(2009) 03 RAJ CK 0046

In the Rajasthan High Court

Ramlal (died) through LR and Others APPELLANT

Vs

Girdharlal and Others RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 2010 Raj 25 : (2010) 4 CivCC 204 : (2011) 7 RCR(Criminal) 99 : (2009) 4 RLW 2960

Hon'ble Judges : J.R. Goyal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Jitendra Ray Goyal, J.—This is a defendants'' second appeal u/s 100 of the CPC (in short the Code) filed against the judgment and decree dated 12/11/1992 passed by learned Additional District Judge, Bayana in Civil Appeal No. 2/1986 whereby the judgment and final decree for redemption of mortgage passed in Civil Suit No. 6/1969 by the learned Munsif, Bayana on 15/9/1983 in favour of the plaintiffmortgagors was affirmed.

2. Brief facts of the case are that the plaintiff-respondents filed a suit on 2/1/1969 against the defendants for redemption of mortgage of a house situated at Rudawal. The trial court passed the contested preliminary decree on 12/1/1978 in favour of all the plaintiffs and directed them to deposit a sum of Rs. 1,000/- into the court within a period of one month which was found due upon them. The plaintiffs deposited the said amount into the court within the stipulated period. Thereafter on 17/11/1981 the plaintiffs applied for passing of final decree in their favour. The defendants opposed this prayer on the ground that application for grant of final decree in the redemption suit was barred by limitation. The trial court after hearing the parties held that there is no limitation for filing application under Order 34 Rule 8 of the Code and passed final decree for redemption of the mortgage on 15/9/1983 in favour of the plaintiffs. Against the aforesaid final decree the defendants filed an appeal but the same has also

been dismissed by the learned Additional District Judge, Bayana by the impugned judgment & decree dated 12/11/1992 holding that the provisions of Limitation Act were inapplicable. Therefore, this appeal has been preferred by the defendants.

3. Heard learned Counsel for the parties and perused the relevant judgments and other material available on the record.

4. A short substantial question of law involved in this second appeal is "whether an application under Sub-rule (1) of Rule-8 of Order 34 of the Code of Civil Procedure, is governed by the Limitation Act, and if an application is not filed within the period of limitation, prescribed under the Limitation Act, the remedy of the plaintiff, in whose favour the preliminary decree has been passed, is lost ?"

5. It was inter alia contended by the learned Counsel appearing for the appellants that the trial court passed a contested preliminary decree on 12/1/1978 in favour of the plaintiffs and also directed them to deposit a sum of Rs. 1,000/- into the court within a period of one month and the plaintiffs deposited the said amount within the stipulated time but did not file application for framing the final decree under Order 34 Rule 8 of the Code within the prescribed period of three years as provided under Article 137 of the Limitation Act and only filed an application on 17/11/1981 whereas three years period of limitation had already expired on 12/2/1981, therefore, on the time barred application final decree could not have been passed under Order 34 Rule 8 of the Code. Reliance was placed upon the judgment delivered in the case of K. Parameswaran Pillai (dead) v. K. Sumathi alias Jesis Jessie Jacquiline and Anr. reported in .

6. Learned Counsel appearing for the respondent-plaintiffs submitted that in compliance of the preliminary decree dated 12/1/1978, within a period of one month the plaintiffs deposited Rs. 1,000/- as directed by the trial court and thereafter it was the duty of the trial court to have directed the defendantsmortgagees under Order 34 Rule 7(1)(c) (1) of the Code to deliver the possession of the mortgaged property to the plaintiffs but no such directions were given, therefore, the plaintiffs-mortgagors filed an application before the trial court to direct the defendants to deliver the possession of the mortgaged property and the documents thereof and in such situation, the provisions of Order 34 Rule 8 of the Code are not applicable in the present case. It was further submitted that the provisions of Order 34 Rule 8 of the Code are applicable only when a final decree debarring the plaintiffs-mortgagors from redeeming the property is to be passed on account of non-deposition of the mortgaged amount by the plaintiffs as directed by the court but since the plaintiffs had already deposited the money well within the prescribed time, therefore, there was no question of passing any final decree debarring the plaintiffs from all rights to redeem the mortgaged property.

