
(1929) 03 BOM CK 0002
In the Bombay High Court

Lal Narsingh Partan Bahadur Singh

APPELLANT

Vs

Mahommad Yakub Khan

RESPONDENT

Date of Decision : 15-03-1929

Acts Referred:

Transfer of Property Act, 1882 — Section 68, 98

Citation : (1929) 31 BOMLR 825

Hon'ble Judges : Tomlin, J; Shaw, J; Lancelot Sanderson, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Tomlin, J.—This is an appeal by the plaintiff in the suit from a decree dated October 26, 1926, of the Chief Court of Oudh which varied a decree dated August 13, 1925, of the Court of the Subordinate Judge at Rae Bareilly.

2. On April 8, 1923, a mortgage, which was duly registered, was executed by the first two defendants in favour of the third defendant to secure an advance of Rs. 30,000 carrying interest at rate of five annas and one pie per cent, per month.

3. By Clause 2 of this mortgage it was stated that an eight annas share in certain villages had been hypothecated in lieu of the principal mortgage money and interest and in order to pay the Lord Tomlin annual interest on the mortgage money possession over the hypothecated property had been delivered to the mortgagee, who, after paying the revenue, should appropriate the surplus profits to the extent of the annual interest.

4. By Clause 3 the mortgage money was promised to be repaid within thirty-five years and at the stipulated time when in Khali fast in the month of the or at any other time the mortgagors should pay money to the mortgagee the mortgaged property should become redeemed.

5. The fourth clause of the mortgage contained a further provision that the mortgagors should remain entitled to eject tenants to enhance rent, to cultivate

land and to issue leases and after enhancement and payment of interest if there be left any surplus or if the mortgagors pay any year or each year any amount of money then that money should be deemed to have been paid towards the principal and interest on the money paid should be deducted and that the mortgagee like the mortgagors, should possess all the remaining powers during the period of his possession.

6. By Clause 5 it was provided that if the mortgagors fail to pay the mortgage" money and fail to redeem the mortgage at the appointed time then the mortgagee should have power to realize the money due to him by sale of the mortgaged property and that if the mortgaged property should be found to be insufficient to satisfy the full demand then the mortgagee should be entitled to recover the balance from the other properties of the mortgagors, and by Clause 7 it was provided that if on the claim of any person any part or whole of the mortgaged property were to go out of the mortgagee"s possession or if there were to arise any disturbance in the mortgagee"s possession then the liability there for should rest with the mortgagors,

7. The money was duly advanced, but the two first defendants failed to deliver possession of the mortgaged property to the third defendant. By a deed of transfer dated April 17, 1924, and registered on April 22, 1924, the third defendant transferred the mortgage and her rights there under to the plaintiff.

8. On May 14, 1924, the plaintiff filed a petition of plaint against three defendants in the Court of the Subordinate Judge at Rae Bareli, claiming a decree for recovery of Rs. 30,000 and Rs. 1,250-15-6 for interest by sale of the mortgaged property and if for any reason a decree for sale could not be passed then a simple money decree for Rs. 81,250-15-6.

9. The first two defendants filed their written statement on August 28, 1924, claiming that the suit ought to be dismissed (inter alia) for the following reasons? that the mortgaged deed was not such as might legally, if the mortgagee did not get possession, entitle him to obtain a simple money decree or recover his money by sale of the mortgaged property before the time fixed (that is the expiration of thirty-five years) and was not one to which Section 68 of the Transfer of Property Act applied and that in view of certain facts alleged in the written statement the plaintiff was stopped from bringing the suit.

10. By his judgment, dated August 13, 1925, the Subordinate Judge found on all issues of fact in favour of the plaintiff and in particular he found that the first two defendants had failed to put the mortgagee in possession and had remained in possession themselves, and as to the issue whether the plaintiff was entitled to sue for a sale or a money decree he held that the plaintiff was entitled to a sale decree u/s 68 of the Act and passed a decree giving the two first defendants till February 13, 1926, to redeem the property at the amount for principal interest and costs mentioned in the decree and in default of payment on or before that date a sale was ordered.

11. On November 17, 1925, the first two defendants appealed to the Chief Court of Oudh at Lucknow.

12. The Court allowed the appeal, setting aside the decree of the Court below and in lieu thereof granting a decree for possession of the mortgaged property.

13. The learned Judges of the Chief Court held that the mortgage in question was an anomalous mortgage and not a combination of a simple mortgage and an usufructuary mortgage and therefore, that Section 68 of the Act was excluded and Section 98 of the Act applied under which the plaintiff was only entitled to a decree for possession in accordance with the terms of the mortgaged deed, their view of the mortgaged deed being that under it the mortgage-money was not recoverable before the expiry of thirty-five years and therefore that the mortgagee's right to enter into possession and the mortgagors' obligation to deliver possession must be given effect to.

14. The plaintiff obtained leave to appeal to His Majesty in Council and appealed accordingly. On the appeal none of the defendants appeared.

15. In order to appreciate the point to be determined it is necessary to refer to the relevant sections of the Transfer of Property Act.

16. A simple mortgage and an usufructuary mortgage are defined 58 (b) and (d) of the Act, as follows :?

58 (d) Where, without delivering possession of the mortgaged property, ? the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

58 (d). Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

17. Section 67 of the Act provides as follows :?

In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

18. Section 68 of the Act is as follows:?

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only :?

(a) where the mortgagor binds himself to repay the same :

(b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor :

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

19. Section 98 of the Act is headed "Anomalous mortgages" and is in the following term?

In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms, the rights and liabilities, of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, be far as such contract does not extend, by local usage.

20. The first question is whether upon its true construction the mortgage is one which is outside the scope of Section 98, and, secondly, if it is outside the scope of that section to what remedy the plaintiff is entitled having regard to the provisions of Sections 67 and 68.

21. In their Lordships' opinion the mortgage is a combination of a simple mortgage and an usufructuary mortgage. The only clause in the mortgage which presents any difficulty is Clause 4, but that clause appears in their Lordships' view at most only to enable the mortgagors to act as manager without in any way detracting from the effect of Clause 2, which entitled the mortgagee to possession. On this view of the construction of the mortgage deed Section 98 of the Act has no application to the case.

22. It is plain according to the findings of the Subordinate Judge that the first two defendants have failed to discharge their obligation of making over possession to the mortgagee and have thereby deprived the mortgagee of part of his security and in these circumstances their Lordships are of opinion that u/s 68 the money has become payable and the plaintiff is entitled to a money decree for the same, but if the money has become payable u/s 68 their Lordships are further of opinion that u/s 67 a decree for sale can be made. It would indeed be a startling result of the legislation if in such a case as this where a default has been made by the mortgagors of a kind which materially affects the mortgagee's security there existed no remedy for the immediate enforcement of the mortgage.

23. In the result, therefore, their Lordships are of opinion that the appeal should be allowed with costs and the order of the Subordinate Judge restored with the

date for redemption extended for six calendar months from the date of His Majesty's Order hereon and their Lordships will humbly advise His Majesty accordingly,