
(1937) 11 PAT CK 0031
In the Patna High Court

Jagat Mohan Nath Sahi Deo and Another APPELLANT
Vs
Sheonarain Marwari and Others RESPONDENT

Date of Decision : 25-11-1937

Acts Referred:

Transfer of Property Act, 1882 — Section 4, 5, 65, 76

Citation : 174 Ind. Cas. 1001

Hon'ble Judges : Courtney-Terrell, C.J;Chatterji, J

Bench : Division Bench

Judgement

Chatterji, J.—This is an appeal by the plaintiffs of whom No. 1 is the husband of No. 2. The suit is for recovery of Rs. 5.1G0 as damages primarily for breach of contract. The contract is embodied in a usufructuary mortgage bond dated March 20,1929,executed by the plaintiffs in favour of defendants Nos. 4 and 5 who are father and son. The mortgage is in respect of eight out of nine villages composing a tenure known as Hurhnri lot which is held by plaintiff No. 1 as a khorposhdar under the Maharaja of Chota Nagpur, Plaintiff No. 1 in his turn created a subordinate tenure in favour of his wife, plaintiff No. 2, by way of khorposh in respect of the eight villages under mortgage. For his tenure, plaintiff No. 1 has got to pay Rs. 50 as rent and Rs. 357-1-4 as cess per ear to the superior landlord, the Maharaja, and plaintiff No. 2 for her sub-tenure i.e. supposed to pay a rent of Rs. 5 a year to plaintiff No. 1. According to the plaintiffs the real mortgagees are defendants Nos. 1 to 3 who are father and sons forming a joint Mitakshara family, defendants Nos. 4 and 5 being their benamidars. There was a decree obtained by the Maharaja against plaintiff No. 1 for arrears of rent and cess of the Hurburi lot for the Sambat years 1984, 1935 and 1986, the amount of the decree being Rs. 1.8U0 including costs and interest. The plaintiffs' case is that defendants Nos. 1 to 3 being the mortgagees in possession were under the obligation to pay the rent and therefore to pay off the decree but they intentionally and fraudulently did not do so though, when asked by the plaintiffs, they promised they would. In execution of the decree, the tenure was put to sale and was purchased by defendants Nos. 1 to 3 and another

person "who has been made defendant No. v in the suit. To set aside that sale, the plaintiffs had to deposit Rs 1,800 as the decretal amount together with compensation Rs. 2,300. It is further alleged that the plaintiffs had to raise the money by selling some of their properties at a loss which has been estimated at Rs. 1,000. The plaintiffs' claim consisting of the above three items comes to Rs. 5,100. "Defendant No. 6" is not a person but mere name in which defendants Nos. 4 and 5 are said to have carried on their business. Defendants Nos. 7 and 8 are relations and of these No. 8 is an under-tenure holder of one of the villages in the tenure they have been impleaded as being co-conspirators in the league formed by the other defendants to deprive the plaintiffs of their property. The claim against them has, however, been dropped in this appeal and no further reference to them is necessary.

2. The suit was contested by all the defendants practically on the same line. Their defence mainly is that they were not liable to pay the rent, that defendants Nos. 4 and 5 are the real mortgagees and defendants Nos. 1 to 3 have no connection with the mortgage and that what was mortgaged was really the interest of plaintiff No. 2 alone for which the rent payable was Rs. 5 only. The learned Subordinate Judge has given effect to the defence and dismissed the suit. It is contended on behalf of the appellants, in the first place, that although their case regarding the independent contract on the part of the mortgagees to pay the rent may not be accepted, the mortgagees nevertheless being in possession were under the law bound to pay the rent of the mortgaged property. The mortgage bond was executed on March 20, 1929, which was towards the end of the Sambat year 1985. The rent decree relates to the Sambat years 1984, 1985 and 1986, out of which the rent for the year 1986 only became due after the mortgage. The plaintiff's claim, so far as the rent is concerned, can therefore, be divided into two parts, firstly, for the rent accruing due after the mortgage, and secondly, for the arrears of rent which had already fallen due. Reliance is placed on their behalf upon Section 76, Clause (c), Transfer of Property Act, which provides that the mortgagee in possession must, in the absence of a contract to the contrary out of the income of the property, pay the Government revenue, all other charges of public nature and all rent accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold. On behalf of the respondents it is pointed out that the words "and all rent" which have been underlined (here italicized) were added in the section by the Amending Act XX of 1929 which came into force on April 1, 1930, that is to say, long after the execution of the mortgage bond, and it is therefore contended that under Clause (c) as it stood before the amendment, there could be no liability to pay rent, but to my mind, the amendment which imported the words "and all rent" did not really change the law and create a new liability on the part of the mortgagee in possession. Even under the old law, I think it was the duty of the mortgagee in possession to pay the rent of the mortgaged property. If we look at Section 65, Clause (d) which provides that where the mortgaged property is a lease, the mortgagor will, so

