The Bank of Poona Vs Navrajasthan Co-Operative Housing Society Limited

Court: Bombay High Court

Date of Decision: Jan. 31, 1967

Acts Referred: Transfer of Property Act, 1882 â€" Section 60, 82, 91, 92

Citation: (1967) MhLj 774

Hon'ble Judges: G.A. Thakker, J; D.V. Patel, J

Bench: Division Bench

Advocate: Y.B. Rege and N.D. Hombalkar, for the Appellant; S.K. Vaidya and M. R. Parpia and S.M. Mhamane For respondent No. 13, for the Respondent

Judgement

D.V. Patel, J.
This is an appeal by the defendant against the decree of the Civil Judge, Senior Division, Poona, in a redemption suit.

2. The facts are few and they are as follows:

The appellant before us is the Bank of Poona, which is now merged into Sangli Bank Ltd. Defendants Nos. 9 and 10 owned survey Nos. 93, 102

and 107 in Poona, near Bhamburda. They effected a mortgage in respect of these Survey Numbers in favour of the Bank of Poona on February

16, 1949. The mortgage deed is at Exh. 85/9. Thereafter defendants Nos. 9 and 10 sold 4 acres and 34 gunthas to the plaintiffs Nav Rajasthan

Co-operative Housing Society Ltd., for a sum of Rs. 67,000. Out of this amount, the Society retained a sum of Rs. 16,500 to be paid to the

mortgagee, but which it did not pay. Thereafter in 1954, the bank instituted arbitration proceedings and ultimately the award was made a decree of

the Court on August 17, 1954, in Suit No. 92 of 1954. In these proceedings the plaintiff-Society was not made a party. Only the mortgagors,

defendants Nos. 9 and 10, were parties as defendants. Under this decree the Bank brought the property to sale and it purchased all the three

survey numbers with the leave of the Court on October 16, 1959, for the amount then due. It appears that during the execution proceedings the

Society appeared in Court and took time to make payment of the due but did not make any payment. Eventually the sale came to be confirmed.

Defendants Nos. 9 and 10 challenged the said order of confirmation in Appeal No. 48 of 1960, which was eventually dismissed on September 6,

1960. The Society then instituted the present suit for redemption.

3. In the plaint, the plaintiff-Society alleged that it had purchased 4 acres and 34 gunthas of the land and that a redemption decree be made in its

favour in respect of all the three survey numbers mentioned in the schedule. In this suit some of the members of the Society who had become

owners of smaller plots made in these 4 acres and 34 gunthas were joined as party-defendants, the main defendant being the Bank. The Bank

contended that the Society was not entitled to redeem the whole of the mortgage property, but only the property that it had purchased on payment

of proportionate amount of the mortgage dues. The learned trial Judge made a decree for redemption of the entire mortgage property, i. e. the

three survey numbers, by decree, dated September 26, 1962. By this appeal the Bank challenges the said decree.

4. In order to appreciate the contentions raised and accepted by the trial Judge, it is necessary to refer to the sale deed executed by defendants

Nos. 9 and 10 in favour of the plaintiff-Society, which is at Exh. 92. The sale deed recites that 4 acres and 34 gunthas out of survey No. 93 was

sold for a sum of Rs. 67,500 free from all encumbrances. To ensure payment of the mortgage dues, Rs. 16,500 were kept with the Society in

order to be paid over to the mortgagee. The terms agreed between them are provided in para. 8, which refers to the amount of consideration for

the sale deed. Against item Rs. 16,500 this appears:

After making accounts of the deed of simple mortgage which we have executed to the Bank of Poona, Ltd., on the date 16-2-1949 for Rs.

15,000 the amount found due to the Bank today is Rs. 16,500. We have deducted the said amount from the amount of this sale deed. So you

should pay in full the amount due to the Bank on the mortgage deed dated 16-2-1949 and the interest from today and should take the mortgage

deed of the Bank satisfied. Today a larger amount is not due to the Bank. If a debt in excess of Rs. 16,500 is found due, we shall pay it. And if the

debt is found to be less, you should pay back the balance to us. As you have accepted the liability to pay the amount of the Bank if any injury is

caused to us and if we suffer any loss we will be entitled to recover the same from you.

