
(1976) 02 BOM CK 0010
In the Bombay High Court
Case No : A.F.O. No. 412 of 1975

Bai Fatubai Fidaali Lala

APPELLANT

Vs

Yusufally Esmailjee Nagree

RESPONDENT

Date of Decision : 03-02-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1977 Bom 170 : (1976) MhLj 685

Hon'ble Judges : Mukhi, J

Bench : Single Bench

Advocate : C.C. Chhaya, for the Appellant; M.R. Kotwal and S.R. Chitnis, for the Respondent

Judgement

1. This appeal arises from a dispute between a brother and a sister in relation to a certain family property, which was dealt with as far back as 1951 in a partition deed between the plaintiff, as one of the sisters, and the other brothers and sisters including the defendant Yusufally as one of the brothers.
2. In the events that happened an equitable mortgage appears to have been executed soon after the execution of the aforementioned partition deed by which the property in suit came to be owned by defendant Yusufally.
3. It requires to be noticed that the equitable mortgage is evidenced by a registered document dated the 10th of June 1952, the document having been duly admitted and registered on the 25th of July 1952.
4. Although the mortgage amount which was Rs. 11,000/- in so far as the plaintiff is concerned (the other sum of Rs. 11,000/- being due to the plaintiff's sister Safiabai since deceased) there was also a provision in the Indenture of mortgage itself that after the principal sum or any part thereof and interest became payable, the defendant would execute an English mortgage in favour of the plaintiff and her other sister Safiabai. Neither the principal amount was paid

nor was an English mortgage executed.

5. It would appear that the two sisters for some reason, it may perhaps have been sisterly affection for their brother, were content to allow the matters to remain as they were, because it is on record that the defendant Yusufally was regularly paying interest on the mortgage amount, at least to the plaintiff. The plaintiff has stated in her affidavit that the defendant Yusufally had agreed to pay interest at 12 per cent., instead of 6 per cent, as provided in the Indenture of mortgage, and that this amount of Rs. 110/- per month he paid to her regularly by way of interest till April 1971, after which he ceased to make the payments. The plaintiff further states that it was only then that the defendant Yusufally sought to tender interest at the rate of 6 per cent, per month, i.e., Rs. 55/-, which the plaintiff did not accept.

6. In any event, as a result of these disputes and the stoppage of payment of interest by the defendant to the plaintiff, the plaintiff filed the suit in the City Civil Court at Bombay for a declaration that the defendant was liable to pay to her a sum of Rs. 15,710/- with further interest on Rs. 11,000/- at 12 per cent, per annum from the date of the suit till the date of the decree and for interest thereafter till realisation. There was also a prayer that it may be declared that the said amount be charged on the property which was the subject-matter of the mortgage.

7. Then followed the prayer that on the defendant's failure to pay the amounts, the suit property should be ordered to be sold.

8. There was also a prayer in the plaint that pending the hearing and final

disposal of the suit, the Court Receiver should be appointed to take charge of the mortgaged property.

9. The plaintiff thereafter took out a Notice of Motion for the appointment of a receiver and in her affidavit in support of the Notice of Motion sought to show the reasons and the circumstances on which it was just and convenient that a receiver should be appointed. One of the grounds taken was that the defendant was in arrears of interest and that he had also to pay the estate of the other sister Safiabai (since deceased) and that the property was very old and in a dilapidated condition. The suggestion was made that the defendant having put tenants all over the property and there being heavy litigation and taxes being in arrears the plaintiff's security for the amounts advanced and the interest thereon was in jeopardy.

