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In the Delhi High Court

Case No : CS (OS) No. 2006 of 2003, I.A. No. 7463 of 2004 and I.A. No. 3564 of 2005

Ramesh Kumar and Others — APPELLANT

Vs

Yashpal Batra and Another — RESPONDENT

Date of Decision : 15-05-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Limitation Act, 1908 — Article 132, 62
Limitation Act, 1963 — Article 61
Transfer of Property Act, 1882 — Section 52, 67

Citation : AIR 2006 Delhi 286 : (2006) 89 DRJ 689

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Rahul Gupta, Vipin Gogia and Rakesh, for the Appellant; A.A. Aggarwal, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

IA No. 7463/2004 (Order -VII, Rule -11 CPC by Defendant No. 1)

1. The plaintiffs have filed the suit for declaration with consequential relief of possession, recovery of damages, mesne profits and permanent injunction.

2. The plaint states that the three plaintiffs are the legal heirs of late Shri Amar Dass being his sons. The suit has been filed in respect of the immovable property bearing No. 399-400 (Old No. 204), Khari Baoli, Delhi whereby the plaintiffs claim that they have become absolute and lawful owners in respect of the suit property. The plaintiffs also seek recovery of possession against defendant No. 1 apart from the relief of recovery of damages / mesne profits and permanent injunction. Defendant No. 2 has been imp leaded as a party in the suit on the ground that he is a tenant in occupation of a part of the suit property in pursuance of a Rent Note dated 12.10.1964 and is also the real younger brother of late Shri Amar Dass, the father of the plaintiffs.

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3. The suit property is stated to have been earlier owned by late Shri Ram Dhan Batra in pursuance of a registered document dated 09.07.1957. Shri Batra passed away on 17.10.1962 leaving behind his widow Smt. Shanti Devi and son, i.e., defendant No. 1 herein.

4. Smt. Shanti Devi and defendant No. 1 are together stated to have executed a registered Mortgage Deed dated 20.08.1969 in favor of late Shri Amar Dass in respect of the suit property to secure an amount of Rs. 7,500/- advanced to them. Subsequently, Smt. Shanti Devi also passed away.

5. It may be noticed that the Mortgage Deed has been executed in Urdu and English translation of the same has been filed with the plaint. The amount of Rs. 7,500/- is stated to have been required for business purposes and to secure the same, the suit property is stated to have been ''mortgaged temporarily without possession''. The amount was repayable within a period of 3 years along with interest at 62 paise per hundred per month. The relevant clauses of the Mortgage Deed are as under:

1. That the possession will remains ours. We shall pay the interest amount regularly every month. The total principal amount shall be paid within the above-mentioned period. If the total principal amount is not paid as promises or the interest amount remains unpaid for 3 months, then the mortgagee shall have the right to retrieve his total principal amount along with the interest due through a court case or issue of a decree till the total payment at the rate of (62) paise per month per hundred, in lump sum, from the mortgaged property and other properties of every types belonging to the deponents and our heirs, and ourselves along with the litigation charges;

4. In case the property (whole or some portion) is acquired by the Government and some compensation is given, then the mortgagee shall have the first right on it, and if there is a shortfall, then he will retrieve it from our property of every kind;

6. A perusal of the Mortgage Deed, thus, shows that what was created was a simple mortgage without possession. Clause 4 has also been reproduced herein-above only in view of the contention of learned Counsel for the plaintiffs that mortgagee has the first right of compensation. It is appropriate to clarify here itself that what the clause stipulates is that in case of acquisition, the mortgagee''s right is protected inasmuch as the outstanding would be recovered from the compensation and any shortfall would be retrieved from the property of the mortgagor of every kind.

7. The plaintiffs have stated in the plaint that there was a clear agreement and understanding between the parties that for all purposes and intentions, the possession of Shri Chaman Lal in the suit property may be treated and accepted as possession of late Shri Amar Dass in his capacity as a mortgagee in the suit property. This averment is clearly inadmissible as it goes contrary to the recital of the registered Mortgage Deed, which stipulates that the mortgage is without

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possession. It may be noticed that the case of the plaintiffs is not that there was any subsequent variation of the Mortgage Deed, but that the understanding was arrived at when Mortgage Deed was executed. There cannot be such an understanding recognized and admissible contrary to a written registered document, especially when only a simple mortgage was created even as per the averments made in the plaint.