long as his security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, it seems pretty clear that the Legislature intended to cast upon the mortgagee in possession the obligation to pay the rent of the mortgaged property, I am supported in this view by the decision in *Kannye, Loll Sett v. Nisoriny Dossee* 10 C. 443 and *Vithal Narayan v. Raje Bahadur Shriram Savant* 29 B. 391 : 7 Bom. L.R. 313. I, therefore, think that the mortgagees were liable to pay the rent of the mortgaged eight villages, for the year 1986.

3. The next question is whether there was any liability of the mortgagees to pay the rent for the years 1984 and 1985 which had already accrued due before the mortgage. On this point again, the learned Advocate on behalf of the appellants relies upon the last portion of Section 76 Clause (c). That portion was already there even before the Amendment of 1929. It obviously applies only where the mortgaged property is liable to be summarily sold for the arrears of rent. Much controversy has arisen as to the true significance of the expression "summarily sold". On the one hand, it is contended that it is meant to apply to cases where sales are held under the provisions of the Tenancy Law according to which the property itself and not merely the right, title and interest of the mortgagor will pass. On the other hand, the contention is that the word "summarily" implies that the proceedings for realization of rent by sale of the property are of a summary nature; for instance, as in the case of a certificate proceeding under the Public Demands Recovery Act. It seems to me that the latter view is correct. If the former contention were to be accepted, it is difficult to understand the significance of the expression "summarily." I do not think Section 76, Clause (c) is of any assistance to the plaintiffs so far as the claim for arrears of rent for the years 1965 and 1985 is concerned. During those years the plaintiffs were in possession of the mortgaged properties and they must pay the rent for the period of their possession. If the mortgagees had been given the right to collect the rents from the tenants that had fallen due prior to the mortgage, or if in fact they collected those arrears, the position would have been different, but the plaintiffs have not made out any case of that sort. In my opinion, therefore, the plaintiffs cannot have any relief with regard to the rent for the years 1984 and 1985.

4. The next point taken on behalf of the appellants is that the learned Subordinate Judge was quite wrong in holding that, what was mortgaged was the interest of plaintiff No. 2 alone. This question depends upon the construction of the document Ex. E. itself. Although in the earlier part of the document it is recited that plaintiff No. 1 joined in the deed as a mortgagor having only the reversion expectant, the operative part of the document runs thus:

The mortgagors do hereby grant, convey and transfer unto the mortgagees by way of zerpeshgi and mortgage all those villages fully described in the schedule hereunder written together with all the respective estates, rights, titles, interest, reversions, remainders, rents, issues, profits, properties, claims and demands

whatsoever of the said mortgagors therein.

