(1957) 11 BOM CK 0014

Bombay High Court

Case No: Second Appeal No. 1140 of 1955

Hirabai Channappa		APPELLANT
	Vs	
Ganesh Datatraya and Others		RESPONDENT

Date of Decision: Nov. 20, 1957

Acts Referred:

- Transfer of Property Act, 1882 - Section 60, 91

Citation: AIR 1959 Bom 172 : (1958) 60 BOMLR 477 : (1958) ILR (Bom) 756

Hon'ble Judges: Miabhoy, J

Bench: Single Bench

Advocate: Y.V. Chandrachud and N.M. Patil, for the Appellant; G.R. Madbhavi, for the Respondent

Judgement

1. This is a second appeal from the appellate decree passed by the learned District Judge. South Satara, at Sangli, in Appeal No. 315 of 1953.

2. This second appeal raises a very short question about the right of the plaintiff-mortgagor to redeem the mortgaged property. The contention of the mortgagee is that the right of redemption of the mortgagor has been extinguished. The two Courts below have taken different views on this subject. The trial Court has held that the right of redemption of the mortgagor was not lost, and the first appellate Court has taken the view that the right was so lost.

3. The suit properties consist of a house and two lands. It is common ground that these properties originally belonged to one Channappa Jangam. He died in or about 1910 leaving behind him his widow Hirabai, the present plaintiff, and a widowed daughter named Bhagirathi. It is also common ground that Hirabai mortgaged the suit properties on or about 12-6-1914 in favour of one Dattoba. Defendants Nos. 1 and 2 are the successors in title of that mortgagee Dattoba. Exhibit 32 is a copy of the mortgage-deed.

The mortgage was for a sum of Rs. 1,200, and was a usufructuary mortgage. Under the mortgage-deed, the mortgagee was to be in possession of the mortgaged house and the two lands. The important terms of the mortgage were that the mortgagee was to remain in possession of the mortgaged properties in lieu of interest. The municipal tax in respect of the house was to be paid by the mortgagor and the assessment in respect of the two lands was to be paid by the mortgagee. The period of redemption was five years. The present suit, from out of which the present appeal arises, was brought by the plaintiff Hirabai for redemption of the aforesaid mortgage. The contention of the defendant Nos. 1 and 2 was that Hirabai had lost her right of redemption by virtue of certain events, which I propose to mention immediately. It appears that, in 1917 one Virupaxayya lay claim to the suit properties. His contention was that he was the cousin of Channappa; that he and Channappa were joint in estate; that the suit properties were joint family properties; and that, on the death of Channappa, he became the sole owner of those properties. On these allegations, Virupaxayya brought Suit No. 27 of 1917, for possession of the suit properties. The plaintiff Hirabai was the only defendant in that suit. The mortgagee Dattoba was not made a party thereto. That suit of Virupaxayya ended in a compromised decree. The consent decree is at Exhibit 38, dated 14-6-191. By this decree, Virupaxayya was declared to be the sole owner of the suit properties. However, the suit house was given to the plaintiff Hirabai for maintenance of herself and her widowed daughter Bhagirathi. For this purpose, she was allowed to retain possession of the suit house. It was provided that the suit house was to revert to Virupaxayya on the death of the plaintiff Hirabai and Bhagirathi. It was also further provided that one-half of the income from the suit lands was to be given to Bhagirathi for her maintenance. The contention of defendants NO. 1 and 2 in the present litigation is that the plaintiff Hirabai has lost her right to redeem the suit properties by virtu of the provisions contained in this consent decree Exhibit 38. I propose to consider this question first. The question has got to be answered with reference to the provisions contained in Section 60 of the Transfer of Property Act. That section gives a right to a mortgagor to redeem the mortgaged property at any time after the principal money has become due. However, there is a proviso to that section, which is material for the purpose of the present litigation. That proviso is as follows:

"Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court."

Therefore, in order to succeed, the defendants Nos. 1 and 2 are required to establish that plaintiff Hirabai has lost the right of redemption either by an act of the parties, i.e., the mortgagor and the mortgagee, or by a decree of a Court. The question for consideration is whether the consent decree Exhibit 38 has extinguished the right of the plaintiff Hirabai to redeem the suit properties. This question came up for consideration in AIR 1934 205 (Privy Council) . In this appeal, Their Lordships were concerned with the construction of that part of the aforesaid proviso which states that a right of redemption is lost by the decree of a Court. The observations which Their Lordships made on the interpretation of

the aforesaid part of the proviso are to be found at p. 369, and they are as follows:

"The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. In the present case, the only basis for the claim that the right to redeem has been extinguished is Section 560; but, in Their Lordships" view, the old decree cannot properly be construed as doing that which it does not purport to do -- namely, as extinguishing the right to redeem."

