

(1952) 11 BOM CK 0019
Bombay High Court
Case No: Appeal No. 40 of 1952

Nagu Tukaram
Ghatule

APPELLANT

Vs

Gopal Ganesh Gadgil

RESPONDENT

Date of Decision: Nov. 13, 1952

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 1
- Limitation Act, 1908 - Article 132, 142, 144, 148
- Transfer of Property Act, 1882 - Section 75, 91

Citation: AIR 1953 Bom 405 : (1953) 55 BOMLR 458 : (1954) ILR (Bom) 10

Hon'ble Judges: Vyas, J; Gajendragadkar, J

Bench: Division Bench

Advocate: S.G. Patwardhan, for the Appellant; V.S. Desai, for the Respondent

Judgement

Gajendragadkar, J.

This appeal raises an interesting question as to limitation. In the suit from which the appeal arises the plaintiff had claimed accounts of the mortgage against defendant 1 and he had asked for a decree for redemption and possession of the property which is the subject-matter of the mortgage. The trial Court had held that the suit was barred by limitation. In the appeal preferred by the plaintiff a contrary view has been taken, with the result that the decree of dismissal passed by the trial Court has been set aside and the plaintiff's suit has been remanded to the trial Court for taking accounts and for passing the usual preliminary redemption decree. It is this order which is challenged before us by Mr. Patwardhan on behalf of defendant 2.

2. It appears that Narhari and Aba, who were undivided brothers, owned five pieces of land. On 1-5-1920, they executed a simple mortgage in respect of three fields, to Rupchand, who is defendant 1, for Rs. 1,300. We are concerned with these three fields in the present appeal. On 8-7-1922, the two brothers mortgaged the said

three fields and two more in sample mortgage to Umabai for Rs. 1,500. Umabai brought a suit to enforce her mortgage (Civil Suit No. 518 of 1925). She did not implead the prior mortgagee to this suit, A consent decree was passed in her suit on 8-1-1927, under the Dekkhan Agriculturists' Relief Act, The amount due to Umabai was found to be Rs. 2,500, and it was made payable by annual instalments of Rs. 250. The decree provided that if the judgment-debtors made a default in the payment of two instalments, the whole of the decretal amount would become recoverable. The two defaults occurred and Umabai filed darkhast No. 933 of 1930 to recover her amount by sale of the mortgaged property. On 26-8-1931, the properties were put to sale at an auction sale and Umabai herself purchased the properties with leave of the Court. Sale certificate was issued to her on 2-4-1932, and she obtained possession on 21 and 25-12 1932.

3. While these proceedings were pending, Rupchand, the prior mortgagee, sued on his mortgage (Civil Suit No. 615 of 1929). This suit was brought against the mortgagor and the puisne mortgagee was not impleaded to it. On 29-11-1929 a decree was passed in this suit. This decree was also under the Dekkhan Agriculturists' Relief Act. It provided for the payment of the decretal amount of Rs. 2,600 by annual instalments of Rs. 250 and it contained a clause as to two defaults similar to the clause in Umabai's decree. The inevitable defaults occurred and the mortgagee filed darkhast No. 1103 of 1932, in these darkhast proceedings Umabai intervened and filed a written statement. She asked for time to redeem Rupchand and prayed for instalments. The prayer for instalments was not favourably considered, but she was given two months' time to file a suit to exercise her right of redeeming Rupchand. Since she did not file a suit within the time granted to her, the execution proceedings continued and the auction sale was held on 19-3-1934, and the property was purchased by the decree-holder himself with the permission of the Court. Sale certificate was issued on 11-4-1934, and the decree-holder entered into possession on 27-4-1934. Defendant 2 has purchased this property from defendant 1 for Rs. 3,500 on 29-9-1940. Similarly, the plaintiff has purchased the three lands in suit from Umabai on 21-7-1947, for Rs. 500. Having purchased this property from Umabai, the plaintiff has brought the present suit on 14-4-1943, for accounts of the mortgage in favour of Rupchand, for redemption of the said mortgage and for possession of the suit property. Thus the conflict is between two rival purchasers and the principal point which falls to be considered is, whether the plaintiff's suit is in time.

