(1941) 01 PAT CK 0014

In the Patna High Court

Gulab Chand Prasad APPELLANT

Vs

Ram Kumar and Others RESPONDENT

Date of Decision : 22-01-1941

Acts Referred:

Bihar Money Lenders Act, 1938 — Section 7
Transfer of Property Act, 1882 — Section 76(h)

Citation : AIR 1941 Patna 296

Hon'ble Judges : Meredith, J;Chatterji, J

Bench : Division Bench

Judgement

Meredith, J.—This is an appeal from a decision of the learned subordinate Judge of Gaya, dated 8th July 1938, decreeing a suit to enforce three simple mortgage bonds.

2. The appeal is by defendant 10 alone, who is a subsequent purchaser of one item of the mortgaged property. The first of the bonds in suit was executed on 13th May 1925, for a sum of Rs. 6000 bearing interest at 14 annas per cent, per mensem compoundable with annual rests. The property mortgaged was a house (holding Ho. 27) in the town of Gaya. This bond is Ex. 1. The amount said to be due at the time of the suit was Rs. 20,619-5-6. Only a sum of Rs. 15,500 was claimed, and the balance was given up. The second bond (Ex. 7) was executed on 2nd February 1929, for a sum of Rs. 3200. The property mortgaged was the same and there were the same provisions with regard to interest. The claim in this case was for Rs. 7593-2-3. The third bond (Ex. 66) was executed on 2lst August 1929, for a sum of Rs. 5000. It contained similar provisions with regard to interest, and the same property was mortgaged together with another house (holding No. 66). The claim in this case amounted to rupees 12,076-12-0. These sums claimed ware decreed in full. As however the interest allowed was compound interest, the learned subordinate Judge allowed no interest pendente lite, or for the period of grace. He ordered that after expiry of the date fixed for redemption interest should run at 6 per cent per annum.

3. The first point taken in the appeal is that the rule of damdupat as contained in Section 7, Bihar Money-lenders Act, must be applied. Section 7 of this Act provides that no Court shall, in any suit brought by a money-lender before or after the commencement of the Act in respect of a loan advanced before or after the commencement of the Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document. It would follow from this that the amount decreed by way of interest for the period from the date of bond to the institution of the suit cannot be, in the case of the first bond, more than Rs. 6000, in the case of the second bond more than Rs. 3200 and of the third bond Rs. 5000.

4. The decree of the learned subordinate Judge will therefore have to be modified to this extent, and this is conceded by the respondents. The principal point argued for the appellant, and indeed the only other point, arises out of the fact that two of the plaintiff respondents were in possession of the mortgaged house in holding No. 27, which has been purchased by the appellant, upon a rental of Rs. 81 per mensem during the continuance of the mortgage. This rent was admittedly not paid, and the appellant consequently claims that the mortgagees in possession must render an account for these rents u/s 76(h), T.P. Act, or failing, that by way of equitable set-off.

5. The document by virtue of which the respondents have been in possession is on the record, and is Ex. A. It appears that these respondents had asked the mortgagors defendants 1 to 5, for a lease of the house in question in order to open a shop and, upon this lease they came into possession on 20th October 1922. The kabuliyat (Ex. A) however was not executed until 23rd June 1934. The recitals in this kabuliyat may be summarised as follows. The respondent Siri Niwas and his son state that they asked the mortgagors, Babu Ajodhya Prasad and Babu Lakshmi Prasad, to rent the house to them to open a shop, and requested them to put the house into repair. The said Babus replied that the repair and reconstruction of the house would costs about Rs. 4000 and they had not that money available.

6. If, however, the lessees were prepared to advance the sum of Rs. 4000 without interest and agreed to its set-off against the rent, they were prepared in return to give the lease requested and to repair the house. This was accordingly done, and the lessees therefore paid in all Rs. 4000 to the proprietors on account of rent for a period of four years, eight months and ten days at the rate of Rs. 71 per mensem, covering the rent from 20th October 1022 to 11th May 1927. It is then recited that the tenants had come into occupation under this agreement and maintained a cloth shop, and lastly there was a provision that if the lessees on the expiry of 30th June 1927, wished to retain the shop as tenants paying rent, they would pay a rental of Rs. 81 per mensem which had been agreed to by

the proprietors.

7. The argument for the appellant based upon Section 76, T.P. Act, is that this was actually a zarpeshgi lease, and the lessees were in possession as mortgagees. The interest on the first bond for the two years, from 13th May 1925 to 12th May 1927, at 14 annas compoundable annually would amount to Rs. 1260. Adding this to Rs. 6000, the amount of the bond, we get a sum of Rs. 7260 upon which sum the interest of 14 annas per cent, per mensem would amount to Rs. 63 per mensem. It is accordingly argued that Rs. 63 out of the rent of Rs. 81 should be set off u/s 76 against the interest due on the bond, and the balance of Rs. 18 per month should be set off towards reduction of the principal of the debt.