The rest of the terms are not material, because they recite the making up of the consideration of Rs. 67,500.

5. In the Court below and here it was contended on behalf of the plaintiff that under this deed the right to the equity of redemption is vested in the

plaintiff and, therefore, the plaintiff had a right to redeem the whole property it being not bound by the proceedings which had so far taken place

between the mortgagors and the mortgagee. The trial Court accepted this contention of the Society. In para. 16, the learned Judge says that as a

result of the sale by Exh. 92 in its favour the Society became entitled to the equity of redemption of the suit property, i e. the whole of the

mortgaged property.

6. We do not see how by any canon of construction of the sale deed the conclusion that the plaintiff-Society became entitled to the equity of

redemption can be supported. The clause which we have reproduced above clearly indicates that the plaintiffs in order to be able to get the

property, i. e. 4 acres and 34 gunthas, free from all encumbrances, retained with it a sum of Rs. 16,500, which the mortgagors said was due to the

bank for payment to the mortgagee-Bank. It thus constituted itself a trustee for making the payment to the Bank only, as shown by the subsequent

terms in the said paragraph, viz. ""If a debt in excess of Rs. 16,500 is found due we shall pay it and if the debt is found to be less you pay back the

balance to us"". It also provides that ""if the Society made a default in making the payment and if any loss was caused to mortgagors then the Society

would be liable."" There is not a word in the said sale deed by which equity of redemption of the whole property is transferred to the Society. It is

clear from the whole tenor of the document that what was transferred was only 4 acres and 34 gunthas of survey No. 93 free from all

encumbrances and in order to fulfil that term, as the Society could not have redeemed only that portion of the land, a sum of Rs. 16,500 was kept

with the Society so that the whole mortgage debt could be discharged and the property freed of the mortgage. This is entirely different from

conveying the right of equity of redemption to an assignee which gives the assignee the right to redeem the whole property.

7. The question then is what are the rights of the Society as an assignee of a portion of the mortgaged property in its favour under the provisions of

the Transfer of Property Act. We would like to consider the question first apart from authorities. The relevant sections which fall to be considered

are sections 60, 82 and 91 of the Transfer of Property Act. Section 60 defines the rights and liabilities of the mortgagor. The first part of the

section entitles him to redeem the property as soon as the mortgage amount becomes payable it being subject to the proviso, ""Provided that the

right conferred by this section has not been extinguished by the act of the parties or by decree of a Court"". The last clause in this section is relevant

and it is:

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a

proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all

such mortgagees, has or have acquired in whole or in part, the share of a mortgagor.

Now, the purport of this section seems to be very clear. As soon as the mortgage money falls due the mortgagor is entitled to redeem the property.

But this right is subject to the continued existence of the mortgage. If the right is extinguished either say by conveyance of the said right by the

mortgagor to the mortgagee by a voluntary act or by a decree of a Court such as one of foreclosure or by a completed sale in execution, then, the

right could no longer subsist. Subsequent provisions must be read in the light of this fundamental requirement. The last clause in this section

provides that where a mortgagor owns only a share of the mortgaged property to be redeemed, he cannot break up the mortgage and insist on

redemption of his share only. He must, if he wants to redeem the property, redeem the entire mortgage. To this again there is an exception and that

is where a part of the equity of redemption is acquired by the mortgagee he can redeem his share only. The exception in this clause is a

consequence to the proviso to the first part of the section and recognises the principle that redemption of the mortgage can be only to the extent to

which the equity of redemption is not extinguished. As has been frequently observed this rule has been enacted both for the benefit of the

mortgagor and mortgagee in order to prevent multiplicity of suits. If redemption can be permitted in part each one of the sharers may institute

separate suit against the mortgagee without making other sharers parties and there may even be conflicting decrees and confusion and chaos may

result. Similarly, if the mortgagee was entitled to file separate suits against the co-sharers a similar result may follow. Where, however, the

mortgagee acquires a part of the property the mortgage is broken up and the sharer is entitled to redeem his share only.

8. Section 91 provides for right of redemption and enables amongst others redemption of the property by any person who has any interest in, or

charge upon, the property mortgaged or in or upon the right to redeem the same, except the mortgagee of the interest sought to be redeemed.

