
(2011) 09 AHC CK 0396

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 15496 of 1983

Smt Hirai and Others

APPELLANT

Vs

D.J., Gorakhpur and Others

RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 7, Order 14 Rule 7(2), Order 34 Rule 7, Order 34 Rule 8, Order 34 Rule 8(1)
Limitation Act, 1908 — Section 30
Limitation Act, 1963 — Article 137, 181, 61

Citation : (2011) 10 ADJ 643 : (2012) 1 CivCC 543

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon"ble S.U. Khan, J.—This writ petition was dismissed in default on 19.9.2006. Thereafter, restoration application was filed by the petitioners on 12.12.2006. On 18.5.2011, arguments of learned counsel for the petitioners were heard on the restoration application as well as on the merit of the writ petition. On the said date no one had appeared on behalf of contesting respondents. Thereafter, the matter was directed to be put up on 23.5.2011 on which date also no one appeared on behalf of contesting respondents. Restoration application was allowed on the said date and further arguments of learned counsel for the petitioners on the merit of the writ petition were heard and judgment was reserved.

2. Sri Dhanraj, husband of original petitioner No. 1 and father of original petitioner No. 2, and Haribansh Misra father of respondents No. 3 & 4 instituted O.S. No. 694 of 1949 against Smt. Munakka Devi, predecessor-in-interest of the original petitioners who have also died and substituted by their legal representatives. The relief claimed in the suit was for redemption of usufructuary mortgage dated 26.9.1919. The suit was decreed on 13.8.1951 and plaintiff was directed to deposit Rs. 2314/- which were deposited on 13.2.1952. The

defendant in the suit Smt. Munakka Devi filed appeal against judgment and decree passed by the trial Court. The appeal was allowed. Against the said judgment and decree, plaintiff Haribansh Mishra filed Second Appeal No. 2323 of 1953 in this High Court. The second appeal was allowed on 1.5.1964. The judgment and decree passed by the lower appellate Court was set aside and judgment and decree passed by the trial Court was restored with the modification that plaintiff was directed to deposit 12% per year interest also. For 16 years plaintiff did not comply with the condition of the deposit of the interest. On 16.1.1980 plaintiff filed application for preparation of preliminary decree. The application was rejected by Additional Munsif, Gorakhpur on 7.4.1981 holding that the judgment and decree passed by the High Court was itself a preliminary decree. Order dated 7.4.1981 was maintained in revision which was dismissed by First Additional District Judge, Gorakhpur on 5.4.1982.

3. Thereafter plaintiff filed an application on 19.5.1982 before the trial Court seeking condonation of delay in depositing the amount of interest as directed by - the High Court through its judgment and decree of 1964. The said application was filed under Sections 148 & 151 and Order 14 Rule 7(2), C.P.C. The specific prayer was that plaintiff might be permitted to deposit amount of interest (12% interest as directed by the High Court to be deposited). The application was registered as Misc. Case No. 117 of 1982, Narbadeshwar Misra and others v. Smt. Hirai and others. Munsif First Gorakhpur allowed the said application (4-ga) on 4.7.1983 and permitted the plaintiff to deposit the amount of interest. The ground of condonation of delay taken by the plaintiff was that after decision of the High Court in the second appeal the file was consigned to record room and plaintiff had no knowledge of the same. The defendants placed reliance upon an authority of Patna High Court reported in Md. Azim and Others Vs. Md. Sultan and Others, holding that in respect of decree of usufructuary mortgage, provisions of Order 14 Rule 7 C.P.C. were not applicable. However learned Munsif placing reliance upon Narsingh Prasad Singh and Others Vs. Partap Singh and Others, , held that time could be extended in the matter of depositing mortgage money. For the sufficiency of ground of condonation of delay, trial Court held that earlier the plaintiff had filed application for preparation of final decree, hence appropriate ground of condonation of delay had been made out. In this regard, the trial Court did not keep in mind that application for preparation of preliminary decree was itself filed after 16 years, i.e. on 16.1.1980. The trial Court did not say anything regarding the delay from 1.5.1964 when second appeal was allowed till 16.1.1980 when application for preparation of preliminary decree was filed.

