(1963) 05 P&H CK 0003

In the Punjab And Haryana At Chandigarh

Case No : Regular First Appeal No. 342 of 1957

Jagan Nath APPELLANT

Vs

Maru Singh and Others RESPONDENT

Date of Decision : 01-05-1963

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 7

Citation : AIR 1964 P&H 365 : (1964) 66 PLR 45

Hon'ble Judges : P.C. Pandit, J;Capoor, J

Bench : Division Bench

Advocate : C.L. Aggarwal, S.S. Mahajan and Shamair Chnnd, for the Appellant; Roop Chand and Subash Chowdhary for Respondent No. 1 and Mr. H.R. Sodhi, for the Respondent

Final Decision : Allowed

Judgement

P.C. Pandit, J.—This is a mortgagee''s appeal against the final decree in a redemption suit.

2. On 18th September, 1948 one Gokal Chand mortgaged with possession the house in dispute with Jagan Nath for Rs. 5,000/. In the registered mortgage-deed, Exhibit P. 2, it was stated that the interest on the mortgage money was Rs. -/12/- per cent per mensem and whatever rent the mortgagee would receive, the, same would be adjusted towards interest. Gokal Chand later on died and his sons. Paras Ram and Sada Ram, became the mortgagors in his place. It appears that Gokal Chand owed some money to the Punjab Government and since he could not pay the same, they attached the house in dispute and auctioned it. It was purchased by Maru Singh in March 1956 for Rs. 1,910/-. In August 1956 he filed the present suit against the mortgagee for possession of the house by redemption. On an objection being raised by the mortgagee that the legal representatives of the original mortgagor should also have been impleaded as parties to the suit, Paras Ram and Sada Ram, sons of Gokal Chand, were impleaded as defendants 2 and 3.

3. The suit was contested by the mortgagee, inter alia, on the grounds that the plaintiff had no locus standi to file the present suit and according to the terms of the mortgage deed, interest was fixed at Rs. 9/- per cent per annum and the rent actually realised was to be credited in the interest account. It was also stated that the mortgagee had incurred certain expenses in litigation in ejecting the mortgagor, Gokal Chand, from the house in dispute and in defending the suit filed by the legal representatives of Gokal Chand, after his death. These expenses also the mortgagee was entitled to get from the mortgagor, if redemption was to be allowed.

4. The Senior Subordinate Judge, Rohtak, held that the plaintiff had a right to file the suit and Jagan Nath, defendant No. 1, was entitled to the costs of defending the suit filed by the sons of Gokal Chand and recover the costs incurred by him in ejecting Gokal Chand from the house in dispute. A preliminary decree was, consequently, passed on 26th August, 1957 for possession of the house by redemption.

5. Shri Devi Dayal, Advocate, was appointed a Local Commissioner and it was stated that he would take account of what was due to the mortgagee, defendant No. 1, as principal and interest on that date. He would also take an account of the income of the mortgaged house received by the mortgagee up to that date. The defendant would be entitled to the expenses of the litigation, mentioned above, and the Local Commissioner would find out what amount was spent by the defendant in that connection.

6. After the passing of the preliminary decree, the Local Commissioner went into the accounts and gave his report on 19th October, 1957. After discussing the various items, he came to the conclusion that on the date of the preliminary decree, a sum of Rs. 7,771/ was due to the mortgagee from the mortgagor. Objections were filed both by Maru Singh and Jagan Nath against this report. Counsel for the parties made a statement that they did not want to produce evidence in support of their objections.

7. The learned Senior Subordinate Judge heard the parties, considered their various objections against the report of the Local Commissioner and held that the plaintiff should deposit Rs. 6,974/- for the mortgagee, after deducting the costs of the preliminary decree already assessed on or before 18th December, 1957 in terms of Order 34, rule 7, Civil Procedure Code. On 11th November, 1957 the final decree was passed and it was directed that the parties would bear their own costs so far as the proceedings after the preliminary decree was concerned. Against this decree, the present appeal has been filed by jagan Nath, mortgagee. His prayer in the appeal is that the amount fixed by the Court below should be enhanced by Rs. 1,900/- and necessary court-fee has been paid on this sum.

8. Learned counsel for the appellant has raised objections with regard to six items and I propose to consider them seriatim.

