

BOMBAY HIGH COURT

Lalchand Sakharam Marwadi

Vs

Khandu Kedu Ughade

(Norman Mucleod, Kt., C.J. Fawcett, J.)

20.07.1920

JUDGMENT

Norman Macleod, Kt., C.J.

1. The plaintiffs sued for accounts under the Dekkhan Agriculturists' Relief Act and for redemption of a mortgage. The first nine plaintiffs were the descendants of four brothers who passed the original mortgage in 1869. I do not know why the other plaintiffs were made parties, for the descendants of four other brothers by the same father have no interest whatever in the mortgaged property. In 1879 Mahadu, one of the first set of four brothers, executed a Rajinama in his capacity of registered occupant of the mortgaged property in favour of Government, and the mortgagee executed a corresponding Kabulayat. Since then the mortgagee has been in occupation of the mortgaged land. The mortgage bond was restored to Mahadu with an endorsement that it had been satisfied. The question is whether the equity of redemption which existed in favour of the remaining three brothers continued and whether it still continues in favour of their descendants. The really important issue is issue No. R in the first appeal: had the mortgagors other than Mahadu consented to and authorized the Litter's Rajinama? That was found in the negative. The corresponding issue in the trial Court was whether the Rajinama and Kabulayat were competent to extinguish the right of redemption of the mortgagors and pass title to the defendants. That was found in the affirmative. Accordingly the trial Judge dismissed the plaintiff's suit. The argument seemed to be that because Mahadu, the registered occupant, executed the Rajinama, the interest not only of Mahadu but also of his brothers in the land passed. But I think that the learned appellate Judge looked at the case from the right point of view when he considered whether the interest of the other brothers was conveyed or transferred when Mahadu executed the Rajinama, unless it could be shown by positive evidence that they had consented to give up their rights to redeem the mortgage. The learned Judge says "there is nothing in these documents, that is to say, the Rajinama and Kabulayat, to show that the three mortgagors had given up their rights to the land in dispute. There is nothing to show that they

had authorised Mahadu to extinguish their rights or that they had consented to his doing so. Exhibit. 60 who proved the documents nowhere said anything about the other brothers authorizing Mahadu to do so or consenting to his doing so' In *Pandu v. Anpurna* (1896) I.L.R. 21 Bom. 793 it was held that "in the absence of any act showing that the mortgagee is asserting himself against the owner of the equity of redemption, his possession is not adverse against the latter is regards limitation. The mere assertion of his claim by the mortgagee would not affect the right of the real owner of the equity of redemption where a person having no right in the property pretends to sell the equity of redemption to the mortgagee." Here no doubt Mahadu was a co-mortgagor with his brothers, but he had no right to sell their interest in the equity if redemption, so far as they were concerned he was in the same position as an outsider. The general Rule is that a mortgagee cannot set up title by adverse possession against the owner so as to defeat his right to redeem. That was decided in *Bhagvant Govind v. Kondi valad Mahadu*¹ We have been referred to the case of *Puttappa v. Timmaji*² where there was a sale of the equity of redemption to an outsider but though the purchaser from a mortgagee can set up a title by adverse possession to the original mortgagor, that does not affect the principle that the mortgagee himself cannot set up a title against the mortgagor. Since then the mortgagee in 1879 did not take the most ordinary precaution to see that the right to redeem which lay in the parties to the mortgage deed was extinguished, it follows that he is now in a difficult position when the descendants of those parties assert their right to redeem. The mortgagee cannot prove that their ancestors consented to the right of redemption being extinguished. There is no hardship really in the case, because there has been an inquiry of what is due to the mortgagees for principal and interest and also an account of the improvements made, to the property.

2. The decree, therefore, of the learned appellate Judge must be confirmed,

3. The plaintiffs cross-objected on the ground that they ought to have been entitled to redeem the whole. But when Mahadu purported to convey to the mortgagee the right to redeem, as there is no doubt about his having a share in the equity of redemption, that brought about a merger of the mortgage to that extent, and consequently the present plaintiffs can only be allowed to redeem the three-fourth of the land in dispute.

4. Therefore the cross-objections are dismissed with costs and the appeal is dismissed with costs.

Fawcett, J.

5. I agree. The appellants clearly cannot rely on adverse possession against the right to redeem asserted in this suit, not only because of the rule which bars a mortgagee setting up adverse possession against his mortgagor, but also because in any case the period of adverse possession that would suffice to bar the right of suit to redeem under Article 14S of the Indian Limitation

Act, viz., 60 years, has not expired. Therefore, under Section 28 of the Indian Limitation Act, the equity of redemption, which is now asserted, would not have been extinguished. It seems to me that the dispute really rests upon the decision on the third issue in the lower Court: viz., had the mortgagors other than Mahadu consented to and authorized the latter's Rajinama? This issue has been found by the lower appellate Court in the negative. And although there are considerations which may be said to favour the view taken by the trial Court that there was such consent and authorisation, yet there are other considerations which go the other way. -Certainly to my mind there is no clear proof of such consent, and in any case it is purely a question of fact which in second appeal we cannot decide for ourselves. Any presumption that there may be in the appellant's favour under Section 135-J of the Bombay Land Revenue Code is in the circumstances rebutted. Accordingly I can see no sufficient reason for interfering with the lower Court's decree.

Cases Referred.

1(1889) I. L. R. 14 Bom. 279

2(1889) I. L. R. 14 Bom. 176