(1995) 08 DEL CK 0082

In the Delhi High Court

Case No : Interim Application No''s. 6099 of 1989 and 1541 and 1566 of 1994 and Suit No''s. 638 and 639 of 1966 and Letters Patent Appeal No. 6097 of 1989

Kenneth Solomon and Another APPELLANT

Vs

Shamlal Suneja and Another RESPONDENT

Date of Decision : 23-08-1995

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 8

Citation : (1995) 60 DLT 277

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : I.S. Mathur, Tarun John, J.K. Seth, Shalini Kapoor and D.R. Katyal, for the Appellant;

Judgement

Devinder Gupta, J.

(1) plaintiffs had filed two suits for declaration that the mortgages are void and not binding on them and in the alternative for redemption of the usufructuary mortgages etc. After trial on 29th March, 1972, a preliminary decree in both the suits in the following terms was passed :-

"IN view of the decision on various issues above and for the reasons stated in support thereof, the suits of the plaintiffs are decreed with costs for redemption of the suit property covered by Exhibits D-17, D-1 and D-2 in Suit No.638 of 1966 and Exhibits D-14 and D-15 in Suit No. 639 of 1966 on payment of amount found due after taking accounts between the parties and a preliminary decree for redemption of accounts is also passed in favor of the plaintiffs and against the defendants who shall render true and full accounts of the moneys or other benefits received by them by way of rent or otherwise and all expenses incurred by them in maintaining the property in question. Accordingly, I appoint Mr. D.R. Dhamija, Advocate of this Court as Local Commissioner to go into the accounts of the parties and submit his report within two months from the date of this judgment. The rest of the suit of the plaintiffs is dismissed with costs. The fee of the Commissioner is fixed Rs. 600.00 which amount shall be paid in equal shares by the parties."

(2) Against the preliminary decree, appeals were preferred by the defendants, which ultimately were dismissed as withdrawn on 24th May, 1990.

(3) In view of the preliminary decrees Mr. D.R. Dhamija, Advocate was appointed as the Local Commissioner, who went into the accounts as regards the five mortgages (three in favor of Sham Lal in S.No. 638/66 and two in favor of Sawan Mal in Suit No. 639/66) for the period up to 28th September, 1977 and submitted his report on 28th December, 1977. Against the report, objections were preferred by the defendants. Objections were turned down by an order passed on 16th February, 1983 upholding the report of the Local Commissioner. As per report of the Local Commissioner, plaintiffs were held entitled to redeem the mortgages of Sham Lal on payment of Rs. 4,556.00 and those of Sawan Mal on payment of Rs. 1,386.62.

(4) According to the plaintiff there was no time prescribed for deposit of the amount in the preliminary decrees and the mortgages being usufructuary one, the same on deposit of the amount would stand redeemed. In the first two applications (I.A. 6099/89 and I.A. 6097/89)), which were moved on 14th August, 1989, it is alleged by the plaintiffs that as per the report of Mr. D.R. Dhamija, Rs. 4,558.01 and Rs. 1386.62 respectively were payable by the plaintiffs to the defendants in two suits as on 28th September, 1977. Taking into account of the amounts recovered by the defendants thereafter by way of rent from the mortgage properties, as per the rates mentioned in the report of the Local Commissioner, which is to be deducted and debited in reducing the amounts due under the mortgages, the whole amount due to the defendants stands paid and thus the plaintiffs are entitled to the refund of the excess amount, which as on 28th July, 1989 comes to Rs. 12,706.85 and, as on 5th August, 1989 comes to Rs. 5,515.02 respectively in S.No. 638 and S.No. 639 of 1966. plaintiffs also appended to the applications statements of account working out the payments of rents, alleged to have been received by the defendants from the tenants and also worked out interest accrued due on the amounts which was found payable by the plaintiffs to the defendants. Prayer accordingly was made in both the said applications for passing of final decree for redemption directing the defendants to deliver to the plaintiffs the possession of the mortgaged property and also to pay a sum of Rs. 12,706.85 and Rs. 5,515.02 to the plaintiffs.