5. In the schedule all the villages are described and there is nothing to restrict the description to the interest of plaintiff No. 2 only. Reading the document as a whole it is plain enough that both plaintiffs Nos. 1 and 2 were mortgaging all the interests they had in the property, Plaintiff No. 1 is in the position of a lessee and plaintiff No. 2 of a sub-lessee and both joined in transferring their respective interest. Our attention was drawn on behalf of the respondent to the agreement Ex. A, which was executed on March 14, 1929, between plaintiffs Nos. 1 and 2 on the one hand and defendants Nos. 4 and 5 on the other for the purpose of showing that" it was really the interest of plaintiff No. 2.alone that was being mortgaged. The fact seems to be that plaintiff No. 2, being actually in possession of tie mortgaged properties as a sub-lessee under plaintiff No. 1, was considered to be the principal mortgagor and recitals in the agreement Ex. A and the mortgage deed Ex. E was made accordingly. Plaintiff No. 1, however, joined with plaintiff No. 2 in executing the mortgage deed and transferred whatever interest he had. I, therefore, think that both the plaintiffs were the mortgagors and the interests of both were mortgaged. I should have mentioned that the object of the defendants in raising the contention that it was the interest of plaintiff No. 2 alone that was mortgaged was that in that case they would be liable to pay a rent of Rs. 5 only which is the rent payable by plaintiff No. 2. The next question that aliases for consideration is whether defendants Nos. 1 to 3 or defendants Nos. 4 and 5 are the real mortgagees. It is significant, that though defendants No. Section 4 and 5 are the ostensible holders of a mortgage for Rs. 9,000, they were not serious in contesting the suit in the Court below. No doubt they filed a written statement but neither of them came forward at the trial to give evidence. Of course they examined two witnesses but they hardly prove any thing and it looks as if defendants Nos. 1 to 3 were running the whole show. It must be remembered that defendant No. 4 is the son-in-law of defendant No. 1. On behalf of the plaintiffs three witnesses, namely P. W's. Nos. 2, 3 and 4, who are apparently respectable persons of position have been is examined to prove that the negotiations for the mortgage were being carried on by defendant No. 1 and his sons and that they paid, the consideration of mortgage. There is no reason why their evidence should not be accepted. The learned Subordinate Judge curiously enough leaves the question of benami open and does not come to any finding on the point. He states in his judgment that the plaintiff's Pleader asked him to keep the point open. The learned Advocate appearing on behalf of the respondents did not like to support this view of the Subordinate Judge. It seems the question of benami is a material issue in the case and the parties have gone into evidence. We have considered the evidence and we find that it is defendants Nos. 1 to 3 who are the real mortgagees.

6. According to the above findings the plaintiffs will be entitled to recover from defendants Nos. 1 to 3 only so much out of Rs. 1,800 which they had paid on account of the rent decree as would represent the liability for the year 1986. The rent decree being for three years, we may roughly calculate the amount payable

for 1966 to be one-third, that is Rs. 600 though strictly speaking the amount would be less than one third because the interest which formed a part of the claim would be greater for the first two years than for the third. Then comes the item of Rs. 2,300 which has been claimed as compensation which had to be paid to the auction-purchaser for setting aside the sale. The position is that the plaintiffs were liable to pay the amount of the decree to the extent of a little more than two-thirds whereas defendants Nos. 1 to 3 were liable for a little less than one-third. The plaintiffs were therefore to a large extent responsible for the sale. They base their claim to compensation on the allegation that defendants Nos. 1 to 3 fraudulently purchased the property and deliberately raised the bid at the auction. The plaintiffs however, have not been able to establish to what extent they suffered loss on account of the defendants' fraud. Therefore the plaintiffs cannot recover any part of the compensation from the defendants. As regards the last item of Rs. 1,000 which is claimed by the plaintiffs on account of the loss they have suffered by the sale of their property, there is hardly any satisfactory evidence and the learned Advocate appearing for them could not seriously press it. There remains one other point. The rent decree was in respect of the entire tenure consisting of nine villages whereas the mortgage was in respect of eight out of those nine villages. Thus the plaintiffs have been in possession of one village and certainly they are liable to pay the rent for it. On the materials on the record, it is hardly possible to find out the proportionate rent on that village of which the plaintiffs are in possession. However, it is agreed between the parties that its rent should be taken to be Rs. 30 a year. In the result the appeal is allowed in part, the decree of the lower Court is set aside, and the suit is decreed against defendants Nos. 1 to 3 for Rs. 570 with proportionate costs of both Courts. The order of dismissal against the other defendants stands, but they will bear their own costs.

Courtney-Terrell. C.J.

7. I agree.