

(1925) 12 BOM CK 0040
In the Bombay High Court

Vasantrao Govindrao Prabhakar and Others

APPELLANT

Vs

Nanabhai Sadanand

RESPONDENT

Date of Decision : 16-12-1925

Acts Referred:

Citation : AIR 1926 Bom 273

Hon'ble Judges : Macleod, C.J;Coyajee, J

Bench : Full Bench

Judgement

Macleod, C.J.—The plaintiffs filed this suit for the redemption of two properties, hereinafter called the Girgaon property and the Mahim property respectively, after taking an account of the two mortgages mentioned in the plaint. The following pedigree is necessary for the purposes of this judgment.

Madhoba Harischandra | Atmaram | |-----|-----|
Ganpatrao Anandrao Shamrao =Manekbai |
|-----|-----|-----| Wamarnao Ramrao
Vinayakrao Madhavrao =Bablibai | Sushilabai 2. The original Plaintiffs Nos. 1 to 3 were Wamanrao, Vinayakrao and Madhavarao, while Plaintiffs Nos. 4 and 5 were the executors of Maneckbai, widow of Gunpatrao. In 1869 Madhoba negotiated with one Shrikrishna Naranji for a loan of Rs. 82,000 to be secured on the Girgaon property. An agreement was arrived at whereby Shrikrishna Naranji was to advance Rs. 82,000 on a deposit of the title deeds of the Girgaon property and Madhoba was to purchase the Mahim property from Shrikrishna for Rs. 50,000. Accordingly the title deeds of the Girgaon property were deposited with Shrikrishna who advanced Rs. 82,000 to Madhoba. Madhoba died on September 19,1869, leaving a Will dated April 16, 1862, and a codicil thereto dated September 18, 1869.

3. Probate of the Will and codicil was granted to Atmaram Madhoba as the executor named in the Will on January 20, 1870. On March 25, 1870, Atmaram obtained a conveyance of the Mahim property from Shrikrishna, and on the same day Atmaram executed two mortgages one of the Girgaon property and the other

of the Girgaon and Mahim properties to secure the sums of Rs. 82,000 and Rs. 50,000 respectively. On March 4, 1875, Shrikrishna assigned the said two mortgages and all his rights thereunder to his son Sadanand.

4. Sadanand filed a suit No. 259 of 1875, against Atmaram for the realization of the amounts due on these mortgages, and obtained a decree nisi on July 15, 1875, by which it was directed that the defendant as executor should pay to the plaintiff Rs. 2,39,538-5-8 for debt and interest on the two mortgages with costs and further simple interest on the principal sum of Rs. 2,32,672 at 13 per cent, per annum from the date of the decree till payment, and it was ordered that on the defendant paying the said principal, interest and costs, within six months after the date of the decree, the plaintiff should reconvey the premises comprised in the mortgage deeds to the defendant free of all in-cumbrances, but on the defendant failing to pay what should be due for principal, interest and costs by the said time the defendant should from thenceforth stand absolutely debarred and foreclosed of and from the equity of redemption of the said mortgaged premises.

5. In or about the month of November 1875, before the six months prescribed in the decree expired, Atmaram put Sadanand in possession of the Girgaon property. The arrangement under which possession was given is said to have been recorded in a letter of November 29, 1875, written by Atmaram to Sadanand, which is Exhibit F to the plaint, though it does not appear to have been proved and put in as an exhibit in the suit. It is alleged in the plaint para 9 that the Municipality of Bombay was pressing Atmaram to execute some repairs to certain chawls of the Girgaon property and was threatening in default to pull them down. As Atmaram could not comply with the requisition of the Municipality he agreed that Sadanand should enter into possession, and rebuild such of the chawls as were required to be rebuilt, debiting Atmaram with the costs thereof and crediting him with the rents received.

6. The first defendant Nanabhai Sadanand, son of the mortgagee, in para 4 of his written statement, denied any knowledge of this arrangement, but he admitted that Sadanand was put into possession of the Girgaon property in December 1875 and that letters were addressed to the tenants to pay rent to Sadanand. He further set up an oral arrangement that Sadanand was to repair and rebuild while Atmaram should have a further six months within which to redeem. The plaintiff further alleges that in or about the month of July 1877 Atmaram put Sadanand in possession of the Mahim property as mortgagee in possession, but in spite of such possession being given Sadanand filed a suit No. 869 of 1877 for possession which was dismissed with costs. Atmaram died on July 6, 1893, and Sadanand in or about the year 1910, leaving his son the first defendant as executor of his Will.

