
(1941) 06 CAL CK 0004
In the Calcutta High Court

Sheikh Akbar Ali and Others

APPELLANT

Vs

Sheikh Mafijuddin of Islampur

RESPONDENT

Date of Decision : 06-06-1941

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26G(5)

Citation : AIR 1942 Cal 55

Judgement

1. This rule is directed against an order dated 18th May 1940 made by the Munsif of Dubrajpur in a proceeding commenced by the opposite party u/s 26G(5), Ben. Ten. Act. In July 1922 the opposite party executed a usufructuary mortgage bond in favour of the father of the petitioners to secure an advance of Rs. 100 only received from the latter. The terms of the mortgage bond were, that the mortgagee would enjoy the usufruct of the land in lieu of interest, and that the mortgagor would take back the property on payment of the principal sum in the month of Baisakh 1332 B S. or in the beginning of any other subsequent year; and the mortgagee would go on enjoying the mortgaged properties till the money was paid. There was a further stipulation in the mortgage bond which stood as follows:

Be it further known, that if there arises any hindrance, or disturbance or you are dispossessed from the land described below, till the principal amount is fully realized; in such event I and my heirs shall be liable to you and your heirs for interest on the said principal at the rate of Re. 1-8-0 per cent. per month from the date of such disturbance, and on failure to pay the same, you shall be entitled to realize the amount from my other properties moveable and immovable, and to that neither I, nor my heirs, shall be entitled to raise any objection.

2. In 1940, the mortgagor presented an application to the Munsif at Dubrajpur u/s 26G(5), Ben. Ten. Act, for recovery of possession of the mortgaged property, on the ground that more than 15 years had elapsed from the date of the registration of the bond. The mortgagee did not appear or contest the proceeding

and an ex parte order was made by the Munsif on 18th May 1940, allowing the prayer of the mortgagor opposite party. It is against this order that the present rule has been obtained. The only point that has been raised by Mr. Das who appears in support of the rule is that no legal claim could be founded on Section 26G, Ben. Ten. Act, which as an enactment of the Provincial Legislature, is void u/s 107(1), Government of India Act, 1935, on account of its being repugnant to the provisions of existing Indian law. What is said is, that Section 26G, Ben. Ten. Act, conflicts with the provisions of existing Indian law which are contained in Sections 62 and 68, T.P. Act, and Section 37, Contract Act, and as the matter relates to contracts which is entry No. 10 in the concurrent list, and no assent of the Governor-General has been obtained u/s 107(2), Government of India Act, the section is void u/s 107(1) of the Act. The point is one of considerable public importance and requires careful consideration.

3. A mortgage, as defined in Section 58, T.P. Act, is a transfer of an interest in specific immovable property for securing the payment of money or money's worth. There are two elements involved in a mortgage. In the first place there is a conveyance of some interest in land, and in the second place there is a debt to secure the payment of which the conveyance is made. Transfer or alienation of agricultural land is a Provincial subject coming under Item 21 of the Provincial list, and all contracts relating to agricultural lands are also excluded from Item 10 of the concurrent list. If the mortgage relates to agricultural lands, it is not disputed that it is within the competence of the Provincial Legislature to make laws which would regulate the rights of the transferor and transferee with regard to the property which is the subject-matter of the mortgage. Section 62, T.P. Act, provides, that in the case of a usufructuary mortgage the mortgagor has the right to recover possession of the mortgaged property when the debt is satisfied out of the rents and profits of the property, or in cases where the mortgagee has taken the profits in lieu of interest only, or, in part payment of the mortgage money, when the term if any prescribed for payment has expired and the balance of the mortgage money is paid or tendered. Section 26G, Ben. Ten. Act, has certainly altered this law with regard to usufructuary mortgages created in respect of an occupancy holding or a portion of such holding. As the section stood under Act 4 of 1928, it was made illegal on the part of an occupancy raiyat to effect a usufructuary mortgage other than a complete usufructuary mortgage as defined in Section 3(3) thereof, in respect of his holding or a portion of the holding, nor could the period of such mortgage exceed 15 years, and, in spite of there being any prescribed term for payment, it was open to the mortgagor to exercise his right of redemption any time within the said period. By Bengal Act 6 of 1938, these provisions were extended so as to affect usufructuary mortgages created before 1928.

4. Under Sub-section 1(a) of this section which was introduced by Act 6 of 1938 every usufructuary mortgage subsisting on or after 1st August 1937, which was entered into before the commencement of Bengal Act 4 of 1928 shall be deemed to have taken effect as a complete usufructuary mortgage for the period

mentioned in the instrument or for 15 years, whichever is less. This means that the loan and interest shall be deemed to be extinguished by the profits arising during the period of the mortgage which can never exceed 15 years. (Vide the definition of complete usufructuary mortgage in Section 3(3), Ben. Ten. Act.) This position has only been made clear in Sub-section (5), which has further laid down a summary procedure, under which possession can be taken back by the mortgagor, and it has also specified the date from which the period of mortgage is to be calculated. Now Section 26G, Ben. Ten. Act, so far as it allows the mortgagor of an occupancy holding in any form of usufructuary mortgage to recover possession of the mortgaged property after the expiry of 15 years or the period mentioned in the bond, whichever is less, is undoubtedly in conflict with the provisions of Section 62, T.P. Act. But this repugnancy is perfectly immaterial, as this is a matter which is not covered by the concurrent list. This relates to transfer of, or contracts relating to agricultural lands, and the Provincial legislation is valid, even though it contradicts any existing Indian law. If the Provincial Legislature has power to make a legislation with regard to future transfers, it can certainly, in virtue of its plenary powers, give retrospective effect to such provision so as to affect transfers made before 1928 : vide AIR 1941 16 (Federal Court) .