8. It is not disputed that at no stage of time was the amount repaid nor did the plaintiffs ever seek recovery of the amount through any legal proceedings or foreclosure of the mortgage. Similarly, neither the predecessor of defendant No. 1 nor defendant No. 1 claimed redemption of the mortgage.

9. Defendant No. 1 is stated to have filed certain legal proceedings against defendant No. 2 before the competent authority under the provisions of the Slum Areas (Improvement and Clearance) Act, 1956 and it appears that the present suit is a counter-blast to the same. The stand of the plaintiffs is that they have become owners on account of failure of late Shri Amar Dass or his legal heirs in exercising the right of redemption.

10. It is also relevant to note that the plaintiffs have also sought a decree for possession of the premises ostensibly on the ground that they have become owners of the property apart from the claim for damages and mesne profits, yet, on the other hand, they seek to plead that there was some understanding by which the possession of Shri Chaman Lal was on behalf of late Shri Amar Dass.

11. Defendant No. 1 has filed the written statement and simultaneously has filed the present application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, ''the Code'') for rejection of the plaint as the suit has no cause of action and is not maintainable in law. It has been stated that there is no provision under the Transfer of Property Act, 1882 (for short, ''T.P. Act'') for filing such a suit. The remedy of the mortgagee was only for enforcement of payment failing which by way of decree for sale and such relief could have been claimed only within 12 years from the date when the money became due. The right to sue arose to the plaintiffs on 20.08.1972 on expiry of the period of 3 years stipulated for making payment and, thus, the period of 12 years expired on 20.08.1984. Thus, the suit was also barred by time.

12. The application has been contested by the plaintiffs on the ground that defendant No. 1 had failed to seek redemption of mortgage within the stipulated period of 30 years and that a false plea has been taken in the written statement that money had been paid back without any evidence filed in that behalf. The cause of action is stated to have arisen under Article 61 of the Limitation Act, 1963 and also when defendant No. 1 instituted proceedings against defendant No. 2.

13. In order to appreciate the rival contentions, it is necessary to reproduce some of the Articles, which deal with the subject matter of the present dispute and the same are as under:

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Description of suit

Period of limitation Time from which period begins to run

Article 61.- By a mortgagor:

(a) to redeem or recover possession of immovable property mortgaged.

(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration.

(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied.

Thirty years

Twelve years

Three years

When the right to redeem or to recover possession accrues.

When the transfer becomes known to the plaintiff.

When the mortgagor re-enters on the mortgaged property.

Description of suit

Period of limitation

Time from which period begins to run

Article 62. - To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.

Twelve years

When the money sued for becomes due.

Description of suit

Period of limitation

Time from which period begins to run Article 63.- By a mortgagee:

(a) for foreclosure;

(b) for possession of immovable property mortgaged.

Thirty years

Twelve years

When the money secured by the mortgage becomes due.

When the mortgagee becomes entitled to possession.

14. Learned Counsel for the plaintiffs initially sought to contend that it is Article

63 which would govern the transaction in question insofar as any claim for foreclosure of mortgage by the plaintiffs is concerned, while the contention of learned Counsel for defendant No. 1 was that it is Article 62 which would govern the transaction. However, after some hearing and on examination of the matter, learned Counsel for the plaintiffs could not seriously dispute that it would be Article 62 which would govern the claim of the plaintiff since it is not a case of usufructuary mortgage, but of a simple mortgage. It is not a case where possession has been handed over to the mortgagee. In this behalf, it has to be kept in mind that in a suit of a simple mortgage, the mortgagee is bound to enforce payment by sale of the mortgaged property and that is the reason Article 62 would govern the transaction. In this behalf, the judgment of the Privy Council in Vasudeva Mudaliar and Ors. v. Srinivasa Pillai and Anr. 30 Mad 426 may be taken note of. In the Limitation Act, 1908 (for short, ''1908 Act''), Article 132 corresponds to Article 62 of the present Act. In the said case, it was held that suits for money charged upon immovable property were well recognized class of suits to which Article 132 would apply and the form of plaint applicable to a mortgage suit for foreclosure of sale would be governed by the said provision. Article 147 was held limited in its application to English mortgages and a suit of simple mortgage bond was held to be enforceable for payment of the amount due on the bond by sale of the mortgaged property, the same being governed by Article 132 of 1908 Act.

