

(1929) 02 BOM CK 0022
In the Bombay High Court

Shamchandra Rampratap and Others	APPELLANT
Vs	
Bhikamchand Ganeshlal and Another	RESPONDENT

Date of Decision : 21-02-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1, 21

Citation : 122 Ind. Cas. 133

Hon'ble Judges : Madgavkar, J

Bench : Single Bench

Judgement

Madgavkar, J.—[After stating the facts :] The first two issues raise somewhat important questions of law, and it will be convenient to dispose of them at the outset.

2. On the question of jurisdiction reliance is placed for defendants Nos, 3a and 3b on the decision of Pratt, J. in Pranalal v. Goculdas 88 I.C. 92 : 27 Bom. L.R. 570 : AIR 1925 Bom. 333, in which he has held that the High Court of Bombay has no original jurisdiction to grant a declaration as to which out of two or more competing mortgagees is a prior mortgagee, when the property is situated as here, outside Bombay. For the plaintiffs it is pointed out that in a suit by a puisne mortgagee, a prior mortgagee of property outside the jurisdiction was added as a party by Strachey, J., in Sorabji v. Rattanji 22 B. 701, and the decision of Pratt, J., above was referred to with disapproval by Marten, C.J. in the course of the Pull Bench decision in Hatimbhai Hassanally v. Framroz Edulji Dinshaw 108 Ind. Cas. 8 : 29 Bom. L.R. 498 : AIR 1927 Bom. 278 : 51 B. 516.

3. It is, therefore, necessary for me either to follow the view of Pratt, J., above, and hold that I have no jurisdiction in respect of defendants Nos. 3a and 3b, or to give reasons for differing from him, as I am not bound by the decision of a Single Judge sitting on the Original Side. It is a matter of surprise that a point of this importance has not been authoritatively decided in Bombay and the practice settled once for all.

4. The decision of Pratt, J., analysed proceeds on four grounds. He begins by expressing his disagreement with the decision in *Yeshvantrav Holkar v. Dadabhai Curestji* 14 B. 353 which, after being overruled by a Bench of three Judges in *India Spinning & Weaving Co. Ltd. v. Climax Industrial Syndicate* 91 I C. 847 : 50 B. 1 : 27 Bom. L.R. 1281 : AIR 1926 Bom. 1, has now been re-affirmed as good law by a Full Bench of seven Judges in *Hatimbhai Hussanally v. Framroz Edulji Dinshaw* 108 Ind. Cas. 8 : 29 Bom. L.R. 498 : AIR 1927 Bom. 278 : 51 B. 516 referred to above.

5. The second ground is that a declaration as between parties between whom no privity of contract exists, has been held, as in the case of *Norris v. Chambres* (1861) 29 Beav. 246 : 30 L.J.Ch. 285 : 7 Jur. (N.S.) 59, to be outside the ordinary equitable jurisdiction of the Courts of Chancery in England, and the same view is confirmed in this Court by *Jenkins, C.J. in Vaghaji v. Camaji* 29 B. 249 : 6 Bom. L.R. 958.

6. The third ground of Pratt, J., is that Order XXXIV, Rule 1, under which defendants Nos. 3a and 3b are joined, is a rule of procedure "and not a rule that can be invoked in order to extend jurisdiction." Pratt, J., finally observes that (page 573 Page of 27 Bom. L.R.-[Ed.]) "the effect"" of my decision will lead to an. anomaly, for whereas according to *Yeshvantrav Holkar v. Dadabhai Cursetji* 14 B. 353 each of the mortgagees may file a suit against the mortgagor and have their rights as between each of them and the mortgagor determined in a suit in this Court, while the respective interest of the mortgagees, inter se, cannot be- so determined." This, he thinks, is the necessary effect of the decision in *Yeshvantrav Holkar v. Dadabhai Cursetji* 14 B. 353 and until that decision is reversed by the decision of a Full Bench, that anomaly must persist-. In other words the decision of Pratt, J., is not really reconcilable with the rule of law laid down in Order XXXIV, Rule 1, and with the decision in *Yeshvantrav Holkar v. Dadabhai Cursetji* 14 B. 353,

7. On the judgment generally, if I may say so with respect, it is difficult to resist the conclusion that Pratt, J's judgment is throughout coloured by his view that *Yeshvantrav Holkar v. Dadabhai Cursetji* 14 B. 353 is not good law. It is not, however, open to me to consider this view, as I am bound by the Full Bench decision in *Hatimbhai Hassanally v. Framroz Edulji Dinshaw* 108 Ind. Cas. 8 : 29 Bom. L.R. 498 : AIR 1927 Bom. 278 : 51 B. 516 where it was held that a suit on a mortgage by a mortgagee, whether prior or puisne, is not primarily a suit for land under Clause 12 of the Looters Patent, but is a suit for the recovery of a debt secured on land, which is only subject to sale for default of payment. Again, under Order XXXIV, Rule 1, all persons having an interest in the mortgage are necessary parties. The section directs that they "shall be joined." Speaking for myself, if a suit between a mortgagor and mortgagee singly is not a suit for land within the meaning of Clause 12 of the Letters Patent, it is difficult to see why a suit between a mortgagor and different mortgagees not separately but all together, should thereby become a suit for land. Prima facie, it would still remain

a suit for the recovery of debts in a certain order, the land being only liable to sale in default of payment.

