(1960) 12 GUJ CK 0013

In the Gujarat High Court

Case No : A.F.A.D. No. 41 of 1960

Gohel Dhulabhai Kalubhai APPELLANT

Vs

Gohel Mabhai Himatsingh RESPONDENT

Date of Decision : 05-12-1960

Acts Referred:
Transfer of Property Act, 1882 — Section 58, 62

Citation : AIR 1961 Guj 129 : (1961) GLR 433

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Advocate : J.C. Sheth, for the Appellant; M.I. Patel, for the Respondent

Final Decision : Allowed

Judgement

V.B. Raju, J.—This is a second appeal by the original defendant against the judgment and decree in appeal of the learned District Judge of Panch Mahals at Godhra in a suit filed by the respondent for the redemption of the suit property, which was in the possession of the defendant as usufructuary mortgagee. The property is the land S. No. 387/3 in Bakrol village. The admitted facts are that there were three mortgages in respect of the said property in favour of the same mortgagee, namely the appellant. The first is a usufructuary mortgage dated 10-2-1944 for Rs. 999/- in which the period was fixed at seven years. The second is a mortgage dated 8-5-1946 for Rs. 200/-. It is termed as an additional possessory mortgage, and it has fixed the period at seven years. The third is also an additional possessory mortgage dated 12-12-1947 for Rs. 250/-, and it has fixed the period of fifteen years. The first Court held that the plaintiff was entitled to redeem the mortgage dated 10-2-1944, but it held that the plaintiff was not entitled to possession, as there are two other subsequent mortgages dated 6-5-46 and 12-12-47 for Rs. 200/- and Rs. 250/- respectively. In appeal, the learned District Judge held that the plaintiff is entitled to redeem the suit property on payment of Rs. 999/-; he also ordered that the defendant should deliver to the plaintiff quiet and peaceable possession of the suit property after the amount of Rs. 999/-has been deposited. He held that the second and third mortgages were merely mortgages of equity of redemption. He also held that the intention of the parties was to keep their rights under the suit mortgage intact and that therefore the mortgagor was entitled to get possession to the property after the first mortgage bond had been redeemed and that the second and the third mortgage deeds did not affect the mortgagor''s right to obtain possession of the property.

2. In second appeal, it is contended that the order of the learned District Judge, in first appeal ordering deft, to deliver possession of the property to the plft. is erroneous. I allow this appeal for the following reasons: It is an admitted fact that the first document (Ex. 33) for Rs. 999/-dated 10-2-1944 is a usufructuary mortgage of the land in question, namely Survey No. 387/3 in village Bakrol. The controversy between the parties, however, relates to the interpretation of the second and third documents. On a careful1 perusal of these two documents, it is clear that these two documents are additional possessory mortgages. The second document (Ex. 34), dated 6-5-46 contains the words "

^^rs rekjks fxjksgDd :- 999 uks dk;e jk[kh rs mijuks o/kkjks veks vs reksus vkt jkst tkLrh dctkfxjks y[kh vkI;ks Ns-**

These words clearly show that the usufructuary mortgage of 1944 was kept intact and was unaffected by the second mortgage. They also show that an additional possessory mortgage was given by the second document. With reference to the words ^^rs mijuk rjkoksa** it is argued that these words show that what was executed was a mortgage of the equity of redemption. The document clearly mentions the time as seven years and also provides that no interest will be paid on the additional amount advanced, namely Rs. 200. It also provides that the transferee should pay the assessment and should take income from the land instead of paying interest. The word ^^rjkoks** in my opinion does not mean "equity of redemption". The words ^^rs mijus rjkoks** would only mean that the security imposed by the first document is augmented by the second document. The same remarks apply to the interpretation of the third document (Ex. 32). It also contains the words

^^rs mijuks c/kkjks esa reku vkt jkst tk?rh dCtkfxjks y[kh vkI;ks Ns-**

These words clearly show that additional possessory mortgage was created by the third document. In my opinion, the learned District Judge was wrong in interpreting the words ^^rjkoks** and ^^o/kkjks** as referring to equity of redemption.

Both these wards refer to the additional security given to the mortgagee.

3. A mortgage is a transfer of an interest in specific immovable property. A second mortgage means a second transfer of interest. If what is transferred by the second document is equity of redemption, then that would amount to a complete sale of the property. It is however urged that equity of redemption was

not transferred hut only mortgaged. A mortgage is a transfer of an interest in specific immovable property. A mortgage must belong to one of the classes mentioned in Section 58 of the Transfer of Property Act. Equity of redemption can be transferred but there cannot be a usufructuary mortgage of equity of redemption, because although equity of redemption is an interest in Immovable property and although therefore it may be Immovable property, it is not specific Immovable property. The contention that the second mortgage and the third mortgage are mortgages of the equity of redemption would recoil on the plaintiff because if the equity of redemption is mortgaged, the plaintiff cannot redeem. In any case, it is clear from the two documents Exs. 32 and 34 that they are possessory mortgages of the land and that they do not transfer the equity of redemption or any interest in the equity of redemption.

4. It is, however, contended that although the words ^^dctkfxjks** i.e. possessory mortgages are used in these two documents, possession was not given. When the mortgagee is already in pos-session of the mortgaged property, it is not necessary that possession should actually be delivered at the time of the creation of additional possessory mortgages.

5. The learned counsel for the respondent relies on AIR 1934 246 (Oudh) That case has no application to the facts of this case, because there were no possessory mortgages in that case. There were two mortgages in both of which there was a right to get possession. There was a stipulation that in default of payment of mortgage money, the mortgagee was to get possession. That case can also be distinguished on the ground that the second mortgagee was different from the first mortgagee, although subsequently the rights of the prior and subsequent mortgagees vested in one and the same person. That case is therefore of no help in the decision of the present appeal. On the contrary, the decision of their Lordships of the Privy Council in AIR 1940 38 (Privy Council) referred to by the learned District Judge is more apposite. Their Lordships observed:

"In the case however of a mortgagee holding a first mortgage on property A and also a second mortgage on the same property, the mortgagor cannot an payment of the first mortgage redeem the property, that is to say, claim a reconveyance and delivery up of the title deeds, and so forth, unless he repays what is due on the second mortgage, But this is not because of the doctrine of consolidation but by reason of the fact that he has a second mortgage on the property".

6. The learned District Judge was also influenced by what he thought the inequitable nature of the transaction. The transaction was not so inequitable, as may at first sight appear, because between 1946 and 1947 the amount on which the interest was to be calculated was not Rs. 999/- but Rs. 1199/- and between 12-12-47 and 10-2-51 the amount on which the interest was to be calculated was not Rs. 999/- but Rs. 1449. If these facts are borne in mind, it will be clear that between 1946 and 1951 the mortgagee was not recovering the interest on the amount outstanding from the income of the land but only a part of it. In any

case, equity cannot over-ride the plain wording of the documents. In my opinion, it is quite clear from the documents that additional possessory mortgage was created and that by reason of the subsequent documents the mortgagor was not entitled to possession by merely redeeming the first mortgage on or after 10-2-1951.

7. I therefore allow this appeal with costs and set aside the decree of the first appellate Court and restore that of the trial Court.