
(1908) 09 BOM CK 0009
In the Bombay High Court
Case No : O.C.J. Suit No. 490 of 1903

Sir Jehangir C. Jehangir

APPELLANT

Vs

The Hope Mills Ltd.

RESPONDENT

Date of Decision : 19-09-1908

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2

Citation : (1908) 10 BOMLR 1057

Hon'ble Judges : Macleod, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Macleod, J.—This is an application by the first defendant Company for the execution of a decree nisi dated the 26th January 1904, passed in this suit which was brought by the plaintiff" as first mortgagee of the defendant Company. Under that decree it was ordered that upon the defendants or any of them paying into Court on behalf of the plaintiff, etc.

2. There was no provision made in the decree for the way in which the account contemplated should be taken. On the 3rd December 1907 an order Sir Jehangir Cowasji Jehangir Vs. The Hope Mills Limited, , was made by Mr. Justice Davar on a rule taken out by the defendant Company that the plaintiff should pass his accounts as first mortgagee in possession and having regard to all the directions in the decree before the Commissioner and the Commissioner was directed to take such accounts. This order was not to be enforced for two months and if the plaintiff within that time filed a suit to establish an agreement made by him with the defendant Company on the 3rd October 1905 the order was to be suspended until that suit was determined. This order was reversed by the Appeal Court Sir Jehangir Cawasji Jehangir Vs. The Hope Mills Ltd., . on the 3rd March 1908. The defendant Company now say that they are anxious to redeem the plaintiff mortgagee but they cannot ascertain what amount should be paid into Court to enable them to get a reconveyance of the mortgaged property-They are ready to

pay into Court any ascertained sum. A mortgagor in such a position demands the sympathy of a Court of Equity. Unfortunately for the defendant Company the Court of Appeal has decided that the omission in the decree to provide how the account should be taken was intentional and that the decree left it open to the parties to have the account taken and settled privately by some person of their nomination. Further it appeared to the Appeal Court that an account had been taken by a person appointed jointly by the parties which the result that a certain sum had been found due by the defendant Company to the plaintiff.

3. Under these circumstances I am asked by the defendant Company in execution proceedings to make an order calling upon the plaintiff to render an account of moneys due and payable to him under the decree nisi passed herein, and to execute a reconveyance of the mortgaged promises in the said decree in favour of the defendant Company on making payment of the said amount. The question at once arises whether there is a decree which can be executed. It has been held that an application for redemption or foreclosure of a decree nisi is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and that until a decree nisi is made absolute there is no decree capable for execution. *Ajudhia: Pershad v. Baldeo Singh* (1894) L.R. R 21 Cal. 818, referred to in *Nandram v. Babaji* (1897) L.R.R. 22 Bom. 77. But it is argued that a decree directing accounts to be taken is a decree u/s 2 of the CPC and can therefore be executed. The answer to that is that this decree nisi does not direct accounts to be taken. While it contemplated an account being taken it was silent on the question how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction. I am asked now in execution proceedings to order the plaintiff to do something which he is not directed to do by the decree. That would be out of the question under any circumstances. There is nothing whatever in the decree nisi which is capable of execution and the application must be dismissed with costs. Counsel certified.