(1) He contended that the costs of the preliminary decree could not have been

awarded to the plaintiff-mortgagor. That could have been done only if it was founded by the Court that the mortgagee had been guilty of misconduct or had refused a valid tender of the amount due to him. For this submission, he placed his: reliance on a Single Bench decision of the Ratna High Court in. Rambilash Sah and Others Vs. Radhakrishna Prasad Sah and Others,

There is no substance in this contention. In the preliminary decree costs were awarded in favour of the plaintiff-mortgagor. No appeal was filed by the mortgagee against this decree. Even if the learned Senior Subordinate Judge had wrongly awarded costs in favour of the plaintiff, the order had become final between the parties. Besides, the awarding of costs is within the discretion of the Court. There is no general principle that in a suit for redemption the mortgagee must always be awarded the costs of the litigation. Wherein a suit for redemption the mortgagee resists the locus standi of the plaintiff to redeem the property and he fails to establish this fact, it is open to the Court to pass the order regarding costs against him (see in this connection Vasteva Holla v. P. Mahabala Rao AIR 1926 Mad 405 and Rup Ram Dhan Singh Vs. Munshi Chhilu,

(2) It was urged that the Court could not reduce the rate of interest on the mortgage amount from Rs. -/12/- per cent per month, as provided in the mortgage-deed, to Rs. -/10/- per cent per month. The plaintiff had neither raised any objection regarding the rate of interest nor did he get any issue struck thereon at the time when the preliminary decree was passed. It should, therefore, he presumed that the Court had granted the rate of interest at Rs; -/12/- per cent per month and the same should be deemed to have been incorporated in the preliminary decree passed by the Court. Under these circumstances, the Local Commissioner and the lower Court had no jurisdiction to reduce this rate.

It is undisputed that if this point had been raised before the Court, which passed the preliminary decree, it would not have granted interest at a rate more than 71/2 per cent per annum, which is prescribed under the provisions of the Usurious Loans Act, 1918, as amended by the Punjab Relief of Indebtedness Act, 1934,.even though in the mortgage-deed the parties had agreed to a rate of interest at 9 per cent per annum. Learned counsel for the appellant, however, contended that since the agreed rate of 9 per cent per annum should be deemed to have been incorporated in the preliminary decree and no appeal had been filed against this decree by the mortgagor, this rate had become final between the parties and neither the Local Commissioner nor the Court below could interfere with the same. There is, however, no merit in this contention. No rate of interest has been specified in the preliminary decree. All that is stated therein is that the Local Commissioner would take an account of what was due to the mortgagee on the date of the preliminary decree on account of "principal and interest on the mortgage mentioned in the plaint such interest to be determined at the time of final decree." According to form 7-A (as given in Appendix ''D'' to the Code). Prescribed for a preliminary decree for redemption under Order 34, rule 7, Civil

Procedure Code, where accounts are directed to be taken, it is mentioned that the Local Commissioner shall take accounts, inter alia, of what was due on the date of the preliminary decree to the defendant (mortgagee) for principal and interest on the mortgage mentioned in the plaint. It is further provided that such interest was to be computed at the rate payable on the principal or where no such rate was fixed at 6 percent per annum or at such rate as the Court deemed reasonable. A perusal of this provision would show that the Court, while passing the preliminary decree, must state the rate of interest granted to the mortgagee. This rate of interest could either be the rate fixed in the mortgage-deed itself, or where no such rate was fixed 6 per cent per annum or such rate as the Court deemed reasonable. A duty is, therefore, cast on the Court to fix the rate of interest in any of the three manners mentioned above. In the present case, no such rate was fixed by the Court in the preliminary decree. Thus, the local Commissioner and the Court below were justified in fixing the rate of interest and the rate fixed by them is, admittedly, in accordance with law. It may also be mentioned that no specific ground of appeal was taken with regard to this point in this Court.

(3) It was submitted that an amount of Rs. 80/-, which was incurred by the mortgagee on the installation of the electric fittings in the house, should have been allowed by the Court, as was done by the Local Commissioner. This was a small amount and the improvement made in the mortgaged property by spending this amount was a lasting and permanent one and had increased the saleable value of the property. Reliance for this submission was placed on a Division Bench authority of the Lahore High Court in Ram Saran Dass v. Bhagwan Singh AIR 1928 Lah. 160.

It is true that this amount was spent on the electric fittings as claimed by the mortgagee, but it was asserted by the mortgagor that these fittings were installed during the pendency of the redemption suit. This is clear from the report of the Local Commissioner, which shows that the electric installations were not got fitted bona fide. Moreover, under the provisions of section 63-A of the Transfer of Property Act, the principles which, admittedly apply to this State, the cost of these installations cannot be recovered from the mortgagor at the time of redemption. It was held by a Bench decision of this Court in Rup Ram Dhan Singh v. Munshi Chhilu AIR 1260 P&H 480-

Under section 63-A (2), the mortgagee in possession, upon redemption of the mortgage is entitled to the amount spent by him to preserve the mortgaged property from destruction or deterioration or to prevent the security from becoming insufficient. He is not entitled to the amount spent by him in order to increase the yield from the mortgaged land so as to recompense himself in lieu of the interest due on the principal money. This is no ground in law for granting compensation to the mortgagee in possession and section 63-A cannot be attracted on this ground. The mortgagee in possession cannot be permitted to lay money in increasing the value of the estate except in circumstances which strictly fall within the four corners of the section.

The decision relied on by the learned counsel for the appellant was given prior to the insertion of section 63-A in the Transfer of Property Act. This section was inserted by the Amending Act of 1929.

