

(1959) 05 AHC CK 0014
In the Allahabad High Court
Case No : Second Appeal No. 1727 of 1951

Sheo Kumar

APPELLANT

Vs

Vishwa Nath Singh and Others

RESPONDENT

Date of Decision : 12-05-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 3

Citation : AIR 1960 All 217

Hon'ble Judges : Niamatullah Beg, J

Bench : Single Bench

Advocate : B.L. Gupta, for the Appellant; S.S. Tewari and T. Rathore, for the Respondent

Final Decision : Allowed

Judgement

Niamatullah Beg, J.—This appeal has been filed by Shiv Kumar who was a defendant in a mortgage suit in which the relief for foreclosure was claimed by the mortgagee. The appellant was arrayed as a defendant along with other defendants also who belonged to the family of the mortgagor. On 15-3-1948 the trial court passed a preliminary decree for foreclosure in favour of the plaintiff directing that an amount of Rs. 4181/5/3 be deposited by the judgment-debtors in court on or before 15-9-1948 failing which a final decree of foreclosure would be passed. It appears that the judgment-debtors failed to make the deposit by 15-9-1948. They made various deposits of small amounts on various dates by making prayers for extension of time to the court or by making compromise with the decree-holder to the effect that time may be extended. The various installments of money thus deposited by the judgment-debtors eventually amounted to a sum of Rs. 2500/-.

In the end the court refused to give the judgment-debtors any further time for deposit of any further amount. The decree-holders made an application, for preparation of a final decree, The court allowed that application and on 25-3-1950 a final decree for foreclosure was passed. Thereafter the appellant

who was a judgment-debtor made an application for the refund of Rs. 2500/- which has been deposited by him after the passing of the preliminary decree. It may be noted that, on the date of the application this amount was still in the hands of the court and had not been realised or withdrawn by the decree-holders. Both the courts below have rejected the prayer of the appellant who had deposited this amount. This appeal has been filed by Shiv Kumar who had deposited the amount.

2. A preliminary objection has been taken in this appeal. It appears that Vishwa Nath respondent No. 7 died and no steps were taken to bring his legal representatives on the record. It is no doubt correct that Vishwa Nath died. I do not, however, think that his death would make any difference to the maintainability of the appeal. Shiv Kumar the appellant is his son and is already on the record. His two other sons viz. Bankey Lal and Gokaran are also on the record as respondents Nos. 5 and 6. His legal representatives are, therefore, already on the record. All that is to be done is to make a note against their names that they are also the representatives of the deceased. In any case, the money was deposited on behalf of Shiv Kumar, and Shiv Kumar alone can give the application for its refund. The death of Vishwa Nath, therefore, would make no difference to the maintainability of this appeal. I, therefore, overrule the preliminary objection.

3. Having heard the learned counsel for the appellant I am of the opinion that this appeal should be allowed. The lower appellate court has rejected the application of the appellant-judgment-debtor for refund on the ground that the deposits made by the judgment-debtor in the court were held in trust by the court for the decree-holders. The relevant portion of the judgment runs as follows :

"Once an amount has been deposited in the circumstances like the present it is evident that the court holds that amount ever since the date of deposit in trust for the decree-holder."

4. I am of opinion that this is not the correct approach to the question. The amount is held by the Court in trust for the judgment-debtor, if the entire amount is not paid, and for the decree-holder, if the entire amount is paid in accordance with the preliminary decree. In other words, the trust is a conditional one. It is a trust for the decree-holder if the condition of payment of the entire amount is satisfied. If that condition is not fulfilled the trust is in favour of the judgment-debtor. This position will be further clarified by the subsequent portion of the judgment when I come to discuss the effect of the provisions of Order 34, Rules 2 and 3.

5. The lower court has also relied on the provisions of Order 34, Rules 2 and 3, I see nothing in Order 34, Rules 2 and 3 to support the claim of the decree-holder. On the other hand, these provisions, if at all, support the claim of the judgment-debtor. Order 34, Rule 2 lays down the form of the preliminary decree. It

specifies the amount which is to be paid by the judgment-debtor and the period within, which it is to be paid. Rule 3 lays down the conditions and form in which a final decree for foreclosure is to be passed. Order 34, Rule 3, Sub-clause (i) provides that where the entire amount has been paid by the judgment-debtor, the court shall pass a final decree directing the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary, ordering him to retransfer the mortgaged property, and to put the defendant in possession of the same. Order 34, Rule 3, Sub-clause (2) lays down that:

"Where payment in accordance with Sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property."

Sub-clause (3), of the same rule lays down that :

"On the passing of a final decree under Sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged."

6. Two important points deserve to be noted at this stage. The first is that a perusal of Sub-clauses (1) and (2), cited above, indicates that the decree of foreclosure is passed not because the judgment-debtor has failed to make payment of any balance but because he has failed to make payment of the entire amount. In other words, it is passed not in lieu of any unpaid balance but in lieu of the failure to pay the entire decretal amount.