8. The second ground of Pratt, J., is with regard to declaration. The case of *Vadhaji v. Camaji* 29 B. 249 : 6 Bom. L.R. 958 as Jenkins, C.J., clearly pointed out, was a suit for declaration of title to land outside the jurisdiction, and it was, therefore, held to be a suit for land and outside ch 12 of the Letters Patent. Similarly, the case of *Norris v. Chambres* (1861) 29 Beav. 246 : 30 L.J.Ch. 285 : 7 Jur. (N.S.) 59, referred to by Pratt, J., was a case of a claim through the heirs of a deceased John Sadleir, one of the founders of the Anglo-Prussian Mining Co, against a Prussian subject for Prussian mines on a contract outside the jurisdiction. It was held by the Master of the Rolls that the dispute must be governed by Prussian Law and decided by Prussian Courts and not according to English Law by the Courts of Chancery which might thereby also pass a decree not executable by the English Courts. With regard to Chancery practice, I may be permitted respectfully to prefer the opinion of Marten, C.J., at page 545 Page of 29 Bom. L.R.-[Ed.] of the Full Bench decision in *Hatimbhai Hassan-ally v. Framroz Edulji Dinshaw* 108 I.C. 8 : 29 Bom. L.R. 498 : AIR 1927 Bom. 278 : 51 B. 516 referred to above, to the opinion of Partt, J. In any case Clause 12 does not itself except declarations between parties between whom there is no privity of contract.

9. As for the third ground, if a rule of procedure, such as Order XXXIV, Rule 1, Civil Procedure Code, cannot be invoked to extend the jurisdiction, neither, it appears to me, can it be set aside to limit jurisdiction. And if separate suits as between a mortgagor on the one hand and a prior or puisne mortgagee on the other are within the jurisdiction, and the rule of procedure under Order XXXIV, Rule 1, enjoins that they should be amalgamated, it is difficult to perceive how jurisdiction is thereby extended. On the contrary, it appears to me that Pratt, J's view would limit, whereas the opposite view does not really extend jurisdiction.

10. On the general canons of interpretation and construction also, the interpretation of one law should not contravene the interpretation laid down of another. The interpretation of Clause 12 of the Letters Patent must not be such as to contravene but, as far as possible, should be consistent with Order XXXIV, Rule 1. Pratt, J , himself admits that his interpretation leads to a clear anomaly and inconsistency. For myself, for the reasons stated above, there appears no difficulty in giving effect both to Order XXXIV, Rule J, and to Clause 12 of the Letters Patent, as interpreted by the Full Bench decision in *Hatimbhai Hassanally v. Framroz Edulji Dinshaw* 108 I.C. 8 : 29 Bom. L.R. 498 : AIR 1927 Bom. 278 : 51 B. 516.

11. For these reasons, with the utmost respect, I must differ from the view enunciated by Pratt, J., in *Pranlal v. Goculdas* 27 Bom. L.R. 570 : AIR 1925 Bom. 333, and hold that a single suit between a mortgagor and prior and pusine mortgagees under Clause 12 as laid down under Order XXXIV, Rule 1, is as competent as separate suits would be And I agree, therefore, with the view

implied by Strachey, J., in *Sorabji v. Rattanji* 22 B. 701 and with the opinion of Marten, C.J., in *Hatimbhai Hassanally v. Framroz Edulji Dinshaw* 108 I. C. 8 : 29 Bom. L.R. 498 : AIR 1927 Bom. 278 : 51 B. 516 , rather than the decision of Pratt, J., and hold on the first issue that this Court has jurisdiction to try this suit as against defendants Nos. 3a and 3b. The finding on issue No. 1 is, therefore, in the affirmative.

12. On the second issue, viz, whether separate leave as against defendants Nos. 3a and 3b was necessary, leave was obtained in January, 1927, against defendant No. 3, who had admittedly died in October, 1926. As observed by Telang, J. in *Rampurtab Samruthroy v. Preme Sukh Chandamal* 15 B. 93, leave is a necessary and a preliminary condition of jurisdiction and must be obtained at the time the suit is filed. Defendant No. 3 was already dead before leave was obtained. Leave obtained in his regard was, therefore, against no person at all, to use the expression of Mulla, J., in *Rampratab Brijmohandas v. Gaurishankar Kashiram* 85 I.C 464 : 25 Bom. L.R. 7 : AIR 1924 Bom. 109. Agreeing with this decision and the view of Candy, J , in *Rampartab Samrathrai v. Foolibhai* 20 B. 767 I am of opinion that the plaintiff should have obtained leave in respect of defendants Nos. 3a and 3b, when they were sought to be joined in February, 1937.

13. That leave has not been obtained. The only further question is whether there has been a waiver on the part of defendants Nos. 3a and 3b. It is to be noticed that the plea of jurisdiction or of leave was not raised by these defendants in their original written statement. At the most, they can only point to para. 2 of their counter-claim "in the event of it being held that this Court has no jurisdiction to entertain the dispute as to the priority of the mortgage." The objection, therefore, to the place of suing has not been taken at the earliest possible opportunity, as was necessary u/s 21 of the Civil Procedure Code, but only before the settlement of issues. On the other hand, the counterclaim only mentions a somewhat vague condition foreshadowing a possible objection. On the whole, therefore, I hold, following the view in *Moore v. Gamjee* (1890) 25 Q.B.D. 244 : 59 L.J.Q.B. 505 : 38 W.R. 669 and of Fletcher, J., in *King v. Secretary of State for India* 35 C. 394 : 7 C.L.J. 441 : 12 C.W.N. 705 that defendants Nos. 3a and 3b have by their omission to take the express plea in their written statement and by their contention waived the objection which would otherwise have been sustainable as to the absence of such leave under Clause 12 in their regard.

14. My finding on issue No. 2, therefore, is that the plaintiff ought to have obtained leave under cl 12 of the Letters Patent to sue defendants Nos. 3a and 3b, but that these two defendants have waived their objection to the place of suing, and, therefore, the finding on issue No. 2 is in the affirmative.

[Note.--The rest of the judgment is not material for the purpose of this report - Ed.]