7. The plaintiffs contended that Sadanand not having obtained a decree absolute for foreclosure or for sale in Suit No. 259 of 1875 and having entered into possession of the said property under the arrangement referred to, the relation

of mortgagor and mortgagee between Atmaram and Sadanand continued to subsist and still subsisted between the plaintiffs as executors of the Will of Manekbai and as administrators de bonis non of the estate of Madhoba and the defendant as executor of Sadanand. Further that execution of the decree nisi had long been time-barred. The plaintiff alleged that Manekbai had an interest in the suit properties, but they did not set out in the plaint how that interest was acquired.

8. However it appears that on June 6, 1878, Anandrao and Ganpatrao, sons of Atmaram, were adjudicated insolvent. When Atmaram died in 1893 the Official Assignee put up for sale the interests of Anandrao and Ganpatrao in the Girgaon property and other properties and sold them to one Major Kirtikar. He died on May 9, 1917, leaving a will and a codicil. By the codicil he devised the Girgaon property to Manekbai, the widow of Ganpatrao. Her executors, therefore, had no claim upon the Mahim property.

9. By an order of August 1, 1924, Plaintiffs Nos. 1 to 3 were struck out and added as Defendants Nos. 2, 3 and 4. For some reason or other this order was cancelled on August 2, but the amendment was reinstated by an order of September 24. All these orders were made after the suit was first called on for hearing, and it is curious to note that the plaint was re-declared on August 5, 1924, and October 17, 1924, by one Motiram Kirtikar, constituted attorney for Defendants Nos. 2, 3 and 4. Para. 21 of the plaint, at page 5 of the printed book, should not have been in black ink as it refers to the order made on September 24.

10. Then the concise statement which appears at page 9 could not possibly have been the original concise statement as it in no way corresponds with the plaint as drawn. In para. 13 of the plaint the plaintiff said they were applying for letters of administration with the Will and codicil of Madhoba annexed to the estate of Madhoba. These letters were not granted until October 31, 1924, limited to the two properties mentioned in the suit. Now the concise statement recites that the plaintiffs and Defendants Nos. 2, 3 and 4 pray that it may be declared that the plaintiff and Defendants Nos. 2, 3, and 4 as administratrix and administrators of the estate of Madhoba Harichandra were entitled to redeem the properties mentioned in the plaint, while the decree which was eventually passed dismissing the suit recites that the plaintiffs pray that it may be declared that they, as executors of the Will of Manekbai and as administrators de bonis non jointly with Defendants Nos. 2, 3 and 4 of the estate of Madhoba should be entitled to redeem the suit properties. Then from the record at page 54 it would appear that the hearing commenced on November 10, 1924, although the decree recites that it was called on for hearing on several days in July, August and October.

11. It is necessary to point out all these defects in the record, since in a case of this description where the parties appear to have more than once changed their positions and their characters, unless the record is properly kept confusion is likely to arise.

12. The first defendant filed a written statement on January 7, 1922, which does not appear to have been amended since. He contended that the decree in the suit of 1875 was not a decree nisi but a final decree, and that in the events which occurred Sadanand became entitled to possession of the Girgaon property at the latest on July 15, 1876, and of the Mahim property on January 15, 1876. He denied that Sadanand went into possession of the Mahim property as mortgagee; on the contrary the Judge in Suit No. 689 of 1877 held that Sadanand :had obtained possession of the Mahim property before suit and on that ground discussed the suit. He claimed that even if the decree in Suit 259 of 1875 was not a final decree, any claim to redeem the properties was res judicata by virtue of the decree.

13. Further, the Mahim property had been handed over to Sadanand in execution of the decree, and had been conveyed by Sadanand in 1882 to one Purshottam Srikrishna. Large sums had been spent on the Girgaon property and in any event the plaintiff could not redeem without an account being taken of such sums. The rule of damdupat had no application. Defendants Nos. 2, 3 and 4 were allowed to put in a written statement on November 10, 1924, supporting the plaintiffs.

14. The Judge found on the issues which were raised on the pleadings : (1) That the plaintiffs, as executors of Manekbai. were only interested in the Girgaon property. They could not sue to redeem only one of the two (the Judge appears to have forgotten there were two mortgages) properties under the mortgage, They had no interest in the other. (2) Thai Dattaram Vaidyaram, heir of Purshottam Srikrishna, was a necessary party. (3) That the decree in suit No. 259 of 1875 barred the defendant therein from all equity of redemption in default of payments as therein directed, (4) That Atmaram had no interest in the Girgaon property as from January 15, or July 15 1876. (5) That the plaintiffs' claim was barred by adverse possession, and dismissed the suit. The plaintiffs, executors of the Will of Manekbai, have appealed.