4. Against order of the Munsif First, Gorakhpur dated 4.7.1983, predecessor-in-interest of defendants petitioners filed Civil Revision No. 300 of 1983, which was dismissed by District Judge, Gorakhpur on 24.11.1983 hence this writ petition.

5. The revisional Court held that delay could be condoned in view of the fact that final decree for foreclosure of sale had not been passed. Regarding sufficiency of cause of delay in a passing manner revisional Court held that plaintiff had

succeeded in showing good cause for extending the time to make deposit.

6. In the second supplementary affidavit filed in this writ petition, it was stated in Para-3 of the same that the 12% per year interest as directed by the High Court through judgment dated 1.5.1964 was deposited on 15.7.1983 (Rs. 8905/-).

7. As far as the question of condonation of delay is concerned, plaintiff respondent completely failed to make out any ground. The Courts below also have not held that any good ground for condonation of delay had been made out. The assertion that after decision of the second appeal by the High Court the file was consigned to the record room is neither here nor there. After decision of a case, the file is consigned to record room unless some application is filed. Second appeal had been filed by the plaintiff himself and was allowed hence he could not say that he was not aware of the same. In fact he never asserted that he was not aware of the same. Thereafter consigning the file to the record room was absolutely no ground of condonation of delay. Sending the file to record room after decision of case is a ministerial act which always follows the decision of the case and for which no party is required to be informed. Just after filing of the applications in 1980 & 1982 the file was taken out from the record room. Similarly if the application giving rise to the instant writ petition had been filed immediately after decision of the second appeal by the high Court in 1964, file would have been summoned from the record room.

8. However the matter does not end here. The Supreme Court in K.P. Pillai v. K. Sumathi, AIR 1994 SC 191 and Achaldas Durgaji Oswal (Dead) through Lrs. Vs. Ramvilas Gangabisan Heda (Dead) through Lrs. and Others, (hereinafter referred to as 1994 and 2003 Authority of the Supreme Court respectively) has held that in the case of usufructuary mortgage after passing of the decree for redemption it is not at all necessary to seek condonation of delay in making the deposit even though time fixed by the Court or six months period provided under Order 14 Rule 7, C.P.C. has expired. Part of Para 2 and Paras No. 3 and 6 to 9 of the 1994 authority of the Supreme Court are quoted below:

2...To resolve the legal tangle, it is necessary to set out the relevant provisions of Order 34, Rules 7 and 8, C.P.C., 1908, which provide thus:

7. (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) if the plaintiff pays into the 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.....

(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 the 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 cost, charges, expenses and interest.

6. In the case of usufructuary mortgage clause (b) of sub-rule (3) of Rule 8 expressly excludes the right of the mortgagee to apply for foreclosure or sale or redemption, Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost It will be barred only on expiry of the period of limitation prescribed under the" Limitation Act. The reasons are obvious. Order 34, Rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor to seek redemption of the usufructuary mortgage in a decree under Rule 8(3) of Order 34. The mortgagee having been in possession and enjoyment of the hypotheca is not disabled by the preliminary decree. On the other hand the liability continues to subsist against the mortgagor. Therefore, it is up to the mortgagor to redeem the mortgage. Till then his liability under the mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34, R. 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 (Article 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.

