(2009) 12 SHI CK 0041

In the High Court Of Himachal Pradesh

Smt. Jaswant Kaur and Others — APPELLANT

Vs

Des Raj and Others — RESPONDENT

Date of Decision : 02-12-2009

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 60, 68(1)(d)

Citation : AIR 2010 HP 61 : (2010) 4 CivCC 103 : (2011) 7 RCR(Civil) 2226 : (2010) 1 ShimLC 299

Hon'ble Judges : Sanjay Karol, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanjay Karol, J.—In this Regular Second Appeal filed u/s 100 of the Code of Civil Procedure, 1908 the judgment and decree dated 26.6.1998 passed by the District Judge, Solan camp at Nalagarh, in Civil Appeal No. 64-NL/13 of 1995, affirming the judgment and decree dated 29.4.1995 passed by the Sub Judge, Ist Class, Nalagarh, District Solan, H.P. in Civil Suit No. 305/1 of 1989 has been assailed. The Courts below dismissed the plaintiffs'' suit for declaration that with the mortgagors'' right of redemption having come to an end due to efflux of time, the plaintiffs have become owners of the mortgaged land.

2. The appellants herein are the original plaintiffs and/or their legal representatives. For the purposes of adjudication of the present appeal, original plaintiffs are referred to as the plaintiffs. The respondents herein are either the original defendants No. 1 to 17 and/or their legal representatives and hence for the purposes of adjudication of the present appeal are referred to as the contesting defendants.

3. Brief facts necessary for adjudication for the present appeal are as under:

The plaintiffs filed a suit for declaration that they have become owners of land measuring 6 Bighas 11 Biswas, comprised in K/K No. 24/24 min, Khasra No. 44, situated in the area of Village Dattowal, Tehsil Nalagarh, District Solan, H.P. (hereinafter referred to as the suit land). It is their pleaded case that Shri Labhu and Datta Ram, predecessor-in-interest of the contesting defendants, who were the owners of the suit land, on 21.6.1958 mortgaged it for a sum of Rs. 5000/- with Smt. Uttami, predecessor-in-interest of the plaintiffs and proforma defendants 18 to 23 (hereinafter referred to as the proforma defendants), when the possession of the same was also handed over to her, but, however, due to fiduciary relationship between the parties, entry of mortgage could not be incorporated in the revenue record. In April 1989, the contesting defendants forcibly dispossessed the plaintiffs from the suit land by claiming themselves to be owners thereof. With the expiry of the period of redemption of mortgage on 21.6.1988, and the cause of action having been lost with the efflux of time and also by forcible dispossession, the plaintiffs be held to be owners and put back in possession thereof.

4. The contesting defendants filed written statement completely denying handing over possession of the suit land by the mortgagor to the mortgagee in the year 1958 or the plaintiffs being dispossessed by them in April, 1989. The mortgagor and then the contesting defendants always continued to be in uninterrupted and continuous possession of the suit land in their own right. However, with regard to the creation of the mortgage, they took a contradictory stand. On the one hand they denied execution of the mortgage deed yet on the other hand they pleaded repayment of the mortgage amount in the year 1959 itself.

5. Based on the pleadings of the parties, the trial Court framed the following issues:

1. Whether Labhu and Datta sons of Gulaba have mortgaged the suit land with possession for a consideration of Rs. 500/- on 21.6.1958 with Ms. Uttami, as alleged? OPP

2. Whether the plaintiffs have become the owner of the suit land by efflux of time? OPP

3. Whether the suit of the plaintiff is not maintainable, in the present form? OPP

4. Whether the plaintiffs have no locus standi to file the suit as alleged? OPD.

5. Whether the suit of the plaintiffs is bad for misjoinder of parties as alleged? OPD.

6. Whether the suit of the plaintiff is barred by time? OPD.

7. Whether Labhu & Datta Ram have repaid the mortgaged amount of Rs. 500/- to mortgager as alleged, if so, its effect? OPD.

