

(1950) 08 GAU CK 0004

Gauhati High Court

Case No: Second Appeal No. 12 of 1950

Maitham Bania

APPELLANT

Vs

Ritu Kaivarta and Others

RESPONDENT

Date of Decision: Aug. 11, 1950**Acts Referred:**

- Assam Money Lenders (Amendment) Act, 1943 - Section 9
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33

Hon'ble Judges: Thadani, C.J; Ram Labhaya, J**Bench:** Division Bench**Advocate:** J.N. Borah, for the Appellant; P.N. Roy, for the Respondent

Judgement

Ram Labhaya, J.

This is an appeal from the judgment and decree of the Additional Sub-Judge, L. A. D., dated 23rd November 1949 by which the order of the trial Court decreeing plaintiff's claim was affirmed. Defendant has appealed.

2. The suit was for redemption of a mortgage alleged to have been made by a registered instrument for a sum of Rs. 80 in 1937. The property in question was 5B 14 Ls. of land. It was prayed that redemption be allowed without payment of the mortgage money as the mortgage had been extinguished by operation of law, viz., u/s 9, Assam Money lenders' Act as amended by Act VI [6] of 1943.

3. The defence raised was that the property; had been sold to the defendant in 1933-34. This has been negated by the two Courts below. The finding is on a question of fact and is not assailable at this stage. The learned Counsel for the appellant, therefore, has not challenged this finding.

4. The trial Court found that the mortgagee had been in possession for 9 years from the date of the mortgage. The usufruct of the land for 9 years was, according to the learned trial Judge, more than double the consideration of the mortgage. Plaintiff

was thus found entitled to a decree for possession of the property without payment of the mortgage money.

5. The learned Sub Judge has affirmed the decree but on a different basis. He has come to the conclusion that the mortgage charge could be extinguished under 8. 9 (2) (1) only after the expiration of 12 years from the date of the execution of the mortgage deed. As this period had not expired on the date of the suit and even on the date of the decree of the trial Court, the learned Sub Judge was of the view that the decree for possession without payment of the mortgage money could not have been passed by the Munsiff. He, however, affirmed the decree on the ground that the period of 12 years also had expired before the date of the hearing of the appeal and the mortgage then stood completely discharged.

6. The learned Counsel for the appellant urges that on the date the suit was instituted the plaintiffs could not ask for possession of the property without payment of the mortgage money. His contention is that the suit, in these circumstances, was premature, and any cause of action that may have accrued during the pendency of the appeal could not have been taken notice of. The suit should have been dismissed and the plaintiffs directed to institute a fresh suit.

7. We think the argument is not well founded. The suit was essentially one for redemption. There was a cause of action for the suit for redemption of the property. There was no impediment in the way of the plaintiffs asking for redemption on payment of money. The cause of action existed for a redemption suit therefore.

8. The relief claimed was that redemption or delivery of possession of the property be decreed without payment of mortgage money on the ground that the charge had been extinguished by operation of law. It is not disputed that this relief was not available to the plaintiffs on the date of the suit. But it became available during the pendency of the appeal, in the lower appellate Court. The ordinary rule is that the rights of parties must be determined as at the date of the action, and not on the basis of rights which accrued to them after the institution of the suit. This rule should not apply to this case. It cannot be said that plaintiffs had no cause of action for the suit. The relief that was claimed on the basis of action was in excess of what they were entitled to. But they became entitled to the relief claimed later on. It would be extending the operation of the rule if it is applied to the circumstances of the case before us.

9. The rule itself has not been followed consistently in all the High Courts. A redemption suit which was premature was dismissed in [\(Mylavarapu Rangayya Naidu Vs. Basana Simon and Others\)](#), even though the cause of action had accrued to the plaintiffs after the institution of the suit. But in AIR 1926 145 (Lahore) the view taken was that if a suit was premature at the date of its institution, it should not be dismissed if the cause of action has accrued after the institution of the suit.

10. We need not resolve this conflict of authority on this point as in the opinion that we have taken of the matter the rule above stated has no application to the facts of this case. The powers of the appellate Court have been described in Order 41, Rule 33, Civil P.C. This rule was introduced in the Code in 1922. It confers on the appellate Court the power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. The power to make further or other decree or order as the case may require would justify consideration of events taking place after the institution of the suit in proper cases. There would not be any excess of jurisdiction if in the exercise of the power given to the appellate Court under Order 44, Rule 33 the Court takes notice of facts which entitled a plaintiffs to a relief which though claimed in the plaint could not be given to him on the date of the suit. Normally, and as a general rule, a Court of appeal in considering the correctness of the judgment of the Court below is to confine itself to the state of the case at the time when the judgment was given But in exceptional cases it may depart from this rule in order to shorten litigation or to achieve the ends of justice.

11. In AIR 1940 194 (Lahore) Dalip Singh J., held that where a suit when instituted was premature but had ceased to be premature in appeal, the question whether it should be decreed or not was a matter within the discretion of the appellate Court.

12. In Pandurang Narayan v. Ramchandra, A. I. R 1930 Bom. 654 : (54 Bom. 902), a Division Bench of the Bombay High Court held that the Court was not precluded from taking cognizance of events which have happened since the filing of the suit or appeal.

13. The learned Counsel for the appellant has not been able to cite any authority in support of the contention that in the circumstances of the case the lower appellate Court exceeded its jurisdiction in allowing the relief which the plaintiffs became entitled to during the pendency of the appeal.

14. We think the power to take notice of subsequent events did exist in this case particularly as the suit for redemption was not premature. The exercise of the power is fully justified on facts. It would not have been fair or just to force the plaintiffs either to pay the money which was not due or to institute another suit.

15. We see no reason to interfere. The appeal is dismissed Parties shall bear their own costs in this Court.

Thadani, C. J.

16. I agree.