(2000) 07 PAT CK 0094

In the Patna High Court

Case No : A.F.A.D. No. 426 of 1984

Amresh Prasad Singh and Others — APPELLANT

Vs

Awadh Kishore Verma and Others — RESPONDENT

Date of Decision : 24-07-2000

Acts Referred:
Bihar Money Lenders Act, 1974 — Section 12

Citation : (2000) 3 BLJR 1886

Hon'ble Judges : Gurusharan Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Gurusharan Sharma, J.—Lala Gauricharan Lall had four sons, Chaturbhuj Lall, plaintiff No. 1, Makardhwaj Prasad, defendant No. 9, Mathura Prasad, defendant No. 10 and Jamuna Prasad, defendant No. 11. Braj Kishore Prasad Sinha and Ram Kishore Prasad Sinha, plaintiffs 2 and 3 were sons of plaintiff No. 1.

2. By registered sale-deed dated 7.11.1921 (Ext. 3), Lala Gauricharan Lall purchased 4 bighas land in plot No. 1837 at Sherghati from Kunj Bihari Lal and others. By registered sale-deed dated 1.4.1924 (Ext. 3(a), 1 1/2 bighas land in plot No. 3002 in the same village was purchased by Chaturbhuj Lall, plaintiff No. 1 from the said Kunj Bihari Lal.

3. Both, father and son mortgaged the aforesaid lands by registered deed dated 11.6.1927 (Ext. J) for Rs. 1,100/- for five years with Ramdeep Singh, defendant No. 1 and Ram Narain Singh, defendant No. 5. It was an usufructuary mortgage and the mortgagors were to remain in possession till principal was paid.

4. Again by registered mortgage-deed dated 16/17.9.1927 (Ext. F), Lala Gauricharan Lall mortgaged 2.95 acres land of plot No. 1837 and 1.05 acres of plot No. 3002 besides other land with Sherghati Co-operative Society, which was registered under Co-operative Societies Act, 1912 and was a member of Gaya Sadar Central Co-operative Bank Ltd.

5. Lala Gauricharan Lall as a member of Sherghati Co-operative Society took a loan of Rs. 400/- from the Bank through the Society and had executed the said mortgage or security bond (Ext. F) in favour of the society.

6. Gaya Sadar Central Co-operative Bank obtained an award (Ext. K) against Sherghati Co-operative Society, passed by Registrar Co-operative Societies, u/s 43 of the said Act. Execution Case No. 345 of 1930 (Ext. G) was levied in the Court of Munsif, Second Court, Gaya to execute the award. Sale Proclamation (Ext. H) was issued in respect of 7.94 acres land of plot No. 1837 and 4.26 acres land of plot No. 3002 and was purchased by the Bank. Sale was confirmed on 20.9.1930 and a Sale Certificate, Ext. I was issued on 8.12.1930. The Bank thereafter went in liquidation and its liquidator, Jageshwar Dayal executed a registered sale-deed dated 19.6.1933 (Ext. A) in respect of 2.98 acres land of plot No. 1837 and 1.11 acres land of plot No. 3002 to defendant No. 2, who was son of defendant No. 1 and father of defendant No. 5.

7. On 19.3.1965, plaintiff No. 1 gave notice (Ext. B/1) to the defendants and thereafter on 23.12.1967 plaintiffs filed Title Suit No. 176 of 1967 for declaration that rehan money with legal interest and profit was fully satisfied out of income of the rehan property, during continuance of rehan and the principal defendants were liable to deliver possession to them. Alternatively, it was prayed that if the Court found that any amount in respect of rehan money was due from the plaintiffs, a direction be given to deposit the same and a decree for redemption with future mesneprofits be passed.

8. According to the plaintiffs, the aforesaid 4 bighas land was purchased by Lala Gauricharan Lall as Karta of the joint family, whereas 1 1/2 bighas land of plot No. 3002 was self-acquisition of plaintiff No. 1. After death of Lala Gauricharan Lall, there was partition among plaintiff No. 1 and defendants 9 to 11, wherein the aforesaid 4 bighas land of plot No. 1837 was allotted to plaintiff No. 1. Their further case was that mortgagees have already acquired income of Rs. 16,000/- as against Rs. 5,600.37 paise being principal of Rs. 1,100/- and interest till 22.11.1967. As such, a decree for recovery of possession of the suit land was required to be passed in favour of the plaintiffs.

9. Defendants 2 to 5, 7 and 8 contested the suit, inter alia, on the ground that after purchase of the suit land from bank in 1933, defendant No. 2 was coming in possession thereof not as mortgagee, but as fullfledged owner. The suit property was being dealt with openly, peacefully and continuously as of right to the knowledge of all concerned, including plaintiffs. Neither mortgage (Ext. J) was subsisting thereafter nor any equity of redemption was surviving. The suit was, therefore, fit to be dismissed.