(5) These applications are vehemently opposed by the defendants, who also questioned the correctness of the statements of account filed by the plaintiffs. According to the defendants, after the Local Commissioner had submitted his report, the plaintiffs had called upon the tenants of the property to pay rent to them. It is also alleged that the defendants had not realised any amount of rent from the tenants after 28th September, 1977 and no amount is due and payable by the defendants to the plaintiffs. It is also alleged that Municipal Corporation of

Delhi had already attached the rents which were payable by the tenants of the property and that the defendants had also spent considerable amount on maintenance, repairs and upkeep of the property from 28th September, 1977 onwards. It was also alleged that the plaintiffs had not been paying the property tax also. In reply it is also stated that the plaintiffs by lapse of time had lost their right of redemption of the property and also on account of their acts of omission and commission.

(6) In the second set of applications which were filed on 16th February, 1994, (I.A. 1566/94 and 1541 /94), it is alleged that as per the preliminary decree and as per the report of the Local Commissioner, a sum of Rs. 4,556.01 and Rs. 1386.62 were payable by the plaintiffs to the defendant-mortgages. Since no time was prescribed in the preliminary decree for deposit of the amount, the same had since been deposited in Court on 16th December, 1993, Therefore, necessary direction be made ordering redemption of the property and delivery of possession of the same to the plaintiffs. These applications are also opposed by the defendants.

(7) Learned Counsel for the parties have taken me through the entire record. Reliance has also been placed by learned Counsel for the plaintiffs on a decision of the Supreme Court in K. Parameswaran Pillai v. K. Sumathi @ Jesis Jessie Jacquiline and Another, , in support of his submissions that the applications are within the period of limitation for passing final decree for redemption. Learned Counsel for the defendants have vehemently contended that limitation period prescribed under Article 137 of Limitation Act, 1963 for applying for final decree is 3 years. Application ought to have been moved within three years of the passing of the preliminary decree and in case no time was fixed in the preliminary decree for deposit of the redemption money, then in that case within three years from 28th December, 1977, the date of report of Local Commissioner or from the date when the report was confirmed, namely, 16th February, 1983. The applications not having been filed within the period of limitation are liable to be dismissed. It is also urged on behalf of the defendants that as per the plaintiffs'' own stand which they have taken in I.A.6097 and I.A. 6099 of 1989, the redemption money, as per the rates mentioned in the report of the Local Commissioner, stood adjusted somewhere in 1980, Therefore, the application for final decree ought to have been made within three years from the date of adjustment.

(8) It is not in dispute that mortgages in question were usufructuary one. Preliminary decrees were passed in both the suits on 29th March, 1972, operative part of which has been quoted above. plaintiffs were granted decree for redemption of the suit properties covered by mortgage deeds Exhibits D-17, D-1 and D-2 in S.No. 638 of 1966 and Exhibits D-14 and D-15 in S.No. 639/66 on payment of the amounts to be found due after taking accounts between the parties. Preliminary decree for rendition of accounts was also passed in favor of the plaintiffs and against the defendants. Defendants were also held liable to

render true and faithful accounts of the amounts received by them by way of rent or otherwise including expenses incurred by them in maintaining the properties in question. Mr. D.R. Dhamija, Advocate, was appointed a Local Commissioner to go into the accounts and to submit his report within two months. It is also not in dispute that after the accounts were taken and a report was submitted by the Local Commissioner, objections were filed by the defendants which were dismissed on 16th February, 1983 and the report of the Local Commissioner was upheld under which the plaintiffs were held liable to pay a sum of Rs. 4,556.01 to Sham Lal and Rs. 1386.62 to Sawan Mal respectively. Neither in the report, nor in the order disposing of the objections, time was prescribed for payment or deposit of the amounts by the plaintiffs to the defendants.

