

HIGH COURT OF GUJARAT

PATEL RANCHHODBHAI BHAICHANDDAS

Versus

RABARI JIVA JAVA

Date of Decision: 24 April 1998

Citation: 1998 LawSuit(Guj) 219

Hon'ble Judges: [D C Srivastava](#)

Eq. Citations: 1998 AIR(Guj) 207, **1998 3 GLR 2165**, 1998 3 GCD 2453, 1999 1 CivLJ 160

Case Type: Second Appeal

Case No: 257 of 1980

Subject: Civil

Editor's Note:

Civil Procedure Code, 1908 - Secs 11, 97 - When no appeal is preferred against preliminary decree, no appeal would lie against final decree - Contention that Trial Court ignored decision of High Court while passing preliminary decree not accepted - Appeal dismissed

Acts Referred:

[Code Of Civil Procedure, 1908 Sec 97, Sec 11](#)

Final Decision: Appeal dismissed

Advocates: [R C Jani](#), [D K Acharya](#)

Cases Cited in (+): 2

D. C. SRIVASTAVA, J.

[1] This is defendant's Second Appeal against the order of the lower appellate Court directing preparation of final decree for redemption in a mortgage suit.

[2] The brief facts are that the plaintiffs-respondents filed suit for redemption of mortgage. The suit was decreed. Preliminary decree for redemption was ordered to be prepared. An appeal against the preliminary decree for redemption was preferred vide

Appeal No. 18 of 1974. Preliminary decree was passed on 2-1-1974. The appeal against preliminary decree was dismissed on 3-8-1977. Application for preparation of final decree was moved which was allowed on 29-9-1978. Appeal against order directing preparation of final decree was filed which was also dismissed on 28-6-1980. It is against this order that the present appeal has been filed.

[3] Following substantial question of law was formulated in this Second Appeal :

"Whether both the Courts below committed a substantial error of law by holding that notwithstanding the view expressed by this Court in Patel Atmaram Nathudas v. Patel Babubhai Keshavlal, (1975) XVI GLR 509 and the view expressed by the authorities under the Tenancy Act, the appellant is not entitled to purchase the land as deemed purchaser in view of the decision between the parties in Civil Appeal No. 18 of 1974 which operates as res judicata on the question of revival of tenancy on the redemption of mortgage ?"

[4] Learned Counsels for the parties were heard and the material on record was examined. The learned Counsel for the appellant contended that the appellant is entitled to the benefit of Sec. 25(A) of the Bombay Tenancy Act, 1948 inasmuch as Ranchhodbhai was cultivating the mortgage land as tenant of the mortgagor prior to the mortgage was created and since the question of tenancy of the appellant is pending before the competent Court the order directing preparation of final decree is illegal and deserves to be set aside. Learned Counsel for the respondent, on the other hand, contended that this objection was raised by the appellant in his written statement in the trial Court and the trial Court held that the defendant-appellant is not entitled to the benefit of Sec. 25(A) of the Bombay Tenancy Act. Similar plea was raised in the First Appeal against preliminary decree wherein also the plea of the appellant was repelled and it was held that the defendant-appellant was not entitled to the benefit of Sec. 25(A) of the Act. He further argued that no Second Appeal was filed against judgment and decree passed in First Appeal No. 18 of 1974. Hence, the matter attained finality and the said matter cannot be re-agitated now in final decree proceeding. Learned Counsel for the appellant in reply to this argument contended that final decree proceedings are continuation of the suit and such objection can be raised even at the stage of final decree.