5. But it is said that even though the Provincial Legislature is competent to lay down that the security shall cease after a certain period, and the mortgagor shall get back the property from the mortgagee, yet it cannot say that the debt itself shall be extinguished if there is a personal liability on the part of the borrowers to pay the money. The mortgagee has a personal remedy against the mortgagor u/s 68(1)(a), T.P. Act, if the latter has personally undertaken to pay the mortgage money. Section 26G(5) so far as it provides that the consideration shall be extinguished being in conflict with this provision of an existing Indian law relating to contract must be deemed to be void. It is further argued that if this part of Section 26G(5) is invalid, the other part which provides for return of the land must be invalid also. The word "thereupon" which connects the two parts of the Sub-section clearly indicates, that it is on the extinguishment of the debt, and as a result of it, that the mortgagor is entitled to claim back his property. In our opinion the fallacy in this argument is in the assumption that there is any personal liability in the type of mortgage dealt with in Section 26G, Ben. Ten. Act, or that Section 68(1)(a), T.P. Act, has any application to such mortgages. The present case is governed by Section 26G, as it was in 1928 and it is the validity of that section, that we have got to consider in this rule. That section refers only to usufructuary mortgages. A usufructuary mortgage has not been defined in the Bengal Tenancy Act and in the absence of a definition in the Act itself we can very well be guided by the definition given in the Transfer of Property Act. u/s 58(d), T.P. Act, the essentials of a usufructuary mortgage are as follows: (1) the mortgagor delivers possession or expressly or by necessary implication binds himself to deliver possession of the mortgaged property; (2) that the mortgagee retains possession till payment of the mortgage money and

(3) the rents and profits of the mortgaged property or any part of the same are received by the mortgagee, in lieu of interest, or in payment of the mortgage money, or partly in payment of the mortgage money.

6. It will be seen therefore that in a usufructuary mortgage properly so called, the remedy of the mortgagee is only to remain in possession till the money is paid. He can neither sue the mortgagor personally for the debt, nor can have a decree for foreclosure or for sale. In our opinion, it is only a pure usufructuary mortgage that conforms to the type defined in Section 58(d), T.P. Act, which comes within the purview of Section 26G, Ben. Ten. Act. Here there is no personal liability on the part of the borrower, and the creditor's remedy is confined to possession of the mortgaged property. If the Provincial Legislature can validly legislate that the mortgagee must give up possession of the mortgaged property after a fixed period, the mortgagee would have no other legal remedy in respect of the mortgage money, and the security and the debt would both stand extinguished. But what would happen if the mortgage deed contains a personal covenant to pay? If there is really a personal covenant to pay within the meaning of Section 68(1)(a), T.P. Act, and the mortgagor besides delivering possession of the mortgaged property to the mortgagee binds himself personally to repay the debt, the mortgagee will certainly get an additional remedy and will be entitled to sue for the mortgage money u/s 68(1)(a), T.P. Act. The mortgage however in that case would cease to be a usufructuary mortgage under the Transfer of Property Act. It would no longer be a pure usufructuary mortgage as defined in Section 58(d), T.P. Act: it can rank only as an anomalous or mixed mortgage, where the rights would be regulated by the contract between the parties. This has been held in a series of cases, some of which are to be found reported in *Chathu v. Kunjan* ('89) 12 Mad 109; *Ramayya v. Guruva* ('91) 14 Mad 232; *Madhwa Sidhanta v. Venkata Ramanjulu Naidu* ('03) 26 Mad 662; *Kangaya Gurukul v. Kalimuthu Annavi* ('04) 27 Mad 526 (FB). It was held in *Kashi Ram v. Sardar Singh* ('05) 28 All 157 that the nature of the mortgage would not be altered by the presence of a personal covenant, unless such covenant imported a right of sale. It has been pointed out by Sir D.P. Mulla in his commentaries on the Transfer of Property Act (vide Mulla, p. 342) that this view is not sound and whenever there is a personal remedy given to the mortgagee whether or not it is accompanied by a right of sale, the mortgage ceases to be a usufructuary mortgage.