(9) The decree which is passed under Rule 7 of Order 34 CPC . is only a preliminary decree which admittedly has been passed in both the suits. In order to terminate the suits, it is necessary to pass a final decree as contemplated in Rule 8 of Order 34 of the Code. In a redemption suit there should be a complete settlement of all accounts between the parties in relation to the mortgage, in order to avoid unnecessary litigation. Rules 9 and 10 of Order 34 require that accounts between the parties should be taken right up to the date of actual payment of mortgage money and re-transfer of possession. Notwithstanding anything in Rule 7 of Order 34, the Court is obliged to pass a final decree under Rule^9 of Order 34 of the Code, where the Court finds that nothing is due to the defendant-mortgagee or that he has been overpaid. It is the plaintiffs'' case in the two applications (I.A. 6097 and I.A. 6099 of 1989) that the defendant-mortgagees have been overpaid, in case further accounts are taken from the last date till which accounts were taken by Mr. D.R. Dhamija. They have prayed for directions against defendants for payment of the excess amounts realised. However, during course of arguments, learned Counsel for the plaintiffs gave up the relief for taking up of further accounts or for refund of excess amount, since according to the admitted position, the redemption money as per the report of Mr. Dhamija, stands deposited in Court and nothing is payable to the defendant-mortgagees.

(10) SUB-RULE (1) of Rule 8 of Order 34 of the Code envisages that on payment of the mortgage money before a final decree for sale or foreclosure is passed, the mortgagor is entitled to a final decree for redemption. Order 34, Rule 8 of the Code gives a right to the mortgagor to seek redemption of the mortgage before a final decree for sale or foreclosure is passed. No such decree at the behest of mortgagees has been passed so far. It is also not in dispute that the defendants have been in possession and enjoyment of the mortgaged property, since admitted the mortgagees were usufructuary one. As per the decision in K. Parameswaran Pillai''s case (supra), limitation to file an application under Rule 8 of Order 34 of the Code to pass a final decree for redemption of usufructuary mortgage would not begin to run until deposit is made though there may be a conditional preliminary decree and default might have been committed by the

mortgagor in compliance thereof. Even if there had been a condition in the preliminary decree, in view of the decision in K. Parweshwar Pilla''s case, no application for extension of time fixed in the preliminary decree is required in case of usufructuary mortgage. The defendant- mortgagee had no right to bring the mortgaged property to sale or to make an application to foreclose the right of the plaintiffs mortgagors for redemption of the usufructuary mortgage.

(11) In view of the ratio of the decision in K. Parmeswar Pillai''s case (supra), the applications (I.A. 1506/94 and I.A.1541 /94) are within the period of limitation. In Panchanan Sharma Vs. Basudeo Prasad Jaganani and others, , it has also been held that there is no limitation for redemption of usufructuary mortgage and a usufructuary mortgagor does not lose his title to their property or right to redemption by lapse of time. In view of this position in law there is no substance in the defendants'' pleas. When applications (I.A. 6099/89 and I.A. 6097/ 89) were moved, the amounts had not been deposited by the plaintiffs, Therefore, reliefs as proved in the said application could not have been allowed and the learned Counsel for the plaintiffs has rightly conceded that all reliefs as prayed in those applications be treated as given up except the prayer for final decree of redemption.

(12) The applications accordingly are allowed and final decree with costs in both the suits is passed in plaintiffs'' favor against the defendants ordering the redemption as per the preliminary decree dated 29th March, 1972 of properties covered by Ext. D-17, Ext. D-1 and Ext. D-2 in S.No. 638 of 1966 and Ex. D-14 and Ext. D-15 in S.No. 639 of 1966 directing the defendants to deliver to the plaintiff the mortgage deeds and title deeds relating to the suit property, to re-transfer the property and to deliver the possession of the mortgage property as per the preliminary decree. Final decree in Form No. 7F in Appendix-D to CPC be drawn.