7. I have considered the rival submissions made the bar. To resolve the legal

tangle, it would be appropriate to have a look over the provisions of Order 34 of the Code which provide the provisions relating to suits of mortgage of immovable property. While Rule 2 to 6 of Order 34 of the Code provide the procedure in regard to suits of foreclosure and for sale. Rule 7 & 8 of Order 34 of the Code provide the provisions in regard to suits for redemption which reads as under:

7. Preliminary decree in redemption suit .-(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree-

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for-

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing-

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under Clause (a), or from the date on which such amount is declared in Court under Clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, 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 amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree-

(a) in the case of 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 mortgaged 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.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under Sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

8. Final decree in redemption suit.- (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under Sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under Sub-rule (1) of Rule 7, the Court shall on application made by the plaintiff in this behalf, pass final decree, or if such decree has been passed, an order-

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and, if necessary,-

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property, as directed in the said decree, and, also, if necessary,-

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under Sub-rule (3) of this rule, the Court shall not pass an order under Sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in subrule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser. Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court, by him, together with a sum equal to five per cent. Thereof.

(3) Where payment in accordance with Sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,-

(a) in the case of mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in Rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property, and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

8. From the above provisions, it is manifestly clear that preliminary decree in the redemption suit is passed under Rule 7 of Order 34 of the Code whereas Rule 8

of the said Order provides procedure for framing the final decree in such matters. So far the question of applicability of Article 137 of the Limitation Act, 1963 is concerned, it has been settled by the Hon''ble Apex Court in K. Parameswaran Pillai (dead)''s case (supra) and it has been held that provisions of Article 137 of the Limitation Act, 1963 are applicable and three years period is prescribed for filing application for final decree for redemption under Order 34 Rule 8 (i) of the Code. The relevant observations of the Hon''ble Apex Court are as under:

The limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree is expired under Article 137 of the Schedule to Limitation Act, 1963 (Act 181 of Schedule 2 of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof.

9. It has further been held that under Article 137 of the Schedule to the Limitation Act, 1963 three years period begins to run when right to apply accrued. In the instant case, it is not disputed that one month period has been granted to deposit Rs. 1,000/- while passing the decree on 12/1/1978 and the plaintiffs in compliance of that preliminary decree deposited the said amount within the stipulated time. Therefore, in view of these facts, period of limitation began to run at the most from 12/2/1978 whereas the plaintiffs filed the application for final decree on 17/11/1981, much beyond the period of three years. In view of the above settled legal position, the submission of the counsel appearing for the respondents does not carry weight that it was not the duty of the plaintiffs to file an application under Order 34 Rule 8 (1) of the Code for framing the final decree but in my considered view after due compliance of the conditions envisaged in the preliminary decree the plaintiffs have to move an application for preparation of final decree under Rule 8 (1) of Order 34 of the Code within a prescribed period of three years from the date of expiry of the period fixed in the preliminary decree or in the case of usufructuary mortgage when money has been deposited in compliance of the preliminary decree and as such the right to apply accrues when the mortgage amount has been deposited.

10. As has been discussed here-in-before, the plaintiffs failed to apply for final decree within a period of three years from the date of deposition of the amount in compliance of preliminary decree, therefore, plaintiffs'' application to pass a final decree is barred by limitation and as such the trial court had no jurisdiction to decide that application under Rule 8 (3) of Order 34 of the Code and to pass final decree.

11. Consequently, this appeal is allowed and the judgment and decree dated 12/11/1992 passed by learned Additional District Judge, Bayana in Civil Appeal No. 2/1986 and the judgment and final decree dated 15/9/1983 passed by learned Munsif, Bayana in Civil Suit No. 6/1969 are hereby set aside.