In the aforesaid case, the mortgagor had instituted a suit for redemption. A decree was passed in 1896, in favour of the mortgagor. The decree stated that if the mortgagor failed to pay in accordance with the decree, his case would stand dismissed. The decree did not provide that, upon default, the mortgagor would be absolutely barred of all right to redeem. The mortgagor did not pay the amount provided for in the mortgage decree. However, the mortgagor brought a second suit for redemption. The contention was that the previous decree had barred the right of the mortgagor to redeem. It was in connection with the aforesaid contention that the aforesaid observations were made by Their Lordships of the Privy Council. The effect of the aforesaid decision of the Privy Council is that, in order that a right to redeem may be lost by a decree, the decree itself must in express terms provide that the right has been so lost. Considering the rival contentions of the parties, in the light of the aforesaid observations of the Privy Council, there is no doubt whatsoever that the consent decree did not in terms provide that the right of the plaintiff to redeem the property was lost. In fact, the mortgagee was not a party to the aforesaid litigation. It is not quite clear from the record as to whether Virupaxayya was or was not aware of the existence of the mortgage. In any case, there is no doubt whatsoever that, at the time when the parties entered into the compromise in suit No. 27 of 1917, they did not intend to make any provision regarding the mortgage which the plaintiff Hirabai had executed in favour of Dattoba. Under the aforesaid circumstances, it is difficult to see how the aforesaid consent decree can be read as extinguishing the right of Hirabai to redeem the suit properties. The effect of the aforesaid decree only is that vis a vis Virupaxayya, the plaintiff Hirabai lost her claim as the successor in title of her husband Channappa to the suit properties, and she only became entitled to a right of residence and maintenance from one of the suit properties. But this change of her position vis a vis Virupaxayya cannot in any way, affect the right of the plaintiff Hirabai to redeem the properties. By the aforesaid change in her position, she can never lose her right to redeem the properties and to recover the same from her own mortgagee. In my opinion, such a result is against the fundamental principles governing the relationship between a mortgagor and a mortgagee. In this connection, the provisions of Section 91 of the Transfer of Property Act may be usefully looked to. Under that section, a mortgagor is always entitled to redeem the mortgaged property. The law on the subject is quite clear that, even if a mortgagor has parted with the equity of redemption and the equity of redemption has become vested in a third person, even then, the mortgagor is always entitled to a right to redeem the mortgaged property. In a majority of the mortgagees, the

mortgagor undertakes a personal liability to pay the mortgage dues. In discharge of this particular liability, the mortgagor must always have a right to bring a suit to pay the mortgage money and thereby get rid of the aforesaid liability. When the mortgagor does not lose a right to redeem even by parting with his interest in the equity of redemption, it is incomprehensible as to how the present plaintiff Hirabai could have lost her right to redeem the properties by entering into a compromise decree with a third party under which she recognized the right of that third party to the title to the mortgaged properties. The matter can be looked at from another angle. If the mortgagee Dattoba or the defendants Nos. 1 and 2 had instituted a suit for enforcement of the aforesaid mortgage against the present plaintiff Hirabai, could the latter have resisted that claim on the ground that, by the aforesaid consent decree she had no longer a title to the mortgaged properties? It is quite clear to my mind that the plaintiff Hirabai would not have been allowed to resist the claim on the aforesaid ground. The utmost that can be said, so far as the aforesaid consent decree in suit No. 27 of 1917 is concerned, is that the present plaintiff, Hirabai could not have contended vis a vis the claim of Virupaxayya that she had a right title and interest in the suit properties. But, it is one thing to say that the plaintiff Hirabai has lost her title to the suit properties and quite another thing to say that her right to redeem is lost. In my opinion, a mortgagor does not lose his right to redeem by losing title to the property itself. As between the mortgagor and the mortgagee, there is still a liability on the part of the mortgagor to repay the mortgage amount, and a liability on the part of the mortgagee to hand back possession of the mortgaged properties. If the mortgagee is paid by the mortgagor his mortgage dues. Under the aforesaid circumstances, in my opinion, the conclusion of the learned appellate Judge that the plaintiff Hirabai had lost the right to redeem the suit properties by virtue of the consent decree Exhibit 38, cannot be upheld. I may mention that Mr. Madhavi, the learned Advocate for defendant Nos. 1 and 2, very fairly conceded before me that he was not in a position to justify the aforesaid conclusion of the learned appellate Judge.