10. The learned Judge of the City Civil Court (Judge Guttal) disposed of the Notice of Motion by a very short order comprising three paragraphs and he seemed to feel that the plaintiff had failed to establish that the security on which she had advanced the loan ran the risk of deterioration. He then noticed the defendant's averments that the property in question was worth Rs. 80,000/- and that it was insured for a sum of Rs. 46,000/-, and came to the conclusion that

the plaintiffs case that the security was in jeopardy was destroyed and that, therefore, "there is no case for appointment of receiver",

11. It is against this order that the plaintiff Bai Fatubai has come in appeal and Mr. Chhaya, the learned Advocate for the appellant-plaintiff, has contended that if regard be had to the history of the case; the fact that there is a registered mortgage deed in existence; that interest is in arrears and that the conduct of the defendant is improper then it can be validly contended that the plaintiff has set out a prima facie case that it is just and convenient that a receiver of the property in suit should be appointed.

12. The case of the respondent-defendant, broadly speaking, is that the moneys said to have been paid by him to his brothers and sisters at the time of the execution of the partition deed dated the 30th of November 1951 were in fact not paid; that the plaintiff was entitled to receive from him only a sum of Rs. 8,653/- as a result of the arrangement envisaged by the partition deed; that the equitable mortgage was a sham document and not intended to be acted upon; and that if regard be had to the payments actually made by him to the plaintiff Fatubai and the allocation of such payments towards capital and interest, then it would be found that nothing is due to the plaintiff. Thus according to the defendant the question of appointing a receiver does not arise.

13. Mr. M. R. Kotwal, the learned Counsel for the respondent-defendant, after referring to some of the factual aspects of the matter as to the execution of the partition deed and the deed of mortgage and how, according to him it is prima facie clear on the record that he has discharged all his liabilities to the plaintiff, argued that even if it be held that there was a mortgage in existence, the plaintiff cannot have a receiver appointed as of right merely because the principal amount is not paid or the interest is said to be in arrears.

14. A number of authorities have been cited by both the Advocates and the first point to be considered is whether a receiver can be appointed in the case of a mortgage by deposit of title deeds, popularly but erroneously referred to in India as an equitable mortgage.

15. The first authority referred to by Mr. Chhaya is a judgment of the Supreme Court in K.J. Nathan Vs. S.V. Maruty Reddy and Others, , where the true nature of a mortgage by deposit of title deeds was considered. The Supreme Court set out the three requisites for such a mortgage as being (1) debt, (2) deposit of title deeds, and (3) an intention that the deeds shall be security for the debt.

16. The Supreme Court then went on to observe that although a mortgage by deposit of title deeds as provided by Section 58 of the Transfer of Property Act, 1882, was often described as an equitable mortgage, there was an essential distinction between an equitable mortgage as understood in England and a mortgage by deposit of title deeds u/s 58" of the Transfer of Property Act in India. The Court held that an equitable mortgage in England did not operate as actual conveyance, though it was enforceable in equity. But under the Transfer of

Property Act, 1882, a mortgage by deposit of title deeds was one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee.

17. There can be no manner of doubt that the Supreme Court has now laid down that under the law of India a mortgage by deposit of title deeds, though it is limited to specific cities, is on par with any other legal mortgage.

18. In this view of the matter, a mortgage by deposit of title deeds has the same effect in law as a simple mortgage, in the sense that there is a transfer of interest in the property mortgaged to the mortgagee, although there is no right to possession of the mortgaged property in the mortgagee.

19. The next authority cited on behalf of the plaintiff is the judgment of the Rangoon High Court in *Ally Ramzan Yezdi v. Balthazar and Son Ltd.* AIR 1936 Rang 290, where it was firstly held that in the case of a simple mortgage or of a mortgage by deposit of title deeds itself, unless there was an agreement to that effect expressly made, neither the right to possession nor the right to rents and profits are part of the interest which is transferred to the mortgagee. The Rangoon High Court then went on to hold that in a mortgage suit, where interest is in arrears, the Court will normally appoint a receiver. It is on this aspect of the judgment that Mr. Chhaya, the learned Advocate for the appellant-plaintiff, wishes to rely, and the passage on which he so relies reads as follows:--

"..... Now, the Court is entitled to appoint a receiver under Order 40, Rule 1, whenever it is deemed just and convenient to do so; for example, in a mortgage suit when interest is in arrear the Court will normally appoint a receiver at the instance of the mortgagee as of course, whether or not the property appears to be a sufficient value to cover the mortgage debt and interest, and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost;"

20. Now, it requires to be noticed that in that case the Court was of the view that it was not just that a defaulting mortgagor, after the mortgagee had taken steps to enforce his security, should be allowed to batten upon the rents and profits without paying either the principal or the interest due under the mortgage.

