(1934) 10 PAT CK 0016

In the Patna High Court

Case No : Second Appeal No. 177 of 1931

Lala Bisheshwar Dayal and others — APPELLANT

Vs

Chedi Singh and others — RESPONDENT

Date of Decision : 11-10-1934

Acts Referred:

Citation : (1934) 10 PAT CK 0016

Final Decision : Dismissed

Judgement

Fazl Ali, J.—This is an appeal from a decision of the District Judge of Gaya, reversing the decision of a Munsif in a suit instituted by the appellants for the redemption of a usufructuary mortgage executed in 1906. The mortgage bond was executed to secure a sum of Rs. 200 which was duly deposited in. Court by the mortgagor under S. 83, T.P. Act, but defendant 1 appeared in Court and contended that besides the sum of Rs. 200 already deposited, the defendants were entitled to get the costs of gilandazi amounting to Rs. 157-12-9 and so they were entitled to retain possession of the property until the amount in question was also deposited by the mortgagors. The same objection was raised by the defendants when the plaintiffs brought the present suit, and there it was overruled by the trial Court, it has been given effect to by the lower appellate Court. The defendants'' contention is based upon a clause in the mortgage bond and the principal question to be decided in this appeal is whether the provision made in that clause amounts to a clog on the equity of redemption. This clause runs as follows:

And on the purnamashi day of the month of Jeth in the last year of the thica, the executant shall be entitled to recover Seer possession of share mortgaged on payment of whatever gilandazi expenses would be found due by the executant on measurement correctly made and also of the entire mortgage money aforesaid and if on the purnamashi day of the month of Jeth of the last of zarpeshgi thicca, the entire zarpeshgi money aforesaid be not paid, the share aforesaid of the village will continue to be in possession, of the zarpeshgidar and his heirs and representatives in interest till realization of the entice zarpeshgi money. And that after the expiration; of the term (of the zarpeshgi) wherever the amount of said zarpeshgi is paid by the executant or his representatives in interest, it shall be paid on the purnamashi day of the month of Jeth (only). If after the expiration of the period of zarpeshgi thica, the gilandazi expenses due by the executant or his bens and representatives to the zarpeshgidar be not paid by the executant the zarpeshgidar, heirs and representatives in interest shall have the right to realise in frill the principle amount (gilandazi expenses) plus the costs of the suit by bringing a suit in a Court of competent jurisdiction, and also by a sale of the share of the mortgaged properties; and other properties of the executant, heirs, representatives. Neither the executant, not his heirs or representatives in interest shall have any objection to this.

2. The learned District Judge in dealing with this passage in the deed refers to S. 72, T.P. Act, which provides that the mortgagee in possession can spend such money as is necessary for the due management of the property and in the absence of a contract to the contrary add such money to the principal; and he has held that a stipulation in the deed entitling the mortgagee to add a certain proportion of gilandazi expenses to his dues under the mortgage cannot be regarded as a clog on redemption. Now, the law on tire subject has been stated by Messrs. Shephard and Brown in their well-known treatise on the Transfer of Property Act, thus:

On the principle that the mortgagee holds the estate only Lisa security for money it has become an established rule that the Courts will not enforce any agreement which be in a made part of the mortgage transaction operates to impede or prevent redemption, or which giving the mortgagee an advantage not belonging to the contract of mortgage is opp revive or unreasonable. The mortgagor''s right is to have his property back as it was when it was mortgaged on payment of principal, interest and costs, and a condition in the mortgage which fetters this right is invalid. So it is not competent to a mortgagee at the time of the loan to enter into a contract for the purchase of the mortgaged property. But an agreement which without fettering that right of the mortgagor secures some collateral advantage to the mortgagee is valid, unless shown to be oppressive or unconscionable.