4. The second ground on which the defendants Nos. 1 and 2 contended that the right to redeem was lost was based upon another parallel litigation which was started by the defendants Nos. 1 and 3 against Virupaxayya. Before I mention the second ground, I propose to mention the history of the second litigation. It appears that Virupaxayya filed Darkhast No. 47 of 1919 to enforce the aforesaid consent decree Exhibit 38, which he had obtained in suit No. 27 of 1917. In execution of that decree, in the aforesaid darkhast Virupaxayya got possession of the two suit lands. Thereafter, defendants Nos. 1 and 2 filed Miscellaneous Application No. 20 of 1919 for recovering the aforesaid two suit lands back from the possession of Virupaxayya. This claim was made by defendants Nos. 1 and 2 on the ground that they were mortgagees of the aforesaid two lands and the consent decree Exhibit 38 was not binding on them. The application was dismissed on 15-12-1920. Thereafter defendants Nos. 1 and 2 brought suit No. 548 of 1921 against Virupaxayya, for determination of their right to recover possession of the aforesaid two lands. Defendants Nos. 1 and 2 claimed title to the two lands as mortgagees and also sought possession of the same ground. It is important to notice that, both in the aforesaid

application and in the suit, the suit house was never included. This was not so done on the ground that defendants Nos. 1 and 2 were already in possession of the suit house as mortgagees and that their possession as such mortgagees had not been disturbed by Virupaxayya. The aforesaid suit No. 548/21 was dismissed on 19-12-1924. Defendants Nos. 1 and 2 preferred an appeal from the decision in suit No. 548/21 and that appeal was No. 37 of 1925. Defendants Nos. 1 and 2 and Virupaxayya entered into a compromise in appeal and a consent decree was passed on 25-3-1931, in terms of the compromise. By that consent decree, Virupaxayya relinquished his right to the suit house in favour of defendants Nos. 1 and 2. However, the right of defendants Nos. 1 and 2 to obtain possession of the suit house was deferred till the death of Hirabai. It was expressly mention in the consent decree that the plaintiff Hirabai was entitled to remain in possession of the suit house during her life-time. No provision appears to have been made for the widowed daughter Bhagirathi on account of the fact that, during the pendency of the aforesaid litigation, Bhagirathi had expired. It was also further provided that if defendants Nos. 1 and 2 made any suitable arrangement for the maintenance and the residence of the plaintiff Hirabai, then, defendants Nos. 1 and 2 were at liberty to take possession of the suit house from the plaintiff Hirabai. Now, the second ground on which the defendants Nos. 1 and 2 contended that the plaintiff Hirabai had lost the right to redeem the properties was on the basis of the aforesaid consent decree passed in appeal No. 37 of 1925. Here again, for the reason which I have already given whilst discussing the ground based upon the consent decree in suit No. 27 of 1917, I fail to understand or appreciate as to how the plaintiff Hirabai could have been said to have lost her right to redeem by virtue of the aforesaid consent decree in appeal No. 37 of 1925. The decree does not state in terms that the right of the plaintiff Hirabai to redeem the properties was extinguished. It is important to notice that the plaintiff Hirabai was not a party to the aforesaid litigation. It is not necessary for me to consider as to what exactly would have been the effect of the aforesaid consent decree on the right of the plaintiff Hirabai to redeem, if the plaintiff Hirabai had been a party to the aforesaid consent decree. So as the terms of the decree are concerned, inasmuch as they do not terminate the right of the plaintiff Hirabai to redeem the properties, it cannot be said that Hirabai had lost the right to redeem by virtue of the aforesaid decree. Even if the consent decree had so provided, having regard to the fact that the plaintiff Hirabai was not a party to the aforesaid consent decree, it is impossible that the right of the plaintiff Hirabai could have been lost. It is true that by the terms of the aforesaid decree, defendants Nos. 1 and 2 have been given the suit house by Virupaxayya as full owners, but in my opinion, that cannot affect the right of the plaintiff Hirabai to redeem the properties from the mortgagee and his successors defendants Nos. 1 and 2. In this connection, it is important to notice that defendants Nos. 1 and 2 were litigating in the aforesaid suit and appeal in their capacity as mortgagees. There was no question of redemption of the aforesaid mortgage at all. What, in fact, defendants Nos. 1 and 2 were contending was that the consent decree arrived at in suit No. 27 of 1917 was not binding on them because the mortgage was prior in date to the date on which the aforesaid suit was instituted and they were not parties to the aforesaid suit. However, the learned appellate judge has held that the plaintiff Hirabai lost her right

to redeem under the aforesaid decree because she was a consenting party to the aforesaid consent decree in appeal No. 37 of 1925. In my opinion, the learned appellate Judge was entirely wrong in this conclusion. The conclusion has ben arrived at mainly on the ground that the plaintiff Hirabai had given evidence in favour of the defendants Nos. 1 and 2 in the aforesaid suit No. 548 of 1921, and that the consent decree had been so framed as to protect the rights of the plaintiff Hirabai. In my opinion, the learned appellate Judge was not right in deciding the question of extinction of the right of redemption on the aforesaid ground, when the ground was not pleaded in the written statement. There was no issue on that particular subject. The trial Court has not considered the same. Under the aforesaid circumstances, in my opinion, it is impossible to overthrow the claim of the plaintiff Hirabai on the ground of the plaintiff Hirabai''s consent. In my opinion, even on the merits, the circumstances narrated by the learned appellate Judge on the merits of the consent of Hirabai''s, though they may have arisen for consideration, if the point had been pleaded by defendants Nos. 1 and 2, are not necessarily conclusive of the matter. It is not improbable that the second litigation which was started in 1919 may have been started not for the benefit of the mortgagees, but for the benefit of the plaintiff Hirabai, who had lost her first battle with Virupaxayya.

