(1991) 03 SHI CK 0004

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 102 of 1980

Gur Sewak and Others — APPELLANT

Vs

Lachhi Devi and Others — RESPONDENT

Date of Decision : 05-03-1991

Acts Referred:

Himachal Pradesh Debt Reduction Act, 1953 — Section 2, 6, 8
Limitation Act, 1908 — Article 148
Limitation Act, 1963 — Section 30
Transfer of Property Act, 1882 — Section 58

Citation : (1993) 1 ShimLC 161

Hon'ble Judges : Kamlesh Sharma, J

Bench : Single Bench

Advocate : Pratima Malhotra, for the Appellant; Rajiv Mehta, for the Respondent

Final Decision : Dismissed

Judgement

Kamlesh Sharma, J.—This is a Regular Second Appeal against the decree and judgment dated 7-5-1980 of Additional District Judge, Mandi, whereby the decree and judgment dated 19-12-1979 of Senior Sub-Judge, Mandi was confirmed and the suit of Het Ram, Sitlu, Jit Ram and Dhana who were the original Plaintiffs was decreed. Sh. Het Ram and Sh. Jit Ram have died during the pendency of the present Regular Second Appeal and their legal representatives have been brought on record.

2. The Plaintiffs had filed a suit against the Appellants Defendants, Sh. Gur Sewak and others for accounts and redemption of mortgage of the suit land u/s 6 of the H.P. Debt Reduction Act, 1953 (hereinafter called "the Act of 1953"). As per the allegations made in the plaint, the suit land was mortgaged by its the then owners, Sh. Sidhu and others to one Sh. Narathu on 31-12-1915 for a consideration of Rs. 18. It was usufructuary mortgage. Later on, the equity of redemption was purchased by the Plaintiffs from Smt. Gangi, the sole surviving successor-in-interest of the original mortgagors. The Defendants are the

successors-in-interest of the original mortgagees. It was also averred that the Plaintiffs were entitled to the possession of the suit land without any payment as the debt in question, that is, the mortgage amount stood discharged by way of usufruct amounting to Rs. 10,000 having been received by the mortgagees from 1915 till the date of filing the suit.

3. The Defendants resisted the suit on the grounds that it was barred by time, the mortgage in question was not subsisting; Smt Gangi was not the sole surviving heir of the mortgagor and the Defendants have not purchased the equity of redemption from her as alleged and that they were in possession as tenants even before 31-121915, besides other preliminary objections The trial Court dismissed the suit holding it time barred vide its judgment dated 30-5-1972. But this judgment was upset in appeal by the District Judge on 27-11-1976 and the case was remanded for trial on merits. Later on, the suit was decreed by the trial Court holding that the Defendants were not the tenants in the suit land prior to the mortgage which was liable to be redeemed u/s 6 of the H.P. Debt Reduction Act, 1953. These findings were confirmed by the District Judge in the appeal filed by the Appellants-Defendants. The District Judge also examined whether the suit was maintainable under the Act of 1953 So far as the point of limitation is concerned, both the Courts refused to consider it on the ground that it stood finally concluded by the judgment dated 28-l-1978 of the District Judge which also operates as res-judicata. Hence the present appeal.

4. I have heard the Learned Counsel for the parties and gone through the record. Mrs Pratima Malhotra, Learned Counsel for the Appellants-Defendants, has vehemently argued that the suit was barred by limitation and the judgment dated 28-1-1978 of the District Judge is neither conclusive nor res-judicata as considered by both the Courts below. In reply to this argument. Sh. Rajiv Mehta, Learned Counsel for the Respondents-Plaintiffs, has urged that since the Appellants-Defendants had not filed any appeal against the judgment dated 28-1-1978 deciding the point of limitation against them and remanding the case for trial on merits they are prevented from challenging the said judgment on the principle of res-judicata. He has relied upon the decision in Deoki Nandan v. Makhan Lal and Ors. AIR 1961 All 380 . The contention of Mrs Malhotra deserves to be upheld. By now it is well settled that an order of remand is not final and is in the nature of an interlocutory order. Therefore, it can be challenged in the superior Courts later on. In AIR 1981 707 (SC) the Hon''ble Supreme Court relying upon the previous judgments in Keshardeo Chamria Vs. Radha Kissen Chamria and Others, and Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, held-

...It is true that the Plaintiff did not come up in appeal before this Court against the first judgment of the High Court obviously because the order passed by the High Court was not a final one but was in the nature of an interlocutory order as the case bad been remanded to the Additional Judicial Commissioner and if the said Court had affirmed the findings of the trial Court, no question of filing a further appeal to the High Court could have arisen Thus, the Appellant could not be debarred from challenging the validity of the first judgment of the High Court even after the second judgment by the High Court was passed in appeal against the order of remand....

