
(1907) 12 BOM CK 0002
In the Bombay High Court
Case No : Original Civil Suit No. 490 of 1903

Sir Jehangir Cowasji Jehangir

APPELLANT

Vs

The Hope Mills Limited

RESPONDENT

Date of Decision : 03-12-1907

Acts Referred:

Citation : (1907) 9 BOMLR 1380

Hon'ble Judges : Davar, J

Bench : Single Bench

Judgement

Davar, J.—The plaintiff, Sir Jehangir Cowasji Jehangir as mortgagor in possession of the property of the first defendant Company The Hope Mills Limited, instituted this suit in August 1903 to recover the moneys due to him under his mortgage and prayed that in default of payment the right to redeem may be foreclosed or the mortgaged premises may be sold. The mortgage is dated the 5th of April 1900. After the date of the mortgage the plaintiff on the 30th of May 1901 had entered into an agreement with the first defendant Company under the terms of which he worked the Mills of the Company. This agreement is mentioned in the plaint and a copy of it is annexed and marked Ex. B.

2. On the 26th of January 1904 the plaintiff obtained a decree which is manifestly defective. In the first place the decree is drawn up in conformity with Form 26 and is entitled "Decree on mortgage, mortgagor in possession." The plaintiff at the institution of the suit and at the date of the decree was admittedly in possession of the mortgaged premises and the decree ought to have been drawn up in accordance with Form 28 and not Form 26. Then the decree contemplates an account. It is obvious that an account would have to be taken before the decree could be enforced. There is however in the decree no reference to the Commissioner and no direction whatever for taking accounts. An application for final decree for foreclosure or sale was on the 9th of August 1904 refused on the ground, as the plaintiff himself in his affidavit says,—that the exact amount due to him as first mortgagee was not determined. After this refusal it

seems that certain correspondence passed between the parties and an agreement bearing date the 3rd of October 1905 was entered into between the plaintiff Sir Jehangir the first defendant Company-and the Compiny''s agents. The Company subsequently on the 1st of November 1906 are alleged by the plaintiff to have passed a Resolution for the purpose of entering into another agreement with him.

3. On the 19th of October 1907 Jivanlal Choonilal Chinoy claiming to be the senior partner in the firm of Rangildas Bhookun-das and Company, agent of the first defendant Company, obtained on behalf of the Company a Rule Nisi calling upon the plaintiff to show cause " why he should not pass his aocounts as first mortgagee in possession of the moveable and Immovable property of the said first defendant, the Hope Mills Limited before the Commissioner of this Hon''ble Court for taking accounts" and why in taking such accounts the Commissioner should not be directed to calculate interest at a certain rate and not at the rate mentioned in the decree. The Rule was argued before me on the 21st of November last when at the outset the first defendant Company''s counsel Mr. Raikes abandoned the latter part of the Rule.

4. The only question for the Court to consider is whether the plaintiff as first mortgagee in possession of the mortgaged premises should be ordered to pass his accounts before the Commissioner. The decree as I have observed above is undoubtedly defective. The direction which I am now asked to give ought to have been given when the decree was passed. When hearing the Rule I had some doubts as to whether I had the power at this stage to give the directions asked for. At page 650 in Daniel''s Chancery Practice it is however stated that "the Court will supply what may be necessary to make an existing direction complete". Now although in the decree there is no "existing direction" the decree does contemplate an account and a direction ought to have been incorporated in the decree when passed. In discussing the question further at page 651 it is stated in Daniel on the authority of Order 33 Rule 2 :-

Now however the Court or a Judge may at any stage of the proceedings in a cause or matter direct any necessary inquiries or accounts to be made or taken.

5. Indeed the Advocate General conceded, that I had power to make the Order but he resisted the making of such a,n order on other grounds.

6. Having jurisdiction to make the Order asked for, it seems to me that it is necessary that there should be directions given to take accounts mentioned in the Rule and that I should make the Order directing the plaintiff to pass his accounts before the Commissioner unless there are circumstances which require me to stay my hand.

