(1945) 03 CAL CK 0005

In the Calcutta High Court

Case No : A.F.A.D. No. 1490 of 1940 and C.R. No. 1110 (s) of 1942

Rai Mohan Majumdar and others — APPELLANT

Vs

The Comilla Union Bank, Chandpur — RESPONDENT

Date of Decision : 15-03-1945

Acts Referred:

Citation : (1945) 03 CAL CK 0005

Judgement

1. This is an appeal by the defendants and it arises out of a suit for recovery of mortgage money under S. 68(1)(c), T.P. Act, upon the allegation that the mortgages had been deprived of the mortgage security owing to the wrongful act or default of the mortgagor.

2. The facts may be shortly stated. On 11th August 1927, the defendants, who are four in number, executed a mortgage in favour of the Chandpore Bank of two properties of which one belonged to defendant 1 and the other to defendant 2. The mortgage did not embrace any property of defendants 3 and 4. The loan advanced was Rs. 1000 which was to bear interest at the rate of Re. 1-8-0 per month, compound, with three monthly rests. The date for the repayment of the loan stated in the bond was 30th September 1927. It may be mentioned here that on 27th August 1934 the Comilla Union Bank, who are the plaintiffs in the suit out of which this appeal arises, acquired the interest of the Chandpore Bank who were the original mortgagees.

3. Two payments were made towards the mortgage debt, one of Rs. 40 on 6th December 1927 and one of Rs. 125 on 4th September 1928. On 14th June 1937 the property of defendant 1 which was included in the mortgage was sold for arrears of rent under the procedure contained in the Public Demands Recovery Act, and it was purchased by the landlord. This sale was confirmed on 18th August 1937 but delivery of possession was never made, and it is not disputed that no notice annulling the mortgage under S. 167, Bengal Tenancy Act was ever served. The claim in the suit was for a sum of Rs. 2000. The plaint contained two prayers, one of which was for a personal decree against all the

defendants. The other prayer was that the property of defendant 2 embraced in the mortgage should be put up to sale first, and that a personal decree should be pronounced against all the defendants only for the balance found due after such sale. The prayer for the sale of defendant 2''s property was eventually given up, and the suit stood for trial as one constituted for relief under S. 68, T.P. Act.

4. The defence taken on behalf of all the defendants was that the plaintiffs had no cause of action under cl. (c) of sub-s. (1) of S. 68, inasmuch as they had not been deprived of any part of the mortgage security. It was contended that although the sale of the property of defendant 1 had been confirmed, the sale had been waived by the landlord, inasmuch as he had allowed defendant 1 to continue in possession thereof and had accepted rents from him. It was further contended that the mortgage had never been annulled by a notice under S. 167, Bengal Tenancy Act, and that it could not now be so annulled by reason of the lapse of time.

5. This argument may be disposed of at once It cannot be disputed that the legal right of defendant 1 as a tenant of the property in question has been lost by the sale. He has not been reinstated in the enjoyment of that right. Mere acceptance of rent by the landlord without granting a re-settlement of the tenancy to defendant 1 cannot amount to a waiver of the sale.

6. As regards the question of a notice under S. 167, Bengal Tenancy Act, annulling the incumbrance, although no such notice has, up to the present, been served, it has not been established that the landlord has lost his right to annul the incumbrance in this way. Before it can be shown that no notice under S. 167, Bengal Tenancy Act can now be served, it will have to be established as a fact that it is not open to the landlord to serve such a notice and to maintain that he is doing so within one year from the date upon which he had knowledge of the incumbrance. In the circumstances just indicated, it would be impossible to say that the mortgagee in the present case has not been deprived of a part of his security.

7. On behalf of defendants 3 and 4 a point of limitation was raised. It was contended that their liability was not the liability of mortgagors as no property of theirs had been mortgaged. Their liability was purely a personal one arising out of a contract to repay the sum which all the defendants were jointly borrowing. In view of this it was argued that Art. 116, Limitation Act would apply and that time would run from the date of breach, and that date, in the present case, is the due date of payment as contained in the mortgage bond, that is to say, 30th September 1927. On behalf of defendants 3 and 4 the position taken up was that no suit under S. 68, T.P. Act could be maintained against them.

8. We do not think that this argument is sound. Section 68 relates to a suit not for realisation of the mortgage security, but for the mortgage money. Such a suit is maintainable against any person who is liable to repay the mortgage money, whether he is the mortgagor or not. The opening words of the original S. 68

were: "The mortgagee has a right to sue the mortgagor for the mortgage money." The section was amended by the Transfer of Property Amendment Act (Act XX [20] of 1929), and the words now are "The mortgagee has the right to sue for the mortgage money". As the section stands, a suit may be brought under its provisions against any person liable to repay the mortgage money, and such a suit is not limited to the mortgagor. The liability of defendants 3 and 4, being one which arises under cl. (c) of sub-s. (1) of S. 68, T.P. Act, it is clear that Art. 120, Limitation Act is the Article which applies. The starting point of limitation under that Article is the date when the right to sue accrues. Such accrual would take place only when the mortgagee was deprived of his security. In the present case, therefore, the date from which limitation runs is the date upon which the sale of the property took place.

9. All the contentions, therefore, fail and the decision of the Courts below must be upheld. This appeal is accordingly dismissed with costs.

10. The learned Advocate for the appellants has asked us to direct that the decretal amount should be paid in instalments. We do not think that this is a proper case for such a direction. The prayer is accordingly refused and the Rule discharged. There will be no order for costs in the Rule.