5. According to Mrs. Malhotra, the suit 8led on 29-11-1971 was not within limitation as on the date of institution of the suit, the mortgage was not subsisting. She has urged that the suit could be filed within seven years next after the commencement of the Limitation Act of 1963 (hereinafter called the Act of 1963) as provided in Section 30. The Act of 1963 had come into force on 1-1-1964 and the period of seven years had expired on 31-12-1970 whereas the suit was filed on 29-11-1971. There is no substance in this argument. Admittedly, the date of mortgage is 31-12-1915. Under the then applicable Limitation Act of 1908 hereinafter called the Act of 1908) the limitation for redemption of mortgage as provided under Article 148 of the Act of 1908 was 60 years, that is up to 30-12-1975, in the present case. In the meantime, the Act of 1953 had come into force with effect from 1-8-1954. Section 6 of the Act of 1953 provides that a suit for redemption of a mortgage to which this Act applies could be instituted at any time after the commencement of this Ac T.S. 6 of the Act of 1953 is as under-

6. Notwithstanding the terms of any contract regarding the date or dates on which a debt shall become due, a suit to which this Act applies for the redemption of a mortgage or for accounts may be instituted by a debtor at any time after the commencement of this Act.

6. Though u/s 6 of the Act of 1953, the period of limitation for filing a suit for redemption of mortgage is made "at any time after the commencement of the Act", yet. It will apply to only those mortgages which were in existence at the time when the Act of 1953 came into force See Sita Ram Singh Vs. Gaya Prasad and Others, ; Dorik Mahto and Another Vs. State of Bihar and Others, and Raghunandan Rai and Vs. State of Bihar and Others, . The mortgage which is the subject-matter of the present case, was definitely in existence on 1-8-19-4 as the limitation of sixty years for the redemption of mortgage under the Act of 1908 was continuing. Therefore, Section 6 of the Act of 1953 applies to the present case and the limitation for filing it was at any time after the Act of 1953 came into force. It is correct that u/s 30 of the Act of 1963, the suit for redemption of the mortgage could be filed within seven years after the commencement of the said Act because the period of limitation was made shorter from 60 to 30 years Had the Act of 1953 not come in operation, the period of limitation for filing the present suit would have been within seven years from the date of commencement of the Act of 1963, that is, upto 31-12-1970. The result is that the suit of the Respondents-Plaintiffs was within time.

7. Another point raised by Mrs. Malhotra is that the suit was not maintainable under the Act of 1953 as neither a loan secured on the ground of usufructuary mortgage was a loan u/s 2(viii) of the Act of 1953 nor the Respondents-Plaintiffs

were the creditors as defined u/s 2(iv) of the said Act. She has relied upon Lachhman Singh v. Natha Singh AIR 1940 Lah 401 Sita Ram Singh Vs. Gaya Prasad and Others, ; Ganga Prasad Gupta Vs. Smt. Saleha Khatoon and Others, ; Parmanand Jain Vs. Firm Babulal Rajendra Kumar Jain and Another, and Krishna Murthy and Others Vs. Government of Andhra Pradesh, in support of her submissions. These decisions are not applicable in the present case in view of different definition of words loan" and "creditor" as given in the Act of 1953 as compared to the State Acts which were under consideration before the High Courts which delivered the said decisions.

8. The word "loan" as defined in Section 2(viii) of the Act of 1953 means "an advance in cash or kind and includes any transaction which in substance amounts to such advance...." The mortgage money is nothing but "loan" as is clear from its definition given u/s 58 of the Transfer of Property Act. It is as under:

58(a) A mortgage is the transfer of an interest in specific Immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

9. The challenge made can easily be met by reference to Section 6 of the Act of 1953 which clearly lays down that the Act applies to the suit for redemption of mortgage. Mortgage includes usufructuary mortgage and all other types of mortgage. Likewise, the definition of the word "creditor" as given u/s 2(vi) is meant for suits filed under Chapter V of the Act of 1953. As the present suit is u/s 6 read with Section 8 of the Act of 1953, which sections fall under Chapter III of the Act of 1953, the definition of the word "creditor" is not relevant In the present case.

10. Mrs. MaJhotra has also tried to urge that the findings of the trial Court that the Appellants-Defendants were not tenants in the suit land before the mortgage, are not sustainable on the evidence on record. Though this argument is not available to her as it was not raised before the District Judge, yet, on scanning the evidence, I find no substance in it. The inferences drawn by the trial Court from the statements of witnesses as well as the documents as given in para 5 of the its judgment are correct.

11. No other point has been raised on behalf of the Appellants-Defendants. In the result, the appeal fails and it is dismissed. The decree and judgment dated 7-5-1980 of District Judge is affirmed. There is no order as to costs.