Under this section a co-mortgagor is entitled to redeem the mortgage and when read with the last clause of section 60 already referred to he must

redeem the whole of the mortgage but if the exception in that clause applies then of course he can redeem his share.

9. Now, the argument in the present case is that inasmuch as in the earlier suit the Bank did not make the plaintiff society a party, though the decree

for sale was made against defendants Nos. 9 and 10 and subsequent sale of the property was effected, it did not affect the rights of the society to

redeem the whole property because it was interested in a part of the mortgage security, viz. 4 acres 34 gunthas. The first question, therefore, to be

decided is what are the rights that are acquired by the Bank by its purchase of the entire property.

10. The provisions of Order XXXIV, rule 1 cannot be ignored. It requires that in a mortgage suit every one interested in the mortgage security

must be made a party. This Court has held that this rule is subject to the other provisions of the Code of Civil Procedure, with the result that merely

because a necessary party is not added, the suit of the mortgagee cannot fail. It is on this principle that in Shahasaheb v. Sadashiv Supdu (1918)

ILR43 Bom 575 = 21 Bom. L R 369 this Court held that a decree for sale can be passed only in respect of the right, title and interest of those co-

sharers who are parties to the proceedings. This case was later followed by the Calcutta High Court in Kherodamoyi Dasi Vs. Habib Shaha, .

Indeed the effect of the decision is that in all such cases where necessary party is not joined in such a suit the rights of those who were not joined

cannot be affected and such person is entitled to enforce such of his rights, as are available to him. The fact remains that the Bank has obtained a

decree against defendants Nos. 9 and 10 and acquired their interest in the auction sale. It is admitted that the decree obtained in the earlier suit by

the Bank is binding as between it on the one hand and defendants Nos. 9 and 10 on the other. In Nagubai Ammal and Others Vs. B. Shama Rao

and Others, , after referring to the passage from the judgment of Sir John Romilly in Wood v. Surr (1854) 19 Beav. 551, Mr. Justice Venkatarama

Ayyar J. said (para. 26), ""These observations directly cover the point now in controversy, and they embody a principle adopted in the law of this

country as to the effect of a sale in execution of a decree passed in a defectively constituted mortgage suit. Such a sale, it has been held, does not

affect the rights of redemption of persons interested in the equity of redemption, who have not been impleaded as parties to the action as they

should have been under Order XXXIV, rule 1, Civil Procedure Code, but that it is valid and effective as against parties to the action."" The result in

the present case would be that after the plaintiff redeems the property, the next day the bank as purchasers of the property in execution sale i e.

owner of the equity of redemption would be entitled to file another suit for redemption against the plaintiff who would be subrogated the

mortgagee''s right. In such case the Court would be called upon to decide the contribution to be made by the two part owners of the property in

respect of the debt and allow the Bank to redeem the entire property minus 4 acres and 34 gunthas. If the very purpose of Order XXXIV, rule 1

is to prevent multiplicity of suits, it is difficult to see why in this very suit the same result cannot be brought about.

11. It is argued that the plaintiff-society has a right u/s 60 read with section 91 to redeem the whole property and this right can be enforced

notwithstanding the fact that there was a decree against defendants Nos. 9 and 10 and the consequential sale of the whole property. This

contention overlooks the fact that so far as defendants Nos. 9 and 10 are concerned their equity of redemption, or right to redeem is completely

extinguished by reason of the sale of the property in execution proceedings. As a result, the Society as purchaser of 4 acres and 34 gunthas

becomes a co-owner of the mortgaged property along with the mortgagee. It is argued that this case does not come within the words of exception

to the last clause in section 60, because this is not a case where the mortgagee has acquired a share in the mortgaged property by a proceeding

against the mortgagor in respect of a different cause of action, independent of the mortgage transaction, but has purchased the whole property of

the mortgagors in execution sale in respect of the mortgage transaction itself. One fails to see on what principle this distinction can be made. It is

well recognised and well settled that what is sold at the execution sale is right, title and interest of the judgment-debtor and there is no warranty of

title. In this case without the knowledge of the alienation in favour of the society of a portion of the property, the defendant brought all the three

properties to sale. As the plaintiff was not a party, the decree was not binding on it and defendants Nos. 9 and 10 had no right or interest in 4

acres and 34 gunthas sold to the Society. As a result of the sale, therefore, the bank got all the property minus 4 acres and 34 gunthas of the

