(2008) 06 BOM CK 0106

In the Bombay High Court

Case No : Second Appeal No. 84 of 2001

Baban Kondiba More and Others — APPELLANT

Vs

Kashinath Maruti Kothule and Another — RESPONDENT

Date of Decision : 12-06-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 7, Order 34 Rule 7(2), Order 34 Rule 8(1), Order 34 Rule 8(3)
Limitation Act, 1963 — Article 137
Transfer of Property Act, 1882 — Section 58

Citation : (2008) 6 ALLMR 333 : (2008) 5 BomCR 678 : (2009) 3 CivCC 96 : (2008) 6 MhLj 828

Hon'ble Judges : Borde R.M., J

Bench : Single Bench

Advocate : Dhananjay Deshpande, for the Appellant; V.S. Bedre, for the Respondent

Judgement

Borde R.M., J.—This is an appeal by original plaintiffs/decree holders raising challenge to the judgment and decree passed in Regular Civil Appeal No. 153/90 whereby the judgment and order passed in Final Decree Application No. 12/88 by the 3rd Jt. Civil Judge, Jr.Dn., Ahmednagar dt. 16-6-1990 came to be set aside and application tendered by the decree holders/plaintiffs in respect of passing final decree came to be rejected.

2. At the time of admission of second appeal this Court has framed following substantial question of law:

Interpretation of Article 137 of the Limitation Act and Order 34, Rule 8(1) and (3) of the CPC as considered by the Apex Court in the case of (K. Parameshwaran Pillai (dead) v. K. Sumathi alias Jesis Jessie Jacquiline and Anr.) reported in AIR 1994 SC 191.

While admitting the appeal, the Court was prima facie of the opinion that the judgment of lower Appellate Court was not in consonance with the law declared by the Apex Court.

3. Few facts necessary for consideration of the question involved in the appeal are:

Plaintiff deceased Dhondiba had instituted suit against the defendants being Regular Civil Suit No. 474/77 for redemption of mortgage and for declaration. Suit was decided in favour of plaintiff and accordingly preliminary decree was passed against defendants under Order 34, Rule 7 of the Code of Civil Procedure. Trial Court passed decree in following terms:

Plaintiff is entitled to redeem mortgage.

Plaintiff shall deposit Rs. 6,000/- (Six Thousand only) and cost of the suit of defendants in Court within 2 months from today. On making such deposit in Court within given time, the defendants shall deliver possession of the suit property to plaintiff or to such persons as plaintiff appoints and the defendants shall also return mortgage deed dt. 9-9-1971 to the plaintiff.

In case amount of Rs. 6,000/- and cost are not deposited by plaintiff within two months from today, defendant shall be entitled to apply for final decree debarring plaintiff from right to redeem the suit property.

Plaintiff to bear his own cost.

Preliminary decree be drawn accordingly (under Order 34, Rule 7 of C.P.C.)

Plaintiff thereafter preferred appeal in District Court. However, said appeal came to be dismissed. Plaintiff died on 15-9-1986. Appellants who are the legal heirs of original plaintiff could not tender application for final decree within time. However, they preferred application on 14-7-1988. It was registered as Final Decree Application No. 12/88. Said application was opposed by judgment debtors/opponent Nos. 1 and 2 contending that final decree proceedings have not been initiated within prescribed period of limitation. Thereafter legal heirs of original plaintiff/appellant herein tendered application to the trial Court for permitting them to deposit amount as directed by the trial Court while passing preliminary decree and the trial Court on consideration of application permitted the applicants to deposit the amount in the trial Court. Accordingly, as per contentions of the applicants with the leave of Court the amount was deposited.