5. The learned Advocate for the defendants Nos. 1 and 2 tied to support the judgment of the learned appellate Judge on another ground. I have already mentioned that one of the terms of the consent decree in appeal No. 37 of 1925 was that defendants Nos. 1 and 2 were at liberty to make suitable arrangement for the maintenance and residence of the plaintiff Hirabai, and that, in case they made such arrangement, they were at liberty to take possession of the suit house from the plaintiff. In the written statement, the defendants Nos. 1 and 2 have averred that they have made an alternative arrangement for the residence of Hirabai and that they were prepared to make arrangement for her maintenance also. The contention was that Hirabai had been put in possession of a house bearing No. 418, and, consequently, the present suit was not maintainable. It is not quite clear from the written statement as to whether, by the aforesaid averment, defendants Nos. 1 and 2 intended to contend that, by the aforesaid alleged arrangement for maintenance and residence of the plaintiff Hirabai, the plaintiff Hirabai must be taken to have consented to the consent decree passed in appeal No. 37 of 1925, or must be taken to have ratified the same. This point also does not appear to have been touched in the trial Court. The learned appellate Judge has referred to the aforesaid point, but he has not recorded a definite finding on the aforesaid subject. The learned Advocate for defendants Nos. 1 and 2, therefore, contended that I should raise a specific issue on the aforesaid subject and reach my own decision on the point. I do not think that it would be proper to do so. But, even supposing that the aforesaid point is material, the evidence on the aforesaid subject, in my opinion, is not such that a definite conclusion on the aforesaid subject can be reached in favour of defendants Nos. 1 and 2. Incidentally, the learned trial Judge has considered the aforesaid averment of defendants Nos. 1 and 2, and the conclusion which he has arrived at on that subject is in the following terms:

"She went to House No. 414 not because defendants made any adequate provisions for her maintenance under the decree, but because her paramour shifted."

Therefore, the conclusion of the learned trial Judge is that the occupation of the plaintiff Hirabai of House No. 414 is not due to the fact that any alternative arrangement had been made on account of the provision contained in the consent decree in appeal No. 37 of 1925, but because Dnyanoba, the uncle of the defendants Nos. 1 and 2, who had illicit connections with the plaintiff Hirabai, was residing in House No. 414. Under the aforesaid circumstances, in my opinion the defence of defendants Nos. 1 and 2 cannot be upheld on the aforesaid new ground also.

6. Taking an over-all view of the defence of defendants Nos. 1 and 2, in my opinion, the defence is altogether untenable. The defendants Nos. 1 and 2 claim to have become owners of the suit properties by virtue of the consent decree in appeal No. 37 of 1925. In fact, their plea that the plaintiff Hirabai has lost the right to redeem is embedded in the aforesaid contention of defendants Nos. 1 and 2. Having regard to the fact that defendants Nos. 1 and 2 litigated in the aforesaid appeal No. 37 of 1925, in their capacity as mortgagees, and all along they were fighting the aforesaid litigation to establish their rights as mortgagees in regard to the suit lands, and as there was no question of the redemption of the mortgage by Virupaxayya, who apparently did not admit the mortgage, if the contention of defendants Nos. 1 and 2 were to be upheld, then, defendants Nos. 1 and 2 would become the full owners of the suit house in spite of the fact that they held title to the suit house only as mortgagees. The only right of defendants Nos. 1 and 2 vis a vis the plaintiff Hirabai is that of a mortgagee, and, so long as the plaintiff Hirabai is prepared to pay off the mortgage dues, the fact that the plaintiff Hirabai had lost the litigation as against Virupaxayya is no consideration whatsoever for throwing off the claim made by the plaintiff Hirabai.

7. For the aforesaid reasons, I have come to the conclusion that he decree passed by the trial Court was correct and the reversal of the decree by the first appellate Court was not justified. Therefore, I allow the appeal. I set aside the decree passed by the appellate Court and confirm that passed by the trial Court, with this modification that I give liberty to the plaintiff-appellant to pay the mortgage dues within six months from to-day instead of on or before 25-3-1954. I further order that respondents Nos. 1 and 2 shall pay the costs of this Court and the first appellate Court to the appellant and bear their own.

8. Appeal allowed.