15. The difficulties in the case have mainly arisen from the fact that Suit No. 259 of 1875 was filed on two separate mortgages, that the decree was passed as if there was one mortgage, and that thereafter the properties in each mortgage were dealt with in different ways. It is admitted that in December 1875, before the redemption period had expired, Sadanand obtained possession of the Girgaon property by arrangement with the mortgagor. Whatever that arrangement may have been, Sadanand continued in possession thereafter as owner. As to the Mahim property Sadanand, in 1877, took out a summons for executing the decree in Suit No. 259 of 1875; and on July 23, 1877, a Judge's order was made on the summons that the decree should be executed against Atmaram by ordering delivery to be given to Sadanand. But when the Judge was asked to sign a further order for the purpose of carrying out the previous order, that a warrant should issue to the Sheriff, he declined to sign it and told Sadanand to file a suit for possession. Sadanand then filed the suit already referred to, but as Atmaram in his written statement stated he was served with a

rule or order to show cause why the decree in Suit No. 259 of 1875 should not be executed and did not appear to show cause against the rule but thereupon gave up possession to the plaintiff, the suit was dismissed Sadanand transferred the property by deed of gift in 1882 to Purshottam.

16. The position then is somewhat Unorthodox. No objection appears to have been taken to the form of the suit No. 259 of 1875 which apparently treated the two mortgages as one and sought for one account of what was due on both the mortgages. With regard to one property the decree was executed as if it was a final decree; with regard to the other the mortgagee-entered into possession by arrangement with the mortgagor before the time prescribed for paying off the mortgage had expired. Even assuming that the mortgage on the Mahim property had been foreclosed absolutely, the mortgage on the Girgaon property continued to be in existence. It would have been otherwise if Sadanand had entered into possession after the six months fixed in the decree had passed. The Judge was of opinion that the decree was a final one, but I think the most that can be said on that question is, that at the time the decree was passed, it was probably the practice to foreclose, by proceedings in execution, instead of obtaining an order absolute. Undoubtedly, the decree was in the form of a decree nisi according to the precedent appearing in Seton which is reproduced in form 3 in Appendix P to the first Schedule of the CPC of 1908. I should prefer form No. 27 annexed to the High Court Rules appearing at page 235 in which it is directed that in default of the defendants paying principal, interest and costs by the time prescribed, the plaintiff will be entitled to a decree absolute for sale.

17. The English practice with regard to foreclosure absolute is set out in Lord Halsbury's Laws of England, Vol. XXI, para 520, at page 293, as follows:

Upon non-payment of the amount certified to be due at the time and place prescribed, the mortgagee is entitled to an order for foreclosure absolute as against the person or persons in default. The order is obtained upon motion or summons, and there must be an affidavit made by the mortgagee...of attendance at the prescribed time and place and non-payment of the money; and also an affidavit by the mortgagee...of non-payment since the appointed time.

18. And note (b) on the same page says:

If the order is made on motion, the matter is not mentioned to the Court unless there has been some irregularity preventing the motion from being treated as of course; counsel hands his brief duly indorsed to the Registrar. But usually it is made on summons in Chambers...whether the* proceedings are by writ or summons.

19. It might be advisable to consider whether this practice should not be prescribed for this Court by rule.

20. But though it would appear that the form used by this Court in those days for

decrees in mortgage suits was the same as was used according to the English practice for decrees nisi, there was no regular practice prescribed for the course to be followed by the mortgagee when default; occurred in payment of principal, interest and costs, within the time allowed. It really did not make any difference whether the mortgagee executed his decree, and obtained possession of the mortgaged property, or applied for a final decree except that an application for execution might be subject to the law of limitation. The question remains, what is the legal position of the parties if the decree is not executed and no order absolute is asked for.

21. Now, ordinarily speaking, if, after a decree nisi for foreclosure has been passed, and the mortgagee enters in possession before the period for payment of the principal, interest and costs has expired, the mortgagee could not foreclose without a further account being taken, as he would be liable to account for the rents received. Admittedly, rents were received from the Girgaon property, but the question would arise by what procedure were these accounts to be taken if the mortgagor demanded them.

