
(1959) 12 BOM CK 0005

In the Bombay High Court

Case No : A.F.O.D. No. 551 of 1955 with C.A. No. 3854 of 1958

Suratsing Chandanmal Marwadi

APPELLANT

Vs

Nomanbhai Abdulhussein Bohari and Others

RESPONDENT

Date of Decision : 02-12-1959

Acts Referred:

Transfer of Property Act, 1882 — Section 76

Citation : AIR 1961 Bom 43 : (1961) BomCR(Cri) 43 : (1960) 62 BOMLR 414 : (1960) ILR (Bom) 709

Hon'ble Judges : Naik, J;Mudholkar, J

Bench : Division Bench

Advocate : R.A. Jahagirdar, T.N. Walawalkar and G.S. Gupte, for the Appellant; H.R. Gokhale, for the Respondent

Judgement

Naik, J.—This is an appeal from a final decree passed in a suit on mortgage. The facts underlying this appeal may be briefly set out as follows:-

2. The property in suit which is an extensive building comprising two storeys in some parts and underground cellars at City Survey No. 2255 situate at Ahmednagar, originally belonged to one Mir Chiraknddin Syed Kamaluddin Pirajade. Mir Chiraknddin executed a usufructuary mortgage-deed in favour of two persons, Premraj Pannalal and Pannalal Ribakram for a sum of Rs. 6,000 on 8-4-1895. Under the terms of the mortgage bond the mortgagees were to remain in possession of the property and to appropriate the usufruct towards the interest. The rate of interest was stipulated in the deed was 9 per cent per annum. Again on 1st August 1896 Chirakuddin borrowed a sum of Rs. 3,750 and passed a second mortgage bond in respect of the same. Possession of the mortgage was confirmed under the second bond and it was stipulated therein that the mortgagee was to apply the usufruct of the same house towards interest accruing due on the amount of advance under the second mortgage. Chirakuddin had one son known as Kamaluddin and a daughter Tarifarabegum, who is defendant No. 3 in this suit. Kamaluddin had two sons, Syed Shamiuddin and

Syed Moinuddin, and two daughters, Rafiya Sultana and Bilkhis. Kamaluddin died in 1948 leaving behind his widow, Sharfunnissa, two sons and two daughters named above. Sharfunnissa had given up all her rights in favour of Kamaluddin during her life-time. After Kamaluddin's death his widow, two sons and two daughters sold their interest in the mortgaged property to defendant No. 1. The sale-deed was passed by Sharfunnisa for herself and in her capacity as guardian of her minor daughter, Bilkhis, and holding a power of attorney on behalf of her major sons and daughter.

3. On the side of the mortgagees, out of the two mortgagees, Pannalal is the sister's son of the other mortgagee, Premraj. Premraj died in 1896. His son, Jashraj had died before Premraj leaving behind him two sons, Chandanmal and Kundanmal. Kundanmal had four sons including Saratsing. Chandanmal died in 1935 leaving behind him his widow. During his life-time he adopted Suratsing, son of Kundanmal as a son to him. This was in the year 1934. It is not necessary to set out the various transactions that took place in the family of the mortgagees. It is sufficient to mention that in 1931 suit-mortgages fell to the share of Chandanmal. Disputes, however, cropped up between Pankuwarbai and Mishrubai, the married daughter of Chandanmal, on the one side and Suratsing who claimed to be the adopted son of Chandanmal on the other. Suratsing, who is the plaintiff in the present suit, had filed through one of his joint guardians Motilal Kundanmal, a suit No. 1656 of 19-12 against Pankuwarbai for a declaration that he was the validly adopted son of Chandanmal and also for possession of the family property including the suit-mortgage. The plaintiff's suit was decreed in respect of both the reliefs. At the same time it was directed that the plaintiff would not be entitled to recover possession from the adoptive mother, Pankuwarbai unless he made a provision for her maintenance. Sometime later, that is on 17th March 1947 Pankuwarbai passed a document styled as release deed in favour of defendant No. 1 to the effect that the mortgage was satisfied and the property was given back to him. It appears that on same day defendant No. 1 secured possession of the two portions of the mortgaged property which have been described in the plaintiff's paragraph (1) clauses (b) and (c). The plaintiff continued to remain in possession of the remaining portion of the property which has been described in Sub-clause (a) of Clause (1) of the plaintiff's suit. On 31-8-1949 that plaintiff filed the suit which has given rise to this appeal praying for possession of the portions of the suit building of which he was dispossessed by defendant No. 1, presumably on the basis of the release deed obtained by him from Pankuwarbai. To that suit defendants Nos. 1 and 2 were the only defendants in the first instance. Defendant No. 1 put in his written statement and amongst other contentions he asked for redemption of the mortgage after taking account of the receipts of the income from the mortgage-property. Because of this prayer for redemption the trial Court thought it fit to add the names of Tarifara Begum and Bilkhis as parties to the suit presumably on the ground that Tarifara Begum had not joined in the sale-deed and Bilkhis was a minor at the time of the said deed and Sharfunnissa purported to execute the