21. In other words, in so far as the Rangoon High Court was concerned, it was found that the fact that the interest was in arrears was sufficient to enable the Court to appoint a receiver at the instance of a mortgagee.

22. Reference was then made to a Division Bench judgment of this Court in *Damodar Moreshwar v. Radhabai Damodar* 40 Bom LR 1266 : AIR 1939 Bom 54, where Chief Justice Beaumont, who spoke for the Court, said that--

..... "there is not the slightest doubt that the Court has jurisdiction to appoint a receiver in the case of a simple mortgage whether before or after a preliminary decree."

23. Upon the question whether in the particular case before the Court it was just and equitable to appoint a receiver, the Court thought that there could be very little doubt because at the time the application was made not only was interest in arrears but rates and taxes were also in arrears and the property was, therefore, in jeopardy. It is interesting to note that the learned Judge in terms stated that he reserved his opinion as to whether interest being in arrears by itself would have been sufficient to hold that it was just and equitable that a receiver should be appointed. In other words, this decision of the Bombay High Court left the sufficiency of, interest being in arrears, as a ground for the appointment of a receiver in a mortgage suit open.

24. Mr. Kotwal, the learned counsel for the respondent-defendant, has cited a number of authorities in support of his contention that the mere fact of interest being in arrears is not enough to furnish a ground for the appointment of a receiver. Mr. Kotwal first referred to a judgment of the Madras High Court in *Ethirajalu v. Rajagopalachari* AIR 1929 Mad 138. In that case it was held that where a simple mortgagor makes default in paying interest and the mortgaged property falls in value, the case is fit for the appointment of a receiver. Mr. Kotwal suggests that this shows that default in paying the interest by itself is not sufficient but other factors must also be present, such as, the fact that the mortgaged property was falling in value so that it was necessary to take hold of it by appointing a receiver,

25. Now, as a matter of fact this judgment of the Madras High Court really does not support the case of Mr. Kotwal because after discussing several authorities, this is what was stated;

"..... I think the result of the authorities is that while Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage is a simple mortgage, there may be circumstances created either by the conduct of the mortgagor or connected with the state of the property which may render it necessary in the interests of justice and for the protection of the mortgagee that a receiver should be appointed. It is impossible to lay down a hard and fast rule laying down under what circumstances the Court will appoint a receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allow possession to remain with the mortgagor which loss could not be compensated except by the appointment of a receiver."

26. It was on the basis of these observations that the Madras High Court having regard to the facts of the case before it, the default of the mortgagors in paying the interest and the fall in the value of the mortgaged properties, thought it fit and proper that a receiver should be appointed.

27. In the next case which was cited, viz., *Bireshwar v. Sudhansu She-khar* AIR 1947 All 157, the Allahabad High Court, after holding that the Court had the power to appoint a receiver of the property the subject of a simple mortgage in a

suit by the mortgagee against the mortgagor in possession of the mortgaged property, felt that because the general ground upon which the Court normally appoints a receiver was the protection of the property for the benefit of persons who had an interest in it, the mere fact that interest on the mortgage amount was in arrears or that the mortgagor's object was merely to delay the final determination of the suit was not sufficient to show that it was just and convenient that a receiver should be appointed, unless the Court was also satisfied that the conduct of the mortgagor was such that it would not merely be to postpone the final determination of the right's of the parties but to imperil the realization by the mortgagee of the amount secured by the mortgage.