22. Presumably, this Court, before the Transfer of Property Act came into force, would be guided by the English practice. Lord Halsbury, in para 532 of Vol. XXI, says:

The time for redemption will be enlarged if the mortgagee is in possession and receives rents between the date of the master's certificate and the day appointed for payment. Such receipt opens the account, and a fresh certificate must be made and a further day appointed; but after default on the day appointed for payment, the mortgagee receives the rents on his own account and the time is not thereby enlarged.

23. The fact then that Sadanand entered into possession before the time appointed for payment rendered necessary the issue of a fresh certificate and the appointment, of a further day for payment. The next-question is, whether the mortgagor's right to bring a redemption suit is barred by the mortgagee obtaining an order nisi for foreclosure. In *Hill v. Rowlands* [1871] 2 Ch. 361 an order for foreclosure was made in the common form and a certificate had also been made in the common form appointing the last day of six calendar months from the date of the certificate as the time for redemption, on payment of the principal money with interest up to that day and costs. The mortgagor claimed to be allowed to redeem at an earlier date than the date so fixed on payment of the amount found due with interest up to the date of payment only. The application was refused by Romer, J., and on appeal Lindley, L.J., said:

24. The rights of the parties are settled by the judgment, and the mortgagor cannot redeem before the time fixed by the certificate on payment of a less sum than is named in it.

25. It would thus appear that the mortgagors' rights are confined to applying in the foreclosure action for an enlargement of the time for payment.

26. The general principles by which the Court will be guided in entertaining such an application are set out in para. 528 of Lord Halsbury's Law of England, Vol. XXI:

...Enlargement of time is not a matter of course. There must be some reason for it, such is that the security is ample, and that the mortgagor has a reasonable probability of obtaining the money to pay the mortgage debt;.... The matters to be taken into consideration include the nature of the estate, whether in reversion or in possession, whether the mortgaged property shows a sufficient margin to protect the mortgagee against loss; and whether the mortgagor's reasonable expectations (of raising the money to pay off the mortgage) have been disappointed.

27. An application to enlarge the time and take further accounts forty-five years after the mortgagee had been put in possession after an order for foreclosure nisi had been made, even though possession was given before the day appointed for payment had arrived, could hardly have been within the contemplation of the learned author. If after a preliminary decree for foreclosure has been passed under the CPC of 1908 the mortgagee enters into possession before the day appointed for payment has arrived, the mortgagor would certainly have a right to demand a fresh account and the appointment of a further day for payment; but if he allowed many years to pass before making his application the Court would probably consider how far by his conduct he could be said to have foreclosed himself.

28. But in this case there is a decree which at the time it was passed, whatever its form might be, was considered by, the Court capable of execution. When the mortgagor put Sadanand into possession of the Girgaon property in December 1875, he had not the means to comply with the Municipality's requisitions for rebuilding or repairing some of the chawls thereon, and he would not have had the slightest expectation of redeeming the mortgaged properties either on the day appointed for payment or six months later. The rents received by the mortgagee between the date of taking possession and the date fixed for repayment could not have amounted to any great sum. I think it must be considered that Atmaram, by taking no further steps to ask for a further account and for extension of the time for payment, acquiesced in the mortgagee holding the property as his own and induced him to believe that it was no longer necessary either to execute the decree he had obtained or to obtain an order absolute for foreclosure.

29. Even if it were held that the suit could be reconstituted as an application in the mortgage suit to enlarge the time for redemption, and an order was made to take accounts from December 1875, it is obvious that the amount due to the mortgagees according to the terms of the mortgage would be many lakhs, as the rule of damdupat does not apply to mortgagees in possession, and any possibility of the plaintiffs being able to pay what would be found due may be discarded.

30. appeal must be dismissed with costs.

Coyajee, J.

31. After stating facts and discussing evidence his Lordship proceeded. Even if the decree passed in Suit No. 259 of 1875 were regarded as a decree nisi, still the result would be the same. The general rule, no doubt, is that after an order for foreclosure nisi, the mortgagor can apply for, and in suitable circumstances and on certain conditions obtain, an order enlarging the time for redemption; but enlargement of the time is not a matter of course (Halsbury, Vol. XXI, Section 528). The power to extend the time is in the discretion of the Court, and in order to entitle himself to such indulgence the mortgagor must apply to the Court with reasonable promptitude. Assuming that it is permissible to treat the plaint in this suit as an application made in the foreclosure suit of 1875, the delay of forty-five years on the part of the mortgagor is fatal to his case.

32. The decree dismissing this suit is, in my opinion, correct, and I agree to the order proposed by the learned Chief Justice.