4. Trial Court after considering the rival contentions came to the conclusion that in view of Order 34, Rule 7(2) the time fixed for making payment can be extended in appropriate cases before a final decree in the proceeding is drawn. Trial Court also observed that provisions of Article 137 of the Limitation Act can be invoked only in cases where no period of limitation is prescribed else where. Trial Court as such came to the conclusion that the application filed by applicants/ appellants herein can be entertained and as such by an order dt. 16-2-1990 directed the opponents/judgment debtors to deliver peaceful possession of suit land to the applicants/appellants within 60 days from the date of passing of the

order. It was also ordered by the trial Court that defendants/judgment debtors/ respondents herein were entitled to withdraw an amount of Rs. 6,473/- deposited in the trial Court. It was further ordered that in the event of failure of the applicants to deliver possession of the suit land the same shall be recovered through the process of Court.

5. Order passed by the trial Court was subjected to appeal at the instance of original defendants/opponents being Regular Civil Appeal No. 153/99. Appellant Court on consideration of contentions of the parties came to the conclusion that the application tendered by the applicants for drawing final decree cannot be treated to be within prescribed period of limitation. Appellate Court also recorded finding that it was an error on the part of the trial Court to permit the applicants to deposit the amount. Application for final decree was in itself not entertainable without making deposit of amount in the Court. Application tendered by applicants is beyond prescribed period of limitation and as such while allowing the appeal, the Appellate Court directed dismissal of the application tendered by the judgment debtors/applicants/appellants. Judgment debtors/ applicants are raising challenge to the appellate order by way of presenting this second appeal.

6. I have heard arguments of Shri Dhananjay Deshpande, learned Counsel for the appellants and Shri V.S. Bedre, learned Counsel for the respondents. Shri Deshpande has vehemently contended that provisions of Article 137 of the Limitation Act are not attracted in the instant case. It is open for the applicants to make deposit of the amount before trial Court prior to passing of final decree. It was also pointed out by learned Counsel for the applicants that judgment debtors have failed to take steps in accordance with provisions of Rule 7(c)(ii)(b) of Order 34 of CPC and as such applicants were within their right to make deposit of the amount and apply to the trial Court for passing final decree. Learned Counsel also invited my attention to provisions of Order 34, Rule 7(2) and contended that the Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under Sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest. Learned Counsel further contends that the trial Court was justified in granting leave to the applicants for depositing the amount and subsequent to passing of final decree. It is contended by learned Counsel that Article 137 of the Limitation Act is not applicable. Learned Counsel also contends that nature of mortgage in the instant appeal is usufructuary mortgage as defined in Section 58(d) of Transfer of Properties Act and as such in view of law laid down in the matter reported in , order passed by the trial Court is correct and sustainable. Learned Counsel contends that in cases of usufructuary mortgage in view of Clause B of Sub-rule (3) of Rule 8 there is express exclusion of right of the mortgagee to apply for foreclosure or sell or redeem and therefore so long as the right subsists though there is delay in compliance of the conditions imposed in the preliminary decree, right to redemption is not lost. Learned Counsel further contends that the

mortgage being a usufructuary mortgage as defined in Section 58(d) of Transfer of Properties Act, before passing of the final decree, plaintiff can make deposit of the amount any time and the application tendered by the applicants before the trial Court seeking final decree cannot be thrown away on the ground that the same has been presented beyond prescribed period of limitation.

7. Per contra, learned Counsel for the respondents has raised challenge to the contentions of the appellants that the character of the mortgage is usufructuary as defined in Section 58(d) of the Transfer of Properties Act. According to learned Counsel for the respondents/judgment debtors, the character of mortgage is as defined in Section 58(c) of the Act and the same is mortgage by conditional sale. Learned Counsel for the judgment debtor has invited my attention to the judgment delivered by the trial Court in Regular Civil Suit No. 474/77 and more particularly Issue Nos. 1, 2 and 5 of the judgments. Trial Court while dealing with Issue No. 1 has specifically recorded finding in para No. 6 of the judgment that the nature of transaction was "mortgage by conditional sale" as defined in Section58(c) of Transfer of Properties Act. In para No. 8 of the judgment trial Court has observed that "it is not usufructuary mortgage in true sense." Learned Counsel also invited my attention to para No. 6 of the judgment of the Apex Court reported in and contended that it was incumbent upon the applicants/ decree holders to deposit the amount before the Executing Court within time stipulated in the preliminary decree. Para 6 of the judgment cited supra reads thus:

6. In the case of usufructuary mortgage Clause (b) of Sub-rule (3) of Rule 8 expressly excludes the right of the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation prescribed under the Limitation Act. The reasons are obvious. Order 34, Rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor to seek redemption of the usufructuary mortgage in a decree under Rule 8(3) of Order 34. The mortgagee having been in possession and enjoyment of the hypothec is not disabled by the preliminary decree. On the other hand the liability continues to subsist against the mortgagor. Therefore, it is up to the mortgagor to redeem the mortgage. Till then his liability under the mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34, Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the Court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree is expired under Article 137 of the Schedule to Limitation Act, 1963 (Article 181 of Schedule 2 of old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in

the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof.

8. Considering the nature of transaction and considering the finding recorded by the trial Court, while passing preliminary decree it cannot be said that the character of transaction as contended by the applicants is of "usufructuary mortgage." However, the same has been construed as mortgage by conditional sale as defined in Section 58(c) of Transfer of Properties Act. It was not open for the trial Court to grant leave to the applicants to deposit the amount even after the period stipulated in the preliminary decree has expired. Exercise of powers under Order 34, Rule 7(2) by the Executing Court in accepting the amount was clearly arbitrary. There does not appear to be any good ground for extending the time for depositing the amount. Even otherwise, by harmoniously reading the provisions of Article 137 of the Limitation Act, in any eventuality, the Court could not have extended time for depositing the amount beyond the period of limitation prescribed under the Statute.

9. Learned Counsel for the appellant has invited my attention to Article 137 of the Limitation Act and contended that right to apply for final decree accrues on making deposit of the amount as directed in the preliminary decree. According to the learned Counsel, trial Court permitted the applicants to deposit the amount in the year 1988 and as such the period of limitation under Article 137 of the Limitation Act to tender application for final decree will start running from 1988. Therefore, according to the learned Counsel, the application tendered was perfectly within prescribed period of limitation. The argument is not sustainable for the reasons that right to apply accrues on passing of the preliminary decree. Preliminary decree contains term in respect of deposit of the amount and it clearly directs the plaintiff to make deposit within two months from the date of passing of the preliminary decree. Preliminary decree was passed on 8-11-1979. The applicants ought to have made deposit of the amount within two months from the date of decree i.e. 8-11-1979. It was not open for the applicants to contend that the time to apply accrues at any time whenever they chose to deposit the amount. Infact, it was an error on the part of the trial Court to permit the appellants to deposit the amount in the year 1988 although the decree contains term which imposes obligation on the plaintiff to deposit the amount within two months from the date of passing of preliminary decree. Moreover, para 6 of the judgment of the Apex Court cited supra clearly lays down that limitation to file application under Order 34, Rule 8(1) to pass a final decree for redemption of usufructuary mortgage starts running and continues to run from the date of expiry of the period fixed under the preliminary decree unless it is stayed or the time prescribed in the preliminary decree is extended by an order of the Court. In the context of expiry of limitation of three years from the date fixed in the preliminary decree having been expired, plaintiff is debarred to enforce right to pass final decree.

10. In the instant matter, plaintiff never tendered any application nor moved the Executing Court by presenting any application within three years after passing of the preliminary decree which was issued in the year 1979. Only in the year 1988 application was tendered requesting the Court to grant relief, on permitting to deposit the amount. Application itself was clearly beyond prescribed period of limitation. Apart from this, the basic contention of the appellants that the transaction between the parties is in the nature of usufructuary mortgage itself is found to be untrue and therefore, the whole case built up by the appellants relying upon the judgment of the Apex Court cited supra falls to the ground. There is no merit in the appeal and therefore the same is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

11. Pending civil application, if any, stands disposed of.