28. Now, it would seem that this authority proceeds on the footing that in a simple mortgage, the mortgagee is not entitled to take possession of the mortgaged property.

29. I should have thought that the Court has to consider whether it is just and convenient on a consideration of the entire background of the case and the conduct of the mortgagor as well as the fact that interest is in arrears.

30. Mr. Kotwal also referred to two judgments of the Rajasthan High Court in Onkarlal Radha Kishan Vs. V.S. Rampal and Others, and Banshi Dhar Vs. Ghisalal and Others, where that Court held that the mere failure to pay interest by itself was not sufficient,

31. Now, it is not really necessary for me to discuss the several authorities in greater detail because this High Court in Pamodar v. Radhabai AIR 1939 Bom 54 (supra) clearly held that the fact of interest being in arrears, with "something more, would be sufficient for the Court to exercise its discretion and appoint a receiver on the footing that it was Just and, convenient to do so.

32. On this position of the law, I will now proceed to consider the factual aspects in order to decide whether the plaintiff had made out a prima facie case for the appointment of a receiver on materials placed on record,

33. First of all it requires to be noticed that the equitable mortgage on the basis of which the suit has been filed is evidenced by a solemn document executed by the parties and registered under the provisions of the Indian Registration Act.

34. At this interlocutory stage there is no reason for the Court to overlook a registered Indenture of mortgage which is shown to have been executed by the parties. It is true that the defendant has alleged that the mortgage deed was a sham and colourable document and was not intended to be acted upon. This may be so, but it will have to be proved to be so by the defendant at the trial and the burden lies heavily on him. The argument of Mr. Kotwal that even at this stage it has been shown prima facie that the mortgage deed is a sham and colourable document is clearly untenable.

35. It requires to be noticed that the indenture of mortgage dated the 10th of June, 1952, refers in its Second Schedule to the partition deed dated the 30th of

November, 1951, made between the several parties, including the plaintiff and the defendant herein. Although a copy of the partition deed has not been placed on record, there is no dispute that the partition deed was executed by all the concerned parties, and that the value of the property shown therein was Rupees 34,692-8-0 and further that the consideration for the conveyance in favour of the defendant Yusufally was shown as Rupees 25,795/-. All that Mr. Kotwal now contends is that although the parties had signed at the foot of the document to show that they had received the moneys, in fact the consideration money was not paid,

36. Now, once again at this interlocutory stage the Court must take into consideration the document as it exists subject to the defendant proving at the trial in such manner as may be provided by law that in fact the consideration money was not paid and that a certain amount was still due and payable to the plaintiff.

37. The result of the above discussion is that this Court must proceed on the footing that there was a deed of partition dated the 30th of November, 1951, which was followed shortly thereafter by the Indenture of mortgage, whereby the said partition deed, as a document of title, was deposited for the purpose of creating a mortgage by deposit of title deeds, as evidenced by the registered Indenture of mortgage itself.

38. Now, it is interesting to notice that even prima facie the contention made on behalf of the defendant that the alleged mortgage deed was a sham and colourable document and was not intended to be acted upon is belied by the fact that by a writing dated the 20th of December, 1966, the defendant Yusufally signing as "Y. E. Nagree" certifies that a sum of Rs. 1,320/- was paid by him to Fatubai daughter of Esmailjee Nagree and widow of Fidally N. Lala during the financial year 1965-66 at the monthly rate of Rupees 110/-, being interest on mortgage. At the foot of this writing, which is Exh. C, to the plaint, there is a statement that--

"This amount is being paid for the last many years."

Now, this shows that on his own showing, the defendant was paying interest at 12 per cent, on the mortgage and that he had been paying similar amounts for the last many years. It is not suggested that that was another mortgage between the parties on which this interest was paid.

39. Then, again an extract from the property register card, Exh. D to the plaint, has been produced in relation to the property in suit, wherein it is mentioned that an equitable mortgage was executed on the 10th of June, 1954, in favour of Fatimabai and Safiabai daughters of Ismailji Nagri.