Society. In principle no distinction can be made between this case and a case where either by agreement with the mortgagor or by sale in execution

of another decree the mortgagee acquires a part of the interest in the equity of redemption. Once this conclusion is reached then, as section 91 and

section 60 must be read together, the plaintiff can redeem only its interest as the right of redemption of defendants Nos. 9 and 10 is lost.

12. There is another way of looking at the question. Assume that the plaintiff u/s 91 has got a right of redeeming the whole property. The plaintiff

not being owner of the whole equity of redemption, owning only 4 acres and 34 gunthas, is liable to be redeemed u/s 92 of Transfer of Property

Act by the owner of the other part of the property. Even in Mirza Yadalli Beg v. Tukaram (1920) L R 47 I A 207 = 22 Bom. L R 1315, relied

upon by Mr. Vaidya, the Judicial Committee says:

A transferee of part of mortgaged property is entitled to redeem the whole, unless the mortgage in whole or in part is extinguished or the transferee

is estopped from denying that it is so; the right is subject to the safeguarding of an equal right to redeem possessed by any other person.

As the Bank has become the owner of the rest of the property it would be entitled to redeem the same from the Society to the extent of its share.

13. Such decision was reached in two cases: (1) AIR 1947 210 (Nagpur) and (2) AIR 1952 341 (Nagpur) .

14. We may here notice the decision in Nawab Azimat Ali Khan v. Jowahir Sing (1870) 13 M I A 404. The appellant before the Judicial

Committee, original defendant, was a mortgagee of sixteen different mouzahs. The estate was sold in execution of the decree against the

mortgagors. The plaintiffs purchased mouzah Hosseinpore, mouzah Jeetpur was purchased by Buhal Singh and Basti Bam. Mouzah Rookunpore

was purchased by Mossein Alli Khan and two others and one fourth of mouzah Chundharee by Mussamat Imamee Begum. The residue of the

estate was purchased by the appellant. In 1862, the plaintiffs brought a suit for redemption of mouzah Hosseinpore on payment of Rs. 4,727-7-0,

saying that that amount was the rateable share of the mortgage dues payable by them. The suit was dismissed mainly on the ground that the

purchasers of other three parcels of land should have been made parties and the plaintiffs should have offered to redeem their shares as well. Then

the plaintiffs filed the new suit claiming to redeem not only their mortgage but also the other three parcels of the property. Decree was made in their

favour which the defendant challenged before the Judicial Committee. He complained that the plaintiffs were wrongly allowed to redeem the other

parcels of the property. The Judicial Committee said (p. 415):

..The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sudder Court. It merely ruled that

the plaintiffs were bound to offer to redeem the villages in question, it did not rule that they were entitled to do so, or to acquire the interest of the

Mortgagee in them against his will. It is unnecessary to determine in this suit, whether in the peculiar circumstances of this case the former

proposition is correct. Their Lordships are of opinion, that the latter cannot be supported. They think that Appellant, if desirous of retaining

possession of these villages as Mortgagee, is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and

recovery of their village of Hosseinpore, upon payment of so much of the sum deposited in Court as represents the portion of the mortgage debt

chargeable on that village.

In the circumstances similar to the present case, the Judicial Committee permitted redemption of only a part of the mortgaged property on this

principle. It is said that the effect of this decision is nullified by the two subsequent decisions.

