Bombay High Court
Sankana Kalana vs Virupakshapa Ganeshapa And ... on 22 January, 1883
Equivalent citations: (1883) ILR 7 Bom 146
Author: Kemball
Bench: Kemball, Pinhey
JUDGMENT Kemball, J.

1. Assuming that the District Judge was justified in going behind the decree obtained by Sankana against Ningana, it is clear that he was wrong in holding under Section 134 of the Contract Act that Sankana's omission to sue the principal Mohidin discharged the surety Ningana. Section 134 is qualified, as held in Hajarimal v. Krishnaram I.L.R. 5 Bom. 647 by Section 137, which obviously governs the present case.

2. It is contended, however, on behalf of the respondent Virupakshapa that the decree obtained by Sankana was not binding on him, he not having been a party to the suit, and that, on the authority of the numerous decisions of this Court--see the cases of Pandubhat v. Balaji Printed Judgments for 1878 p. 54; Ganesh Sadashiv v. Balkrishna Gopal Printed Judgments for 1879 p. 28; Radhabai v. Shamrav Vinayak Printed Judgments for 1881 p. 219; Dayabhai Jaichand v. Maganlal Kalidas Printed Judgments for 1881 p. 232; Wasudev Balaji v. Narayan Krishna See supra p. 131; Rupchand Dugdusa v. Davlatrav Vithalrav I.L.R. 6 Bom. 495; Mansukh Pitambar v. Tarbhovan Parshotam Printed Judgment's for 1882 p. 213; and Shivram v. Genu I.L.R. 6 Bom. 515--he should be allowed even in this suit to redeem the defendant. In most of these cases, it is urged on the other side, there was actual or constructive notice of the existence of other incumbrances: apparently this was so, but it is clear upon the authorities that the question of notice cannot possibly affect the right of a subsequent incumbrancer to redeem. It is well established See Spence's Equity Jurisprudence, Vol. 2, Section 5, and Fisher on Mortgages, Sections 1439, 1440 and 1441 that, in order to obtain a complete title, the first or any subsequent mortgagee or incumbrancer who files a bill for foreclosure or sale must make all persons who have incumbrances at the time of the institution of the suit, posterior in point of time to his mortgage, parties to his suit, and that if such plaintiff should foreclose the mortgagor and such incumbrancers as he has made parties, yet he will be liable to be redeemed by any incumbrancer who might have been, but was not, made a party to his suit, whether he had any notice of that incumbrance or not. It might be a question whether the judgment so obtained by the plaintiff without having received notice of the subsequent incumbrance would bind such incumbrancer as to the accounts; but we are saved the necessity of considering this point in the present case, as we understand Mr. Ghanasham, on behalf of his client Virupakshapa, to express his willingness to accept the sum fixed in the decree obtained against Ningana and to be ready to redeem Sangana's mortgage on the footing of that decree. It is true that the plaintiff has in this suit sought an entirely different remedy; but this was probably rather the fault of his adviser than of himself, and it seems unnecessary to put him to the expense and trouble of another suit. We, accordingly, vary the decree of the District Judge and direct that on payment to Sankana of the amount of his decree obtained against Ningana, within three calendar months from this date the plaintiff Virupakshapa do have possession of the land in dispute, and that in default of such payment within the time specified, he be for ever foreclosed. As to costs we think the proper order to make is, that each party do boar his own costs throughout.

Decree varied.

Pinhey, J.

3. Reading Section 134 of Act IX of 1872 with Section 137 of that Act, and referring to the decision at Indian Law Reports, 5 Bombay, 647, it is impossible to uphold the decree of the District Court, and the simplest way of disposing of this second appeal would have been to reverse the decree of the District Court and to restore that of the Subordinate Court.

4. But the pleader of the plaintiff Virupakshapa in this Court seeing that the decree of the District Court could not be sustained, has now made an entirely different case for his client to that made in the Courts below, and my brother Kemball considers that we should deal with and dispose of this new case on its merits. Concurring, as I do, fully in the observations made by Field, J., in Joytara Dasi v. Mohamad Mobarak I.L.R. 8 Calc. 980 I do not myself think that a plaintiff should be allowed to make an entirely new case in the High Court on second appeal. The thing has, however, been allowed so often in the Bombay High Court that I do not consider it either necessary or advisable to formally differ from my brother Judge on this point in the present case.

5. What plaintiff now says is, I no longer charge the two defendants with collusion and fraud, and I no longer sue to eject them or either of them; but I accept the District Court's finding that defendant No. 2, Sankana, is a prior mortgagee of the property; and, as the District Court has found me to be a puisne mortgagee, I claim to redeem Sankana. This, of course, he would have been entitled to do if he had framed his suit with that professed object, and I, therefore, agree to the decree proposed by my brother Kemball.

6. The question of notice does not arise, as Sankana is a prior mortgagee in possession; but it would have been important if Sankana had, without notice of any puisne mortgage, brought the property to sale, and the property had passed into the possession of a third party as purchaser. If this had been done, the rights of Virupakshapa would have been defeated--Khubchand v. Kalyandas I.L.R. 1 All 240 and Ali Hasan v. Dhirja 4 Id. 518.