7. The question, therefore, is whether the application filed by the appellant is barred by limitation. As seen, the appellant is only puisne mortgagee for redemption of the first usufructuary mortgage with a view to secure his right to remain in possession for 10 years in terms of the conditions in the second mortgage. The preliminary decree extracted above does show the real legal character of the appellant as mortgagee and it is one of simple decree for redemption and in default for sale of the hypotheca. As already held in a suit for redemption of usufructuary mortgage the mortgagee has no right to bring the hypotheca to sale or to foreclose the mortgagor debarring the mortgagor from

redemption of usufructuary mortgage. On the other hand the right to redemption of the first mortgage enured to the respondent mortgagor. So long as the final decree for redemption is not passed, at any time before final decree is passed or sale made in furtherance thereof is confirmed, it is open to the respondent-mortgagor to redeem it. Instead of availing the remedy under Order 34, Rule 8(1) the appellant filed a separate suit. So long as the remedy for redemption is not lost the mortgagor would avail of and seek redemption of the mortgage, even by separate suit.

8. Under Article 137 of the Schedule to the Limitation Act, 1963 (Article 181 of Schedule II of old Act) three years period began to run when the right to apply accrued which began on May 7, 1970. The preliminary decree was drafted in Form No. 7-C (preliminary for redemption where on default of payment by mortgagor a decree for sale is passed). The preliminary decree since fixed the outer limit for deposit of the redemption money as on May 6, 1970 and the same was not extended by an order of the Court and I.A. No. 549 of 1979 was filed for passing the final decree on April 5, 1979 by which time the remedy to pass final decree has been barred by limitation.

9. The proceeding in the preliminary decree does not get terminated by dismissal of I.A. No. 58 of 1972, on June 26, 1975 or for non-prosecution. Till date of passing the final decree and executed or till its remedy is barred by limitation under Article 137 of the Schedule to the Limitation Act, 1963 the Court has power and jurisdiction to entertain the application to pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. The dismissal of the earlier application or non-prosecution, therefore, does not per se bar the right of the plaintiff. But if remedy to enforce preliminary decree for the redemption is barred by the limitation, thereafter the right remains unenforceable. The deposit, therefore, is non est and the Court cannot proceed to pass final decree as the remedy is lost. Therefore, the mere dismissal of the first application for non-prosecution and withdrawal of the redemption money deposited thereunder per se creates no bar to entertain second application. Equally instead of availing the remedy of depositing the redemption amount in the pending proceedings under Rule 8(1) of ORDER 34, the respondent instituted an independent suit for redemption. Per force, though it does not operate as bar to maintain the application to pass final decree, Court cannot proceed further with the application. Otherwise conflicting decisions would arise giving rise to multiplicity of proceedings. The Court would stop to proceed further in the matter. In view of finding that the application to pass final decree is barred by limitation, the trial Court has no jurisdiction to proceed with the application under R. 8(3) of ORDER 34 and to pass final decree. Accordingly, though for different reasons, the decree of the High Court, in the second appeal, is legal and does not warrant interference. The appeal is dismissed but without costs.

(Underlining supplied)

The above authority has been quoted with approval in the 2003 Authority of the Supreme Court, paras No, 25 & 36 of which are quoted below:

25. A bare perusal of the provisions of Order 14, Rules 7 and 8 would show that despite failure to pay the amount found or declared due by the preliminary decree on or before the date fixed by the Court, the mortgagee-defendant shall be entitled to apply for a final decree under Clause c(ii) of Rule 7 of Order 14. In a case of a mortgage by conditional sale or anomalous mortgage, the mortgagee can pray for passing of a final decree debarring the mortgagor from claiming his right to redeem the property. In a case of a usufructuary mortgage, however, the mortgagee is not entitled to apply for a final decree. The right of mortgagee to apply for a final decree is provided in sub-clause (3) of Rule 8 of Order 14. His application for a final decree must be confined to for declaration that the plaintiff and all persons claiming under him are debarred from all right to redeem the property in the case of a mortgage by a conditional sale or of an anomalous mortgage the terms whereof provide for foreclosure only and not for sale. In the case of the mortgage other than usufructuary mortgage, the mortgagee can file an application to pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds thereof 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. Sub-rule (1) of Rule 8 shows that only a mortgagor can apply to the Court to pass a final decree on payment of the amount found or declared due under the preliminary decree on making this deposit and upon filing the application as provided for in sub-rule (1) of Rule 8 the mortgagor can request the Court to order the mortgagee to put him in possession of the properties which were the subject-matter of the mortgagee. The amount determined by the Court which the mortgagor is liable to pay to the mortgagee can be deposited before the right of redeem is lost. It may be noticed that even sub-rule (2) of Rule 7 of Order 14 does not apply to the usufructuary mortgage. It may be noticed that by reason for the amendment introduced in 1929 the right conferred earlier on a usufructuary mortgage to bring the property to sale in case of the mortgagor not making the payment within the time fixed in the decree was taken away. As sub-rule (2) of Rule 7 is applicable only in a case of mortgages other than the usufructuary mortgages, a usufructuary mortgagor is not entitled to seek extension of time and in that view of the matter the fact that such an application made by the first respondent herein was rejected becomes irrelevant.