3. The expression ''"clog" which means an impediment can be applied only to those conditions which are manifestly to the advantage of the mortgagee and which unduly fetter the mortgagor''s right to redeem the property on the payment of what is legitimately due from him. If however the parties agree to certain terms as part of the contract of mortgage and these terms are fair and advantageous to both parties and are not inconsistent with or repugnant to the contract itself, I do not think such a condition would necessarily be construed as a clog on the equity of redemption. If on the other hand the condition is penal, oppressive and unconscionable or it appears that the mortgagee taking advantage of his position in relation to his debtor has by inserting it unduly

fettered the right of the mortgagor to get back the property, it would obviously be a clog. Now, in the present case the parties in order to avoid future disputes dealt with certain items of expenses (gilandazi being one of them) which were to be incurred in future in relation to the property which was the subject of the mortgage and came to a mutual understanding as to who was to incur them and what the respective liabilities of the parties were going to be in respect of those items. As the learned District Judge has pointed out, in the absence of a contract to the contrary the mortgagee would perhaps have been entitled to add to his mortgage dues the entire money spent by him in the course of due management of the properly on gilandazi work. The parties however agreed among themselves that half the expenses of gilandazi Mould be borne by the mortgagees and the other half by the mortgagor and it was distinctly provided that if the mortgage was redeemed upon the due date, the share of the gilandazi expenses to be borne by the mortgagor would have to be paid along with the mortgage money. A contract to this effect was obviously to the advantage of both parties and there is nothing in the record to indicate that the mortgagees had scored an advantage over the mortgagor by inducing her to enter into it. In my opinion therefore such a stipulation cannot be regarded as a clog on the equity of redemption.

4. As I have stated the defendant''s case was that altogether a sum of Rs. 315 odd had been spent on gilandazi work during the period of about 10 years and the sum that they claimed from the mortgagor was Rs. 157 odd. The learned District judge has found that the claim is supported by certain chittas written by a patwari of the 16 annas maliks which in his opinion were genuine and he has also stated that the claim is not unreasonable. Thus the only question, to be determined is whether the learned Judge was right in his view that this money was to be paid along with the mortgage dues, even though the property was sought to be redeemed after the due date. Mr. Dhyan Chandra, who appears on behalf of the appellants, as we as his leader Mr. Sushil Madhab Mullick, have pointed out that although it is provided in the deed that if the mortgage money was paid on the due date the gilandazi expenses were to be paid along with it, yet a different provision was made in the bond in case the money was not paid on that date. The passage which is relied upon on behalf of the appellants runs as follows:

If after the expiration of the period of zarpeshgi thica, the gilandazi expenses due by the executant or his heirs and representatives to the zarpeshgidar be not paid by the executant, the zarpeshgridar, heirs and representatives in interest shall have the right to realize in full the principal amount of the gilandazi expenses plus the costs of the putt by bringing a, suit in a Court of competent jurisdiction, and also by a sale of the share of the mortgaged properties and other properties of the executant, etc.

5. It is contended by Mr. Dhyan Chandra that it in the present case the mortgagees could recover the gilandazi expenses only by means of a suit and could not raise an objection to the effect that the property could not be

redeemed without the payment of the money spent on gilandazi work. Mr. Dhyan Chandra also contends that provision referred to above was deliberately inserted in the mortgage bond so as to enable the mortgagees to realise the mortgagor''s share of gilandazi expenses year by year. This is not how the lower appellate Court has read the mortgage bond and I do not think that the lower appellate Court was necessarily wrong in holding that the intention of the mortgagor was that the gilandazi expenses should be payable along with the mortgage dues. Even, however if Mr. Dhyan Chandra''s contention is correct, I am not prepared to hold that the defendants were necessarily deprived of the rights they had under S. 72, T.P. Act, independently of the provision in question. As the learned advocate for the respondent has pointed out, the mortgagees had a two-fold remedy one indicated in the deed and the other which he had under the law. Now, the learned District Judge has found as a fact that the sum in question was actually spent by the mortgagees and as in any event the liability of the mortgagor to pay that sum cannot be questioned. I am not prepared to interfere with the decree of the Court below. It is clear that .if the mortgagees were entitled to realise the amount by means of an independent suit, they could also claim ii as defendants in a redemption suit. Mr. Sushi Madhab Mullick contended that before it is held that the mortgagees are entitled to add the gilandazi expenses to the mortgage due, there must be an accounting between the parties. As there is no counter claim by the mortgagor, the question of accounting would necessarily be confined to the gilandazi expenses claimed to have been incurred by the mortgagees. On this point however as I have already stated, the learned District Judge has, relying upon some certain chittas hled on behalf of the defendants, held that in fact the amount claimed by the defendants was spent by them.

6. I would therefore dismiss the appeal, but in the circumstances of the case there will be no order for costs. This is not a fit case for appeal under the Letters Patent.

