that in any suit of the description to which the Act applies, the history of the transactions with agriculturist-debtors must be investigated by the Court, and Section 13 says:

When the Court inquires into the history and merits of a case u/s 12, it shall?

notwithstanding any agreement between the parties or the persons (if any) through whom they claim, as to allowing compound interest or setting off the profits of mortgaged property without an account in lieu of interest, or otherwise determining the manner of taking the account,

and notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create a new obligation,

open the account between the parties from the commencement of the transactions and take that account according to the following rules (that is to say):

(a) separate accounts of principal and interest shall be taken:

(b) in the account of principal there shall be debited to the debtor such money as may from time to time have been actually received by him or on his account from the creditor, and the price of goods, if any, sold to him by the creditor, as part of the transactions:...

12. Then

(d) in the account of principal there shall not be debited to the debtor any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transactions, unless the Court, for reasons to be recorded by it in writing, deems such debit to be reasonable.

13. The section next deals with the account of interest and with money paid by or on account of the debtor to the creditor, and profits received by him, and finally directs that the account shall be made up, to the date of institution of the suit, and the aggregate of balances, if any, appearing due on both such accounts against the debtor on that date shall be deemed to be the amount due at that date, except when the balance appearing due on the interest account exceeds that appearing due on the principal account, in which case double the latter balance shall be deemed to be the amount then due.

14. Section 13A directs that:

Where the mortgaged property is in the possession of the mortgagee or his tenants other than the mortgagor, and the Court is unable to determine what profits have been actually received, it may fix a fair rent for such property and charge to the mortgagee such rent as profits for the purpose of section 13:

Provided that, if it be proved that in any year there was an entire or serious failure of the crops, an abatement of the whole or part of such rent may be allowed for the year.

15. These are the sections of the Act applicable to the facts here, and if, as we think, Section 76 of the Transfer of Property Act is not to be enforced against the mortgagee, then these rules must be followed. Section 13 says that the actual receipts by the mortgagee are to be taken as being what he has received, and since there are accounts from 1891 to 1907, we think what the lower Court ought to have done was to take an account in this manner. The accounts have been subjected to attack in this Court. The original Court thought, on comparing the kirds and khatavanis for the years 1900-01 to 1906-07, that the entries were not quite accurate, but that the accounts were not prepared for the purposes of this suit. On the whole the learned Subordinate Judge seems to have thought that they were not, therefore, proper ones. The learned Subordinate Judge, A.P., says:

In my opinion the defendant did not furnish the Court with the required information on the subject. The account kept by him was not reliable and whatever account was kept did not supply sufficient details to enable the Court to arrive at any definite estimate of the rent.

16. It has been argued that this is a finding of fact, but in the view we have taken of the law in this case, and since we have to reopen the account on another basis, we think that that does not interfere with our jurisdiction on the point.

17. We have, therefore, come to the conclusion that as regards the accounts, they should have been taken from 1891 to 1906 on the basis of the receipts they showed as having come into the hands of the mortgagee, and not on that of wilful default, which has been adopted as the proper basis by the learned Subordinate Judge. This brings us as far forward as 1907. From 1907 to 1918

there is a gap, no accounts having been produced, though we are told that there is some evidence of what was received in that interval on the record. From 1918 to date of suit the mortgagor has been in possession, and the rent he is paid is, what is stated by the learned Subordinate Judge in his finding on the point, four khandis, two maunds and eight payalis. It seems to us that the rate to be adopted between 1907 and 1918, in the absence of evidence, should be a mean between the rates for 1906-07, the last available, and that for 1918, which is as stated in the learned Subordinate Judge's judgment. In our view, therefore, the accounts should have been taken on the basis of the actual receipts from 1891 to 1907, on the basis Of the mean between the rents of 1906-07 and of 1918 for the period between those years, and as taken by the learned Subordinate Judge from 1918 onwards.

18. The second difficulty is the fixing of a rate of payalis of grain per rupee for each year. The way in which this has been done by the learned Subordinate Judge has already been explained. It seems to be based entirely on the statement of the plaintiff. There is no evidence of the actual course of prices, evidence which must be available locally; nor has an attempt been made to look at records of prices during this series of years. We think that such evidence as is available on the point should be called for and taken, and that if none is offered, that statistics must be consulted to show the course of prices in this interval of years, and that conversion from payment in kind into payment in money should be effected on this basis.

19. Lastly comes the point at which a fair rate of interest should be fixed. The rate agreed on in the Courts below was nine per cent. Mr. Desai has argued that we should adopt the Court rate of six per cent. in case we interfere with the judgment, as being a fair one, if the actual receipts are to be taken as the basis of the account. The ordinary rate in the mofussil is a rupee per hundred per month, that is, twelve per cent. We think that in the circumstances of this case the rate adopted by the learned Subordinate Judge, of nine per cent., as the basis of the account, is a fair one to take.

20. We reverse the decrees of the Courts below and remand the appeal to the District Court for taking a fresh account on the lines we have laid down in this judgment. If any evidence is to be tendered, it may be taken by the trial Court.

21. The appellant should get his costs of this appeal in this Court from the respondent who should pay his own. As to the costs in the lower Court, it being a redemption suit, we allow the order in the Courts below to stand.

22. The cross-objections are dismissed.