15. Mr. Vaidya relied upon the decision in Mirza Yadalli Beg v. Tukaram (1920) L R 47 I A 207 = 22 Bom L R 1315., to which we have already

referred to. The facts were that one Laxman Balkrishna mortgaged with possession to the appellant sixteen fields in five different villages by a

document, on March 9, 1893. On October 4, 1906, the mortgagor sold one of the fields so mortgaged. In 1899, the appellant-mortgagee filed a

suit in the District Court, East Berar to recover mortgage amount with interest without making the alienee under the deed dated October 4, 1896, a

party to the suit. In this suit a consent decree was made providing that the appellant should be paid within a year and on failure to do so the nine

fields including the field alienated under the said deed dated October 4, 1896 be foreclosed. As the terms were not complied with, the property

stood foreclosed and he obtained possession of the property so foreclosed on April 14, 1901. Thereafter the alienee filed the suit for redemption

of the entire property. The Judicial Committee affirmed the right of the plaintiff to redeem the whole mortgage saying (p. 211):

..According to English Law the respondents would have been entitled to redeem the mortgage in its entirety, subject only the safeguarding of the

equal title to redeem of any other person who had a right of redemption, a point which has not arisen so Jar in the present case. The respondents,

being transferees of part of the security, by English law, if it applied, would on the one hand be entitled to redeem the entire mortgage on properties

generally, and correctively could not compel the mortgagee to allow them to redeem their part by itself. This would be so as the result of principle

unless something had happened which extinguished the mortgage in whole or in part, such as an exercise of a power of sale originally conferred on

the mortgagee by his security, or such conduct on the part of the transferees as would estop them from asserting what normally would have been

their right. Nothing of this kind is alleged in the case before their Lordships.

(Italics are ours).

This case was governed by English law. As pointed out by Mr. Justice Hidayatullah in AIR 1947 210 (Nagpur) , the decision did not specifically

consider and decide whether foreclosure decree would not be a means of acquiring mortgaged property. A passing observation has been made by

their Lordships in the last para in connection with section 60 that ""if it had applied, it would have done more than declare applicable what is just the

law as established in England."" The observation of the Privy Council is good enough so far as it goes but cannot be read to decide anything on the

construction of the relevant provisions of this group of sections which must be construed together with due regard to the binding nature of the

decree between the mortgagor and the mortgagee. In this connection we cannot fail to notice a peculiar incident of a foreclosure decree in English

law. In Halsbury''s Laws of England (3rd Edn., Vol. 27, para. 757) we find:

Neither the order for foreclosure nisi, which directs foreclosure in the event of nonpayment at a prescribed date, nor the order for foreclosure

absolute, is conclusive as regards the mortgagor"s right to redeem. After the order for foreclosure nisi, whether followed by an order for

foreclosure absolute or not, the mortgagor may apply for, and, in suitable circumstances and on certain conditions, obtain an order enlarging the

time for redemption, and, if there has been foreclosure absolute, opening the foreclosure and giving a new right of redemption.

This would not be so under our Civil Procedure Code. If a final decree for foreclosure is made, it is binding and cannot be reopened, except of

course on the ground of fraud as any other decree. Sir Dinshaw Mulla seems to be of the opinion (Transfer of Property Act, 5th Edn., p. 444) that

Nawab Aziz Azimat Alli"s case (1870) 13 MI A 404, is overruled by Mirza Yadalli Beg"s case (1920) L R 47 I A 207 = 22 Bom. L R 1315. In

the present case we are not concerned with the question whether the owner of a parcel of mortgaged property is bound to redeem the whole of

the mortgaged property, parcels of which are owned by others including the mortgagee. We, therefore, need express no opinion on that, though

we doubt the correctness of the observation.

16. Mr. Vaidya has relied upon the decision of the Privy Council in Sukhi v. Qhulam Safdar (1921) L R 48 I A 465 = 24 Bom. LR 590, where

the mortgagee obtained a foreclosure decree against his mortgagor without making a puisne mortgagee a party. The latter then filed a suit for

enforcing his mortgage by sale of the property. The right of the puisne mortgagee to have the property sold was approved on the condition that he

should pay the amount due under his mortgage. So far there is no difficulty. A second point arose in that case and under these circumstances.

Original owners of suit property and others had mortgaged the same to K. by two deeds of January 3, 1874 and June 10, 1875, the husband of

the plaintiff before the Judicial Committee. The mortgagor executed another mortgage on January 13, 1883 for suit property in favour of one G. S.