8. It is argued that for the application of Section 76, it is sufficient if the mortgagee takes possession of the mortgaged property. The section does not in terms state that the possession of the mortgagee must be taken qua mortgagee. In my view, the contention of the appellant on this point can by no means be accepted. In the first place, I am of opinion that the transaction referred to in Ex. A is merely a lease with a provision for the payment of rent in advance and can in no sense be described as a mortgage of any sort. It has been held in a number of cases that there is no question of property being held in mortgage unless it is held as security for the debt, and to constitute a mortgage there must also be provision, express or implied for a right of redemption.

9. Upon this point I need only cite the Privy Council case in Nidha Sah v. Murli Dhar (03) 25 All. 115 and a decision of this High Court in Maharaw Kesho Prasad Singh Bahadur Vs. Chandrika Prasad Singh and Others, . In Ex. A there is neither any provision whereby the property is held as security for the debt nor is there any provision at all for redemption. It is clear, in my view, that under Ex. A the lessees came in purely as tenants, and not as mortgagees. Apart from that however, there can be no question that the lessees remained in possession purely as tenants upon a rental of Rs. 81 per mensem from 12th May 1927, which is the only period with which we are concerned in the present case. That is the clear provision which is found in Ex. A itself. Lastly, even if it could be held that the possession under Ex. A was possession as mortgagees, it was not as mortgagees under the mortgage in suit, and possession was in no way referable to the mortgages upon which this suit has been brought.

10. It is quite clear, therefore, that respondents were not in possession as mortgagees but as tenants upon rent under a lease which had nothing whatever to do with the mortgages in suit. This being so, Section 76, T.P. Act, has, in my opinion, no application to the case. It has been held that for Section 76(h) to be applicable the possession of the mortgagee must be qua mortgagee: Page v. Linwood (1831) 4 cl. & f 399.

11. To a similar effect is the decision of the Bombay High Court in Chunilal Bulakhidas Patel Vs. Abdul Karim Shaikh Subhrati, where it was held that for the

mortgagee in possession to be held liable to account it must be proved that the mortgagee had received possession by virtue of the agreement. There are certain cases which have perhaps gone a little further than this, for example, Kishundayal Bhagat v. Mahabir Bhagat AIR 1920 Pat. 485, where Section 76 was held applicable when the mortgagee was in possession not directly upon the terms of the mortgage but under a lease which provided that the rent should be setoff towards the interest due upon the mortgage.

12. This decision has been followed in a Madras case, Vengubai Ammal Vs. V. R. Ramaswami Iyer and Others, . But the principle applied in those cases was that the mortgagees had actually taken possession by way of further security for the debt, and they do not in any way conflict with the contention, which is to my mind unassailable, that before Section 76(h) can be applied it must be shown that the possession of the mortgagee is by way of security for the debt, or in some way referable to the mortgage.

13. In the present case, the possession was in no way referable to the mortgage, and, as I have said, Section 76 has clearly no application.

14. It is argued, as I have said, in the alternative that the appellant should get an equitable set-off of the amount due as rent. That amount, however, if due to any one would be due to the mortgagors, defendants 1 to 5, and the defendant has not shown that it is a sum in any way due to him. His purchase of the property was only just before this suit was brought. He came into possession under his purchase on 6th May 1937 and the suit was brought on 15th May 1937. In the circumstances the question of equitable set-off cannot arise as between the respondents and the appellant. That plea might possibly have been taken by the mortgagors, defendants 1 to 5, though it may be noted that one of the plaintiffs stated on oath that the rents had actually been set off against other debts due from the mortgagors. However that may be, no such plea for set-off was raised by defendants 1 to 5, and the appellant-defendant 10 has not shown that he has got any right, legal or equitable, to raise it.

15. There is no substance in this contention for the appellant, and except with regard to the application of the rule of damdupat u/s 7, Money-lenders Act, the appeal must fail. For the respondents it was at first argued that interest pendente lite should be allowed, if necessary, by the application of Order 41, Rule 33, Civil P.C. Apart, however, from the fact that no cross-objection was filed by the respondents, it appears that it was because compound interest had been allowed at a fairly heavy rate that the learned subordinate Judge did not allow interest pendente lite. Before his decision could be reversed upon that point, it might be necessary to consider the whole question of the interest allowed, and upon this being pointed out Sir Manmatha Nath Mukharji has not pressed this point for the respondents.

16. In the result I would allow the appeal to this extent that the decretal amount will be reduced to give effect to the provisions of Section 7, Bihar Money-lenders

Act. The decision of the learned subordinate Judge with regard to interest pendente lite and for the period of grace will not be altered. A fresh preliminary decree will be drawn up in these terms providing that the amount due must be paid within three months from the date thereof, failing which the property shall be sold in the manner and order directed in the judgment of the learned subordinate Judge. Prom the date, if not paid, interest will run at six per cent, per annum. In my opinion, each party to this appeal should bear its own costs. The plaintiffs will get costs in the lower Court proportionate to their success.

Chatterji J.

I agree.

