

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 738 OF 2001

Manik Dagadu Shaikh	]	
(Since deceased Through LRs.)	]	
1. Sow. Fatimabi Shahabuddin Inamdardar	]	
R/o. Asu, Taluka Phaltan,	]	
District Satara.	]	
2. Buddhan Manik Shaikh	]	
R/o. Sarde, Taluka Phaltan,	]	
District Satara.	]	
3. Gulab Manik Shaikh	]	
R/o. Sarde, Taluka Phaltan,	]	
District Satara	]	
4. Mirkhan Manik Shaikh	]	
R/o. Shivanagar, Malegaon Factory,	]	
'E' Type Chawl, Chawl No.2,	]	
Room No.4, Hanuman Mandir Chawl,	]	
Taluka Baramati, District Pune.	]	<u>... Appellant(s).</u>

Versus

Sopan Tatyaba Wadhmode	]	
Adult, Occu. Agril,	]	
R/o. Sarde, Tal. Phaltan,	]	
District Satara.	]	<u>... Respondent.</u>

- Mr.Vishwanath Talkute for the Appellant(s).
- Mr.Uday Warurnjekar for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 2nd AUGUST, 2018.

ORAL JUDGMENT :

1] Heard learned counsel for the Appellant(s) and learned counsel for the Respondent.

2] This Second Appeal is directed against the judgment and decree dated 06/05/2000 passed by the 2nd Additional District Judge, Satara, thereby allowing Regular Civil Appeal No. 357 of 1994, which was preferred against the judgment and order dated 06/07/1994 passed by the Civil Judge Junior Division, Phaltan, in Decree Final Application No.205 of 1975.

3] The said 'Final Decree Application' was filed by the present Appellant for passing a decree of redemption under Order 34, Rule 8(1) of the Civil Procedure Code, 1908 (*for short, "C.P.C."*).

4] It is undisputed position on record that the Appellant-Manik had filed Regular Civil Suit No.205 of 1975 against the Respondent for redemption of the mortgage of the suit land. The said suit was decreed on 26/10/1978 directing the Appellant to deposit the amount of Rs.200/- towards the mortgage money into the Court within six month from the date of the decree. As per the case of the

Appellant, the preliminary decree was prepared on 27/12/1978 and the Appellant has deposited the amount of Rs.200/- into the Court on 11/06/1978. Thereafter, on 03/07/1990, he had filed the present application for passing 'Final Decree of Redemption' with a prayer for directing the Respondent to execute re-conveyance deed in his favour with further relief of possession.

5] This application came to be resisted by the Respondent contending *inter-alia* that he has incurred lot of expenses for levelling and developing the land. Hence, he is entitled to get those expenses.

6] The trial Court considered that these contentions were raised by the Respondent in his written statement to the suit also and they were not accepted. In view thereof, it was held by the trial Court that there remains no more legal or factual hitch to deny the relief, which the Appellant was claiming, that of execution of the deed of re-conveyance with the possession and other consequential reliefs. Accordingly, the trial Court allowed the Final Decree Application.

7] This order of the trial Court was challenged by the Respondent in the First Appeal and for the first time, it was contended therein that the amount of Rs.200/- was required to be deposited in

the Court within six months from the date of the decree and as the judgment in the case was pronounced and signed on 26/10/1978, it has to be held under the provisions of Order 20, Rule 7 C.P.C. that the decree is also of the same date of 26/10/1978. As the amount was not deposited within six months there from and no application was also filed for extension of the period, the application filed for 'Final Decree' is not within time and hence, barred by law. This contention of the Respondent was accepted by the First Appellate Court and it has reversed the order passed by the trial Court, thereby rejecting the application for Final Decree, which was filed by the Appellant.

8] Being aggrieved by this order, the instant Second Appeal is preferred, which is admitted on ground Nos.(i), (ii) and (iii). In the course of final hearing of the Appeal, learned counsel for the Appellant has pressed into submission ground No.(iv) as stated in the 'Appeal Memo', on which both the parties are heard at length. These four grounds are as follows:-

“(i) What is a starting point of the limitation stipulated in the terms of the preliminary decree passed by the learned Civil Judge, Junior Division, Phaltan, under O.34, R.7 of the Code of Civil Procedure, 1908 for the purpose of deposit of the mortgage money in the Court?”

