

(1958) 12 MP CK 0024

In the Madhya Pradesh High Court

Case No : Second Appeal No. 148 of 1955

Har Sharan Lal

APPELLANT

Vs

Surajmal Kundanmal Oswal

RESPONDENT

Date of Decision : 11-12-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Madhya Bharat Interest Act, 1956 — Section 1
Transfer of Property Act, 1882 — Section 67A

Citation : AIR 1959 MP 426 : (1960) JLJ 72 : (1959) 4 MPLJ 554

Hon'ble Judges : H.R. Krishnan, J

Bench : Single Bench

Advocate : Patankar, for the Appellant; J.P. Shrivastava, for the Respondent

Final Decision : Dismissed

Judgement

H.R. Krishnan, J.

This is a second appeal by the mortgagor defendant from the concurrent decisions in a suit by the mortgagee plaintiff for repayment of the principal and of interest on a mortgage, and on failure for sale of the mortgaged property.

The points for decision are the following:

(i) Whether the suit is incompetent under Order 2 Rule 2, the same mortgagee having filed and obtained a decree in a suit based on a second mortgage on the same property? In this regard the controversy centres round whether by the recitals in the second deed that mortgage and the earlier one had been consolidated into a single cause of action.

(ii) Whether, not having pleaded in the trial court or in the memorandum of first appeal that the plaintiff-mortgagee was barred u/s 67A Indian Transfer of Property Act (Section 74 of the Gwalior Transfer of Property Act) from bringing the present suit, it was open to the mortgagor-defendant to raise it during arguments in the first appellate court and again in the present court in second

appeal.

(iii) Whether Section 67A does actually debar the plaintiff from bringing the present suit, the defendant having in the earlier suit on the subsequent mortgage acquiesced and not called upon the plaintiff to sue him, in respect of this mortgage as well. And finally.

(iv) Whether in view of Madhya Bharat Interest Act 1956 interest should be scaled down to C per cent per annum,

The broad facts of the case are mostly common ground. The defendant-appellant mortgaged his house on 22-3-48 for Rs. 2500/- payable after three years, that is on 22-3-51 it was described as one with possession. At the same time interest at 1 per cent per month was also mentioned, obviously to take effect if possession was not given simultaneously. The mortgagor executed a separate instrument called Kirayanama agreeing to pay Rs. 25 per month as rent for the house, which it is noted, is exactly the monthly interest at 1 per cent per annum specified in the instrument.

Subsequently, on 18-9-48 the defendant took another sum of Rs. 500/- and executed another mortgage deed mentioning "the same terms as in the first deed". A second Kirayauama was executed for Rs. 30/- per mensem; (i.e.) the equivalent of 1 per cent per month on Rs. 3000/-. Whether interest or rent was payable is of no consequence here, because nothing was paid on that account and the suit was brought claiming interest at 1 per cent on Rs. 2500/-, while the earlier one had been brought and a decree obtained for Rs. 500/- and interest at 1 per cent.

On 11-2-52 by which time the amounts payable on both the deeds were overdue, the plaintiff filed a suit for Rs. 500/- plus interest on the second mortgage deed. He however, mentioned as required by Order 34, Rule 1, that he was holding an earlier mortgage for Rs. 2500/- dated 22-3-48 payable after three years. That suit was decreed for principal and interest and the amount was paid. So the house did not come up for sale. After it the plaintiff filed the present suit on 25-3-53 for the sum of Rs. 2500/-principal, which had become payable on 22-3-51 plus interest at 1 per cent, the rent mentioned in the kirayanama admittedly not having been paid. The defence was that this suit did not lie as the plaintiff had given up this part of the claim, in the single cause of action, and Order 2 Rule 2 was a bar.

There was no pleading in regard to Section 67A of the T. P. Act. The trial court held that the two transactions were different and even after 18-9-43 there were two causes of action one based on the first mortgage deed with a principal of Rs. 2500/-repayable on 22-3-1951 and the other on a second cause of action based on a principal of Rs. 500/-repayable also three years thence, i.e. on 18-8-51. As there was no other controversy the suit was decreed. In the memo of appeal in the first appellate court one finds the same argument repeated, but no mention made of Section 67A of the T. P. Act. However, in argument in the first appellate

court the new point seems to have been taken.