K. filed a suit on his mortgage without impleading G. S. and in execution purchased the property. Subsequently K died leaving a will of his

property in favour of his widow the plaintiff. Then she made a gift of the property to her nephew Jag Ham and Net Ram and they agreed to pay

her Rs. 1,200 per year as maintenance, and as security for this, they hypothecated the properties including the suit property. G. S. filed suit against

Jag Ram and Net Ram but did not implead the plaintiff. Jag Ram and Net Ram set up the original mortgage of K. and the foreclosure decree was

made conditional upon his paying them Rs. 2,954. The plaintiff filed the suit for sale and the decree for sale was conditional upon her paying the

dues of G. S. under his mortgage and also what G. S. paid in connection with mortgage to K. The plaintiff challenged the second condition. Their

Lordships approved of the general principle enunciated by the High Court which is:

The plaintiff is a present mortgagee seeking to enforce his mortgage, the first mortgagee in his suit having failed to make her a party. It is the duty of

the Court to give the plaintiff the opportunity of occupying the portion which she would have occupied if she had been a party to the former suit.

Reliance is placed on this proposition for the contention that the plaintiff-society would have been entitled to redeem the whole property if it had

been made a party in the former suit and, now should be enabled to do so. The observation cannot be read out of its context. Their Lordships

observed that as the widow was wrongfully deprived of the amount which was carried away by Jag Ram and Net Ram which she was entitled in

right of her mortgage could not be called upon to pay the same to G. S. This was what was restored to her. We think, the general principle must

be applied having due regard to definite provisions of law. As we have stated, the Society even if it is allowed to redeem the whole must again

return the rest of the property of the Bank which has become owner of the same by purchase. This follows from the following observations of their

Lordships (p. 473): ""Now the original mortgagee having bought the estate at the sale in the suit, was owner of both the mortgage and the equity of

redemption, merged in one, by the decree of the Court.

17. Mr. Vaidya has adopted a rather indefinite attitude. In one breath he says that the decree in favour of the mortgagee and the sale proceedings

in the former suit were binding on defendants Nos. 9 and 10, and yet as they do not bind him, the mortgagee gets nothing. He was not able to cite

any authority for such a proposition. He said that that would be the logical conclusion which must follow from the decision of the Privy Council in

Mirza Yadalli Beg v. Tukaram (1920) L R 47 I A 207 = 22 Bom. L R 1315 and Sukhi v. Ghulam (1921) L R 48 I A 465 = 24 Bom. L R 590.

We have shown above that no such conclusion follows. The case of Sukhi v. Ghulam (1921) L R 48 I A 465 = 24 Bom. L R 590 decides to the

contrary since it holds that K the mortgagee became owner of the property though he had not impleaded G. S. in his suit. It is settled that a

decision in a case is authority only for what it decides and not what may be thought to follow logically from that decision. Mirza Yadalli Beg V.

Tukaram (1920) L R 47 I A 207 = 22 Bom. L R 1315 was decided in accordance with English law.

18. It is not necessary to refer in detail the three other decisions which were referred to by Mr. Vaidya as they have absolutely no application to

the present case. One is Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, . It was a case of puisne mortgagee, who was not made a party to the

suit of the first mortgagee for sale and it was held that he was not bound by the decree for sale. The next case is Pala Singh v. Attar Singh AIR

1954 Punj. 81, where the Court held relying upon the decision of the Privy Council that a co-mortgagor is entitled to redeem the shares of other

co-mortgagors even if they did not seek to redeem the same, which is entirely a different matter. In the third case, Prithi Nath Singh and Others Vs.

Suraj Ahir and Others, , there is an observation that if a mortgagor makes payment of all the moneys due under the mortgage the mortgage is

extinguished. We are not concerned with the question of extinction of the mortgage.

19. We, therefore, hold that the plaintiff is entitled to redeem that portion of the property that it had purchased on payment of proportionate

amount of mortgage dues, viz 4 acres and 34 gunthas, which it holds in its possession out of Survey No. 93.

20. We think it is desirable that we call for a finding from the lower Court since the relevant issue has not been decided. The issue will be what is

the rateable amount of the mortgage debt of defendant No. 1 Bank payable by the plaintiff as purchaser of 4 acres and 34 gunthas of the land?

The Court will decide the issue in accordance with the principles laid down in section 82 of the Transfer of Property Act and certify its finding to

this Court within two months of the record and proceedings reaching it.