6. Appreciating the evidence led by the respective parties, the trial Court concluded that (i) keeping in view the admissions made by the contesting defendants, the execution of the deed of mortgage (Ext.P-1) stood proved; (ii) as claimed, the contesting defendants could not prove repayment of the

mortgage amount, (iii) the oral as well as documentary evidence, Ext.D-1 being the revenue record, conclusively proved that in fact the possession of the suit land was never handed over to the mortgagee and uninterruptedly continued to remain with the mortgagors, (iv) plaintiffs'' pleaded case was at variance with their evidence. During trial they set up a new case that the mortgagors'' possession was permissive as they were tilling the land as tenants on "Batai" basis, (v) neither was the mortgagors'' possession permissive on "Batai" basis nor were the plaintiffs ever dispossessed from the suit land by the contesting defendants in the year 1989, (vi) the mortgage was usufructuary in nature and not simple, and (vii) Since both the mortgagors and mortgagees had failed to exercise their statutory rights within the prescribed period of limitation, therefore, the plaintiffs'' suit was barred by limitation, hence the same was dismissed. Aggrieved plaintiffs filed an appeal by urging a ground that the trial Court had erred in interpreting the mortgage to be usufructuary in nature whereas in fact it was a simple mortgage. The parties had only created a simple mortgage. The mortgagors having failed to redeem the mortgage within the prescribed period of limitation, therefore, the cause of action for filing the suit accrued only with the expiry of the said period.

7. The first Appellate Court (i) accepted the plaintiffs'' contention that the mortgage was simple in nature as possession of the suit land was never handed over to the mortgagees; (ii) the findings of the trial Court that the contesting defendants had not dispossessed the plaintiffs from the suit land were upheld; (iii) Subject to the period of limitation prescribed under Articles 62 and 63 of the Limitation Act, 1963 (hereinafter referred to as the Limitation Act), the mortgagee had a right to either recover the mortgaged amount or the possession of the suit land; (iv) in a case of a simple mortgage the mortgagee had a right of sale and realization of the mortgaged debt which stood expired; (v) the claim for possession u/s 68(1)(d) of the Transfer of Property Act, 1882 (hereinafter referred to as the T.P. Act), having accrued with the execution of the deed of mortgage also expired with the efflux of time; (vi) relying upon the decision of the High Court of Mysore in Puttamadamma v. Puttappa AIR 1969 Mys 20, it was held that mortgagee''s right to sue did not flow after the expiry of the prescribed period of limitation for redemption by the mortgagors. Hence the appeal was dismissed.

8. The present appeal stands admitted on the following substantial question of law:

In a suit for possession of mortgage property whether the time would start to run when the right to redeem the mortgage accrues u/s 60 of the Transfer of Property Act or when the right to possession becomes available.

9. Shri Roshan Lal Batta, learned senior counsel for the plaintiffs and Shri S.S. Mittal, learned Counsel for the contesting defendants have made their respective submissions. I have perused the record.

10. Undisputed facts emerging from the record are as under:

The predecessor-in-interest of the contesting defendants mortgaged the suit land with the predecessor-in- interest of the plaintiffs vide registered deed dated 21.6.1958. Though there was no fixed period for repayment the mortgage amount was to be repaid in the month of May/June. The mortgagee was never put in possession of the mortgaged property and the mortgagors uninterruptedly continued to occupy the same in their own right.

11. Admittedly neither did the mortgagors exercise their statutory right envisaged under Sections 60 to 66 of the T.P. Act nor did mortgagees exercise their right under Sections 67 to 77 of the T.P. Act. The mortgagors did not file any suit for redemption nor did the mortgagees initiate any action for foreclosure or sale. It was only on 30.9.1989, for the first time that the plaintiffs initiated the proceedings in question. Importantly, the suit is not for foreclosure of redemption or sale of the suit land.

12. That the plaintiffs themselves had taken false and contradictory pleas which stands proved by concurrent findings of fact returned by the Court below.

13. The plaintiffs themselves, during the course of arguments before the trial Court, in the grounds urged before the first Appellate Court and before this Court contended that the mortgage is simple in nature. Hence, by taking it to be a simple mortgage the case is being examined for the purposes of deciding the appeal. The rights of the parties are governed by Chapter-IV of the T.P. Act, 1882. Simple mortgage has been defined as under:

58(b). - Simple mortgage. --Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagees shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

14. Sections 60 to 66 deal with the rights of the mortgagors and Sections 67 to 77 deal with the rights of the mortgagees. The period prescribed under the Limitation Act for exercising such rights is as under:

61. By a mortgagor-

(a) to redeem or recover possession of immovable property mortgaged; Thirty years When the right to redeem or to recover possession accrues

(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration; Twelve years When the transfer becomes known to the plaintiff

(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied Three years When the mortgagor re-enters on the mortgaged property.

