
(1973) 06 BOM CK 0012
In the Bombay High Court
Case No : Appeal No. 96 of 1963

Shankar Madhaorao Gampawar and Others

APPELLANT

Vs

Maltibai

RESPONDENT

Date of Decision : 28-06-1973

Acts Referred:

Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1974 Bom 46 : (1974) ILR (Bom) 1011 : (1973) MhLj 851

Hon'ble Judges : Chandurkar, J

Bench : Single Bench

Advocate : C.S. Pultamkar, for the Appellant; P.S. Badiye, for the Respondent

Judgement

1. The appellants are the defendants who are the heirs of one Madhaorao Gampawar. The plaintiff brought a suit for possession of a house situated at Chanda basing her claim on a document which is styled as a conditional sale deed executed by Madhaorao on 18-6-1953 for a consideration of Rupees 9,00/-. The terms of the deed were that in case the defendants father Madhaorao paid back the amount of Rs. 9,00/- in one year, the plaintiff should execute a deed of reconveyance and deliver back the possession of the house property to him; but if the defendant's father failed to pay back the amount of Rs. 9,000/- as agreed, the conditional sale deed would be an absolute one and the defendant's father would lose and forfeit his right of getting a deed of reconveyance. The plaintiff alleged that the defendant's father had paid only rs. 1,600/- by 20-6-1954 which was the last date fixed for getting a deed of reconveyance and that her conditional sale deed had become an absolute one and, therefore, she was entitled to possession. After the initial payment of Rs. 1,000/- by the defendant's father made on 29-4-1954, he had further paid Rs. 1,100/- on 7-1-1955; Rs. 400/- on 6-4-1955 & Rs.1,000/- on 7-5-1957. Thus a total amount of Rs. 3,500/- was received by the plaintiff, she was entitled to appropriate towards compensation for use and occupation of the house by the defendant's father. This amount, according to the plaintiff, she was entitled to

appropriate towards compensation for use and occupation of the house by the defendant's father who had utilised all rents and profits from the building. The plaintiff made an alternative claim that in case the transaction amounted to a mortgage by conditional sale, she was entitled to a decree for foreclosure against the defendants in respect of the house. She therefore, claimed Rs. 9,000/- along with interest at 1 per month by way of damages. She also relied on a letter dated 27-6-1955 (Ex. 64) written by the defendants' father agreeing to pay interest at 1 per cent per month as he wanted further extension of time to get a deed of reconveyance. Along with the plaint, she filed a schedule of accounts, in which charging interest at the rate of 1 per cent, per month and giving credit for repayments made from time to time, Rupees 13,782.62 were shown to be due from the defendants.

2. According to the defendants, the transaction in dispute was a mortgage and not a sale and the defendants had a right to redeem the mortgage. They denied that the plaintiff was entitled to a decree for Rs. 13,782.62 P. According to them the plaintiff was a money-lender, and sine she had no licence under the C.P. Moneylenders Act, she was not entitled to file a suit for recovery of the mortgage dues. According to them, the consideration for the document was not Rs. 9,000/- but only Rs. 8,000/- and therefore, the plaintiff. was entitled to claim only Rs. 8,000/- but they were entitled to be given credit for the amounts repaid by their father. They further pleaded that in case the transaction was held to be a sale, they should be given credit for Rs. 3,000/- which were spent by their father for repairs and maintenance while making account for damages for use and occupation of the suit premises.

3. The trial court held that the transaction dated 18-6-1953 was a mortgage by conditional sale and that the plaintiff was entitled to interest at 12 per cent per annum as agreed by the defendants' father. It found that Rs. 9,000/- were due on account of the mortgage amount as principal and Rs. 4,782.62 as interest. Thus, the defendants were directed to pay Rs. 13,782.62 and costs of the suit to the plaintiff out of the mortgaged property with 4 per cent. Per annum future interest on Rs. 9,000/- from the date of suit till satisfaction within six months from the date of the decree, failing which the plaintiff was to apply for a final decree for foreclosure. A preliminary decree was, therefore, accordingly directed to be drawn. The defendants have now filed this appeal.

4. The only contention which is now raised by Mr. Pultamkar on behalf of the appellants in this appeal; is that sine the document of mortgage was silent with regard to the rate of interest, the trial Court had no jurisdiction to award interest for any period prior to the suit, and giving credit for Rs. 3,500/- which were admittedly found to be repaid by the defendant's father the plaintiff was entitled only to a decree for Rs. 5,500/- as principal. He relied on a decision of the Madhya Pradesh High Court in Jeewanchand V. Smt. Kalibai 1963 MPLJ 418. In that case, a Division Bench of the Madhya Pradesh High Court held that variation of rate of interest which has an effect on the interest in the equity of redemption