4. Contests between rival purchasers of this kind are not unknown, because frequently suits on mortgage are brought without impleading all the mortgagees who are interested in the mortgaged property. Under Order 34, Rule 1, a puisne mortgagee is a necessary party to a suit by a prior mortgagee, whereas in a suit by a puisne mortgagee a prior mortgagee is not a necessary party. If a prior mortgagee sues on his mortgage, obtains a decree and takes his decree to execution, all the proceedings between him and the mortgagor do not affect the puisne mortgagee's

right to redeem. When the mortgagor creates a mortgage, the first mortgagee is entitled to the mortgagee's rights, and the equity of redemption vests in the mortgagor. When a second mortgage is purported to be made by the mortgagor, what is really mortgaged by the mortgagor to the second mortgagee is the equity of redemption. After such a second mortgage is executed, the equity of redemption vests both in the mortgagor and the puisne mortgagee. That is the basis of the rule under Order 34, Rule 1, which requires that in a suit by a prior mortgagee the puisne mortgagee must be impleaded in order that the whole of the equity of redemption should be properly represented before the Court. The position in a suit by a puisne mortgagee against his mortgagor is not similar, and so a prior mortgagee is not a necessary party to such a suit. It is well settled that a decree obtained by a prior mortgagee against his mortgagor and all subsequent proceedings taken by him in pursuance of such a decree do not bind the puisne mortgagee and cannot affect his rights at all. In -- "Sukni v. Gulam Safdar Khan", AIR 1922 PC 11 (A) the Privy Council have held that, where a puisne mortgagee seeks to enforce his mortgage, the prior mortgagee in his suit having failed to make him a party, the Court should give the puisne mortgagee an opportunity of occupying the position which he would have occupied if he had been a party to the former suit. This position is not disputed before us.

5. In the present case, at the time when the decree obtained by the prior mortgagee in his suit against the mortgagor was executed and an auction sale was held, the equity did not vest in the mortgagor at all. In a suit between the mortgagor and the puisne mortgagee, the equity which had vested in the mortgagor had been put to sale and had in fact been purchased by the puisne mortgagee himself. The result of this auction sale was that Umabai was the sole holder and owner of the equity of redemption. In the absence of Umabai, therefore, the equity could not be validly sold, and if an auction sale purported to convey the equity to the prior mortgagee, it was always open to Umabai to exercise her right as the owner of the equity of redemption in spite of the said sale. That is exactly what the present plaintiff claims to do. Undoubtedly defendant 2 has stepped into the shoes of defendant 1, who purported to purchase the right, title and interest which vested in his mortgagor at the auction sale, and who succeeded in obtaining possession of the property on the strength of the said auction sale. But the possession of defendant 2 is not the possession of the owner of the property. "Quae" Umabai defendant 2 still continues to be a mortgagee, and the true legal position which can be inferred in favour of defendant 2 as a result of the execution proceedings which took place between him and the mortgagor is that he is in possession and he was and still continues to be a mortgagee so far as Umabai is concerned. In -- "Dattatraya v. Venkatesh", AIR 1922 Bom 334 (R) this aspect of the matter has been considered. Narayanrao was the owner of the property. He had mortgaged the said property to Laxmibai in 1890. In 1899 a simple creditor of Narayanrao had obtained a money decree against Narayanrao and in execution of the decree Narayanrao's right, title and interest in

the property was sold at court sale and it was purchased by one Laxman. From Laxman the property had gone to Venkatesh, who was in possession. The mortgagee subsequently sued on the mortgage and impleaded only the mortgagor to her suit and not Laxman who had already purchased the equity of redemption. A decree was passed in the mortgagee's suit, and in execution of the mortgage-decree the mortgagor's rights were again sold at a court auction and were purchased by the mortgagee in 1912, The plaintiff purchased the said rights from the mortgagee in 1917, and in 1918 sued to recover possession of the property from Venkatesh. In dealing with his claim for possession it was necessary for the Court to consider what was the right in which the plaintiff claimed to obtain possession from the defendant; and this question was considered in the light of the admitted fact that in the mortgagee's suit the equity of redemption was wholly unrepresented. Chief Justice Macleod observed that (p. 335).

"....the possession of the purchaser at a sale by a mortgagee in execution of the decree in a suit brought by him on his mortgage, the owner of the equity of redemption not being a party to the proceedings, is not the possession of an owner of all the interests in the property. He buys subject to the equity of redemption, and therefore, by virtue of his purchase, only steps into the shoes of the mortgagee."

In other words, the conclusion of the Court was that the auction which had taken place in 1912 conveyed to the auction-purchaser only the mortgage rights of Laxmibai, since the owner of the equity of redemption was not a party to the suit. In our opinion, the position with regard to the possession of defendant 2 or his predecessor defendant 1 is exactly the same.