62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property. Twelve years When the money sued for becomes due.

63. By a mortgagee -

(a) for foreclosure;

(b) for possession of immovable property mortgaged Thirty years Twelve years When the money secured by the mortgage becomes due. When the mortgagee becomes entitled to possession.

15. The Apex Court in State of Kerala Vs. Cochin Chemical Refineries Ltd., , has held that failure on the part of the mortgagee to advance the money undertaken by him under the deed of mortgage would not make the transaction to become invalid as the mortgagor would have the right to recover the same. The logic being that once a document transferring the immovable property has been registered, the transaction passes out of the domain of a mere contract and into one of a conveyance and such a completed transaction is governed by the provisions of the Transfer of Property Act and not so much of the Contract Act.

16. The Privy Council in Sri Raja Papamma Rao v. Sri Vira Pratapa H.V. Ramachandra Razu and Anr. ILR Mad. 249 (Five Judge Bench) has held that in a case of simple mortgage there is no transfer of ownership and the mortgagee''s right is to be enforced by judicial sale.

17. In Manimala Devi Vs. Indu Bala Debya and Others, the Apex Court while dealing with a case, where upon the sale of mortgagor''s interest in a Court auction, the mortgagor was dispossessed and the mortgagee was pleading the same to be furnishing a fresh cause of action for enforcement of the mortgage, while dealing with mortgagee''s right u/s 58(1)(b) of the T.P. Act the Court held that a suit for enforcement of a mortgage being governed by Article 132 of the Limitation Act, 1908 had to be filed within a period of twelve years from the date on which money sued for had became due. The dispossession of the mortgagee is not one of the grounds prescribed by the Act for extension of the time prescribed for filing a suit by the mortgagee. The Court further held that Section 68 of the Transfer of property Act does not deal with the period of limitation for filing a suit or extension of the period prescribed by the Limitation Act for filing a suit. The right conferred u/s 68 of the property is not a right to enforce the mortgage but a right to sue for the mortgage money on the personal covenant or to claim compensation when the mortgagee is deprived of his security. A suit for enforcement of the personal covenant to pay the mortgage money when the mortgagor has bound himself to repay the same is governed by Article116 of the Limitation Act, 1908.

18. In Priya Sakhi Debi v. Manbodh Bibi ILR CS-425, a view has been taken that a simple mortgagee is not entitled under the Transfer of Property Act to take possession of the mortgage property as he holds the property as security of loan

and the mortgagor continue in possession thereof.

19. The period of limitation starts the very first date of the valid mortgage, unless any restraint in the mortgage deed itself is provided for.

20. The Apex Court in Panchanan Sharma Vs. Basudeo Prasad Jaganani and others, has held that when there is no stipulation regarding period of limitation in the deed it can be redeemed any time.

21. Where the deed does not fix time for payment, it starts running from the date of the deed and if the time is fixed for payment, the time would start running from the date so fixed. The assumption in law being that the deed of mortgage itself is the date on which the amount is payable. [Hikmatulla Khan and Anr. v. Imam Ali and Ors. ILR (1890) All. 203 ; Sonar Bangla Bank Ltd. Vs. Calcutta Engineering College and Others, and Ram Dayal and Others Vs. Aminuddin and Another

22. A five Judge Bench of Allahabad High Court in Shib Lal v. Ganga Prasad ILR Vo.VI 1884 Allahabad Series-551, has held as under:

The relation of mortgagor and mortgagee, in common with other contracts, creates mutual rights and obligations. After the relation is once established, and viewing that relation with reference to the question now before us, the right of the mortgagor is to redeem the property from the encumbrance; the right of the mortgagee is to enforce his security, whether it is a simple mortgage, a usufructuary mortgage, or a mortgage by conditional sale, and it seems to me that if sixty years are allowed to the mortgagor for enforcing his right by redemption, a similar period should reasonably be allowed to the mortgagee for enforcing his right according to the nature of his security. It is intelligible to me, therefore, that so long as the mortgagor is allowed sixty years to redeem, the mortgagee should be allowed a similar period to enforce his security by foreclosure or sale of the property, as the case may be. That the present Limitation Act has introduced an important alteration in the law cannot be doubted: that the alteration is consonant with natural justice and jurisprudential conceptions I fully believe.