amounts to an interest in the property and a document varying the rate of interest stated in the mortgage deed is compulsorily registrable u/s 17 of the Registration Act and is not admissible in evidence in the absence of registration. The contention raised by Mr. Pultamkar must be accepted. It is not disputed that the document of mortgage does not contain any stipulation with regard to interest being payable to the mortgagee by the mortgagor. The right to receive interest is a part of the interest which mortgagee has in the mortgaged property. When there is no stipulation in the document of mortgage about the payment of interest on the mortgage amount by reason of a subsequent letter written by the mortgagor, the mortgagee obviously wants a fresh interest to be created in the mortgaged property in his favour for the first time. Such an interest in the mortgaged property cannot be created except by a registered instrument having regard to the provisions of Section 17(b) of the Registration Act when the immovable property which is the subject-matter of the mortgage is valued at more than Rs. 100/-. In *U Po Thin V. Official Assignee* AIR 1938 Rang 285 the Rangoon High Court was dealing with a case where the question was whether an agreement to reduce the rate of interest on mortgage was compulsorily registrable and it was held by a Division Bench of that Court that any document which reduces the mortgagee's right to receive interest at the rate given in the mortgage deed affects his "interest in immovable property" and hence the agreement to reduce the rate of interest is compulsorily registrable u/s 17 of the Registration Act, 1908, and if not registered cannot be received in evidence. In *Kashinath Bhaskar Datar Vs. Bhaskar Vishweshwar Karve*, the Supreme Court referred to the decision of the Rangoon High Court and quoted with approval the view that one part of the "interest" which a mortgagee has in mortgaged property is the right to receive interest at a certain rate when the document provides for interest. The Supreme Court further observed that if that rate is varied, whether to his advantage or otherwise, then his "interest" in the property is affected, and if the subsequent agreement substitutes a higher rate, then to the extent of the difference it "creates" a fresh "interest" which was not there before and if the rate is lowered, then his original "interest" is limited. The decision in *Kashinath's* case is, therefore, an authority for the proposition that if the rate of interest is increased the increase has the effect of creating a fresh interest in the mortgagee claims interest on an agreement contained in a letter written by the mortgagor, the observations of the Supreme Court will apply with full force because what the mortgagee is now trying to enforce is the agreement by which interest is being claimed for the first time in modification of the agreement that interest was not to be paid at all. In 1963 MPLJ 418 the Madhya Pradesh High Court applied the ratio of the Supreme Court decision in *Kashinath Bhaskar's* case.

5. A reference may also be made to a decision of the Punjab High Court in *Karam Chand Gurditta Mal and Others Vs. Banwari Lal Ram Rattan*, In that case in the mortgage deed executed by the mortgagor for a sum of Rs. 4,000/- interest was agreed to be paid at the rate of 3 percent and the mortgage was described as

one with possession. However, the mortgagor remained in possession and continued to pay rent to the mortgagee for about six years when the property was actually delivered to the mortgagee. The mortgagor brought a suit for redemption, and payable only at the rate of 3 per cent as stated in the mortgage deed. The mortgagee, however, placed reliance on two letters written by the mortgagor himself in which he reluctantly agreed on pressure from the mortgagee to raise the rate of interest from 3 per cent to 51/2 per cent. The trial Court had taken the view that the mortgagee was entitled to claim the higher rate of interest in view of these letters and a decree was accordingly passed, directing payment of interest at 51/2 per cent. In appeal the Additional District Judge held that the letters were inadmissible evidence for want of registration and the rate of interest was reduced to 3 per cent. In second appeal the only question was whether interest could be awarded at the rate of 51/2 per cent as undertaken by the mortgagor in his two letters. The Punjab High Court took the view, after referring to the decision in Kashinath Bhaskar Datar Vs. Bhaskar Vishweshwar Karve, and Jeewanchand's case 1963 MPLJ 418, that the letters being compulsorily registrable and not being registered were inadmissible in evidence.

6. It is, therefore, clear that the mortgage was not entitled to claim interest at the rate of 1 per cent, per month prior to the date of suit on the basis of the letter Ex. 64 as contended by Mr. Badiye for the mortgagee. It is no doubt true, as contended by Mr. Badiye, that the letter written by the mortgage contains a promise to pay interest at 1 per cent per month, but in the view which I have taken that letter is inadmissible and cannot have the effect of fastening a liability for payment of interest for want of registration. The claim for interest made by the mortgage-plaintiff prior to the date of suit was, therefore, liable to be negatived.

7. The only amount which the plaintiff was entitled to recover on the date of suit was the amount outstanding as principal. It is an admitted position that Rs. 3,500/- were already repaid by the father of the defendants-appellants, and giving credit for that amount, the only amount which the plaintiff was entitled to recover was Rs. 5,500/-. He was, however, entitled to interest as awarded by the trial Court from the date of suit till realization at 4 per cent, per annum. The result, therefore, is that the decree passed against the appellants is modified by substituting the figure of Rs. 5,500/- in place of Rs. 13,782,.62 and also in place of Rs9,000/- for the purpose of calculation of interest from the date of suit till realization. The appeal is thus allowed with costs.

8. Appeal allowed.