
(1929) 02 BOM CK 0011
In the Bombay High Court
Case No : O.C.J. Suit No. 101 of 1927

Shamchandra Rampratap

APPELLANT

Vs

Bhikamchand Ganeshlal

RESPONDENT

Date of Decision : 21-02-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 21
Letters Patent Act, 1865 — Clause 12

Citation : (1929) 31 BOMLR 1002

Hon'ble Judges : Madgarkar, J

Bench : Single Bench

Judgement

Madgavkar, J.—[His Lordship, after setting out facts and issues, proceeded.] 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 *Pranlal v. Goculdas* (1825) 27 Bom. L.R. 570 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. Rattonj* I.L.R.(1898) 22 Bom. 701 and the decision of Pratt J. above was referred to with disapproval by Marten C.J. in the course of the Full Bench decision in *Hatim-bhai v. Framroz Binshaw*(1926-27) 29 Bom. L.R. 498.

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 *Highness Shrimani Maharaj Yashvantrav Holkar v. Dada bhai Cursetji Ashburner* I.L.R.(1890). 14 Bom. 353 . which, after being overruled by a Bench three Judges in *India Spinning & Weaving, Co., Ltd. v. Climax Industrial Syndicate* (1925) ILR 1281 has now been re-affirmed as good law by a Full Bench of seven Judges in *Hatimbhai v. Framroz Dinshaw*(1926-27) 29 Bom. L.R. 498. 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 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 Vaghoji v. Camaji* (1904) ILR Bom. 249

6. The third ground of Pratt J. is that Order XXXIV, Rule 1, under which defendant 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 (p. 573) "the effect of my decision will lead to an anomaly, for whereas according to *Holkar v. Dadabhai*, 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 interests, of the mortgagees inter se cannot be so determined." This, he thinks, is the necessary effect of the decision in *Holkar v. Dadabhai*, 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 *Holkar v. Dadabhai*.

7. On the judgment generally, if I may say so with respect, it is difficult to resist the conclusion that Pratt J. judgment is throughout coloured by his view that *Holkar v. Dadabhai* 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 v. Framroz*, 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 Letters 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], 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 *Vaghoji v. Camaji* (1904) ILR 29 Bom. 249 as *Jenkins C.J.* clearly pointed out, was a suit for a declaration of title to land outside the jurisdiction, and it was, therefore, held to be a suit for land and outside Clause 12 of the Letters Patent. Similarly,

the case of *Norris v. chambers* (181) 29 Beav. 246 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 made 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 p. 545 of the Full Bench decision in *Hatimbhai v. Framroz Dinshaw* (1926-27) 29 Bom. L.R. 498. referred to above, to the opinion of Pratt 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 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 1, and to Clause 12 of the Letters Patent, as interpreted by the Full Bench decision in *Hatimbhai v. Framroz*.

11. For these reasons, with the utmost respect, I must differ from the view enunciated by Pratt J. in *Pranlal Tribhuwandas Vs. Goculdas Damodar*, and hold that a single suit between a mortgagor and prior and puisne 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 *orabji v. Rattonjim*, and with the opinion of Marten C.J. in *Hatimbhai v. Framroa*, 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 Bamruth roy v. Premsukh Chandamav*, leave is a necessary and a preliminary condition of jurisdiction and must be obtained at the time the suit is filed. Defendant No. 8 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 v. Oavrishanhar*, Agreeing with this decision and the view of Oandya J. in *Rampartab Samrathmi v. Foolibai and Ooolibai* I am of opinion that the plaintiff should have obtained leave in respect of defendants Nos. 8a and 3b, when they were sought to be joined in February 1927.

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 counter-claim only mentions a somewhat vague condition foreshadowing a possible objection. On the whole, therefore, I hold, following the view in *Moore v. Gamgee* (1890) 25 Q.B.D. 244 and of Fletcher J. in *King v. Secretary of State for India* ILR (1908) Cal. 394 that defendants Nos. 2a 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 Clause 12 of the Letters Patent to sue defendants Nos. 3a and 8b, 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.

15. [The rest of the judgement is not material to this report].