23. In Bibijan and Others Vs. Murlidhar and Others, , the Apex Court held that where the mortgagee had acknowledged the mortgage, the limitation would start to run from the date of such acknowledgement by the mortgagee which would give fresh cause of action for filing a suit for redemption and possession of the mortgagors. The Court was considering the provisions of Article 61 of the Limitation Act.

24. The Apex Court in Sampuran Singh and Others Vs. Smt. Niranjan Kaur and Others, had to deal with a case where for the property mortgaged in the year 1893 and in the year 1959 the mortgagors sold their land vide registered sale deed. In the year 1960 the mortgagees also sold their mortgaged rights. Thereafter in the year 1980 mortgagors filed a suit for possession by way of

redemption of the land. All along the mortgagors continued to be in possession of the suit land and got it cultivated through their tenants. Considering the starting point of limitation, the Apex Court repelled the mortgagors contention that with the original mortgagees acknowledging the mortgage a fresh period of limitation had started to run from the year 1960. The Apex Court further held that:

The period of limitation starts the very first date of a valid mortgage. The court has only to see whether a mortgage is valid or not. If it is valid, right to redeem to the mortgagors accrues from that very date, unless any restraint in the mortgage deed is provided specifying restriction under it. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage, that would be from March 1893. The submission based on the language of Article 60(a) of the Limitation Act is misconceived.

25. In Achaldas Durgaji Oswal (dead) through Achaldas Durgaji Oswal (Dead) through Lrs. Vs. Ramvilas Gangabisan Heda (Dead) through Lrs. and Others, the Apex Court has reiterated the principle that once a mortgage always a mortgage and nothing but a mortgage. The Apex Court further held that:

A mortgagor despite having mortgaged the property might still deal with it in any way consistent with the rights of the mortgagee. He has an equitable right to redeem the property after the day fixed for payment has gone by but his right or equity of redemption is no longer strictly an equitable estate or interest although it is still in the nature of an equitable interest."

the right of the mortgagor to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of this ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.

A right of redemption was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, however, confines the said right so long as the same is not extinguished by an act of the parties or by a decree of court.

26. In Harbans Vs. Om Prakash and Others, the Apex Court reiterated the view taken in Seth Ganga Dhar Vs. Shankar Lal and Others, and Bakhtawar Begum v. Husaini ILR (1914) All 195, that right of redemption would only arise on the expiration of the prescribed period, as right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. The only manner it can be extinguished is as provided for in the Act itself. The same cannot be extinguished by any agreement made at the time of the mortgage as part of the mortgage transaction. The dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption so long as the mortgage subsists and the right of redemption is not extinguished "by the efflux of time" or by a decree of the court in the prescribed form.

27. While considering the period of limitation for a suit by a mortgagor to redeem or recover possession of the immovable property mortgaged, the Apex court in Prabhakaran and Others Vs. M. Azhagiri Pillai (Dead) by LRs. and Others, , has held that where the usufructuary mortgage did not fix any date for repayment of the mortgage money, but merely stipulated that the mortgagee is entitled to be in possession till redemption, the right to redeem would accrue immediately on execution of the mortgage deed and mortgagor has to file a suit for redemption within 30 years, as provided for in Article 61(a) of the Limitation Act.

28. A similar view was taken by the Apex Court in M.R. Satwaji Rao (D) by L.Rs. Vs. B. Shama Rao (Dead) by L.Rs. and Others,

29. The Apex Court in Ahilyabai and Others Vs. Shantabai (Dead) and Others, again had the occasion to deal with the case where with respect to a mortgage deed dated 10.7.1933, possession had been taken back by the mortgagors in the year 1942 and continued with the same till the year 1981, when pursuant to the decree passed by the Court on the action initiated by the mortgagee, the possession of the mortgaged property was handed over to him. In a subsequent action initiated by the mortgagor to redeem and recover the possession of the mortgaged property, the Court considering the expression" when the right to redeem or recover the possession accrues" under Article 61(a) of the Limitation Act held that since the mortgagors were in possession from 1942 onwards till 1981 there was no question of filing a suit for recovering the possession of the mortgaged property and only when they were dispossessed by a decree in the year 1981, the right to recover the possession had accrued. The mortgagors action initiated after 1981 was held to be totally within the period of limitation.

30. The rights of the mortgagor and mortgagee flow from different provisions of the Transfer of Property Act but, however, the said right is circumscribed by statutory limitation contained under the Limitation Act. The mortgagee has a right to sue for foreclosure when the money secured becomes due, which in the instant case was with signing of the deed itself in the year 1958. It is not the

case of the parties that the right of the mortgagor to redeem was open ended.