document as guardian of Bitkhis. After protracted hearing a preliminary decree came to be passed under which the trial Court granted the prayer of redemption in favour of defendant No. 1. The trial Court, however, rejected the plaintiff's claim for possession. The trial Court further directed that accounts should be taken of the receipts of income and interest due on the mortgage by a commissioner. There was an appeal to the High Court and in modification of the decree of the trial Court plaintiff's prayer for possession was granted. The rest of the decree was substantially confirmed.

4. The suit then went back to the trial Court for taking accounts according to the directions contained in the preliminary decree which was substantially affirmed by the High Court in its judgment. Mr. B.P. Saptarshi a Pleader, was appointed Commissioner for taking accounts. Mr. Saptarshi recorded the evidence adduced on both sides and submitted his report to the trial Court. He came to the conclusion that not only the capital sum under the two mortgage-deeds was fully satisfied out of the incomes received from the suit building but that a sum of Rs. 38,599-4-0 fell due from the plaintiff to defendant No. 1 at the foot of the accounts. The trial Court accepted the report and passed a decree for the said sum in favour of defendant No. 1. It is from that decree that the plaintiff has come up in appeal to this Court.

5. The plaintiff in this appeal has not only sought to vacate the decree passed in favour of defendant No. 1 but in addition has claimed a sum of Rs. 26,000 as being due to him from defendant No. 1 at the foot of the accounts. Considerable difficulties were experienced by the Commissioner as also by the trial Court in taking accounts of the transactions in suit by reason of the fact that the plaintiff did not produce his account-book in respect of the suit transactions for considerably long periods and he only produced certain extracts of accounts for a short period viz. from 1920 to 1930. The plaintiff also did not produce all the rent-notes that he and his predecessors in title had taken from the various tenants who resided in different parts of the premises from 1895 to 1920. The Plaintiff mostly relied upon the extracts from the house-tax register maintained by the Nagar Municipality and also on the rents prevailing in the adjoining locality. So far as the accounts produced by the plaintiff from the period 1920 to 1930 are concerned the Commissioner remarked that those were not regularly kept accounts and were absolutely unreliable. The commissioner also rejected the extracts of the house-tax register as rendering no assistance in arriving at the proper rental value of the suit house. The Commissioner, therefore, had to base his findings about the income from the suit house on such material as was placed before him, particularly the material which related to a point of time after 1947. The findings of the Commissioner were largely accepted by the lower Court.

6. Mr. Jahagirdar, the learned advocate, for the plaintiff-appellant has contended that the findings arrived at by the Commissioner are without basis in the evidence led in this case and are also contrary to the documentary and oral evidence led on behalf of the plaintiff. He also referred to the subsequent conduct

of defendant No. 1 consisting of his having agreed to sell the property in the year 1952 for a sum of Rs. 9,000.

7-8. Before considering the merits of the case it is necessary to refer to the circumstance that the plaintiff has not produced his accounts relating to the mortgage transactions at least for the period from 1890 to 1920 and also for the period from 1930 to 1947. (His Lordship after referring to the circumstances proceeded):

We must therefore hold that the plaintiff has failed to produce proper accounts as contemplated by Section 76 of T. P. Act for any period. The plaintiff in his deposition stated that his genitive father Motilal, did not give him any information about the account-books which had been taken possession of in Special Darkhast No. 1656 of 1942 referred to above. It will not, therefore, improper to infer that the accounts have been withheld because it is not convenient for the plaintiff to produce these books of accounts.