After noting that this was not taken in the trial court, the appellate court discussed this ground for what it was worth. It agreed with the trial court in regard to Order 2, Rule 2. In regard to Section 67A of the T. P. Act, the first appellate court held that for one thing it could not be raised at that stage, and for another, the defendant had in the first suit acquiesced in the suit being brought only on one mortgage, and therefore, should be deemed to have contracted out of his right to insist on his being sued on all mortgages. Hence it dismissed the appeal.

Point No. 1. Application of Order 2, Rule 2: In its application to a mortgagee suing the mortgagor, Order 2 Rule 2 is of a scope altogether different from that of Section 67A. On the one hand, the former section will come in only when there is a single cause of action; the latter subject to other conditions, applies when there are more than one mortgage. On the other hand, the disability imposed by Order 2, Rule 2, on the plaintiff is absolute, he cannot bring a fresh suit. While the disability imposed on the plaintiff mortgagee by Section 67A is not absolute, as the section itself does not expressly create any such disability. It being enacted solely for the benefit of the defendant-mortgagor, he can waive it. In what circumstances waiver would amount to "a contract" for the purposes of that section, will depend upon the circumstances of each case.

Since the defendant took his stand in the trial court under Order 2, Rule 2, it becomes necessary to ascertain whether after 18-9-48 both the considerations had been consolidated or united into one single consideration. This naturally takes us to interpreting the deed executed on 18-9-48. It has usual recitals and continues afterwards,

"Now on this house under mortgage the principal amount payable has become Rs. 3000/-. The other terms of this mortgage will be the same as are contained in the existing mortgage (Rahannama sabika) dated 22-3-1948 and the mortgagor shall be liable for the repayment of the amount etc. etc. and I shall make no objection."

From this the defendant has argued that the old mortgage for Rs. 2500/- had been satisfied and a new mortgage for Rs. 3000/- had been created. There being only one cause of action, the plaintiff when he brought his suit in 1952 for Rs. 500/-, would be deemed to have relinquished a part of the claim (in effect the larger part), and is therefore debarred from bringing a fresh suit. Obviously, the whole thing centres round whether this recital consolidated or unified the two causes of action. I would certainly make allowance for the inartistic drafting of the deed though in 1948 Gwalior State had a separate Transfer of Property Act of its own and there was the usual paraphernalia of Registrar's office and the like.

Even so, the intention of the parties should be ascertained. A very formal procedure would have been to expressly state that a new mortgage had been created for Rs. 3000/-; in regard to the stamp and registration fee, state that the

entire fee was being paid minus amounts already paid for this purpose in March 1948. None of these features is found in the present document. The statement "that Rs. 3000/- are now payable on mortgage" is only an arithmetical statement of fact. It does not say that by this instrument Rs. 3000/- are being made payable, nor does it say (as documents of this class sometimes do) that the older amount is now consolidated with a new amount, and the entirety is payable on a date mentioned in the present instrument.

Quite on the contrary, all that it says is that the term for repayment like the other payments will be the same as in the earlier document, that is 3 years, the effect being that while the sum of Rs. 2500/- would fall due for repayment on 22-3-51, The amount of Rs. 500/- would fall due on the 18th of September 1951. I would, therefore, agree with the two lower courts, in holding that there continued to be two causes of action one based on the money paid on the first mortgage, due for repayment on 22-3-51 and the second on the later deed, for Rs. 500/- payable on 18-9-51. So Order 2 has no application.

Point No. 2. Probably the defendant became aware of this while arguing the first appeal but not earlier. On behalf of the defendant-appellant it has been argued by Shri Fatankar, that paragraph 7 of the written statement mentions the substance of Section 67A of the T. P. Act, though the section itself has not been referred to; it is, as if the scope of Order 2, Rule 2 and that of Section 67A are to a considerable extent identical and the mention of the one and the non-mention of the other was immaterial. It is difficult to agree. As already indicated in the beginning the two provisions have altogether different scopes.