6. The question as to whether a suit by a puisne mortgagee who has not been impleaded by a prior mortgagee in a suit in which the mortgagee sought to enforce his mortgage rights against his mortgagor is governed by Article 132 or Article 148 has been frequently considered by our Courts, and the consensus of judicial opinion appears "to be in favour of the view that such a suit is governed by Article 143 of the Limitation Act. If the respective rights and liabilities of the parties such as the mortgagor, the first mortgagee and the second mortgagee are analysed, the question which falls to be considered in a contest between rival claims made by the two sets of mortgagees would not really present great difficulty. If the puisne mortgagee obtains a decree against his mortgagor in enforcement of his mortgage without impleading the prior mortgagee, the decree and the sale which may follow it are all subject to the rights of the prior mortgagee. Similarly, if a prior mortgagee obtains a decree and executes it by putting the mortgaged property to auction sale, that does not affect the puisne mortgagee's rights at all so long as the puisne mortgagee's rights are enforceable under the law. It is possible that at the time when the prior mortgagee brings his suit, the equity may vest both in the mortgagor and the puisne mortgagee; or, it may be that the equity may vest only in the puisne mortgagee when he has obtained a decree against his mortgagor and

the equity vesting in the mortgagor has been purchased by him at court sale. It is also possible that the equity may vest solely in the mortgagor and such a case would arise where the puisne mortgagee's right to enforce his mortgage is extinguished. In the present case, the equity had vested in the mortgagor and the puisne mortgagee when the suit was brought and it had vested only in the puisne mortgagee at the time when the auction sale took place at the instance of the prior mortgagee. In such a case, it seems to us difficult to hold that the auction sale made defendant 1 the owner of the property, if the rights of the puisne mortgagee cannot be affected at all by whatever may have happened between the prior mortgagee and the mortgagor since he had not been impleaded to the proceedings between them, it must be held that despite the auction sale the prior mortgagee continues to be a mortgagee "quae" the puisne mortgagee. In other words, the puisne mortgagee's right to redeem the prior mortgagee will subsist in spite of the said auction sale. If the puisne mortgagee's right to enforce his rights is itself barred by limitation, the position may be different. In the present case not only had the puisne mortgagee's rights not been barred, but they had been effectively exercised and, in fact, as I have just mentioned, at the material time of the auction sale in favour of the prior mortgagee, he was the sole owner of the equity of redemption.

7. In -- "Mt. Ramjhari Koer v. Kashi Nath", AIR 1923 Pat 337 (C) a puisne mortgagee had sought to redeem a prior mortgagee who had obtained a decree against his mortgagor without impleading the puisne mortgagee; & in execution of the said decree had brought the mortgaged property to sale, purchased it himself and obtained possession thereof. When a suit was brought by the puisne mortgagee to redeem the prior mortgagee who had thus obtained possession of the mortgaged property, the claim was resisted on the ground that the claim was barred under Article 132 of the Indian Limitation Act. The Patna High Court held that the proper article to apply was not Article 132, but Article 148. It may be material to mention the dates of some transactions which the Patna High Court had to consider in this case. The first mortgage was of 1886, and the second of 16-2-1893. The prior mortgagee's suit was brought in 1394 and the sale in execution of this decree was held on 26-10-1895. To this suit the subsequent mortgagee was not impleaded. The subsequent mortgagee sued to redeem the prior mortgagee on 17-1-1919. It would be noticed that unless the larger period provided by Article 148 was applied the suit would have been barred by limitation. Kulwant Sahay J., who delivered the judgment of the Court, expressed his dissent from the contrary view which had been taken in -- "Nidhiram Bandhopadhyaya v. Sarbessur Biswas", 14 CWN 433 (D) and observed (pp. 338-9):

"....The right to redeem the prior mortgage was vested in the second mortgagee by virtue of his being a second mortgagee. This right was not acquired by him by his purchase at the sale in satisfaction of his mortgage debt."

The right which the second mortgagee was seeking to enforce in the proceedings was not the right to enforce his mortgage, but it was the right to enforce the equity of redemption which vested in him as a puisne mortgagee. In such a suit, the puisne mortgagee does not seek to recover the money due on his second mortgage; but, on the contrary, seeks, to redeem the prior mortgagee himself. On this view. Article 148 was applied to the suit. The same view has been taken in --"Priya Lal v. Bohra Champa Ram", AIR 1923 All 271 (E) -- "A M.A. Firm v. Marudachalam Chettiar", AIR 1948 Mad 412 (F) and -- [Sayamali Molla Vs. Anisuddin Molla and Others](#) . Only one comment may be made with regard to the last decision just cited. In "Sayamali's case (G)" a Full Bench of the Calcutta High Court have explained the apparently contrary observations made in "Nidhiram's case (D)". Ghose J. has referred to the facts of that particular case and has pointed out that the puisne mortgagee's right to enforce his mortgage had been extinguished at the time when he sought to redeem the prior mortgage; and he held, and with respect we think rightly, that if the puisne mortgagee's rights to enforce his mortgage were barred different considerations would arise. The learned Judge, however, added that in the judgment in "Nidhiram's case (D)" the statement of the law was made rather too broadly and the said observations should be taken only as laying down the law in respect of the facts with which the Court was then dealing.