15. Learned Counsel for the plaintiffs, however, sought to rely on the provisions of Section 67 of the T.P. Act to contend that as the mortgagor has a right to redeem, a corresponding right is given to the mortgagee which alone is the right of foreclosure. Thus, if the mortgagor has failed to avail himself of the right of redemption, the mortgagee has a right to apply to the court for a decree that the mortgagor shall be debarred of his right to redeem the mortgaged property. Section 67 of the T.P. Act reads as under:

67. Right to foreclosure or sale. - In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure. Nothing in this section shall be deemed.-

(a) to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or on usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

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(b) to authorize a mortgagor who holds the mortgagee''s rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

16. A reading of the aforesaid provision, however, does not advance the case of the plaintiffs. The Section itself provides that a suit to obtain a decree that the mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure. Such foreclosure can only be in respect of mortgages as per clause (a) of Section 67 of the T.P. Act. The only methodology open for the plaintiffs was to file a suit within time as per Article 62 of the Limitation Act, which has admittedly not been done.

17. In this behalf, it would be relevant to refer to the provisions of Order XXXIV of the Code. In such a suit, a preliminary decree is first passed and time is given to the defendants to make payment within the time stipulated. It is only on non-payment of the amount within the time stipulated that a final decree debarring the defendants from all rights to redeem the mortgaged property has to be passed and the property put to sale for realization of the dues.

18. Learned Counsel for the plaintiffs sought to rely on the judgment of the Apex Court in Harbans Vs. Om Prakash and Others, . It may be noticed that the said dispute related to a usufructuary mortgage and the rule against clogs on equity of redemption was considered. The other question examined was the impermissibility of the usufructuary mortgagee trying to convert his position to that of an absolute owner. The suit there had been instituted on the ground that the occupants had become owners in possession on the ground of foreclosure since allegedly limitation for redemption of the mortgaged land had expired. The Trial Court decreed the suit, while the first Appellate Court held that there was no period of limitation to redeem the usufructuary mortgage. The second Appellate Court held that the plaintiffs had not become owners, as there was no evidence brought on record to show that the mortgage was for a fixed period and since no time had been fixed for redeeming the land, the right to get the property redeemed remained. The suit filed by the plaintiff was only decreed to the effect that the defendants were restrained from interfering with peaceful possession of the plaintiff except by law. The appeal against the same was dismissed by the Apex Court. Learned Counsel submitted that the findings were arrived at on scrutiny of evidence in such a suit filed for declaratory relief and, thus, the evidence should be recorded in the present matter and the suit be not thrown

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out by exercise of jurisdiction under Order VII Rule 11 of the Code.

19. Learned Counsel for the plaintiffs also referred to the judgment of the Apex Court in Achaldas Durgaji Oswal (Dead) through Lrs. Vs. Ramvilas Gangabisan Heda (Dead) through Lrs. and Others, to emphasise that the Supreme Court had reiterated the maxim ''once a mortgage, always a mortgage''. Once again, this is a case of usufructuary mortgage.

20. I fail to appreciate how these judgments can be of any assistance to the plaintiffs. No doubt, there is discussion on the issue of failure of the mortgagee to redeem the property, but the principles laid down are of wider latitude and the permissibility for a mortgagee to redeem the property, unless the time-period for such redemption is pointed out. It is not in dispute that in the present case that neither the plaintiffs exercised the right for recovery of money and foreclosure nor defendant No. 1 exercised the right for redemption.

21. Learned Counsel for the plaintiffs also referred to the judgment of learned Single Judge of the Punjab and Haryana Court in Banarsi Dass Vs. Jiwan Ram (deceased) and others, which laid down that on the failure to exercise the right of redemption within 30 years as stipulated in Article 61 of the Limitation Act, the right to redeem as also the right in the property is extinguished and the mortgagee in possession can bring the suit claiming that he has become full owner of the property. As mentioned, this was a suit for usufructuary mortgage where the mortgagee is in possession. In the present case, it is a simple mortgage where the mortgage is not in possession and the Mortgage Deed states so clearly.

