

(1963) 11 MP CK 0010
In the Madhya Pradesh High Court
Case No : First Appeal No. 5 of 1961

Jagannath Prasad Tulsiram and Another APPELLANT
Vs
Kanti Prasad Battilal and Another RESPONDENT

Date of Decision : 29-11-1963

Acts Referred:

Transfer of Property Act, 1882 — Section 58, 67, 68

Citation : AIR 1964 MP 305 : (1964) JLJ 38 : (1964) MPLJ 97

Hon'ble Judges : V.R. Newaskar, J;P.R. Sharma, J

Bench : Division Bench

Advocate : G.P. Patanker, for the Appellant; B.L. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Newaskar, J.

This appeal principally raises the question as to the right of the mortgagee to bring the mortgaged property to sale, the contention being that the mortgage in suit is a purely usufructuary mortgage in spite of the circumstance that the mortgagor had covenanted to pay the mortgage money by a certain date. Material facts are as follows :

Plaintiffs' claim for the recovery of the mortgage-money amounting to Rs. 23,615-9-0, was based on a mortgage-deed dated 6-12-1946 for Rs. 21,000/-. Under the terms of this mortgage-deed (Ex. P-16) the mortgagors had agreed to pay interest every month at Annas 8 per cent per month on the mortgage amount of Rs. 21,000/-, the method of paying the same being by execution of a rent-note: in mortgagee's favour for the amount equal to interest. The mortgagors further agreed to pay the principal amount by instalments spread over 10 years, first instalment payable at the end of first year being Rs. 3000/- and later on by instalments of Rs. 2000/-every year. The mortgagors further bound themselves not to transfer the mortgaged property either by mortgage, sale or gift. In case the amount of any instalment was not paid in due time it was

open for the mortgagees, under the terms of the deed, to recover the amount in accordance with law. The document further provided for proportionate reduction of rent-cum-interest on payment of a full sum of Rs. 1000/- at any time. The mortgagors were liable to pay house-tax, water-tax and electric charges and he was also responsible for carrying out repairs and in case the mortgagees were required to pay the same due to their default the burden of that amount and interest thereon at 1 per cent per month would also be upon the mortgaged houses and that the same would be paid along with instalments. The mortgagors agreed not to mortgage the mortgaged property elsewhere for a period of one year and in case they did they were liable to pay interest for the first full year. There was also an indemnity clause.

Having regard to the aforesaid terms of the mortgage-deed question raised was whether the mortgagees had the remedy to bring the property to sale for realisation of first instalment of Rs. 3000/- together with seven instalments of Rs. 2000/- each falling due in subsequent years as also interest on the entire mortgage-money at the contract rate.

The trial Court held that the mortgage being a combination of simple and usufructuary mortgages the plaintiffs had such a right and, rejecting other contentions raised by the defendants, decreed the claim of the plaintiffs together with further interest which had become due till the date of the decree. The total amount of decree passed was for Rs. 25,143.31 nP. A preliminary decree for sale was accordingly passed in usual terms.

In this appeal the only contention pressed on behalf of the appellants by Mr. Patankar is that the mortgage is purely usufructuary and the mortgagees had no right to bring the property to sale. Reliance is sought to be placed upon the decision of the Allahabad High Court reported in *Ram Lal v. Mt. Genda* AIR 1942 All 326.

In my Opinion, in the first place having regard to the terms of the mortgage-deed set out above, the aforesaid Allahabad decision has no application. There are clear terms in the mortgage-deed indicating that the mortgagors, had bound themselves personally to pay the mortgage money by specified dates and had, in the event of failure on their part to pay the same according to the terms of the contract, agreed that the same might be recovered according to law. They had also bound themselves to pay interest on the mortgage money in the form of rent every month and in the event of their failure to do so had agreed that the same might be recovered out of the mortgaged property. Besides this they had also agreed that in case the mortgagees were required to pay house-tax, watertax and electric charges there would be charge in respect of them also upon the mortgaged property. Thus the personal covenant to pay together with right of recovery, and agreement that the burden for such payment would rest upon the mortgaged property, clearly imply right of sale in the mortgagee. If the mortgagees had the right to recover the amounts of unpaid instalment how can that be done without bringing the mortgaged property to sale? The property is

clearly subject to a burden for the payment of the amount according to contract. When such burden is there not only for the principal amount but also for interest and taxes there is a clear right of sale by necessary implication. The mortgage in question cannot be called a purely usufructuary mortgage as is the contention of Mr. Patankar. In a purely usufructuary mortgage the mortgagee has a right of possession and a further right to retain the same until the mortgage money is paid and to receive rents and profits of the property while in his possession in lieu of interest or in payment of mortgage money or both. The present mortgage is thus a simple mortgage usufructuary.

In AIR 1927 32 (Privy Council) , there was a deed of mortgage with possession. It provided for payment of interest at a specified rate and contained covenants by the mortgagor to pay the principal and interest. By a separata document of the same date mortgagee leased back part of the mortgaged property to the mortgagor. The document upon its true construction provided for charge upon the property in respect of rent remaining unpaid. Their Lordships of the Privy Council observed with reference to this document --

"The mortgage in question no doubt is usufructuary but it is something more, inasmuch as it contains covenants on the part of the mortgagor to pay both principal and interest. Their Lordships are disposed to agree in the view taken of the mortgage by the learned Chief Justice of Madras that it was an anomalous mortgage or at least a combination of a simple mortgage and a usufructuary mortgage."

It is thus clear from these observations that the mortgage in question is not a purely usufructuary mortgage.

In Mohammad Saeed v. Abdul Alim AIR 1947 Lab 40 (FB), Mahajan, J., who delivered the leading judgment also distinguished the Full Bench decision of the Allahabad High Court reported in Hakim Kanhaiya Prasad Vs. Mt. Hamidan and Others, , as also the decision in AIR 1942 All 326, relied upon by Mr. Patankar, in the following terms:

"In that case, there was no hypothecation clause but in the present case it is clearly stipulated in Clause (3) that for failure to pay interest for three successive months the mortgaged property can be sold. Similarly from other clauses of the deed it is clear that the mortgagee had a right to recover the mortgage debt from the person or other property of the mortgagor. With great respect I cannot subscribe to the observations made by the Full Bench to the effect that where there is a personal covenant to pay the mortgage debt it does not necessarily, imply a right of sale. As at present advised, I consider that the view taken in the various Madras cases that a personal covenant implies a right of sale is sound in law. That view has been accepted by a Bench of this Court in the case of Qadir Parasat Khan v. Mehr Nur Mohammad ILR 16 Lah 612 at p. 814 : (AIR 1935 Lah 103 at p. 104) cited above."

The Madras cases referred to by the learned Judge include Kangaya Gurukul v.

Kalimuthu Annavi ILR Mad 526 (FB) and earlier Madras decisions.

It is not necessary of the purpose of the present appeal to go into the question whether a mere covenant to pay unattended by anything to indicate hypothecation, of the property, in the case of a deed which confers right of possession of the mortgaged property upon the mortgagee, does or does not imply right of sale as in the case of a simple mortgage; because in the present case there is clear hypothecation of property on account of existence of terms entitling the mortgagee to recover unpaid interest-cum-rent out of the mortgaged property and a further term that the burden of taxes remaining unpaid shall "also" lie upon the mortgaged property. The significance of the word in Hindi "Bhi" meaning also in the deed cannot be lost sight of and is a clear pointer to the fact that there is hypothecation of the property for the payment of the principal amount by necessary implication. The decision in AIR 1942 All 326 (Supra), relied upon by Mr. Patankar has no application.

The appeal is therefore without substance and is dismissed with costs.