7. In resisting an order for passing his accounts before the Commissioner the plaintiff relies on clauses 4 and 7 of the agreement of the 3rd of October 1905 annexed to his affidavit of the 13th of November 1907. Clause 4 of the agreement states that accounts up to 31st December 1904 have been settled

and adjusted between the parties and clause 7 provides a special mode for examining and checking the plaintiff's account and further provides as follows:-

Neither the first mortgagee nor the said Company shall be entitled to reopen the accounts so passed on any ground whatever and none of the parties shall be entitled to have such accounts passed by the Commissioner High Court for taking accounts.

8. If this agreement is binding on the first defendant Company these provisions are a complete bar to their getting the order 1 am now asked to make.

9. Mr. Raikes for the Company contends that this agreement is void u/s 257A of the Civil Procedure Code. In the course of argument on this point the Advocate General relied on Sankaran Nambiar v. Kanara Kurup ILR (1898) Mad. 182 and Mallikarjuna Sastri v. Narasimha Rao ILR (1901) Mad. 412. Mr. Raikes argued that the case of Sankaram Nambiar v. Kanara Kurup had no applicability to the present case and that that Mallikarjuna Sastri v. Narasimha Rao was overruled by the case of Vaidhinadasamy Ayyar v. Somasundrum Pillai ILR (1905) Mad 473. In reply the Advocate General relied on the decision of our Court in the Bank of Bengal v. Vyabhoj Gangji ILR (1891) 16 Bom. 618.

10. The agreement is attacked on other grounds. Jivanlal in para 4 his affidavit of the 20th of November 1907 made in reply to the plaintiff's affidavit states that the agreement was made in collusion with Rangildas Bhukhandas the late agent of the company and is not binding on the company.

11. Whether the agreement in question is or is not void depends on a great many facts and circumstances which it is impossible to ascertain with any degree of precision on affidavits and the question of collusion can only be decided on evidence.

12. I have considered the authorities cited by counsel before me. My mind is by no means free from doubt and I refrain from expressing any opinion on the question whether the agreement is binding on the Company or not in view of the order I have decided to make, so that neither party may be prejudiced in the litigation that I think must follow.

13. I was invited by Mr. Roikes to order oral evidence to be taken on this Rule. I am averse to starting a long inquiry on a motion more especially as I think that this question can best be decided by an independent suit between the parties. In coming to this conclusion I have been influenced by the fact that there are other questions between the parties--notably the question as to the assignment of the second mortgage to the plaintiff and the further agreement set up by the plaintiff based on the Resolution of the 1st of Ist November 1906-which must be decided by a suit.

14. In making my order I take into consideration merely the decree and the omission therein of proper directions. All rights arising under other agreements or transactions between the plaintiff and the Company subsequent to the date of

the decree must be settled by them in proceedings independent of this rule.

15. I make the first part of the rule absolute and order that the plaintiff do pass his accounts as first mortgagee in possession and having regard to all the directions in the decree before the Commissioner and I direct that the Commissioner do take such accounts. This order is not to be enforced for a period of two months. If within that time the plaintiff files a suit to establish his agreement of the 3rd of October 1905 the execution of this order to be suspended till the final determination of that suit or appeal therein, if any. If in the suit it is held that the agreement of the 3rd of October 1905 is binding on the company this order will stand discharged, If clauses 4 and 7 of the said agreement are held to be not binding on the company in the said suit this order will then come into operation and the plaintiff must pass his accounts before the Commissioner.

16. In making my order for costs I must keep in view the fact that it was quite as much the plaintiff's fault as the Company's that the decree was defective in the first instance. The Company never cared to appear before The Court and see that a proper decree was passed. I must also have regard to what the Advocate General, I think very justly, urged, that the Company when in distress and difficulties went to the plaintiff for help and now when with his help the Company's prospects have improved a new agent has come forward and in resorting to technical legal contentions to defeat the rights secured by the plaintiff under an agreement on the terms contained in which alone he gave further assistance to the Company.

17. The first defendant Company must bear its own costs of this Rule and order the plaintiff to be at liberty to add his costs to his mortgage debt.