

(1989) 09 GAU CK 0005
In the Gauhati High Court
Case No : Second Appeal No. 112 of 1980

Ramakanta Deb Roy and Another

APPELLANT

Vs

Shri Amalendu Dutta and Others

RESPONDENT

Date of Decision : 13-09-1989

Acts Referred:

Assam Money Lenders Act, 1934 — Section 9(2)
Contract Act, 1872 — Section 10, 2, 80
Evidence Act, 1872 — Section 91
Transfer of Property Act, 1882 — Section 28, 59

Citation : (1990) 1 GLR 332

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : S.K. Sen and A.R. Paul Mazumdar, for the Appellant; S.K. Senapati, for the Respondent

Final Decision : Allowed

Judgement

B.P. Saraf, J.—This second appeal arises out of the judgment and decree "passed by the learned Assistant District Judge, Karimganj in Title Appeal No. 131/79 reversing the judgment and decree passed by Munsiff No. 2, Karimganj.

2. The case of Plaintiffs-Respondents was that on 19.4.61 the Plaintiffs obtained a sum of Rs. 500/- as a loan from the Defendant No. 1 for the marriage (sic) of the daughter of the Plaintiff No. 3 and gave possession of the suit land to the Defendant No. 1 with right to enjoy its usufruct in lieu of interest till the principal amount was repaid. Defendant No. 1 agreed to deliver possession of the suit land to the Plaintiffs as and when the principal amount of Rs. 500/- was repaid. When the Plaintiffs could manage the amount they asked the Defendant No. 1 to receive the same and deliver possession of the suit land, but he failed to do so despite repeated demands. The Plaintiffs, as such, filed the suit for giving direction to the Defendant No. 1 to receive the amount of Rs. 500/- deposited by them in the Court and for delivery of khas possession of the suit land to the Plaintiffs. The Defendants contested the suit. They denied the story of the

Plaintiffs and gave a specific version of their own case. Their case was that the Plaintiffs 1 to 3 and Sarojunda Dutta, husband of Plaintiff No. 4 and father of Plaintiffs 5 to 8, being in need of money settled the suit land with the Defendant No. 2 at the mediation of Defendant No. 1 by taking Rs. 800/- in the month of Aswin 1366 B.S. The yearly rent was fixed at Rs. 5 and 1 anna and the rent for the years 1367 B.S. and 1368 B.S. amounting to Rs. 10 and 2 annas was paid in the month of 1369 B.S. Receipts were also obtained therefore through the employee of Plaintiffs. The Defendant No. 1 was enjoying the land all along as Bhagidar under Defendant No. 2. As such, it was contended by the Defendants that the suit was not maintainable. A number of other objections were also raised.

3. The trial Court framed a number of issues, examined witnesses, and on consideration of the evidence and materials on record did not accept the Plaintiffs' version and accepted the version of the Defendants that the land was settled by the Plaintiffs in the name of Defendant No. 2. Accordingly, it was held that the Plaintiffs were not entitled to the decree as prayed for. The Plaintiffs filed an appeal before the learned Assistant District Judge, Karimganj. In appeal only the following issues 4 to 8 were pressed by the Appellants:

4. Is the suit barred by law of limitation?

5. Did the Plaintiffs borrow as alleged in the plaint any amount and was there any contract between the parties for enjoyment of the suit land by the Defendants in lieu of interest so long the alleged loan remains unpaid;

6. Is the suit land correctly described in the plaint in respect of its boundaries and area?

7. Was there any settlement of the suit land obtained by Sri Satyesh Rajan Gupta from the Plaintiffs No. 1, 2, 3 and predecessors of Plaintiffs No. 4, 5, 6, 7, 8 at a rent of Rs. 5 & 1 anna per year as alleged in written statement?

8. What relief, if any are the Plaintiffs entitled to?

4. The learned Assistant District Judge accepted the Story of the Plaintiffs in regard to taking of the loan and giving the land to the Defendants with right to enjoy the usufruct thereof in lieu of interest till repayment of the principal amount. The Court, however, turned down the contention of the Defendants that if the above version of the Plaintiff was accepted, then it would be a case of usufructuary mortgage and the suit would not be maintainable as the evidence in regard to the terms of contract was not admissible as it had not been reduced in writing and not registered as required by law. The learned appellate Court held that it was not "usufructuary mortgage" but a "contract" and, as such, the requirement of law applicable to usufructuary mortgage would not apply and evidence in regard to the terms of the contract between the Plaintiffs and the Defendants can be admitted in evidence.

