
(1943) 08 BOM CK 0019

Bombay High Court

Case No: O.C.J. Appeal No. 29 of 1943 and Suit No. 2720 of 1930

Thakorebai Shrinivas
Khemraj

APPELLANT

Vs

The Central Bank of
India, Limited

RESPONDENT

Date of Decision: Aug. 27, 1943

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 5

Citation: AIR 1944 Bom 35 : (1943) 45 BOMLR 976

Hon'ble Judges: Rajadhyaksha, J; John Beaumont, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

John Beaumont, Kt., C.J.

This is an appeal against an order of Mr. Justice Blagden on a motion, which asks in substance that the applicant may be at liberty to exercise the privilege conferred by Order XXXIV, Rule 5, Civil Procedure Code, 1908, enabling a defendant in a mortgage suit by paying into Court all amounts due from him under Sub-rule (1) of Rule 4, that is the mortgage money, to redeem the property, and that privilege can be exercised at any time before the confirmation of a sale made in pursuance of a final decree. Various questions are discussed in the judgment of Mr. Justice Blagden, but in this Court the only point which has been argued, and the only point with which we need deal, is whether the applicant can exercise the right conferred upon a defendant under Order XXXIV, Rule 5.

2. The facts giving rise to the application are these. The mortgage, which is in question, was made on May 24, 1928. It was a mortgage of the Lucknow Flour Mills made by two gentlemen named Shrinivas Khemraj and Rangnath Khemraj in favour of the Central Bank to secure Rs. 4,50,000. On August 20, 1930, at the time when the mortgagors were in very serious financial difficulties, the minor son of Shrinivas, who is the present

applicant, filed a partition suit against his father and uncle, to which the Central Bank was a party. I will deal with the subsequent history of that suit first. On June 11, 1931, there was a reference to the Commissioner for taking accounts to report whether the partition suit was for the benefit of the minor, and the Commissioner reported that it was not for his benefit, and the suit was dismissed on August 19, 1931, as against the Central Bank. On August 31, 1932, Mr. Justice Mirza, on exceptions to the Commissioner's report, held that the suit was for the benefit of the minor, but nothing further has been done in that suit. I will now go back to the year 1930. After the partition suit was filed, viz. on September 5, 1930, there was a petition for adjudication against the mortgagors, and on September 9 they were adjudicated insolvent. On December 17 this mortgage suit was filed by the Central Bank against the mortgagors and the Official Assignee, On January 28, 1931, there was a preliminary mortgage decree, and on August 28, 1931, there was a decree absolute for sale. In 1940 Shrinivas died. The order for sale was not proceeded with, apparently because the property had been let at a satisfactory rental, but after the commencement of the war the mortgaged property enhanced greatly in value, and accordingly in 1943 the Commissioner proceeded to carry out the order for sale, and in April he entered into a contract for sale of the property to respondent No. 5, for something over eight lacs of rupees. Attempts were made by the present applicant, the minor son of Shrinivas, under Order XXI, Rule 89, to avoid the sale; but those attempts were unsuccessful. On May 19 of this year this notice of motion was launched in order to enable the applicant to redeem the property under Order XXXIV, Rule 5.

3. Mr. Justice Blagden assumed in favour of the applicant that he was a member of the joint family of the mortgagors, but he held that, even on that assumption, he was not a defendant in the mortgage suit, and was, therefore, not entitled to exercise the privilege conferred under Order XXXIV, Rule 5, on a defendant. I agree with Mr. Justice Blagden in thinking that Rule 5, when it speaks of a defendant, means a defendant, and does not mean anybody who has an interest in the equity of redemption. But I think that one must read Rule 5 in conjunction with Rule 1, and the practice which exists under Rule 1. Rule 1 provides that all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Now, prima facie, the minor son of Shrinivas, if he was a member of the joint family at the time when the mortgage suit was started, had an interest in the equity of redemption, and ought to have been made a defendant. But it is well settled that, where the manager of a Hindu joint family is made a defendant in a mortgage suit, he sufficiently represents the other members of the joint family. That rule has been established in many cases, and I need only refer to a decision of the Privy Council in AIR 1914 136 (Privy Council) and a decision of the Madras High Court in Venkatanarayana v. Somaraju [1937] Mad. 880. That rule of practice is based, not on the view that Order XXXIV, Rule 1, does not apply to a Hindu joint family, but on the view that, owing to the peculiar relations which subsist between the manager and the other members of the Hindu joint family, the manager sufficiently represents the joint family, so that the other members of the joint family are regarded for the purposes of Rule 1 as being joined as parties through the manager. But

it seems to me that if that view prevails under Rule 1, and if what I may call the junior members of the joint family are regarded as sufficiently before the Court to enable them to be bound by an order for sale, since they are represented by the manager, they must be regarded also as sufficiently before the Court to enable them to exercise the privilege of stopping the sale in manner provided by Rule 5. Therefore, if I were satisfied that the applicant was a member of the joint family, I should say that he was sufficiently a defendant under Rule 1 and could exercise the privilege conferred on a defendant under Rule 5.

4. [The judgment then proceeded to determine if the minor was as a matter of fact a member of the joint family, and concluded :] The applicant has, in my opinion, failed to establish that he was a member of the joint family, and has made it impossible for this Court to assume that he was a member of the joint family. The appeal fails, and must be dismissed with costs. The mortgagees can add their costs to the mortgage debt Separate sets of costs to be taxed.

Rajadhyaksha, J.

5. I agree.