22. Learned Counsel for defendant No. 1 drew the attention of this Court to the judgment of Andhra Pradesh High Court in Dhonavakonda Gopalarao Vs. Thatha Venkatadri wherein it was observed that a person cannot use his mortgage as a weapon of attack by filing a suit on the mortgage beyond the period prescribed by Article 132 of 1908 Act. That was also a case where a declaration was sought by the mortgagee. It was held that it would be an abuse of the power to grant declaratory decree in such a case as the plaintiff has the right to recover his mortgage debt. The declaration could have been made only in a suit to enforce the mortgage by sale which is required to be filed in terms of Order XXXIV of the Code, which had become barred and, thus, mere declaration for the amount due of mortgagee could not be given.

23. Learned Counsel also referred to the judgment of Bombay High Court in Anaji Thamaji Patil Vs. Ragho Bhivraj Patil and Another, wherein it was held that where a land is mortgaged by way of simple mortgage, grant of lease by mortgagor during the pendency of suit does not violate the doctrine of lis pendens. Thus, the rights as contemplated by Section 52 of the T.P. Act were not affected by such a mortgage. The object of relying on this judgment was to show that the mortgagor remained the owner of the property during such mortgage.

24. There is another aspect to the matter. It is settled principle of law that what

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cannot be done directly, cannot be permitted to be done indirectly. If the plaintiffs cannot exercise the rights of recovery of money and consequent sale of property in case of failure to pay the money, the plaintiffs cannot be permitted to achieve that object through the circuitous method by filing by the present suit for declaration. The present suit is not only for mere declaration, but the plaintiffs are even claiming possession from defendant No. 1 and damages. The plaintiffs seem to be under a misconception that the consequence of the failure of defendant No. 1 or his predecessor-in-interest to exercise the right to redemption implies that the plaintiffs have automatically become owners of the property. In order for the plaintiffs to exercise the rights in respect of the property, it was incumbent upon the plaintiffs to have exercised their rights for recovery of the amount and for sale of the property within the stipulated period of 12 years, which they failed to do so. It is no answer for the plaintiffs to contend that defendant No. 1 has not paid the amount and, thus, the plaintiffs cannot be without a remedy. The law of limitation is like guillotine and once the period expires, the party is remedy- less. This is what has happened in the present case.

25. The judgments aforesaid do show that the mortgagor continues to be the owner of the property and especially where it is a simple mortgage, the only option for the mortgagee is to exercise the rights to seek recovery and on the failure of payment of the amount, would the property be put to sale. There is no automatic ownership transferred in favor of the plaintiffs where the plaintiffs have failed to exercise their rights in case of such a simple mortgage. The judgment in Dhonavakonda Gopalarao''s case (supra) applies on all fours.

26. I am unable to accept the plea of learned Counsel for the plaintiffs that trial is required for this matter. No doubt, the defense taken in the written statement of defendant No. 1 that the amount had been returned cannot be taken into account since while considering an application under Order VII Rule 11 of the Code, only the averments made in the plaint and the documents filed by the plaintiffs are liable to be considered. If the averments made in the plaint alone are seen, it is apparent that neither have the plaintiffs exercised the right of recovery of amount or of sale of property nor has defendant No. 1 exercised the right of redemption. In such a case, the plaintiffs cannot seek a declaration of ownership of the property nor can the plaintiffs claim possession, as there is no such provision in law and more specifically in the T.P. Act. Furthermore, when the right of the plaintiffs to recover the amount, which is secured by the property, is extinguished on account of the claim being barred by time, the present claim cannot be entertained. It has to be appreciated that the mortgage is also one form of security to recover the amount and in case of a simple mortgage where there is no transfer of possession, the plaintiffs were required to exercise the rights within time for recovery of amount and for sale of the mortgaged property. On their failure to do so, such right stands extinguished and they cannot claim this right indirectly through the process of a declaratory suit with the claim of possession and damages, which is really the similar nature of right in a different

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27. I am, thus, of the considered view that the suit is not maintainable in law and does not disclose any cause of action. The application is, thus, liable to be allowed. Ordered accordingly.

CS (OS) No. 2006/2003

28. In view of the application of defendant No. 1 under Order VII Rule 11 of the Code (I.A. No. 7463/2004) being allowed, the plaint is accordingly rejected as not maintainable.

IA No. 3563/2005 (Order-I, Rule-10 CPC by the plaintiffs)

29. The application for impleadment of the sister of defendant No. 1 on the ground that she is one of the legal heirs of late Smt. Shanti Devi does not survive for consideration and is accordingly disposed of.

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