(1992) 02 GAU CK 0004

In the Gauhati High Court

Case No : Civil Revision No. 351 of 1985

Sher Alam APPELLANT

Vs

United Bank of India RESPONDENT

Date of Decision : 10-02-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11, Order 34 Rule 4

Citation : AIR 1993 Guw 25

Hon'ble Judges : U.L. Bhat, C.J

Bench : Single Bench

Advocate : T.C. Khatri, K.K. Bhatra and J.N. Ansari, for the Appellant; B.K. Goswami and R.L. Yadav, for the Respondent

Final Decision : Dismissed

Judgement

U.L. Bhat, C.J.—Respondent bank Which advanced money to revision petitioner on charge of immovable property filed a suit for recovery of the money on the charge and by the sale of the hypothecated property. Defendants initially filed written statement admitting the material facts in the plaint and praying that a decree may be passed allowing them to pay the decretal amount at a monthly instalment of Rs. 2,000/- and exempting them from paying future interest. Thereupon the plaintiff filed an application praying for decree to be passed on admission and also stating that the plaintiff was not agreeable to allow the defendants to pay the decretal amount in instalments. Thereupon the defendants filed an application on 15-10-85 praying that either a decree may be granted allowing them the benefit of instalment or they may be permitted to file a fresh written statement. This application is opposed by the plaintiff and dismissed by the trial Court. Hence this revision.

2. I have gone through the plaint and the written statement filed by the defendants. The defendants admitted the loan, the mortgage, the guarantee, the non-payment of the loan and the right of the plaintiff to enforce the mortgage. These admissions are contained in paragraphs 2 and 3. Paragraph 1 reads thus

"That the defendants admit the claim of the plaintiff."

Paragraph 4 reads thus -

"4. That this application is made bona fide and for ends of justice.

In these premises, the defendants pray

a) that the suit be decreed against the defendants with mortgage rights over the lands and house and hypothecated charges over the said vehicle and its accessories as described in schedule.

b) that the defendants be allowed to pay the decretal dues by monthly instalments of Rs.2,000/- (Rupees Two Thousand) each without fail.

c) that the defendants be granted exemption from paying future interest."

3. The claim for benefit of instalment was resisted by the plaintiff and thereupon the defendants wanted either a decree with the benefit of instalment as suggested by them or permission to file written statement contesting the suit. This application, it appears to me, was rightly dismissed by the trial Court: The defendants having filed a written statement admitting the material averments and claim in the plaint, cannot ordinarily be allowed to turn round and substitute the written state ment by another written statement contesting the suit. The ordinary rule must give way in exceptions cases such as where a party is made to sign a pleading on account of fraud or compulsion or where his written statement is vitiated on account of any other legal infirmity. But there is no such plea in this case. Defendants sought to compel the plaintiff to allow repayment in instalments under threat of filing a written statement contesting the suit. That could not have been allowed by the Court below.

4. It is, of, course, always open to the plaintiff in a suit on mortgage to permit his judgment-debtor to pay the decretal amount after a lapse of a particular period or in instalments. That is a matter for the plaintiff to decide. Order 34 Rule 4 deals with preliminary decree in a suit for sale. The relevant portion of the rule reads :--

"4. Preliminary decree in suit for sale. -- (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in Clauses (a), (b) and (c) (i) of Sub-rule (1) of Rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree....."

Relevant portion of Rule 2 reads thus :--

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

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

(c) directing -

(i) that, if the defendant 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 amount taken under clause (a),........"

5. By virtue of Rule 4 read with Rule 2 of Order 34 C.P.C., in passing a preliminary decree, the Court shall fix a period (and that period must be 6 months or less) within which the defendants shall pay the amount determined to the plaintiff. The decree should specifically refer to the time so granted and direct the defendant to pay the amount determined within such time and allow the plaintiff to apply for a final decree in case the amount is not paid within time fixed. Sub-rule (2) of Rule 4 enables the Court to extend the time for payment of the amount. In acase where the mortgage document does not allow the mortgagorto repay the "amount in instalments, the Court in passing decree under Rule 4 of Order 34, CPC can only grant to the defendant time not exceeding 6 months and cannot grant him the benefit of paying the amount in instalments. Payment in instalments is foreign to the scope of Rule 4 Order 34, CPC.

6. In this connection it may be relevant to notice that Sub-rule (1) of Rule 11 of Order 20, CPC reads thus -

"11. Decree for recovery of immovable property.--(l)Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason incorporate in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable."

The above provision enables the Court passing the decree to grant defendant benefit of paying decretal amount in instalments in the case of "decree for payment of money". It is argued a decree for recovery of money on mortgage can be regarded as decree for recovery of money. A decree under Order 34 Rule 4, CPC is not a decree for payment of money, but it is a decree for recovery of money by sale of mortgaged property. Such a decree has to be passed in conformity with the provisions of Order 34, CPC, and has to be regarded as a decree passed on a mortgage and not a decree for money simpliciter. Therefore, the provisions of Rule 11 of Order 20, CPC cannot enable the Court to grant the benefit of instalments while passing a decree for enforcement of a mortgage. The same view has been taken by Division Bench of this Court in F.A. 79 of 1986, United Bank of India v. Sri Jadav Chandra Deka relying on a decision in United Bank of India Vs. The New Glencoe Tea Co. Ltd., and I am in respectful agreement with the same. The Calcutta High Court has placed reliance on three decisions of the Madras High Court in Dwarampudi Basivireddi by mother and guardian Manikyam Vs. Gadi Kamaraju and Others, K.G. Monappa Vs. A. Venkataswami Naidu and Others, (2) N. Shantilal Vs. A. Sankarasubha Mudaliar, andoneofPatna High Court in Basanta Kumar Mitra Vs. Chota Nagpur Banking Association, Ltd.,

7. For the above reasons I decline to interfere and accordingly dismiss the revision petition but without cost.