7. The second important point to note is that a perusal of Sub-clauses (2) and (3) cited above indicates that where the entire amount has not been paid, under the law it is the transfer of property mortgaged that operates as a complete discharge of the claim of the mortgagee under the decree. In other words, the law does not entitle the mortgagee decree-holder to claim anything more than the property mortgaged to obtain full satisfaction of his decree. The mortgagee is not entitled to appropriate any partial payments made by the judgment-debtor in court towards the satisfaction of his decree. Thus under the law the decree-holder is either entitled to the entire amount of money or the entire property. He cannot have both.

To allow him to have both would not only be against law but also against equity. Neither the directions given by the court in the order nor the decree which is passed on the basis of the same make any provision for taking account of any partial payment. In fact, they could not do so, as the law itself does not make any such provision. If the intention of the law was that in addition to the property, the mortgagee would further be entitled to the payment of any money deposited in the meantime, one would have thought that the law would have expressly laid it down. In the absence of any specific provision in that regard, I do not see why the equitable interpretation of which this provision of law is

capable and which is in favour of the judgment-debtor should not be accepted as the correct one.

8. Learned counsel for the appellant has relied on two cases. The first case relied on by him is reported in Syed Tayyab Hasan Vs. Syed Saghir Hasan and Others, . In this case the money had already been withdrawn by the decree-holder after the deposit and before the application for refund was made. There is no procedure by which the court can order the decree-holder to redeposit in court the money already withdrawn by him. In the present case, however, at the date of the application the money was still in the control and custody of the court and was not withdrawn by the decree-holder. Under the circumstances, there was no difficulty in the court paying back the money to the party entitled to the same. This case is, therefore, clearly distinguishable from the present one. It may, however, be noted that this case also contains the following observation:

"As regards the effect of the payment of Rs. 1500 by the mortgagors, the law is clear that the decree for foreclosure is to be made final in lieu of tile balance that is left due after giving credit for any payments made by the mortgagors, vide Order 34, Rule 3, Clause (2)."

9. A perusal of Order 34, Rule 3, Clause (2), cited above, "however, does not indicate that the final decree for foreclosure is to be passed in lieu of any balance or on account of the judgment-debtor's failure to deposit the balance. On the other hand, it shows that the final decree for foreclosure is passed because of the failure of the judgment-debtor to pay the entire amount. I, therefore, find it difficult to agree with the above proposition of law as enunciated in this case. In any case, as already observed, this case being clearly distinguishable has no application to the facts of the present case.

10. The next case relied on by the learned counsel is reported in Fida Husain v. Lala Chhanga Mal 10 Oudh Cas 354. In this case also the amount had already been realised by the decree-holder. There is no procedure provided by law by which the court could proceed against the decree-holder and get the amount already withdrawn by the decree-holder refunded by him in the same proceedings. This case is also, therefore, distinguishable. It may, however, be noted that this case also contains the following observation :

"No authority can be produced for the proposition that sums paid under foreclosure decree should be returned when the decree is made absolute."

11. The above observation seems to ignore the aspect that it is for the decree-holder who claims this money to support his claim by reference to some law or authority and not vice versa. As already shown above, both law as well as equity seem to point in a contrary direction. Even if law is taken to be silent on this point, there is reason why in such a situation the equitable position should not prevail.

12. The position of a court in such cases is that of estate holder so long as the

money is in its hand. The question that should be decided by the court in such a case is as to which party is entitled to the money which is kept in deposit in the court. Can it be said that the decree-holder is entitled to this amount? The decree-holder would no doubt be entitled to the amount if the amount paid is the entire amount. In that case, however, he would lose the property. If, however, the entire amount is not paid, the decree-holder would get the property and the person entitled to this amount would be the judgment-debtor who had deposited the money, and who has had to part with his property in full satisfaction of the claim of the decree-holder.

13. Learned counsel for the appellant also argued that the money can be appropriated by the decree-holder as there has been delay in the payment of his dues as a result of extension of time. This argument would mean that he concedes that if partial payment had been made within the period prescribed, the decree-holder would not be entitled to the said amount. There is no provision in the decree by which the decree-holder can claim any payment for any extension granted by the court. Under the circumstances, the same principles should be applicable to both the cases. If the decree-holder suffered in any way by the grant of extension of time, it was open to him to ask the court to grant extension only on certain conditions.

In fact the law has made a definite provision in that regard in Order 34 Rule 2(2) C. P. C. No such conditions were imposed at the time of the extension of the period of payment. Further, no such conditions were even incorporated in the compromise for extension of period arrived at as a result of agreement between the parties. For the above reasons I am of the opinion that there is no warrant either in law or in equity for refusing refund of this amount to the appellant. I would, therefore, allow this appeal, set aside the judgment of the court below, and direct that the amount be refunded to the judgment-debtor appellant. The appellant would be entitled to his costs. Leave to appeal to a Bench is allowed.