9. In view of this finding a very important question of law arises to be considered in the present case. Section 76 of the Transfer of Property Act relates to the liabilities of mortgagees in possession. Clause (g) of that section runs thus:--

"76. When during the continuance of the mortgage, the mortgagee takes possession of the mortgagee! property, --

(a) to (f) *****

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported,"

The wording of this clause makes it clear that statutory obligation is cast upon the mortgagee to keep full and accurate accounts of all sums received and spent by him as mortgagee. The sub-clause further lays down that the account must be supported by vouchers. It is true that Section 76 does not lay down the consequences that might flow from a failure of the mortgagee to keep accounts as required by clause (g). But in this respect we have a decision of the Privy Council, AIR 1933 85 (Privy Council) . The facts of that case were as follows: "On December 20, 1905, Munshi Inder Sahai executed a mortgage of his share of a village situated at Bareilly to secure payment of Rs. 7,000 lent to him by Rai Kishan Lal at interest at the rate of seven annas per cent per mensem.

The mortgage was one with possession, and the mortgagee was put in possession of the property on the same day. The mortgage was for a term of five years.

On June 15, 1906, the mortgagor executed a document called Zamanatnama (security bond) by which he created a charge on two other properties the charge to operate if the property mortgaged by the deed of 1905 was found to be

insufficient for payment of the mortgage debt in full

Sometime thereafter the mortgagor died leaving him surviving two sons, -- and a widow. After his death the mortgagor obtained a decree on April 26th, 1909, against the heirs of the mortgagor for Rs. 679-6-6, being the balance of interest due up to January 2nd, 1909, and recovered the amount from them.

On December 20th, 1922, the appellant brought the suit out of which the present appeal arises in the Court of the Subordinate Judge of Bareilly against the respondents to enforce the mortgage; by sale of all the three properties. The amount claimed was Rs. 14,000 of which Rs. 7,000 was for principal, and the balance for interest.

In their written statement, respondents Nos. 1 and 2 averred that "the mortgaged property" was ancestral, and that there was no necessity for the loan. They also pleaded that the mortgage debt had been paid out of the rents and profits of the mortgaged property, and that nothing was due to the appellant".

The trial Judge on taking accounts found that a sum of Rs. 14,000 was due to the mortgagee and awarded a decree in respect of the same in addition to costs etc. Respondents Nos. 1 to 3 appealed to the High Court at Allahabad. The High Court held that the appellant had failed to keep such accounts as are required of a mortgagee in possession and disallowed the claim both for past and future interest. They varied the decree of the trial Court accordingly. The mortgagee went up in appeal before the Privy Council. The finding of the High Court disallowing the appellant's claim for interest was vehemently attacked before their Lordships of the Privy Council. Sir Dinshaw Mulla who delivered the judgment of the Board observed as follows:--

"As to interest, it was urged that the High Court ought not to have disallowed the appellant's claim in toto, and they ought to have in any event directed an inquiry into the accounts. Their Lordships are unable to accede to this contention, As regards accounts, it is enacted by Section 76, Clause (g), of the Transfer of Property Act, that a mortgagee in possession "must keep clear, full and accurate accounts of all sums received and spent by him. as mortgagee". No such accounts were kept by the appellant or his predecessors, nor were any such filed in Court In the circumstances, their Lordships think that the High Court were right in disallowing the appellant's claim for interest".

Mr. Jahagirdar contended that this decision does not lay down any absolute rule to the effect that in all cases where accounts have not been produced, interest to the mortgagee must be disallowed. He argued that it was in the peculiar circumstance of the case that their Lordships came to the conclusion that the facts justified their Lordships in holding that interest should not be allowed to the mortgagees. In particular, he laid stress upon the words "in the circumstances" appearing in the last sentence of the paragraph cited above. We are unable to accept this line of argument. The words "in the circumstances" are not indicative of the existence of any discretion with the court in the matter of allowing or

disallowing interest when it is found that accounts have not been maintained in the ordinary course or if maintained, have not been produced in court. The words "in the circumstances" have reference to only one fact, viz., the mortgagee's failure to produce the accounts. There was no other circumstance present in the case and the only circumstance which prevailed with their Lordships in coming to the conclusion that interest should not be allowed to the mortgagee was the non-production of accounts. Mr. Jahagirdar further pointed out that if any such penalty viz., the forfeiture of the right to claim interest were to follow from the mortgagee's failure to keep accounts the Legislature would have provided for the same in the section itself. This argument also leaves us unimpressed because Section 76 does cast a statutory duty upon the plaintiff to maintain clear, full and accurate accounts of the incomes received and the sums spent by the mortgagee. The reason for this provision is not far to seek. Unless the mortgagee were to keep full and accurate accounts and to produce them before the court, it would be difficult and not infrequently well nigh impossible for the court to take accounts and to find the true position obtaining at the foot of the accounts. If the mortgagee, therefore, fails to comply with this statutory obligation then he must forfeit his right to claim interest.