- (ii) *Whether the Appellate Court has committed a gross error of law by not applying the provisions of O.34 R.7 (1)(b) of the Code of Civil Procedure to the Appellant-Plaintiff's case for the purpose of deposit of the mortgage money?*
- (iii) *Whether the Appellant-Plaintiff's case falls within the purview of the Provisions of O.34, R.7(1) (a) (ii) R/w. O.34 R.7 (1) (c) (i) of C.P.C. and therefore, period of six months stipulated in the preliminary decree for the purpose of deposit of the mortgage money in the court starts from 17-12-1978 on which the Court confirms and countersigns the Accounts of Costs awarded to the Appellant-Plaintiff and therefore mortgage money deposited on 11-6-1979 by the Appellant-Plaintiff was in time?*
- (iv) *It is a substantial question of law that the Appellant-Plaintiff's Application dated 10-6-1979 to deposit mortgage money can be treated as tantamount to an Application for extention of time as provided under O.34, R.7 (2) of the Code of Civil Procedure, 1908."*

9] The First and foremost submission advanced by learned counsel for the Respondent is that none of the above said grounds in the 'Appeal Memo' raises any substantial question of law which is involved in the present case. It is urged that the Second Appeal is not maintainable on this very ground itself. According to learned counsel for the Respondent, as all the grounds in the 'Appeal Memo' are clearly

pertaining to factual aspects and no substantive question of law is involved therein, the Second Appeal should not have been entertained and if entertained, it should be dismissed.

10] The second submission of learned counsel for the Respondent is that if the decree specifically provides that the amount was to be deposited within six months from the date of the decree or in the time extended by the Court and as in the present case, admittedly, neither the time was got extended, nor the amount was paid within six months from the date of the decree, it is too late in a day for the Appellant to contend that the said decree was in accordance with the provisions of Order 34, Rule 7 of C.P.C.. It is urged that this question was neither raised before the trial Court nor before the Appellate Court and therefore, in the Second Appeal, this Court cannot allow the said legal point to be raised.

11] Per contra, according to learned counsel for the Appellant, the grounds mentioned in the Appeal Memo raise the substantial questions of law which are having roots in the facts of the present case. Here, the question of law required to be considered is, *“whether the Appellate Court has committed an error in relying upon the provisions of Order-20, Rule 7 of C.P.C. instead of the provisions of*

Order-34 Rule 8 C.P.C., which were legally and correctly applicable to the facts of the present case? According to him, therefore, it is a substantial question of law, which is required to be considered by this Court and in my considered opinion rightly so.

12] In order to appreciate the rival submissions advanced by learned counsel for the parties, on this substantial question of law, it would be necessary to first consider the judgment and decree, which was passed in Regular Civil Suit No.205 of 1975, which was a suit for redemption of mortgage. The said decree reads as follows:-

- “1. Suit is partly decreed.*
- 2. It is hereby ordered and decreed that the plaintiff shall deposit Rs.200/- in Court after deducting the costs of suit awarded to him within a period of 6 months from the date of this decree.*
- 3. On deposit of amount in Court by the plaintiff, the defendant shall deliver upto the plaintiff or such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property and shall re-transfer the property to the plaintiff at his costs free from mortgage and all encumbrances created by the defendant or any person claiming under him and shall also put the plaintiff in possession of the property.*

If the amount found due is not deposited by the plaintiff within 6 months from the date of decree or such further time as is extended by the Court, the defendant shall apply for a final decree debarring the plaintiff from all rights to redeem the property.

A preliminary decree in terms of Order 34, Rule 7 with the above directions be drawn. The defendant shall pay proportionate costs of this suit to the plaintiff and shall bear his own costs.

Plaintiff's claim for damages of Rs.200/- is dismissed with costs."

13] Thus, this decree clearly provides that the Appellant was to deposit the amount found due within six months from the date of the decree or such further time as extended by the Court and if, the Appellant failed to deposit the said amount found due within the stipulated time, then the Respondent was entitled to apply for 'Final Decree' debarring the Appellant from all rights to redeem the property.

14] As the trial Court has directed the decree to be drawn in terms of Order 34 Rule 7 C.P.C., the provisions of Order 34, Rule 7

C.P.C. are required to be considered. These provisions are as under :-

“O.34, R.7 : Preliminary decree in redemption suit :-

(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree-

(a) ordering that an account be taken of what was due to the defendant at the time of such decree for -

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon;

or

(b) declaring the amount so due at that date; and

(c) directing -

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent cost, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the

mortgage and from all encumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii)

(a)

(b)

(2)”

15] Therefore, it follows that whenever decree for redemption of the suit is passed under Order 34 Rule 7 C.P.C., that decree has to be in the nature of a 'Preliminary Decree' and it should provide for taking of the account of what was due to the defendant including the cost of the suit, if any, awarded to the Plaintiff and after the amount is calculated and declared to be due by the Court, then only the time will start running for deposit of the said amount. This proceeding for taking of the account in order to decide what amount is due to the defendant from the plaintiff is called Final Decree Proceeding. It is initiated on the application filed by the plaintiff-the Decree-holder. Only when in this 'Final Decree Application', the Court directs the plaintiff to deposit the amount found due to the defendant in particular period, as stipulated in the decree, the period of limitation

will start running and not from the date when the decree is passed in the suit.

