
(1921) 02 PAT CK 0008
In the Patna High Court

Jainandan Prashad and Others

APPELLANT

Vs

Babu Baijnath Saran and Others

RESPONDENT

Date of Decision : 16-02-1921

Acts Referred:

Transfer of Property Act, 1882 — Section 67, 68

Citation : AIR 1921 Patna 403 : 63 Ind. Cas. 297

Hon'ble Judges : Ross, J;Jwala Prasad, J

Bench : Division Bench

Judgement

Jwala Prasad, J.—This appeal arises out of a suit based upon a mortgage bond, dated the 7th December 1901. The bond was executed by the predecessor of the defendants in respect of Rs. 3,733 5-4, out of which Rs. 3,000 was received by the executant Kamla Sahai in cash and the balance Rs. 738 5-4 was kept with the mortgage in order to pay off a prior encumbrance. This sum was never paid and we are not at all concerned with this in the present case.

2. The bond was in the nature of an usufructuary mortgage-bond for a term of seven years commencing from 1309 Fasli and terminating in Jaith 1315. Out of the income of the property the mortgagees were to take Rs. 308 in lieu of interest calanlattd at 11 annas per cent. per mensem; the sum of Rs. 3 3-14 was to be used for the purpose of paying Government revenue and cesses and the balance Rs. 194-2-2 was to be paid annually as hak hazri or rent reserved to the mortgagor. It was further covenanted that if the mortgagees are dispossessed of the mortgaged property in whole or in part, they will be entitled to recover the amount advanced by them with interest at Rs. 1 per cent. per mensem from the time of dispossession to the date of realisation by sale of the mortgaged property and any other property of the mortgagor" The property was further hypothesised by a distinct clause in the bond, which runs as follows:

As security for this debt, principal with interest, which may be charged under the above terms and conditions or may be declared to be justly payable, I do mortgage and pledge the leased property subject to the condition that until the

re payment of the amount, principal with interest I, the declarant, shall not on any ground sell, conditionally sell, execute gift, rehan or mortgage, make any transfer of rent mokarrari, etc., in respect of and in any way make the zerpeshgi property liable or transfer it.

3. The mortgage-debt was made payable in the month of Jaith 1315 F.S. At the time of the execution of the bond the villages mortgaged were in possession of the mortgagor, his brother Tara Prasad and his nephew Adya Prasad, each of them being interested in the property to the extent of a third share. The management of the shares of Kamla and Tara was joint and under the charge and control of the latter. Tara Prasad was, therefore, unwilling to allow the plaintiffs to take possession of the share of his brother Kamla, the mortgagor. The transaction in question was entered into through the intervention of Babu Shiva Saran Lal, a leading Vakil of the Arrah Bar and then manager of the Duraraon Raj, He anted in this matter through the assistance of his trusted clerk Kamla Prasad, who appears to be related to the plaintiffs. One of the plaintiffs Gupteswar was at that time Tehsildar of the Dumraon Raj.

4. It appears from the evidence on the record that all the members of the family were dissatisfied with the transaction. Babu Shiva Saran Lal happened to be the brother-in-law of Kamla Sabai. His mother-in-law and Tara Prasad approached him so that the transaction might be rescinded. Baba Shiva Saran Lai did intervene in the matter and triad his utmost to bring about a settlement between the parties, the subject of which was to keep the property in the direst possession of Kamla and Tara and to secure the payment of the money in some other way to the plaintiffs, but he failed in his attempts.

5. The plaintiffs' case is that they were not allowed to take possession of the property by Tara Prasad in collusion with Kamla, and subsequently an arrangement was arrived at whereby Tara was allowed to remain in possession of the property as before and to pay interest on the bond at the rate of one rupee per cent, per mensem to the plaintiffs and to discharge the other liabilities under the bond, namely, the payment of Government revenue and the hak hazri to the mortgagor.