36. We are, therefore, of the opinion that although by reason of preliminary decree in the suit for redemption of usufructuary mortgage, the Court may fix the time for payment of the amount declared due but default in depositing such payment would not debar him from a right to redeem the mortgaged property

(Underlining supplied)

9. The authority of Patna High Court of Mohd. Azim not followed by both the Courts below has been quoted with approval in the 2003 authority of the

Supreme Court along with an authority of this Court reported in Loknath Misir and Others Vs. Smt. Daulta Kuer and Others, . The 2003 Authority of the Supreme Court also quoted with approval the authority of this Court in Yashpal Singh v. Ved Prakash, 1988 ALJ 594, wherein the view taken by the Patna High Court in Mohd. Azim's authority was approved. Paras No. 26 & 27 of 2003 authority of the Supreme Court are quoted below:

26. As regards application of Article 137 of the Limitation Act, the different High Courts have laid down different laws. The Oudh High Court in Banke Behari Lal and others v. Ghani Ahmad and others, AIR 1922 Oudh 33 held that Article 181 of the old Limitation Act will have no application. Similar view has been taken in Ramaiah v. Veeraiah, ILR (1983) 1 Kar 114. However, same High Courts have taken a view that the period of limitation provided for under Article 137 starts from the date of deposit. (See Subramaniam Chettiar and Another Vs. Muthiah Pillai, , Bhagabat Sit v. Balaram Sit, AIR 1963 Ori, Krishnaji Moreshwar Joshi v. Bhakatram Sadashiv Patil and others, 1998 (2) Kar LJ 290, K. Kunjamma and Others Vs. Bhageerathy Amma Gomathy Amma and Others, , Loknath Misir and Others Vs. Smt. Daulta Kuer and Others, , Md. Azim and Others Vs. Md. Sultan and Others,).

27. A learned Single Judge of the Allahabad High Court in Yashpal Singh v. Ved Prakash, 1988 (2) Civil LJ 356: 1988 All LJ 594 held (wrongly recorded by the High Court as a judgment of this Court):

Similar observations have been made in Md. Azim and Others Vs. Md. Sultan and Others, , these two cases have also indicated that a preliminary decree in a suit for redemption of an usufructuary mortgage under Clause (c)(i) of Rule 7(1) of Order 14 of the CPC fix a time for payment of the amount declared due under the decree. But default in making payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff-mortgagor from all right to redeem the mortgaged property.

10. Under old Limitation Act, 1908, limitation to file suit for redemption was 60 years, however under the Limitation Act, 1963, the limitation was curtailed to 30 years (Article 61 of the Schedule). By virtue of Section 30(a) of Limitation Act, 1963, which is quoted below suit could be filed till 1970:

30. Provision for suits, etc: for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908.--Notwithstanding anything contained in this Act,--

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908 (9 of 1908), may be instituted within a period of seven years next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier:

Accordingly, deposit could be made only till 1970 when limitation to file suit

would have expired.

11. The writ petition is therefore allowed. Impugned orders are set aside.