40. Now, it would appear that in 1974 an engrossment of a Release Deed was prepared by Messrs. Dadla and Co., who are admitted to be the then common Attorneys of the parties, presumably with the object of the defendant paying off

the plaintiff the principal sum of Rs. 11,000/- along with interest due. As a matter of fact, the engrossment contained at the foot thereof a receipt which reads as follows:--

"Received the day and year first hereinabove written of and from the within named Borrower the sum of Rupees eleven thousand being the full consideration money within mentioned to be by him paid to me."

41. If reference is made to the last paragraph of the engrossment of the Deed of Release, it will be noticed that there is a reference to Bank of India Pay Slip No. NGP 0065050 dated the 22nd of February, 1974, for the amount, i.e., Rupees 11,000/-

42. It is significant that the flank of India Pay Slip as shown on the separate receipt for interest amount of Rupees 5,000/- which was also prepared bears the number of the Bank of India slip as NGP. 0065051 dated 22-2-1974 for Rs. 5,000/-.

43. It is the plaintiff's case that these two documents, that is to say, the engrossment of the Deed of Release and the Receipt for interest both duly stamped, were sent to the plaintiffs for her signature and in fact she signed the engrossment as well as the receipt. It is also significant that the defendant had kept ready with himself the Bank Pay Slips bearing consecutive serial numbers both dated the 22nd of February, 1974. In the face of this it is idle to suggest that the plaintiff has failed to make out a prima facie case that there was a registered document which shows that the principal sum of Rs. 11,000/- was advanced by her to her brother Yusufally and that in February, 1974, the repayment of the amount together with the interest due thereon was imminent. It is stated that the defendant refused to go along with the reconveyance transaction because of some collateral dispute between him and the plaintiff's son,

44. It was vehemently suggested by Mr. Kotwal on behalf of the defendant that the Indenture of Mortgage itself shows that the interest payable was at the rate of 6 per cent. On this basis, he argues that if the amounts paid by him are allocated partly by way of interest at 6 per cent, and partly by way of return of capital, then it will be found that he had repaid the entire amount due. The defendant seeks to place reliance on a statement of account prepared by him, which is Exh. 1 to his affidavit in reply.

45. It requires to be noticed that this statement of account as prepared by the defendant is at variance with his certificate dated the 20th Of December, 1966, where he refers to Rs. 1,320/- as interest for the year 1965-66, being the interest at the monthly rate of Rs. 110/-. The amount of Rs. 110/- on the principal sum of Rs. 11,000/- clearly shows the calculation of interest to be at the rate of 12 per cent and indeed it is the plaintiff's case that the defendant Yusufally was paying her interest at Rs. 110/- per month for all these years upto 1971 and it was only in 1971 that the defendant for the first time sought to

contend that he would pay interest at the rate of Rs. 55/- per month, which she did not accept.

46. It is appropriate now to notice the conduct of the defendant. While taking me through the history of the case Mr. Kotwal stated that the suit property originally belonged to the plaintiff Fatu-bai, her sister Safiabai and their mother Rakhibai in the following shares:--

Fatubai 4 annas. Safiabai 4 annas. Rakhibai 8 annas. 47. On the 20th of October, 1951, Rakhibai died so that the interest of the plaintiff and the defendant and other brothers and sisters in the suit property under the relevant law came to be as follows:-- Yusufally, the defendant, 2 annas; Ibrahim, other brother: 2 annas; Abdul Karim, another brother 2 annas; Fatubai, the plaintiff, 5 annas; and Safiabai, the other sister 5 annas.

48. It was on this footing that on the 30th of November, 1951, that is to say, within 20 days of the death of Rakhibai, a deed of partition was got executed wherein the suit property was valued at Rs. 34,692-8-0 and a sum of Rs. 7,000/- was deducted as being the amount due and payable to Atikabi (a stranger to whom the property had been mortgaged) and the consideration for the conveyance of the suit property to the defendant Yusufally was fixed at Rs. 25,795/- In other words, even though the defendant Yusufally had only a share of 2 annas he managed to obtain the property all for himself,

49. As to the consideration amount payable by him, the partition deed shows that Rs. 25,795/- were paid. It requires to be noted that the defendant now contends that the amount was in fact not paid at that time. He does not say why it was not paid.