[5] The contention of the learned Counsel for the appellant, to my mind, cannot be accepted. Admittedly, against the preliminary decree only First Appeal was preferred and no Second Appeal was filed. The matter was decided against the present appellant by the trial Court as well as by the first appellate Court. Consequently, this objection which was specifically raised was decided by two competent Courts between the same parties. If the two Courts, viz., the trial Court and the first appellate Court, were

competent and were having jurisdiction to decide this question and had actually decided the said question between the same parties then the principles of res judicata as enunciated in Sec. 11 of the C.P.C. will be directly attracted. Since no Second Appeal was preferred against the judgment and decree of the first appellate Court confirming the preliminary decree for redemption the matter cannot be agitated either in final decree proceeding or in appeal arising out of the final decree proceeding or in the Second Appeal. Similar question came up before the Apex Court in Venkata Reddy & Ors. v. Pethi Reddy, reported in AIR 1963 SC 992. The Hon'ble Supreme Court made the following observation in the said case :

"A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, insofar as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees - a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its binding executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made, the decision of the Court arrived at the earlier stage also has a finality attached to it. Section 97 C.P.C. clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree."

[6] Section 97 C.P.C. provides that where any party aggrieved by a preliminary decree passed after commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which will be preferred from the final decree. Thus, in view of Sec. 97 C.P.C. finality is attached to the preliminary decree. If no appeal is filed against the preliminary decree its correctness cannot be disputed in any appeal which may be preferred from the final decree. If this is so and this has been the intention of the legislature then it would be going against the wisdom of the legislature to permit appellant to raise the same question going to the root of the preliminary decree in an appeal from final decree which was already raised and decided in the Appeal against preliminary decree. Likewise those questions cannot be permitted to be raised in the Second Appeal.

[7] Learned Counsel for the appellant, however, contended that the lower appellate Court in its judgment placing reliance upon the case reported in 1975 GLR 509 has held that benefit of Sec. 25(A) of the Bombay Tenancy Act also extends to mortgage even if the said mortgage is not usufructuary mortgage and that this verdict is applicable to the facts of the present case, still no relief was granted to the appellant on the ground that the matter became final in the preliminary decree and appeal

against the said decree. In my view the lower Appellate Court did not commit any illegality in making such observation. A Court has jurisdiction to decide the matter rightly or wrongly. If the matter is decided wrongly ignoring certain principles of law and such decision is not challenged before the higher Court and such judgment is neither set aside nor reversed nor modified by the higher Court, the same cannot be challenged in final decree proceedings in view of bar of Sec. 11 of the C.P.C. It is then futile exercise to discuss in detail the provisions contained in Sec. 25(A) of the Bombay Tenancy Act. It simply provides that if any land is mortgaged by a landlord by way of usufructuary mortgage to a tenant cultivating such land, the tenancy of such land shall be in abeyance during the period the mortgage subsists. After expiry of the said period it shall notwithstanding any other law for the time-being in force be lawful to the tenant to continue to hold the land on the terms and conditions on which he held it before the mortgage was created. Apparently, Sec. 25(A) deals with the case of usufructuary mortgage, but this Court in Patel Atmaram Nathudas v. Patel Babubhai Keshavlal, reported in 1975 GLR 509 held that benefit of Sec. 25(A) is applicable to mortgages which are not usufructuary mortgages. In that case, it was a mortgage by conditional sale where the benefit was granted under Sec. 25(A) of the Act.

[8] As stated above, since the matter was finally decided, may be wrongly, by the two competent Courts that the defendant-appellant is not entitled to the benefit of Sec. 25(A) the said matter which has attained finality in view of the verdict of the Apex Court in the case of Venkata Redely (supra) the same cannot be reopened in this Second Appeal. There is thus no merit in this Second Appeal which is liable to be dismissed.

[9] The learned Counsel for the appellant, however, requested that a direction may be given that since the question of tenancy is under consideration before the Competent Court, the decree holder may not take actual possession till the decision of the pending suit. The request cannot be accepted, because that would amount to staying the execution of final decree proceeding indefinitely or till the suit, appeal, etc., is decided. Once the Second Appeal is dismissed, this Court cannot issue any such direction nor can make such observation as was suggested by the learned Counsel for the appellant. If the appellant succeeds in the suit and if the law permits him he can raise objection before the executing Court and for that also no direction from this Court is required.

[10] In the result the appeal fails and is dismissed. The parties shall bear their own costs.

Appeal dismissed.