
(1932) 12 BOM CK 0014
In the Bombay High Court
Case No : Second Appeal No. 770 of 1931

Shankarrao Keshavrao Deshmukh

APPELLANT

Vs

Vadilal Mulchand Gujarati

RESPONDENT

Date of Decision : 15-12-1932

Acts Referred:

Contract Act, 1872 — Section 72

Dekkan Agriculturists Relief Act, 1879 — Section 15B

Citation : AIR 1933 Bom 239 : (1933) 35 BOMLR 462 : (1933) ILR (Bom) 601

Hon'ble Judges : Patkar, J; Barlee, J

Bench : Division Bench

Judgement

Patkar, J.—The mortgage-bond, on which defendant No. 1 obtained a decree, was executed by one Balwantrao bin Nana Deshmukh as heir of Parvatibai for her debts, and Survey Nos. 159, 160, 161 and 162 belonging to her were mortgaged under the mortgage-deed. According to the compromise in the partition suit of 1896 between the heirs of Parvatibai, Survey No. 159 was allotted to Keshavrao, the plaintiffs' grandfather, free from the mortgage-debt and the liability to pay the mortgage-debt was allotted to the share of defendants Nos. 2 to 6. In execution of the partition decree the plaintiffs got possession of Survey No. 159, The mortgagee was not a party to the partition decree.

2. The mortgagee brought a suit on the mortgage in 1914 against the members of the family to enforce the mortgage. The present plaintiffs were defendants Nos. II and 12 in that suit. During the pendency of the suit the mortgagee gave a purshis by which he consented to abide by the decree in the partition suit and had no objection to a decree being passed in accordance with the compromise in the partition suit In execution notices were not served on defendants Nos. 11 and 12, who are the present plaintiffs, but only Survey Ho. 159 which was free from the mortgage-debt according to the compromise was sold. The plaintiff's paid the money then due by the other defendants. The present suit is brought by the plaintiffs to recover the amount from the mortgagee and the other defendants.

3. The learned Subordinate Judge held that the plaintiffs were entitled to recover the amount from the mortgagee and the other defendants. On appeal by the mortgagee, the appellate Court set aside the decree against the mortgagee on the ground that it was not shown that the mortgagee recovered the amount improperly and fraudulently.

4. In second appeal it is contended that on the construction of the decree in the mortgage-suit, Survey No. 159 was impliedly freed from the mortgage debt, and therefore, the plaintiffs having paid the money under Order XXI, Rule 89, for setting aside the sale, were entitled to recover the amount back from the mortgagee. The plaintiffs have already obtained a decree in the lower Courts against the other defendants who had undertaken in the partition suit to pay the debt of defendant No. 1.

5. The only question to be determined in this appeal is whether the plaintiffs are entitled to recover the amount paid by them from the mortgagee-defendant No. 1. According to the purshis in the mortgage suit defendant No. 1 agreed that he had no objection to a decree being passed in terms of the compromise decree in the partition suit which exempted Survey No. 159 allotted to the share of the plaintiffs from the payment of the mortgage-debt. The decree does not specifically refer to Survey No. 159 as being liable for the mortgage-debt, nor does it expressly exempt Survey No. 159 from the mortgage liability. The plaintiffs were already in possession of Survey No. 159 before the institution of the suit by the mortgagee. The plaintiffs, who were defendants Nos. 11 and 12, were not made liable to pay the mortgage-amount in the decretal order. The other defendants were ordered to pay the decretal debt with interest by instalments and in default the property was to be sold in accordance with Section 15B of the Dekkhan Agriculturists' Relief Act. The decree further directed that the property in the mortgage suit should be handed over to the other defendants. It is common ground that the property handed over to the other defendants according to the decree did not include Survey No. 159 which was admitted in the plaint to be in the possession of the present plaintiffs, who were defendants Nos. 11 and 12 in the mortgage suit, and order of costs was passed in favour of the plaintiffs to be paid by the other defendants.

6. The learned Subordinate Judge held that defendant No. 1 dishonestly put Survey No. 159 to sale though he knew full well that it was not liable for his mortgage-debt. On appeal, the learned First Class Subordinate Judge with appellate powers held that it was not shown that the defendant fraudulently or improperly got Survey No. 159 sold in the execution proceedings. The execution proceedings were sent to the Collector and the Collector sold Survey No. 159 which was not specifically excluded from the mortgage decree though it was included in the plaint. It is contended on behalf of the respondent that though the mortgagee gave a purshis that he was willing to abide by the compromise decree in the partition suit and had no objection to a decree being passed in accordance with the compromise, no application was made to the Court for