8. Mr. Patwardhan has, however, contended that there is a decision of this Court which is inconsistent with the view we are taking about the question of limitation in the present appeal. Mr. Patwardhan says that virtually the present suit is one for possession and the plaintiff would not be entitled to claim possession in view of the decision of this Court in -- "Nathmai v. Nilkanth", 34 Bom LR 1519 (H). The head-note of the case does prima facie lend some support to the contention urged by Mr. Patwardhan;

"A prior mortgagee," (that is how the head-note runs), "who goes into possession of the mortgaged property as purchaser in execution of the decree on his mortgage, does not become a mortgagee in possession as against a puisne mortgagee who was not a party to the suit. The result of tile transaction does not merge the interest of the prior mortgagee and the equity of redemption in such a sense as to make the prior mortgagee a mortgagee in possession."

If the facts on which the point had to be decided are considered and the reasoning adopted by Beaumont C.J. itself is taken into account, it would be clear that the head-note is somewhat misleading. There were several mortgages executed in respect of the property which belonged to Mahadev, but the dispute had arisen between a prior mortgagee who had obtained a decree against the mortgagor without impleading the puisne mortgagee, had put the property to sale, purchased it himself and obtained possession thereof on the one hand, and a puisne mortgagee on the other, whose right to enforce his mortgage had been barred. The facts stated in the report are not very clear; but it appears that, though the puisne

mortgagee had obtained a decree against his mortgagor without impleading the prior mortgagee in suit No. 294 of 1904, his application to execute the decree had been dismissed. In other words, the decree which he had obtained proved to be infructuous and his right to enforce his mortgage was, therefore, treated as barred. Thus the question which the Court had to consider was whether a puisne mortgagee whose right to enforce his mortgage is barred can fall back upon his right to redeem the property conferred upon him u/s 75 of the Transfer of Property Act as it then stood. This section has now been repealed and its provisions are included in Section 91 of the present Act. The argument urged before the Court on behalf of the puisne mortgagee was that though his right to enforce his mortgage debt may be barred, that would not impair his right to redeem the prior mortgagee, and it is significant that the learned Chief Justice accepted this contention. That however, was not enough to entitle the plaintiff to succeed in the said suit, because as the learned Chief Justice points out, the right to redeem in such a case would not include the right to obtain possession, since the only right which vested in the puisne mortgagee in this particular case was the right to redeem and nothing more; he was not entitled to enforce his mortgagee rights at all, and so the learned Chief Justice observed that the right to redeem which was in these circumstances a purely technical right, may well be exercised without the plaintiff obtaining possession of the properties in suit. It is in this connection that the learned Chief Justice had to consider the position of the prior mortgagee who had obtained possession of the property after having purchased it at a court sale in execution of his own decree (p. 1522):

"The effect of the sale" (held in his favour) (observes the learned Chief Justice), "was either that defendants 1 and 2 (who were the purchasers at the Court sale) remained in possession as holders of the equity of redemption as against the plaintiffs, the second mortgagees, or the first mortgages were extinguished being, so to speak, merged in the equity of redemption, in which case the plaintiffs' mortgages would have become first mortgages."

With respect, we agree with this statement of the law, & it is clear that this statement of the law cannot help Mr. Patwardhan's contention. But the learned Chief Justice went on to add that this position would not help the plaintiffs in the case before him because their right to enforce their mortgage itself had been barred, incidentally, we may point out that in dealing with the principal argument urged before the Court that though the puisne mortgagee's right to enforce his mortgage may be barred, his right to redeem which was statutory would still survive, the learned Chief Justice has, with approval, referred to the decisions of the Patna and Allahabad High Courts in [Ramihari Koer Vs. Kashi Nath Sahai and Others](#), and "AIR 1923 All 271 (E). I have already referred to these decisions and pointed out that they take the view that in a suit like the present the article of limitation which applies is not Article 132 but Article 148.

9. Mr. Patwardhan has then contended that in the present case the plaintiff seeks not only redemption, but possession, and his argument is that his claim for possession must be held to be barred by limitation either under Article 142 or Article 144 of the Limitation Act. We are unable to accept this contention. If the true legal position is that defendant 2 was no more and no better than a mortgagee who had obtained possession of the suit properties, we do not see how the plaintiff's claim to redeem him can be resisted on the ground that the claim of redemption would lead to the consequential relief of possession in his favour. If the mortgagee takes possession of the property which is his security, and if during the time that he is in possession of such security he continues to be a mortgagee, we do not see any justification for the argument that in a suit for redemption the mortgagee can claim to be in possession of the property adversely to the party entitled to redeem. In our opinion, therefore, the lower appellate Court was right in applying Article 148 to the present suit and in holding that the suit is in time.

10. The result is, the order of remand passed by the lower appellate Court is affirmed. The appeal therefore, fails and must be dismissed with costs.

11. Appeal dismissed.