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(1998) 04 GUJ CK 0037

In the Gujarat High Court

Case No : Second Appeal No. 68 of 1981

Vora Ibrahimji Dosaji (deceased) through LRs. — APPELLANT

Vs

Vora Ibrahim Noorbhai Makati and Bros. and Others — RESPONDENT

Date of Decision : 23-04-1998

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1, Order 41 Rule 27
Limitation Act, 1963 — Article 61 , 64
Transfer of Property Act, 1882 — Section 60 , 91

Citation : AIR 1999 Guj 101 : (2001) GLR 359

Hon'ble Judges : D.C. Srivastava, J

Bench : Single Bench

Advocate : Suresh M. Shah, for the Appellant; D.U. Shah, for No. 1, for the Respondent

Judgement

D.C. Srivastava, J.—This is plaintiffs Second Appeal.

2. Essential facts for disposal of this Appeal are as under:

One Dosaji Ismuil owned and possessed certain immovable properties in Jamnagar. He died '' leaving behind four sons, viz. Ibrahim, Abdul. Ahmad and Ajgar and widow Amtulla and the daughter Husena as the heirs and legal representatives. After death of Dosaji Ismuil. Ibrahim, his eldest son executed mortgage deed on 8-3- 1947 in favour of one Kadarbhai for Rs. 2000/- and delivered possession of the mortgage prop erly to the mortgagee. On the same day the second son Abdul had also executed mortgage in favour of Kadarbhai, aforesaid, for Rs. 2000/- and delivered possession of the property mortgaged. Ibrahim as well as Abdul failed to pay the mort gage debt and redeem the properly. Hence, two separate suits Nos. 96/61 and 98/61 were filed against Ibrahim and Abdul by the plaintiff. Preliminary Decree was passed, but thereafter no application for final decree was moved. Original mortgagee Kadarbhai also expired and his four sons, defendants Nos. I to 4 had sold the rights of mortgagee in view of the above Decree to a firm M/s. Vora Ibrahim Noorbhai and

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others, defend ant No. 5. The said firm was run by Mohmadali Makali. Ibrahimji artd Kadarbhai. On 8-8-1962 Husena", daughter of Dosaji Ismail sold her share in the property of Dosaji Ismail to the above firm. In this way the firm - defendant No. 5 became owner of the share of Husena. On or about 3-11- 1975 the said firm was dissolved and under the arrangement between partners the properly in dispute went to the share of Vohra Ahyabhai Kadarbhai. the defendant No. 10. Accordingly the suit for redemption was filed by Ibrahimbhai to redeem the mortgage deed dated 8-3-1947 and for recovery of possession of the mortgaged prop erty.

3. The defendants Nos. 5 to 10 contested the suit on variety of grounds denying the execution of mortgage and delivery of possession to the mortgagee. The plea of bar of limitation and perfection of title by adverse possession was also raised by them. They also pleaded that the Suit is bad for non-joinder of necessary parties.

4. The trial Court repelled these contentions of the defendants, decreed the suit and granted preliminary decree for redemption with a specific direction that if so required deliver to the plaintiff quiet and peaceful possession of the suit property.

5. An Appeal was filed, the lower Appellate Court modified the decree of the trial Court and ordered modification of the judgment and decree of the trial Court reversing the decree for handing over the possession of the entire property to the plaintiff- mortgagor on redemption. It is, therefore, this Second Appeal.

6. The only substantial question of law formulated in this Appeal is as under:

"Whether in a redemption suit, decree for possession can be refused on the ground that some rights of a mortgagee are purchased or any other St. sharees of the mortgagor ha\\a share."

7. The learned Counsel for the parties have been heard.

8. Before coming to the substantial question of law, it is expedient to decide Civil Application No. 1739 of 1994 filed by the respondent No. 6 for admission of additional documentary evidence in this Second Appeal. It is photostat copy of Sale Deed Dated 27-1-1992, In the first place it may he said that photostat copy is not admissible in evidence, hence inadmissible evidence cannot be admitted in the Second Appeal. Secondly additional evidence in Appeal cannot be filed by any party to the Appeal as of right. Additional evidence can be accepted only in view of the provision contained in Order: 41. Rule 27 C.P.C. This provides that the parties shall" not be entitled to adduce additional evidence in Appeal except in three cases mentioned under Rule 27 of Order 41. The first case is where the Court from whose Decree the Appeal is preferred has refused to admit evidence which ought to have been admitted. It is not a case that this document was tendered before the lower Appellate Court which was refused. Hence Clause (a) of Rule 27(1) of order 41 does not apply. The second ground is where the party seeking to produce additional evidence establishes that such evidence Was not

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within his knowledge or could not be produced when the decree was passed by exercise of due diligence. This clause also does not apply because the judgment of the lower Appellate Court was rendered on 6-12-1980 whereas the sale deed was executed on 27-1-1992.