specifically excluding Survey No. 159 from the operation of the mortgage-decree. It appears that the Collector in ignorance of the facts sold Survey No. 159 and the plaintiffs paid the amount under Order XXI, Rule 89, in the application for setting aside the sale. I think that, though there was no express exclusion of Survey No. 159 from the operation of the mortgage decree, the plaintiffs, who were defendants Nos. 11 and 12, were not made liable to pay the mortgage debt, nor is there a specific mention of Survey No. 159 being liable for the mortgage debt, and though reference is made in the decree to the suit property to be handed over to the other defendants, only the property comprised in the mortgage other than Survey No. 159 was given in the possession of the other defendants and Survey No. 159 was admitted in the plaint to be in the possession of the present plaintiffs. No notice was served on the present plaintiffs in execution proceedings. Under these circumstances, though Survey No. 159 was not expressly excluded from the mortgage decree, it appears that it was impliedly excluded from the mortgage-decree. The present plaintiffs, so far as the mortgage-decree is concerned, were in effect strangers to the mortgage-decree. Therefore, the property, Survey No. 159, was exonerated from the mortgage-debt by the compromise in the partition suit which was consented to by the mortgagee in his suit. The mortgagee did not apply specifically for the sale of Survey No. 159. The decree was accompanied by the plaint which included the Survey No. 159. The decree was sent to the Collector for execution and the Collector in ignorance of what had transpired in the suit sold only Survey No. 159. It is not shown that the mortgagee defendant No. 1 fraudulently got the Survey No. 159 sold. No notice was served on the plaintiffs in execution though it was served on defendants Nos. 2, 4 to 6 and therefore the plaintiff could not contend that Survey No. 159 was not liable to be sold. When the property was attached, the plaintiffs could have applied for setting aside the attachment on the ground that it was not liable to be attached being impliedly freed from the mortgage-debt by the mortgage-decree. They did not pay the money to prevent the sale, but made the deposit under Order XXI, Rule 89, after the sale.

7. It has been held in *Jugdeo Narain Singh v. Raja Singh* ILR (1888) Cal. 656 that money paid into Court to prevent the sale of the plaintiff's property, in execution of a decree against a former owner of the property, was not voluntary payment and that the plaintiff was entitled to recover the amount from the decree-holder u/s 72 of the Indian Contract Act. The same view was laid down by the Privy Council in the case of (1881) ILR 7 648 (Privy Council) and in *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdry* (1863) 12 M.I.A. 65

8. It was held by their Lordships of the Privy Council in the case of *Seth Kanhaya Lal v. National Bank of India, Limited* (1913) I.R. 40 I.A. 56 15 Bom. L.R. 472 that the word "coercion" in Section 72 of the Indian Contract Act is used in its general and ordinary sense, its meaning not being controlled by the definition of "coercion" in Section 15 of the Act, and that where the plaintiff, who was the sole proprietor of certain mills, was compelled to pay to the defendant under protest the money on a decree, obtained by the defendant against a limited company,

under attachment against his property, he was entitled to recover back the amount on the ground that the payment was involuntary and was made under coercion u/s 72 of the Indian Contract Act.

9. When the property of any person, which is not liable to be sold in execution of a decree, obtained against a third person, is attached, the true owner can apply to raise the attachment under Order XXI, Rule 58. In case his claim is disallowed, he can file a suit to establish his claim. But if the owner pays the money to remove the attachment, he can recover back the amount from the decree-holder according to the eases referred to above. If the property is sold, he can resist the auction-purchaser in getting possession of the property, and the purchaser can then apply under Order XXI, Rule 97, complaining of such resistance and obstruction, and the question as to the title to the property can then be decided. If the owner, in order to save the property from sale, pays the amount to the decree-holder, he can recover back the money so paid u/s 72 of the Indian Contract Act on the ground that the payment was involuntary or obtained by coercion.

10. In the present case, the plaintiffs paid the money after the sale under Order XXI, Rule 89, to set aside the sale on payment to the decree-holder of the amount of the decree and five per cent, of the sale price to the auction-purchaser. If the matter were *res Integra*, it might have been possible to hold that the plaintiffs are entitled to recover back the amount u/s 72 of the Indian Contract Act. The action of the plaintiffs would not be a voluntary payment of the debts of the other defendants Nos. 2 to 6 who were liable, but it was a payment made to save their property and get it back from the mortgagee-decree-holder who had wrongly allowed it to be sold in execution of the mortgage-decree. No doubt, they could have waited till the auction-purchaser came to dispossess them, and they could have driven the auction-purchaser to file an application under Order XXI, Rule 97, and the question of title would then have been determined.

11. In *Seth Kanhaya Lal v. The National Bank of India, Limited* it is observed (p. 63) -

A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged, The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which, sooner or later, he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in no wise bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, and under English law he was unquestionably entitled to demand

repayment of that sum because it was an involuntary payment produced by coercion, namely, the wrongful interference of the defendants with his full and free enjoyment of his own property. By English law it is not open to the wrongdoer to proscribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act or estop him from claiming that it was done under coercion.