10. The trial Court dismissed the suit holding that it was manifest that rehan money could not be said to have been satisfied out of the income of the rehan property. The security-bond (Ext. F) was executed by Lala Gauricharan Lall as karta of his joint family for legal necessity. Court''s auction-sale of the suit land

was eventually confirmed. Relationship of mortgagor and mortgagee over the suit land did not subsist, rather it was extinguished between the parties and after execution of Ext. A principal defendants became full owner of the suit lands as purchasers. The fact that there was no break in their possession over those lands even for a moment, naturally plaintiffs were not entitled to decree for redemption as sought for. The legal dictum once a mortgage always a mortgage does not hold good in the instant suit on the facts and evidence on record. The present suit was also barred by limitation and adverse possession.

11. Plaintiffs preferred Title Appeal No. 6 of 1974, which was allowed by impugned judgment and decree dated 25.7.1984 and the plaintiffs'' suit was decreed. Defendants were directed to give vacant possession of the suit land to the plaintiffs.

12. Defendants, therefore, preferred the present Second Appeal, which was admitted to be heard on the following substantial question of law:

Whether the view taken by the Court below that interest and title of the plaintiff could be sold in execution of an award given against co-operative society of which the plaintiff was a member is correct or not?

13. The Full Bench of this Court in Harihar Prasad Vs. Bansi Missir and Others, had occasion to consider the question whether the decree-holder Central Bank Ltd. of Gaya, a society registered under Co-operative Societies Act, 1912 was entitled to issue execution against the members of the Co-operative Society (Gajadharpur Society, which was also incorporated under the said Act), which was a member of the bank under the Act. In the said case, certain members of Gajadharpur Society had from time to time borrowed money from the bank through their society and ultimately their society became indebted to the bank. The bank applied to the registrar for an award under the Act and obtained one; which under the Act had the effect of a Civil Court decree. Having discovered that the loan, which had become the subject-matter of award had been advanced through the society to its members, the bank applied to the Munsif for execution of the award against those members. The Full Bench held that society was a body corporate u/s 18 of the Act and as such execution could not have been levied against a member of that body corporate, but only against the society itself and its assets.

14. The present case is squarely covered by ratio of the aforesaid Full Bench decision in Harihar Prasad (supra). Here Lala Gauricharan Lall was a member of Sherghati Co-operative Society, which was a member of Central Bank Ltd., Gaya under the Co-operative Societies Act, 1912. Sri Lall had taken loan from the bank through Sherghati Co-operative Society and had executed security-bond (Ext. F) therefor. Subsequently, Sherghati Co-operative Society was indebted to the said bank and consequently, the bank obtained an award against the said society, which was executed against Sri Lall also and his properties contained in Ext. F. were auction-sold. Execution of award (Ext. K) against Lala Gauricharan Lall, a

member of Sherghati Co-operative Society, was illegal and auction-sale of his properties therein was void.

15. In my view, the Court of appeal below, therefore, rightly, held that auction-sale dated 25.8.1930 in respect of suit land was without jurisdiction and no title on the basis thereof could be passed on the auction-purchaser. Therefore, by dint of sale dated 25.8.1930 the mortgage (Ext. J) in favour of defendants 1 and 5 was not extinguished and relationship of mortgagor and mortgagee between plaintiff No. 1 and his father on the one hand and defendants 1 and 5 on the other hand continued. If the principal defendants or any member of family purchased the mortgaged land as they claimed on the basis of Ext. A, equity of redemption of the mortgagors could not be said to have been purchased, so as to amount to. merger.

16. If a mortgagee by availing himself of his position as mortgagee gains an advantage, which would be derogation of the right of a mortgagor, he has to hold the advantage so derived by him for the benefit of the mortgagor. In the present case, when the defendant No. 2 purchased under the second sale, Ext. A he did not thereby destroy the plaintiffs right to redeem Ext. J, because he was at that time standing in the plaintiffs'' shoes as mortgagee in possession. In the aforesaid circumstance, mortgage (Ext. J) still subsisted and plaintiffs were entitled to redeem the same.

17. If mortgagee comes into possession of the property, pursuant to usufructuary mortgage his possession has a lawful origin. A mere assertion of an adverse title on his part cannot affect the subsisting equity of redemption of the mortgagors or operate to shorten the period of limitation prescribed for a suit for redemption.

18. In the present case, mortgage (Ext. F) was executed in 1927, when period of limitation for redemption was 60 years. By new Limitation Act, 1963 that period was shortened to 30 years and it was provided that where period of limitation was shortened, a suit can be instituted within time prescribed under the new Act. However, if that period had not already expired, the suit for redemption can be filed within a period of 5 years (the said grace period was raised to 7 years) from 1.1.1964, when the new Act came into force. The present suit for redemption was instituted on 23.12.1967, i.e., within the period of grace.

19. The Court of appeal below further held that in the meantime on 25.7.1975, the Bihar Money-Lender''s Act, 1974 came into force. u/s 12 of the said Act, the mortgage (Ext. F) was fully satisfied and redeemed on expiry of a period of 7 years from the date of its execution and the mortgagors were entitled to recover possession of the suit land from the principal defendants without making any payment towards the mortgage money. I find no reason to interfere with this finding also.

20. The appeal is, accordingly, dismissed, but without costs.