16] It is pertinent to note that in this case also, while decreeing the suit, the Court has directed the Appellant to deposit the amount of Rs.200/- after deducting the costs of the suit awarded to him, within a period of six months from the date of the said decree. Hence, the amount of costs, which was awarded to the Appellant in the said suit was required to be ascertained and which could be done only after the 'Preliminary Decree' was drawn. Even the amount otherwise due to the Respondent/Defendant was required to be ascertained. For example, the Respondent has raised claim in this case for the amount he has spent towards the development of the suit land. That claim was required to be ascertained and accordingly, the amount due from him was to be found without, such amount due is found in the Final Decree Proceeding, how the period for Appellant-Plaintiff to deposit the amount can start to run?

17] Therefore, herein, the Appellate Court has clearly committed an error in relying upon the provisions of the Order 20 Rule 7 of the C.P.C., which may apply to the decree passed in other suits, but so far as the decree passed in a suit for redemption of

mortgage, the provisions of Order 34, Rule 7 of the C.P.C. have to be applied, as directed by the Court also, while decreeing the suit. As per those provisions, the amount is required to be deposited after it is found due or declared to be due and while arriving at that amount, the Court has to consider the costs and other charges. Here, in the case, the decree of the Court was clearly in consonance with the provisions of Order 34, Rule 7 of the C.P.C., but the First Appellate Court has committed an error in relying upon the provisions of Order 20, Rule 7 of the C.P.C., which were not applicable to the facts of the present case. It cannot be said that before the amount due to the Respondent is adjudicated or declared to be due, the Appellant was to deposit the said amount in the Court. The law necessarily requires that only after the 'Preliminary Decree' is passed, declaring the said amount found to be due, some period is required to be given to the Appellant/Plaintiff to deposit the said amount. Hence the period will start running from that day and not from the judgment and decree in the suit.

18] Learned counsel for the Appellant has rightly placed reliance on the judgment of the Hon'ble Apex Court in the case of *Sudesh Vithal Hanamsheth & Ors. V/s. Sadanand Shivrao Koppal & Ors.*, (1998) 8 SCC 591, wherein in the backdrop of the similar facts, it was found by the Hon'ble Apex Court that the 'Preliminary Decree'

which does not take into consideration, the provision of Order 34, Rule 7 of the C.P.C. cannot be called as a decree in accordance with law, because Order 34, Rule 7 of the C.P.C. requires, *inter-alia*, the taking of account of what was due to the Defendant towards principal and interest. This is necessary to enable the Plaintiff to pay the amount in question, whereafter he can ask for preparation of 'Final Decree', as would appear from the reading of Order 34, Rule 8 of the C.P.C.. It was held further in the facts of the said case that, this not having been done and it being an obligation of the Court to do so, for the lapse of the Court, a party cannot be penalized and accordingly, necessary direction was given to the trial Court to prepare the 'Preliminary Decree, as required under Order 34, Rule 7 of the C.P.C., whereafter it was held that the Appellant would act in accordance with the preliminary decree and then apply for final decree on requirements of Rule 8 being satisfied.

19] In this respect, learned counsel for the Appellant has also placed reliance on the judgment in the case of *Maung Tun Maung & Anr. V/s. Ma Ywe & Ors., AIR 1920 Upper Burma 43*, wherein the similar issue was raised for consideration and it was held that the 'Preliminary Decree' in a suit for redemption is provisional and until it

is made final, redemption cannot be permitted. It was held that,

“Order 34, Rule 8 provides for an extension of time for good cause shown, and ordinarily where a mortgagor decree-holder wishes to pay in the redemption money after the time specified but before the final decree, the correct course for him is to apply for an extension of time. The Court may however treat an application to pay in the money as tantamount to an application for extension of time. The Court however is not absolved from the necessity for passing a final decree and there is no provision for the execution of the preliminary decree before it has been made final”.

20] The point therefore to be stressed is that in a suit for redemption of mortgage, it was incumbent on the Court itself to pass the decree in a format laid down in Order 34, Rule 7 of the C.P.C.. After the Court has done so, then the Appellant is to pay such amount adjudged as “due”, under Order 34 Rule 7 of the C.P.C., sub-clause (a), sub-clause (ii) of the C.P.C. within the time from the date of such 'Preliminary Decree'.

21] In this case, as already the amount is accepted as deposit from the Appellant by the Court and therefore, as held in this

judgment of *Upper Burma*, an application of deposit of the amount is required to be held as tantamount to an application for extension of time, which is granted indirectly by the Court by permitting him to deposit the amount. As a matter of fact, all these contentions were raised by the Respondent before the trial Court and in the Appellate Court also. The Appellate Court has however allowed itself to be misguided by the provisions of Order 20, Rule 7 of the C.P.C., instead of relying on the proper provision of Order 34, Rule 7 of C.P.C..

22] In this case, it is also necessary to remember that during all this period, Respondent has also not applied for foreclosure of the decree, which was an option available to him in the decree. Hence, this aspect also cannot be ignored.

23] The impugned judgment and order therefore passed by the First Appellate Court cannot be called as legal, just and correct and hence, the Second Appeal is allowed. The impugned judgment and order of the First Appellate Court is set-aside. The judgment and order of the trial Court is restored.

[DR.SHALINI PHANSALKAR-JOSHI, J.]