31. The rights of the mortgagor and the mortgagee are not inter-dependant but are independent and mutually exclusive. This is the position which emerges from the law as noticed hereinabove.

32. In Babaji and Anr. v. Vithu and Ors. 1882 6 Bom S 734, the Bombay High Court has specifically held as under:

The general principle is that the right to redeem is co-extensive with that of foreclosure, and that, consequently, the right to redeem, under such mortgage agreements as the above, is postponed until the time fixed for payment.

Article 63, third column carries the words "when the mortgagee becomes entitled to possession" instead of the words "when the mortgagor''s right to possession determines.

33. Looking from another angle, the mortgagee could have instituted a suit for possession within twelve years from the date of the execution of the deed as according to the plaintiff the possession of the mortgaged property was to be delivered to the mortgagee. The mortgagee under a wrong assumption could have also enforced a suit for payment of money secured by a mortgage or otherwise charged upon immovable property within a period of 12 years starting from 1958. This was rightly not done as the mortgagee, in fact, had no right in law to do so. It was a case of simple mortgage and there was no personal covenant of the mortgagors to pay the mortgage amount.

34. Mr. Batta, learned senior counsel for the appellant has laid much emphasis on the decision rendered by the learned Single Judge of the Punjab & Haryana High Court in Ram Dass and Ors. v. Piara Singh and Ors. (1991) P.L.R. 426. Reference, in particular, has been made to paras 8 and 9 of the report and the relevant portion is as under:

8. The reading of Section 63 (supra) would leave no manner of doubt that the mortgagees can ask for foreclosure after thirty years when the money secured by the mortgage becomes due. In other words, he can sue for attaining the property after thirty years if the mortgage still subsists and this was what precisely sought to be achieved by the plaintiffs in the present case. In so far as the Clause (b) is concerned, the same talks of limitation of twelve years so as to obtain possession of immovable property which is the subject matter of the mortgage when the mortgage becomes entitled to possession. It is Clause (b) of Section 63 which has been applied by the learned first appellate Court so as to knock out the plaintiffs on the grounds of limitation. In my considered view, the learned appellate Court clearly erred while applying Clause (b) of Section 63 which is not at all applicable. "the stress on the aforesaid clause i.e. Clause (b) of Section 63 is on seeking for possession of immovable property which has been mortgaged. This necessarily would mean that the mortgage is subsisting. Thus it is the right of a mortgagee to seek possession in cases where possession has not

been handed over to him and he is to seek such possession within twelve years when he becomes entitled to possession. In the present case the relief was for possession on account of fact that the mortgage had come to an end and the right of mortgagee had nurtured into ownership. Section 63 (b) of the Limitation Act would not be attracted when the mortgagee sheds his limited right of seeking possession as a mortgagee and attains a larger interest i.e. when he becomes an owner by prescription of time.

35. With respect, I am not in agreement with the reasoning and the conclusion. The rights of a mortgagee in a case of simple mortgage are clearly spelt out in Chapter IV of the T.P. Act. The mortgagee has a specific right of foreclosure or sale of the mortgaged property. Further the learned Judge failed to take into account that the rights of the mortgagor in the mortgage were circumscribed by different provisions of the Limitation Act. The right of the mortgagor expired with the expiry of the accrual of the right to redeem or recover the possession; when the transfer becomes known to the plaintiff; or when the mortgagor re-enters into the mortgaged property. This is in juxtaposition with the mortgagee''s right for foreclosure or possession of the immovable property, which right accrues when the money secured by the mortgagee becomes due; when the mortgagee becomes entitled to possession; or when the money sued for becomes due.

36. There is yet another distinctive feature on facts. The trial Court had framed a specific issue about the mortgagee''s possession on the suit land and affirmatively decided in their favour with a finding that the mortgagor had been inducted as tenant by the mortgagee and only symbolic possession was required to be transferred. This is not the position in the instant case.

37. Thus it cannot be said that right of the mortgagees would start to run with the ending of the mortgagors'' right to sue for redemption. The time would begin to run with the starting of the mortgagees'' right under the T.P. Act.

38. The substantial question of law is answered accordingly.

39. For the aforesaid reasons, the present appeal is dismissed. However, there shall be no order as to costs.