12. The same case came again before the Privy Council in AIR 1923 114 (Privy Council) where the same view was emphasized and it was held that as the plaintiff had a statutory right to recover the money u/s 72 of the Indian Contract Act, his claim should not have been rejected on the ground that, upon a consideration of the whole circumstances, it was not equitable that the money should be paid back.

13. The sale of survey No. 159 was a wrongful interference with the plaintiffs' enjoyment of their own property and the plaintiffs were entitled to rid themselves of the unlawful interference by any lawful means without thereby affecting their right to hold defendant No. 1 liable for what he had caused them to do. After the sale the only lawful means by which the plaintiffs could get rid of the unlawful interference of defendant No. 1 was by payment under Order XXI, Rule 89, and it was not competent to defendant No. 1 to prescribe some other way to put a stop to the wrong to which they were subjected.

14. But it has been held in the case of Narayan. Amgauda ILR (1920) Bom. 1094 23 Bom. L.R. 455 that under the terms of Order XXI, Rule 89, the amount paid must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally, and therefore, no suit could lie for its recovery. In that case the defendant, who had obtained a decree against a third person, got the property sold and purchased it himself, and the plaintiff, who claimed to be the owner in possession of the property, got it set aside under Order XXI, Rule 89, by paying into Court the decretal amount and five per cent. of the purchase money, and on the amount being paid to the decree-holder and auction-purchaser, the plaintiff sought to get it refunded. The decisions to which I have referred have been distinguished on the ground that the payment made under protest to get rid of an attachment to prevent a sale in execution stands on a different footing from the payment under Order XXI, Rule 89, in support of an application to set aside a sale of the right, title and interest of a third party held in execution of a decree. It was held in that case that under Order XXI, Rule 89, the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally, and that a person could not be allowed to go back on his own act and claim the amount back from the decree-holder after he had secured the benefit of having the sale set aside. The payment to the decree-holder of the amount deposited under Rule 89 would amount to a satisfaction of the decree to that extent, and he could not be justly deprived of that benefit unless he could be restored to his original position under the decree.

This view has been followed by the Patna High Court in the case of Raghu Ram, Pandey v. Deokali Pande ILR (1927) Pat. 30 and by the Madras High Court in Kummakutty v. Neelakandan Nambudri ILR (1930) Mad. 943

15. The plaintiffs seem to have been all along under the impression that under the decree, which was not got amended by them, Survey No. 159 was liable to be sold. Otherwise it is inexplicable why defendant No. 9, the plaintiffs' pleader in the mortgage suit, was impleaded and was sought to be made liable on the ground that though as a matter of fact the decree did not release the property from the mortgage, the pleader intimated to them that the land was released from the mortgage liability. It is not contended that the plaintiffs made the payment under a mistake. The fraud alleged in the plaint has been negatived by the finding of the lower appellate Court.

16. We have come to the conclusion, on the construction of the decree and the purshis of the mortgagee in the mortgage suit, that Survey No. 159 is not liable to be sold in execution of the mortgage-decree, and though, according to the decision in Narayan v. Amgauda, the plaintiffs are not entitled to recover back the amount from the mortgagee, they are entitled to a declaration against defendant No. 1 that the property is not liable to be sold in execution of the decree. It appears that the decree of defendant No. 1 was not fully satisfied by the sale of Survey No. 159. I would, therefore, vary the decree by awarding a declaration against defendant No. 1 that Survey No. 159 is not liable to be sold in execution of the mortgage-decree of defendant No. 1. Each party to bear his own costs of this appeal.

Barlee, J.

17. The important facts are these : Certain property including Survey No. 159 was mortgaged by the plaintiffs' grandfather to defendant No. 1. It was joint family property and later fell to the share of the plaintiffs' grandfather at a family partition between him and defendants Nos. 2 to 6. The family debts were divided at the same time and the debt due on the mortgage was assigned to another member of the family so that the plaintiffs' grandfather might enjoy Survey No. 159 free from the mortgage. The mortgagee then filed a suit and of course impleaded the plaintiffs ; but subsequently he agreed to the family arrangement and filed a formal purshis to record his agreement; and he accepted a decree against the other members of the family, defendants Nos. 2 to 6. Unfortunately the plaint was not amended by the omission of Survey No. 159, and this land was in consequence included in the list of property given in the first part of the decree, which embodies the plaint. But the final order makes it sufficiently clear that the debt was to be recovered from the other members of the plaintiffs' family (defendants Nos. 2 to 6 in this case) and in the alternative by the sale of their land and not Survey No. 159.

18. This decree was framed in 1915. In 1923 the decree-holder filed a darkhast and issued notices to defendants Nos. 2 to 6 but not to the plaintiffs. The

darkhast was transferred to the Collector and he sold Survey No. 159, the only land which should not have been sold. When the plaintiffs heard of the mistake they paid the auction price into Court with five per cent, for the decree-holder and filed this suit to recover the amount from the mortgagee or in the alternative from defendants Nos. 2 to 6.