(4) Learned counsel argued that the Court below should have allowed the entire amount of Rs. 109/12/-, which represented the expenses incurred by his client in getting the mortgagor ejected from the house in dispute. In the preliminary decree, it was clearly stated the mortgagee was entitled to recover the costs for ejecting Gokal Chand. It was also mentioned that the Local Commissioner would find out what amount was spent by the mortgagee in this respect. The Local Commissioner in his report has stated that the sum of Rs. 109/12/-, which consisted of four items of Rs 69/12/-, Rs. 5/-, Rs. 6/- and Rs. 29/-, was correct and the of this provision would show that the Court, while passing the preliminary decree, must state the rate of interest granted to the mortgagee. This rate of interest could either be the rate fixed in the mortgage-deed itself, or where no such rate was fixed 6 per cent per annum or such rate as the Court deemed reasonable. A duty is, therefore, cast on the Court to fix the rate of interest in any of the three manners mentioned above. In the present case, no such rate was fixed by the Court in the preliminary decree. Thus, the local Commissioner and the Court below were justified in fixing the rate of interest and the rate fixed by them is, admittedly, in accordance with law. It may also be mentioned that no specific ground of appeal was taken with regard to this point in this Court.

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The Commissioner in his report has stated that the transliteration of the bahis had been produced by the mortgagee. We had also seen these accounts and all the four items mentioned by the Local Commissioner were entered therein There is no reason to disallow the other three items amounting t J R;. 40/-, when the main amount of Rs. 69/12/- has been allowed by the learned Judge.

(5) Learned counsel submitted that the mortgagee was entitled to a sum of Rs. 500/-, which he had spent in defending the suit filed by the sons of the mortgagor, after his death. He was entitled to get this amount under the provisions of section 72 of the Transfer of Property Act. In the preliminary decree also, it had been clearly mentioned that he was entitled to the costs of defending the suit filed by the sons of Gokal Chand, mortgagor, and the Local Commissioner was directed to find out this amount. In his report, the Local Commissioner has mentioned that the mortgagee had stated before him that he had appointed one Bakhtawar Lal, resident of Bahadur Garh, where the house was situated, as his mukhtar-i-khas for defending this suit. Bakhtawar Lal spent Rs. 500/- in this connection and he had produced a rough estimate of the expenses, Exhibit D. W. 2/1. The Local Commissioner had further remarked that the mortgagee was entitled to get reasonable expenses under this heading. According to the statement of the mortgagee, 20/25 hearings had taken place in

this suit and on every date Shri Munshi Ram, Advocate, was brought from Delhi to conduct this case. Besides, a local counsel had also been engaged by him. An appeal was also filed against an interim order passed in this case. Taking all, these things into consideration, the Local Commissioner allowed a sum of Rs. 500/- for this purpose. The Learned Judge, however, held that the taxed costs in this suit were Rs. 69/8/- only. No receipt or certificate of the lawyer had been produced by the mortgagee. Bhakhtawar Lal had not kept any account of the amounts spent by him on this litigation. The mortgagee had stated that he had not paid this amount of Rs. 500/- to Bakhtawar Lal so far. On these grounds, the learned Judge allowed a sum of Rs. 100/- only on this;account. Learned counsel submitted that the Senior Subordinate Judge was wrong in reducing the amount from Rs. 500/- to Rs. 100/-.

In my opinion, the learned Senior Subordinate Judge has not allowed reasonable expenses of this litigation to the mortgagee. It is undisputed that when the mortgagee has to defend his title to the mortgaged property from adverse claimants, the mortgagor is bound to pay him not merely the taxed costs, but the actual costs which he had to pay to his legal advisers and which were reasonable in the circumstances of the case (vide Raja Venkatarangayya Appa Rao v. Raja Varaprasada Rao Naidu I L.R. 43 Mad. 898. Taking into consideration that the suit filed by the sons of the mortgagor was of first class nature and there were 20/25 hearings in the case, on which a counsel from Delhi was brought, and there was also an appeal filed against an interim order passed in this suit, I am of the view that a sum of Rs. 300/- would be the reasonable amount.

(6) Learned counsel lastly argued that the Senior Subordinate Judge was wrong in allowing Rs. 40/- per mensem as the rent for the period when the house remained in the possession of Bakhtawar Lal. The Local Commissioner had rightly found that the rent deed executed by Bakhtawar Lal in favour of the mortgagee for Rs. 25/- per mensem was a genuine one.

9. The learned Judge has found that Bakhtawar Lal was related to the mortgagee and the house in dispute was rented out to him when the redemption suit had already been filed. According to the learned Judge, the income of the property was Rs. 45/- per mensem and this rent deed was not a genuine document. It was merely a device to show less income of the house. The learned Judge has already allowed Rs. 40/- per mensem to the mortgagee, that is, Rs. 5/- less than the actual income. Under these circumstances, I see no reason to disturb the finding given by the learned Judge on this point.

10. The result is that the appeal is partly accepted and the mortgage amount is increased by Rs. 240/- with proportionate costs. This additional amount should be deposited in the trial Court within two months from today.

Capoor.J.

11. I agree.