10. Mr. Gokhale, the learned advocate for the defendant No. 1 wanted us to construe the judgment to mean that not only the mortgagee would be disentitled from claiming interest on account of his failure to keep clear and full accounts but that further the mortgagor would be entitled to credits in respect of whatever incomes the mortgagee has received from the mortgaged property. He, therefore, contended that on the one hand the mortgagee will not be entitled to claim interest and on the other he will have to account for the receipts of incomes from the mortgaged property. We have given our earnest consideration to the proposition which was seriously advanced by Mr. Gokhale particularly in view of the very cryptic sentence contained in the judgment of the Privy Council to the following effect:--

".....their Lordships think that the High Court were right in disallowing the appellant's claim for interest".

Mr. Gokhale urged that so far as the receipts of income are concerned there is also a statutory obligation laid down in the same section that is Section 76 under which the mortgagee is bound to give credit to the mortgagor in respect of income received by him. He contended that there is no reason why the mortgagor should lose his claim to demand accounts for the receipts of income. In this connection we may refer to a previous decision of the Privy Council in *Mirza Yadalli Beg v. Tukaram*, reported in 47 Ind App 207 : AIR 1921 PC 125 which may throw some light upon the question under discussion. The facts of that case were briefly as follows:--

On March 9, 1893, one Laxmansa Balkrishnasa mortgaged to the appellant sixteen fields in five different villages by a document which, after reciting that the mortgagor had received Rs. 6,000, mortgaged the property above mentioned

for that amount and authorised the mortgagee (appellant) to take possession if the money due was not paid by July 9, 1893, and to apply the income towards payment of (1) cultivation expenses, (2) Government rent and other charges, (3) interest at Re. 1 per cent per mensem, and (4) the balance, if any, towards the principal: the document also purported to authorise the mortgagee (appellant) to sell the property. Laxmansa Balkishnasa executed a sale-deed of one of the fields comprised in the mortgage to the respondents. In the year 1899 the appellant, the mortgagee, sued in the District Court, East Berar to recover the sum due on the mortgage, with interest, and by a consent decree it was agreed that unless the said Laxmansa Balkishnasa made certain payments within 3 year, nine fields of the mortgaged property, including the field in which the respondents claimed to be interested, should be foreclosed and given into the appellant's possession. On December 17, 1900, the conditions of the said consent decree not having been complied with the Court ordered that the defendant (the said Laxmansa Balkishnasa) should stand absolutely debarred and foreclosed of and from all equity of redemption of, to and to the said mortgaged premises". The appellant did not make the respondents parties to the suit and it was found by both Courts that he was ignorant of their interest. The appellant received possession of the property so foreclosed, including the property purchased by the respondents, on April 14, 1901, and had even since been in possession, but had kept no accounts of his receipts from and expenditure on it.

Later on the respondents filed a suit claiming redemption of the nine fields which were in the possession of the appellant.

The main contention raised was whether the respondents were entitled to redeem the entire property or only such of the properties as he had purchased. The trial Court held that respondents were not entitled to claim redemption in respect of the entire property. This decision was reversed by the Judicial Commissioner who held that the respondents were entitled to redeem all the properties. There was an appeal to the Privy Council which affirmed the above decision of the Judicial Commissioner. We are not concerned in this appeal with that aspect of the decision but we are concerned with another matter which incidentally cropped up before their Lordships on which they expressed their opinion in the following terms:--

"The appellant went into possession. He kept 110 accounts. The officiating Judicial Commissioner in the Central Provinces, Berar Jurisdiction, has decided that the respondents as owners of an interest in the equity of redemption as it originally stood, an interest which although only fractional remains undisturbed, are entitled to redeem the mortgage on the footing of paying the balance left of the mortgage debt after debiting the mortgagee with a fair occupation rent during the period of his possession, and crediting him with simple interest on the debt due to him under the mortgage deed. If the respondents have the right to redeem the entirety, their Lordships think that this direction as to the form of

account was right".