7. In our opinion the proper way to construe Section 26G, Ben. Ten. Act, is to exclude from its purview all anomalous mortgages where any personal remedy has been given to the mortgagee and to confine it to usufructuary mortgages pure and simple where the mortgagee has no other remedy to realize his dues except by remaining in possession of the lands. If this construction is sound no conflict with Section 68(1)(a), T.P. Act, is possible, for, in cases where Section 68(1)(a), T.P. Act, will come into operation, Section 26G, Ben. Ten. Act, will have no application at all. This is quite in accordance with the trend of decisions in our Court which has held that all anomalous mortgages are outside the purview of

Section 26G, Ben. Ten. Act. But there is another class of personal contracts which require consideration and which stand on a quite different footing. They are contingent promises and occur more or less as indemnity clauses in a usufructuary mortgage deed. The mortgagor undertakes to pay interest or compensation or the whole or a portion of the mortgage money if the mortgagor is dispossessed from the mortgaged property, or the property is sold for default of Government revenue, or the arrangements contemplated by the parties are somehow or other upset. They are really no part of the mortgage transaction for they come into effect only when the mortgage fails. In *Panchanan Mandal and Another Vs. Sashi Bhusan Pradhan and Others*, the contract was of this description, and it was held by Rau J. that such covenant being in the nature of an indemnity clause was outside the mortgage transaction. The view was accepted in other decisions since then, vide *Khoaj Jamadar Vs. Abdul Sobhan Khan Jalkadar Khan*, , *Abhoy Charan Malo and Another Vs. Harendra Chandra Mandal and Others*, , *Bhutnath Janan and Another Vs. Gopal Prosad Sahu through Sm. Kamini Dei*, . If such contract is really outside the mortgage, it would not give the mortgagee a personal remedy which Section 68(1)(a), T.P. Act, contemplates. It can only furnish a cause of action for instituting a suit in the nature of one to recover damages or compensation.

8. The presence of a stipulation like this would not certainly alter the nature of the mortgage, and the case would still come u/s 26G, Bengal Tenancy Act; but it is not a part of the mortgage transaction, and is an independent contract altogether. Whether such contract is enforceable or not is another matter. It may be a moot point as to whether such indemnity really purports to give relief against loss occasioned by acts done under express provisions of law, and if it does so whether the provisions of the law would nullify such indemnity if given. In considering this last point, the effect of Section 37, Contract Act, in so far as it makes enforcement of contracts subject to other laws would require to be considered. But that is a matter, which is not necessary for us to discuss in the present case. Our conclusion is that when the mortgage is a mixed mortgage and there is a personal remedy given to the mortgagor in addition to his being let into possession of the mortgaged property, Section 26G, Bengal Tenancy Act, as it stood after amendment in 1938 has no application, and no question arises as to whether any part of the section comes into conflict with Section 68(1)(a), T.P. Act. If it is a pure usufructuary mortgage, the return of the lands to the mortgagor puts an end to the security as well as to the debt, and as it is within the competence of the Provincial Legislature to direct the return of the mortgaged property after a certain period the provision of Section 26G(5) even if it is repugnant to Section 62, T.P. Act, is not ultra vires, or void. Whether in such cases, a subsidiary agreement in the nature of an indemnity clause can be enforced or not is a question upon which we do not desire to express an opinion.

9. In *Panchanan Mandal and Another Vs. Sashi Bhusan Pradhan and Others*, , referred to above, Rau J. had to deal with a pure usufructuary mortgage, and he himself held that the so-called personal covenant which the mortgage instrument

contained was in the nature of an indemnity clause. The argument put forward in that case was somewhat different from that urged before us, and in order to meet it Rau J. dealt with the two parts of Sub-section (5) of Section 26G separately. He held that the mortgagor's right to apply for restoration of possession under Part 2 of the Sub-section, and the powers of the Court to make appropriate orders upon such an application were in no way affected by the validity or otherwise of part 1 of the Sub-section. He held that the power given under Part 2 came exclusively within item 21 of the Provincial List, and that the exercise of the right under this Sub-section was in no way dependent in the extinguishment of the debt which was provided for in Part 1. He held that the word "thereupon" referred only to the expiry of the period which was specified immediately before. He therefore left open the question whether owing to some failure in the validity of Part 1 of the Sub-section some right u/s 68(1)(a), T.P. Act, or any similar right conferred by any other "existing Indian law" was saved or not. We respectfully suggest that what has to be left open in these cases is not whether Part 1 of Sub-section (5) may be invalid, and thus save certain rights, but whether the indemnity clause itself, which was outside the mortgage, is enforceable in law or not.

10. In the case before us, there is no personal covenant to pay mortgage money which would make the mortgage a mixed mortgage in law. It is a pure usufructuary mortgage, and comes within Section 26G, Ben. Ten. Act. The stipulation to pay interest in case of dispossession is a collateral agreement, and makes the mortgage nonetheless a usufructuary mortgage. We have no hesitation in holding that the Munsif was right in allowing the mortgagor's prayer for recovery of possession in the present case. The result is that the rule is discharged. Costs one gold mohur. We are not unmindful of the fact that there have been changes introduced into Section 26G, Ben. Ten. Act, by the amending Act 43 of 1940 and now all mortgages where the mortgagee is given possession of the mortgaged property, and which may not be pure usufructuary mortgages have been brought within the purview of the section. We express no opinion on the validity or otherwise of the recent legislation. Certificate u/s 205(1), Government of India Act, is granted.