6. The plaintiffs received from time to time some money from Tara Prasad in lieu of interest, and after the expiry of the due date, the 30th Jaith 1315, the plaintiffs brought the present suit to enforce their mortgage, giving credit of Rs. 1,027-8 realised by them from Tara Prasad in lieu of interest. The sum claimed by them was Rs. 5,242 8 and the plaint was filed on the 24th September 1912. Kamla Sahai haying died in the meantime, his sons were made defendants Tara Prasad was also impleaded as a defendant, on the ground stated in paragraph 7 of the plaint as having been in possession of the property on behalf of his brother Kamla and having paid interest on different dates. Tara did not enter appearance in the case. The plaintiffs' claim I was resisted by the defendants of Kamla. Their main defence was that the plaintiffs I took possession of the property in terms of the bond in question and that they continued to be so up to the date of the suit,

and that, therefore, they were not entitled to any interest; on the other hand, they were liable to the defendants for the payment of hak hozri at the rate of Rs. 194 12 2, which they never paid. In short, the defendants' case was that far from anything being due to the plaintiffs from them, the plaintiffs owed them a large sum of money upon proper account being taken as set forth in the written statement.

7. The case was originally tried by Mr. Jai Prasad Pandey, Subordinate Judge, who refused to admit any evidence regarding the new terms sought to be proved by the plaintiffs, whereby they were kept out of possession of the property and allowed the mortgagor to remain in possession through his brother Tara prasad. He further held that the plaintiffs were in possession of the property till the date of the suit and that on account being taken nothing was due to them from the defendants. He accordingly dismissed the suit.

8. On appeal by the plaintiffs, the High Court of Calcutta held that the plaintiffs were entitled to prove that they did not obtain possession of the property in question in terms of the mortgage bond, and in order to prove that, they were also entitled to give evidence of the oral arrangement by which they agreed not to take possession of the mortgaged property. The decree of the Subordinate Judge was accordingly set aside and the case was accordingly set aside and the case was remanded for further investigation and disposal after allowing the parties to adduce evidence on the above point. The direction of the Court were as follows:

If it is established after the admission of such evidence that the plaintiffs did obtain possession, then an account will be taken between the parties on the footing that the plaintiffs are liable to pay the defendants annually the sum of Rs. 835 as rent. If it is established that the plaintiffs did not obtain possession then the plaintiffs will get a decree for Rs. 3,000, together with interest which the learned Vakil for the defendants admits to be 8 1/2 per cent. Per year, and in the event of non-payment, they will be entitled to bring them mortgaged properties to sale.

9. The case after remand was tried another Subordinate Judge, Mr. Abdul Jabbar. Both the parties gave additional evidence. The learned Subordinate Judge accepted the case of the plaintiffs and held that they were entitled to recover the money advanced by them with interest at one per cent. per mensem.

10. The defendants now appeal to this Court. It is contended that upon the evidence on the record the Court below ought to have held that the plaintiffs were in possession of the property and that Tara was in charge of the share of Kamla on behalf of the plaintiffs And that the plaintiffs are not entitled to get anything from the defendants upon a proper account being taken.

11. The principal point for determination in this appeal is whether the plaintiffs were in possession of the property or not in terms of the mortgage-bond in question.

12. His Lordship then discusses the entire evidence in the case on the point whether the mortgagees got actual possession and proceeds:

The plaintiffs as mortgagees have a right to be in possession of the property and to remain in an undisturbed possession, so that if at any time their possession is disturbed or they cease to be in possession, they will be entitled to enforce the terms of the mortgage-bond or to bring a suit u/s 68 of the Transfer of Property Act, whichever course is open to them.

13. In the case of Pargan Pandey v. Mahatam Mahto 6 C.L.J. 143 Mookerjee, J., pointed out that-

The subsequent dispossession of the mortgagee, after possession was once delivered to him, is a failure on the part of the mortgagor, to secure him in undisturbed possession. In the present case, it is not disputed that possession was originally delivered to the mortgagees, nor is it questioned that at the time when the suit was instituted, the mortgagor had taken possession of the property. The result, consequently, has been that although the mortgagees were originally let into possession, their possession has not been secured to them without disturbance by the mortgagor. Under these circumstances there has clearly been a cause of action for a suit under Clause (c) of Section 68 of the Transfer of Property Act.

14. The transaction by which the plaintiffs were either not allowed to take possession or ceased to be in possession of the property was in February or March, according to the evidence on behalf of plaintiffs. The dahi and the gur ceremony is said to have taken place in December 1901, and consequently even if that amounted to taking possession of the property, the plaintiffs ceased to have their possession by virtue of the subsequent arrangement between the parties....

15. The result is that on a careful consideration of the evidence in the case and of the arguments advanced on behalf of the defendants, we do not see our way to disagree with the view taken by the learned Subordinate Judge that the plaintiffs did not obtain possession of the property and consequently they are entitled to recover the mortgage money with interest as stipulated for in the bond.

