(1990) 09 KAR CK 0027

In the Karnataka High Court

Case No : R.S.A. No. 653/1990

Raghunathji Saraf APPELLANT

Vs

Syed Shah Baqur Hussaini and Others RESPONDENT

Date of Decision : 10-09-1990

Acts Referred:

Transfer of Property Act, 1882 — Section 60

Citation : (1991) 1 KarLJ 107

Hon'ble Judges : M. P. Chandrakantaraj Urs, J

Judgement

Chandrakantaraj Urs, J.-This is a defendants'' second appeal against the Judgments and Decrees of the Courts below.

2. The plaintiffs brought the suit against the defendants one of whom was later on transposed as third plaintiff for a decree for redemption and possession of the suit schedule properties which consisted of shop premises in Sedam. The mortgage deed is of the year 1946. The consideration was for a sum of Rs. 5,500/-(erstwhile Hyderabad Rupia). One of the conditions in the mortgage deed was that if the mortgagors did not pay the amount within 10 years from the date of mortgage, the deed of mortgage itself would be treated as a deed of absolute sale. Relying on that clause the defendant while admitting the execution of the deed of mortgage claimed that the plaintiffs had lost the right of redemption and the defendant had become absolute owner of the suit schedule premises. He also pleaded that his possession after the expiry of the 10 year period was independent possession and therefore he had perfected his title by adverse possession by the time the suit was filed. On such pleadings, the trial Court framed as many as seven issues including the additional issue. Issue No. 3 is the one which is relevant for the purpose of the question of law raised in this appeal and that is as follows:

"3. Whether defendant proves the mortgage was mortgage by conditional sale and right to redeem is forfeited ?"

But that issue came to be deleted having regard to the fact that there was no plea to that effect in the written statement. The lower appellate Court and the trial Court considered that such a condition in the deed of mortgage should not render the mortgage to be a mortgage by conditional sale and considered that the condition imposed was a clog on the equity of redemption. In the light of the evidence led, the lower appellate Court was required to consider only issue No. 1 framed by the trial Court and issue No. 4 which related to the plea of adverse possession pleaded by the defendant.

3. Therefore, the stand taken in this Court is totally different from the stand which was taken before the lower appellate Court and the trial Court. Having not pleaded suit mortgage to be mortgage by conditional sale, it cannot now be urged at this stage that it should be treated as a question of out-right sale.

4. On the other hand, both the plaintiffs and the defendant went to trial understanding the case of each other that the suit deed of mortgage was a deed of mortgage. As long as the mortgage was subsisting and the plaintiffs had the right to redeem it and if it was not subsisting and the suit was barred by limitation. They further went to trial on the basis that the defendant had perfected his title to the property after the lapse of 10 years and continued to be in possession for over 12 years, and as such, had perfected his title by adverse possession.

5. In that view of the matter, the present question formulated did not at all arise for consideration before the Courts below.

6. Any condition which will be a clog on the equity of redemption will be invalid and the mortgage will continue to subsist until the period for mortgage for redemption imposed by law of limitation expires. In this case, such period not having expired and mortgage having subsisted, on such findings of fact this Court need not interfere.

7. No case is made out for interference. The appeal is therefore rejected.

Appeal Rejected.