50. As to loan amount shown in the Indenture of mortgage, his first contention is that Rs. 11,000/- was not loaned to him by the plaintiff and his second contention is that he has returned Rupees 8,653/- which, according to him, was all that was due to the plaintiff.

51. I asked Mr. Kotwal why a mortgage deed for Rs. 11,000/- was executed in so far as the plaintiff Fatubai is concerned, when, according to the defendant, all that was due to her was Rupees 8,653/- on the basis of the Partition Deed. His answer was that this was so because there were cordial relations between the brother and sister at that time. I regret, I am unable to accept an answer of this kind. It may have been possible to contend that as between a brother and a sister an odd amount may be rounded off to the nearest rupee or even the nearest hundred, but there is no explanation as to why if the defendant's contention is true that only Rs. 8,653/- were due to the plaintiff, the amount was not paid at the time of the execution of the partition deed and again why a mortgage was executed for Rs. 11,000/- in so far as Fatubai, the plaintiff, is concerned and Rs. 11,000/- in so far as the other sister, Safiabai was concerned.

52. It is difficult to believe the defendant's case as to the alleged circumstances

and the reasons surrounding the execution of the partition deed dated the 30th of November 1951 and the Indenture of mortgage dated the 10th of June, 1952. It is also difficult to believe the defendant's version that the arrangement was that he was to pay Rs. 110/- per month partly towards capital and partly towards interest on Rs. 8,653/-.

55. The conduct of the defendant clearly shows that he took advantage of his own sisters, arranged for the whole of the property to be conveyed to him, paid interest for some time and thereafter declined to pay the principal sum as well as interest on the mortgage deed on plea that somehow in his own way of thinking he had repaid the full amount which was due from him.

54. There is no dispute that the defendant has not paid anything to the plaintiff from May 1971 and on his own view of his rights and obligations he has no intention of doing so.

55. On consideration of the totality of the facts and circumstances as spread across the record, a prima facie case has clearly been made out by the plaintiff that the principal amount on the mortgage is due and that the interest thereon is in arrears from May, 1971. It has also been shown that the conduct of the defendant has been to assert his ownership of the property without meeting his obligations under the arrangement as evidenced by the Partition deed and the Indenture of mortgage. There is also the fact that in the Deed of mortgage itself there is a covenant that on the defendant's failure to pay the amount due on the mortgage (and the principal amount was payable in 1956) he was duty bound to execute an English mortgage which would have entailed his handing over possession of the mortgaged property to the plaintiff and the other sister Safiabai.

56. The record prima facie shows that the suit property is tenanted by several persons and that there are a number of disputes and some amount of litigation, There is also the contention that the property is not in good condition.

57. In these circumstances. I consider it just and equitable that a receiver should be appointed.

58. The learned Judge was in error when he approached the matter on only one ground, i.e., whether the security was liable to deteriorate. The learned Judge failed to consider the several other factors which are spread over the record and in particular that the interest was in arrears and the conduct of the defendant prima facie improper,

59. The order of the learned Judge dated the 15th of July, 1975, in so far as he did not appoint a receiver and rejected prayer (a) of the Notice of Motion is set aside and the Notice of Motion is made absolute not only in terms of prayer (b) but also in terms of prayer (a).

60. I also find that this is a matter which should be heard expeditiously because on a prima facie view of the case the plaintiff Fatubai has been deprived of her

moneys for a considerable period of time.

61. I, therefore, direct that the suit be expedited and it should us far as may be, heard in the month of March, 1976.

62. In the result the appeal is allowed with costs.

63. Appeal allowed.