16. There is absolutely no substance in the contention that the claim of the plaintiffs for interest is in the nature of damages and is barred by Article 116 of the Limitation Act. The plaintiffs' claim is not with respect to a personal covenant in the bond or u/s 68(c) of the Transfer of Property Act by reason of the mortgagor's failure to deliver or secure the possession of the property, but is to enforce the charge upon the Immovable property under the covenants in the bond itself. Such a suit is clearly governed by Article 132 of the Limitation Act. We have construed the mortgage in the present case and it is not a purely usufructuary mortgage, nor is it a purely simple mortgage. If I may use the term, it is a complex or mixed mortgage containing in itself both the terms of a

usufructuary and of a simple mortgage. Such a mortgage is not uncommon in this country, and indeed at the present moment on account of the bar imposed upon an usufructuary mortgagee by Section 67 of the Act to sue for foreclosure or sale vide *Luchmeshar Singh v. Dookh Mochan Jha* 24 C. 677 : 12 Ind. Dec. 1121, people are generally having the hypothecation clauses inserted in usufructuary mortgage-bonds. For examples of this kind of bonds vide the case of *Narpat v. Ram Saran Dat* 30 A. 162 : 5 A.L.J. 130 : A.W.N. (1908) 70 and the cases reported thereunder. The case already cited, *Pargan Pandey v. Mahatam Mahto* 6 C.L.J. 143, is an instance of the same kind, where the terms of the bond are not very dissimilar to those of the present case. A reference may also be made to the case of *Chintaman v. Dulari* 8 Ind. Cas. 570 : 33 A. 107 : 7 A.L.J. 1087. All these cases seem to follow the Privy Council case in *Madappa Hegde v. Ramkrishna Narayan Bhat* 12 Ind. Cas. 42 : 15 C.W.N. 962 : (1911) 2 M.W.N. 1 : 13 Bom. L.R. 698 : 14 C.L.J. 245 : 35 B. 327, and the claim for interest must go with the claim for the principal sum assured and the mortgaged property is as much liable for the principal sum as for the interest accrued thereon. The terms of the bond are clear in this respect. Clause 18 of the bond, already quoted in extenso at the outset of this judgment, may be referred to. I, therefore, hold that the mortgaged property is liable to be sold for the principal amount as well as the interest accruing thereon within the terms of the bond in suit.

17. The question then arises, what rate of interest the plaintiffs are entitled to recover. I waited to be enlightened by the members of the Bar appearing on both sides on this point, but they confined themselves only to the larger question as to whether the suit should be dismissed in toto or decreed in toto.

18. The learned Subordinate Judge has given a decree at the rate of 1 per cent, per mensem for the reason that the plaintiffs were not able to get possession of the property on account of the act of the defendants. It is more than doubtful whether the stipulation as to interest set forth in Clause 18 of the bond applies to the 11 annas rate of interest at which the money was advanced or to the one rupee rate of interest which was to be enforced on account of the wrongful act of the defendants. If the one rupee rate of interest is to be enforced as a damage, then the claim of the plaintiffs will be barred so far as that rate of interest is concerned. I think that a construction favourable to the mortgagor must be placed upon the document which is not repugnant to the terms of the bond as a whole, namely, that the stipulation in Clause 18 refers to the 11 annas ordinary interest at which the money was advanced, This is also the view taken in the case of *Chintaman v. Dulari* 8 Ind. Cas. 570 : 33 A. 107 : 7 A.L.J. 1087 referred to above, where upon similar terms the rate of interest of 11 annas was enforced in lieu of Rs. 2, which was said in the bond to be the rate of interest in case of dispossession. I will, therefore, follow this case and allow interest at the rate of 11 annas only. This is the view taken by their Lordships of the Calcutta High Court in this very case wherein they said that in the event of the plaintiffs having not been able to get possession of the property, they will get their money at 11 per cent. per annum.

19. The result is that the decree of the Court below is modified by reducing the rate of interest from one rupee to 11 annas and calculating interest at the aforesaid rate on Rs. 3,000, the principal amount, from the date of the bond up to the date of the suit and thereafter at 6 per cent. up to the date of realisation. A usual mortgage-decree will be prepared in accordance with the aforesaid directions. The costs throughout will be in proportion to the success of the parties.

Boss, J.

20. I agree.