5. The learned Assistant District Judge also reversed the finding of the trial Court in regard to the settlement of the land by the Plaintiffs in favour of Defendant

No. 2 on the ground that the name of Defendant No. 2 was not entered in the "Tauji accounts book" maintained by the Plaintiffs (Exhibits 1 and 2) He did not rely on Exhibits A and A (1), the Farogs which were duly exhibited and proved by Defendant No. 2, who was an employee of the Plaintiffs. The learned appellate Court, therefore, allowed the appeal and set aside the judgment and decree passed by the learned trial Court and decreed the suit with costs. The Defendant No. 1 was directed to receive the amount of Rs. 500/- deposited in the Court and to deliver possession of the suit land within one month from the date of passing of the appellate order, failing which, it was ordered that the Plaintiffs would be entitled to recover possession of the suit land by ejecting the Defendants through the process of the Court. Against the aforesaid judgment of the learned Assistant District Judge, the present second appeal has been filed.

6. The main submission of the learned Counsel for the Appellants is that the case of the Plaintiffs itself was one of usufructuary mortgage. The facts stated in the plaint also clearly indicated that it was usufructuary mortgage. The prayer also, was for redemption of such mortgage. The Plaintiffs deposited a sum of Rs. 500/- in the Court and prayed for a direction to the Defendants to accept the same and deliver possession of the suit land to the Plaintiffs. Thus, the Plaintiff had set up a case of usufructuary mortgage. The learned appellate Court has passed the judgment directing the Defendants to accept the amount of Rs. 500/- and to deliver possession of the land to the Plaintiff treating it as a mortgage. The question is whether the appellate Court could hold that it would not be "usufructuary mortgage" if it is not in writing and registered but would be a "contract" and that it could be enforced as contract even though it was in violation of the mandatory requirements of the law applicable to a usufructuary mortgage.

7. Mr. S.K. Sen, learned counsel for the Appellants submitted that the case of the Plaintiffs was clearly one of usufructuary mortgage. The principal money secured by it was Rs. 500/- and as such, it was necessary that the mortgage should be in writing and should be registered. If it was not done, no evidence could be given in proof of the terms of such mortgage in any Court in view of the provisions of Section 91 of the Evidence Act. In other words, the terms of the alleged mortgage cannot be legally enforced in such a case. Mr. Sen further submits that the Defendants had succeeded in establishing their case that the land was settled by the Plaintiffs in their favour by adducing oral as well as documentary evidence in support thereof. "Farogs" were issued by the employee of the Plaintiffs in regular course on printed forms which were serially numbered, evidencing payment of rent in respect of the suit land by the Defendant. These receipts which were duly proved were enough to establish the case of the Defendants. It was submitted that the learned appellate Court was not justified in discarding the aforesaid evidence on the ground that the names of the Defendants were not entered in the Touzi accounts book. Non-keeping of up-to-date account by the landholder cannot take away the right of the settlement holders.

8. Mr. S.K. Smapati, learned Counsel for the Respondents on the other hand,

supported the judgment of the learned Assistant District Judge passed on appeal, According to him, as the transaction in question between the parties was oral, it could not be termed as "mortgage" within the meaning of the expression as used in the Transfer of Property Act, 1882 and in such a situation, it will be a contract. According to him in case of a "contract" there is no legal requirement of reducing it in writing or registration and, as such, evidence in regard to the terms of contract can be given in Court of law and decision can be based on such evidence.