It is true that the question as to whether the mortgagee would be disentitled to claim interest on account of his failure to keep accounts was not specifically raised nor discussed by the Privy Council in the above case. All the same the fact remains that the mortgagee had not kept accounts and yet their Lordships directed that credit should be given to the mortgagee in respect of interest just as credit must be given to the mortgagor in respect of a fair occupation rent during the period of his possession. Mr. Gokhale sought to distinguish this case on the ground that the mortgagee entered into possession of the mortgaged properties in the above case on the basis of the decree for foreclosure and not on the basis of the terms of agreement under the mortgage. We are unable to understand how this circumstance would take the present case away from the operation of the principle laid down in AIR 1933 85 (Privy Council) . The provisions of Section 76 in terms are not limited to usufructuary mortgagee or to a mortgagee who is entitled to claim possession on the basis of the terms of the mortgage bond. The opening words of Section 76 are quite general and they include a mortgagee who obtained possession of the mortgaged property. So, although a mortgagee may not be entitled to claim possession on the basis of the covenant contained in the mortgage bond still if for any other reason he entered into possession as a mortgagee he would still be liable to fulfil the conditions laid down in Section 76. It is also true that the mortgagee in the case under discussion had entered into possession on the basis of a decree for foreclosure. It must, however, be remembered that the subsequent purchaser of a portion of the mortgaged property was not added as a party to the said suit and therefore, was not bound by the decree passed therein. It was on that basis that the subsequent purchaser was held entitled to claim redemption. This means that so far as the subsequent purchaser was concerned the decree-holder-mortgagee who went into possession of the property on the strength of the foreclosure decree stood in the same position as a mortgagee in possession.

11. Even on principle we do not think that a failure on the part of the mortgagee should entail the consequence of a double penalty on him as was suggested by Mr. Gokhale. It is further to be noted that in the case in AIR 1933 85 (Privy Council) a decree for Rs. 7,000, that is to say, for the principal, was granted by the High Court and was maintained by the Privy Council. If as was suggested by Mr. Gokhale the receipts of income are to be taken into account those receipts would have gone to satisfy the principal amount in the event of the mortgagee not being entitled to claim interest. In that case at least a substantial portion, if not the whole, would have been satisfied. We however, find that a decree for the entire principal amount was allowed by the High Court. In our view all that was laid down by the Privy Council was that the mortgagee would not be entitled to claim the benefit of the accounts in respect of the income received by him, when he has failed to keep accurate and full accounts. The mortgagee cannot be heard to complain that the receipts of the income were not sufficient to cover the amount of interest and, therefore, the balance of interest should be added to the

principal. Inasmuch as he has failed to keep full and accurate accounts of those receipts, the receipts whatever they are even if they are less, must be deemed to satisfy the interest accruing due on the principal. Of course, if the income is more than the amount of interest due on the principal, credit will have to be given to that extent to the mortgagor. In our view, the use of the words "after debiting the mortgagee with a fair occupation rent" in 47 Incl App 207 : AIR 1921 PC 125 are significant. Under Clause (g) of Section 76 the question of fair occupation rent arises only when the mortgagee is in personal occupation of the mortgaged property. But in a Case where the mortgagee has failed to keep accounts, the actual receipts of income ought not to be taken into account but the fair occupation rent will have to be credited towards the income. If that rent is less than the amount of interest then the mortgagee cannot claim to add the balance to the principal but must be satisfied with whatever he has received. If on the other hand the amount is more than the amount of interest, then the mortgagor would be entitled to ask the court to take that into consideration and give Credit to him in respect of the same and this amount will naturally go towards the satisfaction of the principal

12. In our opinion, this is not only the correct view on the interpretation of the provisions of Section 76 Clauses (g) and (h) and the decisions cited above, but that view is in consonance with justice and equity and is fair to both sides.

13. The upshot Of the above discussion is that we must proceed on the footing that the plaintiff-mortgagee has not produced any accounts for any period between the dates of the mortgage and the institution of the suit. That bring the case, the plaintiff will not be allowed to contend that the income was not sufficient to cover the interest. From this it would follow that he would be precluded from leading any evidence to show that the income of the property was less than the interest for the whole period or any part of it. The plaintiff has led some evidence to show that the income which he was receiving by way of rent was very much less than the amount of interest due every year. But we would be justified in shutting our eyes to that evidence in the view that we have taken about the correct legal position in the above para-graphs. All the same perhaps we will make a brief reference to the evidence led by the plaintiff on this point.

14-21. (His Lordship after referring to the evidence recorded findings but the parties put in a compromise and requested the court to pass a decree in terms thereof except Clause 10. The court after disallowing the item in Clause 10, passed the decree in terms of the compromise.)

22. Order accordingly.