It has been argued on behalf of the mortgagee-plaintiff, that having failed to raise this point in the trial court, and in the memorandum of appeal in the first appellate court, the defendant should not be heard to raise it at a later stage. Case law has been cited in support of this view, but as it is well known it is unnecessary to reproduce it. It remains, however, that the applicability of Section 67A has been canvassed during argument of the first appeal and has been discussed in the first appellate court judgment, If after considering the argument, I find that there is some substance, there may be a case for remanding of the suit for a fuller investigation of this issue, subject of course to costs being awarded against the party that has been negligent. If, on the other hand, Section 67A has no application and the view taken by the first appellate judgment is correct, no such question would arise.

Point No. 3. Section 67A was enacted in 1929 to settle the conflict of rulings between different High Courts, some applying the equitable principle of consolidation recognised by the English Law, and the others refusing to apply it, in view of the absence of express statutory provision in the Indian Transfer of Property Act. Now that it has come in the statute all the older rulings are of no application. The points to note are (i) firstly, that this section is for the mortgagee's benefit only and can, therefore, be waived by him. The word used is "contract". Contract here need not be in writing, and can in circumstances be

based on waiver alone.

(ii) Secondly, unlike the provisions of the type of Order 2 Rule 2 there is no express disability imposed upon the plaintiff-mortgagee. It does not say, in so many words, the mortgagee having failed to sue on all the mortgages executed by the same mortgagee, will in future be absolutely debarred from bringing a fresh suit for the other mortgages not included in the suit concerned. The idea of the disability is there, but it is a limited or if one may say, it is conditional disability.

(iii) Thirdly, if the mortgagee-plaintiff has acted in good faith and has apprised the defendant of the existence of the other mortgages and if the defendant, for his part, does not call upon him to sue on those mortgages also, I would hold that he will not be debarred from bringing a fresh suit. This in fact follows both from the wordings of Section 67A and from the legislature's intention. No doubt, the obligation of the plaintiff mortgagee to sue on all the mortgages is for the benefit of the mortgagor, but like all benefits it is not an unmixed convenience. If all the mortgages are lumped in one suit then the mortgagor is safe from the expense and the harassment of a number of separate suits one on each of the mortgages. On the other hand, he is now exposed to the inconvenience of having to pay up the amounts payable on all the mortgages. Here for example, the suit for Rs. 500/- and interest was brought in 1952, the existence of the other mortgage was also mentioned. But the mortgagor did not call upon the plaintiff-mortgagee to sue on all the mortgages. Thus, while exposing himself to the possible inconvenience of being sued again, he got a respite for paying the sum of Rs. 2500/- plus interest.

(iv) Fourthly, the result is that the plaintiff may if he chose sue on all the mortgages. If he did, the defendant could have no grievance. He may also sue on one or other of the mortgages thereby at fording the defendant some period of grace in regard to the others: as long as he mentions in his plaint the existence and the particulars of the other mortgages held by him he would be acting in good faith. Now it would be for the defendant either to insist upon the benefit given to him by Section 67A T. P. Act or waive it. By waiving he would, on the one hand, be inviting the inconvenience of the possible second suit or suits; but on the other, he would be getting respite in respect of the other amounts. This is a question of weighing the balance of convenience. In case the defendant chose to wait and not to insist /on the plaintiff's suing on all the mortgages, he cannot challenge the subsequent suit on the basis of Section 67A T. P. Act.

I find that this aspect of the matter has not been discussed or elaborated in any of the rulings placed by the parties; but to me this appears to be the only reasonable view consistent with the intention and the wording of the section,

Looked at in this way it is clear that even if pleading of Section 67A had been raised at the earlier stage, the result would be that in view of the defendant's silence in the first suit he would not be allowed to raise it now.

Point No. 4. There are several rulings of this court in which it has been held that the Madhya Bharat Act has a retrospective effect. So the decree passed by the lower courts is modified to the extent that the interest payable will be 6 per cent per annum (instead of 12 per cent p. a.) on the principal till the date of realisation.

The appeal is dismissed, but for the reduction in the rate of interest. The defendant-appellant having lost over the larger part of his ground, he should pay costs and pleaders fee to the plaintiff-mortgagee on minimum contested scale.