9. I have heard Mr. Senapatl at length. I however, find it extremely difficult to reconcile with his submissions, which if accepted, can lead to curious results. To appreciate the submissions, I may refer to the relevant provision of the Indian Contract Act, 1872. Clause (h) of Section 2 defines "contract" as follows: "An agreement enforceable by law is a contract" Section 10 of the Act provides what agreements are contracts. It reads:

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

10. From a reading of Section 80, it is clear that "contract" is an expression of agreement between the parties made by the free consent of the parties competent to contract for lawful consideration with the lawful object. It cannot be said that mortgage is not "contract." Mortgage also is an agreement between the mortgagor and the mortgagee by which a transfer of interest in specific immovable property is made for the purpose of securing the payment of money advanced or to be advanced by way of loan etc. "Usufructuary mortgage" has been defined in Clause (d) of Section 28 of the Transfer of Property Act, 1882 as follows:

Usufructuary mortgage.-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to, retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

"Usufructuary mortgage" is thus an agreement between the mortgagor and the mortgagee. The agreement has been entered into by free consent of the parties competent to contract. It is a contract named as "usufructuary mortgage". ""Contract" is a broader expression. It is the genus of which usufructuary mortgage is a specie. Different formalities have been prescribed for different types or species of contracts by different enactments. All such requirements arc

to be fulfilled in order to have a valid contract enforceable in a court of law. This has been made clear by Section 10 itself.

11. Section 59 of the Transfer of Property Act requires that when the principal money secured is one hundred rupees or upward, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. When, however, the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property. It reads:

59. Mortgage when to be by assurance.-When the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

12. According to Mr. Senapati, a usufructuary mortgage, which is not reduced in writing and not registered, can still be enforced in a Court by terming it as "contract". The submission, in my opinion, is wholly misconceived. It is based on the supposition that the expression "contract" does not include a "usufructuary mortgage" and that by naming an agreement "contract" the legal requirement of enforceable usufructuary mortgage can be by-passed. This submission fails to take note of the fact that Section 10 of the Act itself provides that nothing contained therein shall affect any law in force in India, by which any contract is required to be made in writing, or in the presence of witnesses, or any law relating to registration of documents.

13. In view of the clear language of Section 2(h) and 10 of the Contract Act, I am of the clear opinion that "usufructuary mortgage" is one of the species of "contract" and it is subject to the provisions of Section 59 of the Transfer of Property Act which provides that it must be effected by a registered instrument in writing except in cases specified therein. It therefore, hold that if from the terms of the agreement between the parties, It can be deduced that it was a case of "usufructuary mortgage", the contract in such a case must comply with the requirements of Section 59 of the Transfer of Property Act.

14. The present case is clearly a case of usufructuary mortgage. The prayer is also that in terms of the clauses of the said mortgage, Defendants should be directed to accept the principal amount from the Plaintiffs and return back the mortgaged land. The principal money secured is Rs. 500/-. The mortgage is not in writing and not registered. The trial Court found so and held that the suit was not maintainable. The appellate Court also did not find the facts differently. It, however, took a peculiar view that if a mortgage which is required to be in

writing and registered, is not reduced in writing and registered, it ceases to be mortgage and can be enforced as a "contract". I have considered the aforesaid decision of the learned Assistant District Judge and find it difficult to accept the same. The interpretation given by the learned Assistant District Judge to "contract" if accepted, will not only render the provision of Section 59 of the Transfer of Property Act otiose but will also go counter to the express provision contained in Section 10 of the Contract Act itself. I, therefore, hold that the agreement in the instant case was "usufructuary mortgage". As stated above, the evidence of terms of usufructuary mortgage was not admissible in evidence by virtue of Section 91 of the Indian Evidence Act, 1872 which reads:

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.-When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in which secondary evidence is admissible under the provisions hereinbefore contained.

15. In view of the facts of the case and the law stated above. I am of the opinion that the learned Assistant District Judge committed manifest error of law in acting on the evidence of the terms of usufructuary mortgage which was not in writing and registered as required by Section 59 of the Transfer of Property Act.

16. Mr. Senapati further submits that if it is held to be usufructuary mortgage the Respondents would be entitled to benefit of Section 9(2) of the Assam Money Lenders Act, This submission has no force. In order to claim the benefit of the Assam Money Lenders Act also the mortgage must be executed in terms of the provisions of Section 59 of the Transfer of Property Act. Section 91 of the Act applies to all cases in which evidence in respect of the terms of a contract is necessary. A case under the Assam Money Lenders Act is no exception to it.

17. I, am, therefore, of the opinion that the judgment and decree passed by the appellate Court cannot be sustained and these are set aside. The suit is liable to be dismissed.

18. The appeal is allowed with costs all throughout.