19. The ground on which the plaintiffs based the claim against the mortgagee defendant No. 1 was fraud. They pleaded that, in spite of the exclusion of the land, Survey No. 159, from the decree, defendant No. 1 had fraudulently put it up for sale and had it sold. The learned Subordinate Judge, who tried the case, held that fraud was proved and gave the plaintiffs a decree against all the defendants except defendant No. 9 who had been their pleader in the mortgage suit.

20. On appeal, however, the learned First Class Subordinate Judge, A.P., modified the decree of the lower Court by disallowing the plaintiffs' claim against the mortgagee. The reasons given by him are that it was due to the negligence of the plaintiffs themselves that Survey No. 159 had not been excluded from the mortgage-decree, that the mortgagee had applied for execution of the mortgage-decree as it stood and had no power to do more, that it was quite improper to expect him to know what was in the mind of the Judge who passed the decree and that he was not to blame for the mistake of the Court passing the mortgage-decree. "Similarly he writes it was not possible for the Collector who executed the decree to know what was intended by the Court by such implication. It has not been shown that defendant No. 1 specially applied for having a particular land sold either by the Court or by the Collector. Defendant No. 1 only described the property and specified all the survey numbers in his application for execution as they were specified in the decree." On these grounds the learned appellate Judge decided that there had been no fraud,

21. The facts on which we have to decide this second appeal are, therefore, that the decree excluded survey No. 159, that owing to the negligence of the plaintiffs in not having the plaint in the mortgage suit amended, the decree in that suit as it was framed by the Court was ambiguous, that the mortgagee when he went to execute the decree did not ask for the sale of survey No. 159 but simply filed a copy of the decree and asked for execution. Survey No. 159 was mentioned in the decree and the Collector of his own motion sold this number. In other words, the mortgagee had nothing to do with the mistake. Had he asked for the sale of Survey No. 159, knowing at the time that it had been excluded from the mortgage charge, he would certainly have been guilty of fraud. But as fraud has been negatived, we must take it that he did not do anything in the matter.

22. The plaintiff, therefore, cannot succeed against the mortgagee on the ground of fraud. What we have to determine is whether he has a cause of action u/s 72 of the Indian Contract Act which enables a man to remove money paid by mistake or undue coercion. "We have to consider whether there was coercion, for the payment was not made by mistake. The argument of his learned counsel is

that the case is analogous to that of (1913) L.R. 40 I.A. 56 (Privy Council) The Bank obtained a decree against the Delhi Cotton Mills Ltd. and in execution attached certain mills at Sabzi Mandi and took possession of them. Kanhayalal, who claimed to be the sole proprietor, was ousted and he paid the sum claimed, under protest, and sued the Bank for a refund of his money. Their Lordships of the Privy Council held that he was entitled to succeed inasmuch as he had paid under legal coercion and was entitled to rid himself of the unlawful interference of the Bank by any lawful means. Thus a payment into Court made to remove a trespass can be recovered by suit.

23. But according to the view adopted by a Bench of this Court in Narayan v. Amgauda (1920) 23 Bom. L.R. 455 ILR 45 Bom. 1094 a payment made under Order XXI, Rule 89, to have a sale set aside is not a payment to remove a trespass. The facts of that case were similar to those in our case, if we negative the plea of fraud. S mortgaged certain land to N who obtained a decree for sale. A claimed the land as his, satisfied the decree, and sued for a refund. It was held by Sir Norman Macleod and Shah J. that the payment was voluntary and not under coercion. Kanhayalal's case was cited but distinguished and the main ground of distinction was that what had been sold was not the property which A claimed but the right, title and interest of S in it. There had been no actual trespass and on the assumption that the property belonged to A and not to the judgment-debtor S, there was no threat of trespass, their Lordships considered, against the property of A, for A by paying the debt of S was protecting not his own property which was not in danger, but the non-existent right, title and interest of S in that property. This view has been expressed by Kulwant Sahay J. in Raghu Ram, Pandey v. Deokali Pande ILR (1927) Pat. 30 in the following terms (p. 32) :-

If the property sought to be sold does not really belong to the judgment-debtor, then the sale of the property in execution of a money decree will not affect the rightful owner of the property and he can ignore the sale and resist the auction purchaser in his attempt to take possession after the sale. A person who is the owner of the property is not affected by a sale of the right, title and interest of the judgment-debtor to whom the property does not belong.

24. This decision of our own Court has been followed also by the Madras High Court in Kummakutty v. Neelakandan Nambudri ILR (1930) Mad. 943 and is binding on us. The plaintiff, therefore, cannot get a refund. But I agree that we can give a declaration as proposed by my learned brother.