(1974) 02 PAT CK 0014

In the Patna High Court

Case No : Civil Revision No. 1171 of 1971

Paltan Mahto and Another APPELLANT

Vs

Jagaru Mahto and Another RESPONDENT

Date of Decision : 23-02-1974

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 7
Limitation Act, 1963 — Article 181

Citation : AIR 1974 Patna 276

Hon'ble Judges : H.L. Agarwal, J

Bench : Single Bench

Advocate : Rameshwar Nath Roy and Ali Mozaffar, for the Appellant; Shilesh Chandra Misra, for Opposite Party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Agarwal, J.—This application in revision is by the defendants. The question raised in this application for consideration is, as to whether any period of limitation applies for preparation of a final decree in a suit for redemption of a usufructuary mortgage.

2. Opposite Party No. 1 instituted Title Suit No. 909 of 1951 in the Court of the Munsif at Gopalganj for redemption of certain usufructuary mortgage bonds in favour of different sets of defendants and had also claimed mesne profits. A preliminary decree was passed in the suit on 28-9-1953 and three months time was allowed by the trial Court to the plaintiff to deposit the mortgage money, in default of payment whereof, a decree for foreclosure was to be passed under the provisions of Order 34, Rule 7 (1)(b) of the Code of Civil Procedure. After the passing of the said preliminary decree, the plaintiff did not take any step in the matter until 16-12-1970, when he filed a petition praying to permit him to deposit the mortgage dues determined under the preliminary decree and thereafter to prepare a final decree. A separate petition was also filed by him praying to condone the delay in making the deposit and applying for preparation

of the final decree. By order dated 6-2-1971, the learned Additional Munsif condoned the delay and directed the plaintiff to make the deposit of the mortgage money by a chalan. In pursuance of the said order, the plaintiff deposited the sum of Rupees 682/- by a chalan dated 12-2-1971 to the credit of the petitioners and notice was issued in the matter to them. After service of notice, the petitioners filed an objection taking a plea of limitation and asserting that no final decree could be passed in this case on account of the default committed by the plaintiff in not making the deposit in time and the right to redeem the mortgage bonds in question in terms of the preliminary decree stood barred, and as such, the Court could not now permit the plaintiff to deposit the mortgage dues by extending the period granted for depositing the same beyond the period for preparation of the final decree itself. Learned Additional Munsif, however, relying on the provision of Section 148 of the Code held that the said provision entitled him to extend the period originally fixed by him for making the deposit of the mortgage money.

3. Section 148 of the Code reads as follows :

"Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

It was contended on behalf of the petitioners that the powers of the Court to grant extension u/s 148 of the Code could not be exercised if limitation had already set in. It was submitted that Article 181 of the old Limitation Act (corresponding to Article 137 of the new Limitation Act) providing a period of three years only would apply to this case as no other specific Article has been provided in the Limitation Act for the purpose of preparation of a final decree. In this case the preliminary decree was passed on 28-9-1953 and the application for preparation of the final decree was made on 16-12-1970. The learned Additional Munsif, therefore, could not enlarge the period of depositing the mortgage dues beyond the period of three years from the date of the passing of the preliminary decree. Reliance was placed upon a decision of the Madras High Court in the case of Subramaniam Chettiar and Another Vs. Muthiah Pillai, . The contention put forward on behalf of the petitioners has got no substance and must be rejected. Had it been a case of simple mortgage, the contention of the learned counsel for the petitioners might have been correct, but this being a case of a usufructuary mortgage, the position is entirely different. Order 34, Rule 7 of the Code provides that in a suit for redemption by a mortgagor, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the defendant shall be entitled to apply for a final decree......... (a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgage property be sold, or (b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property. It is not disputed that the period of redemption of a usufructuary mortgage under the old Limitation Act was sixty years. The mortgage bonds in this case were dated the 25th June 1923 and the redemption suit was filed on the 4th June 1951, that is, much within the period of limitation available to the mortgagor. Under Article 61 of the new Limitation Act, however, this period of sixty years has been reduced to thirty years only. In Section 31 of the New Limitation Act, however, it has been specifically provided that the provisions of this Act will not in any way affect any suit, appeal or application instituted, preferred or made before or pending at the commencement of the new Act. It is, therefore, clear to me that the suit by the mortgagor in this case having been filed in 1951, the rights of the parties will be governed by the provisions of the old Limitation Act and the mortgagor will be entitled to the period of sixty years fixed for redemption of a usufructuary mortgage under the old Limitation Act. In this view of the matter, therefore, the date on which the plaintiff opposite party No. 1 applied in the court below for permitting him to deposit the mortgage money and condoning the delay was within limitation and the Court below was entitled in law to entertain the petition and pass an appropriate order on the same.

4. As already stated, the learned Additional Munsif has condoned the delay and permitted the plaintiff opposite party No. 1 to deposit the amount. No illegality, much less any error of jurisdiction, was, in my opinion, committed by him. A Bench of this Court in the case of Md. Azim and Others Vs. Md. Sultan and Others, has held that in the case of a usufructuary mortgage, even after the period for payment of the amount declared due fixed in the preliminary decree has expired, the plaintiff mortgagor can apply for a final decree at any time before the right to redeem becomes barred. No question of limitation arises in such a case as the plaintiff mortgagor has a right to apply for the final decree until his right to redeem the mortgaged property is barred. I find myself in respectful agreement with the view of the learned Judges in the above case. A similar view was taken by a learned Single Judge of the Madras High Court in the case of Angammal Vs. V.K.M. Muhammad Sulaiman Lebbai and Another, .

5. In view of the discussions made above, I do not find any reason to interfere with the order of the Court below. I would, accordingly dismiss this application, but shall make no order as to costs.