It is only under the third category that the document could be admitted, but here also the requirement is that such document is required by the appellate Court to enable it to pronounce the judgment. Having considered the arguments of the learned counsel for the respondent 1 do not think that admission of photostat copy of subsequent Sale Deed during the pendency of litigation and after decision in First Appeal will be necessary for this Court to enable it in pronouncing effective judgment. As such the application is rejected.

9. The next point for consideration is whether any cross-objection has been filed by the respondent. Shri D.U. Shah, learned Counsel for the respondent argued that the cross-objections were filed. However, the cross-objections were not traceable. He made a statement at the bur that in cross-objections three points were raised. The first was that the suit for redemption was barred by limitation, the second was that the respondents have acquired title by adverse possession and the third was that the Suit is bad for non-joinder of necessary parties. Thus, before taking up the substantial question of law formulated in this Appeal, these cross-objections have to be decided first.

10. The suit for redemption and recovery of possession was filed by the mortgagor Ibrahimbhai. It is mentioned in the Mortgage Deed that at the time of execution of mortgage on 8-3-1947 the possession was delivered to the mortgagee. It was usufructuary mortgage. The suit was filed in the year 1976 i.e. within 30 years of the execution of the mortgage deed, the period comes about 29 years. The question is whether such suit will be governed by Article 61(a) of the Limitation Act or by Article 61(b) of the Limitation Act. This controversy on the fact of the case is settled from the pronouncement of the Supreme Court in Lilachand Tuljaram Gujar and Others Vs. Mallappa Tukaram Borgavi and Others, . In this case old Articles 142 and 144 corresponding to new Articles 61 (a) and 61 (b) of the new Limitation Act were under consideration. It was held by the Apex Court that where the mortgagee comes into possession of the property pursuant to the usufructuary mortgage, his possession has a lawful origin and mere assertion of adverse title on his part cannot affect the subsisting equity of redemption of the mortgagors or operate to shorten the period of limitation prescribed for a suit for redemption. The period of limitation under Article 61(a) of the Limitation Act is 30 years when the right to redeem or recover possession accrues. Since the mortgage deed was executed on 8-3-1947 and the Suit was filed in the year 1976 only 29 years period has completed. Hence the Suit is within limitation. This cross-objection has therefore no merit.

11. The plea of adverse possession has also no merit because the mortgagee or his successor in his interest cannot claim title adverse to the mortgagor. The mortgagor has right to redeem the property at any lime within the period of

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limitation and till the property is redeemed by the mortgagor it should be deemed that the mortgagee was in possession of the property on behalf of the mortgagor and not that the mortgagee had independent possession or possession hostile or adverse to the mortgagor. In this view of the matter the plea of adverse possession has also no substance and force.

12. The next cross-objection is that the Suit is bad for non-joinder of necessary party. It was argued that all the heirs and legal representatives of the original owner Dosaji Ismail were not impleaded and arrayed as plaintiffs. Hence, the suit for redemption by one of his legal representatives, viz, Ibrahim is bad for non-joinder of necessary party. It was also urged that the daughter of Dosaji Ismail was also a necessary party inasmuch as she has share in the property and the other sons and widow are likewise necessary parties. In my opinion the two Courts below have rightly held that the Suit is not bad for non-joinder of necessary parties. The mortgage in question was executed by Ibrahim, the eldest son of Dosaji. Thus, he should have filed the suit for redemption in the Court below. The other son Dosaji Ismail who created a similar mortgage on the same day did not file any Suit for redemption. Section 91 of the Transfer of Property Act provides as to who can sue for redemption. Under this section besides mortgagor any of the person mentioned in Clauses (a) to (c) can file suit for redemption. The first category consists of any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in or charge upon the property mortgaged or in or upon the right to redeem the same. The second category of persons are surety for payment of mortgage debt or any part thereof and the third category consists of any creditor of the mortgagor who has in suit for administration of his estate obtained a decree for sale of mortgage property.

13. Ibrahim was the mortgagor. He is certainly interested in the property mortgaged and also interested upon the right to redeem within the meaning of Section 91(a) of the Transfer of Property Act and as such he could have filed suit without joining other heirs of Dosaji Ismail. I, therefore, do not find any error of law in the finding of the two Courts below that the Suit is not bad for non-joinder of necessary parties. This cross-objection has also no merit. In the result the cross-objections are liable to be dismissed and are hereby dismissed.

14. Coming to the main Appeal, the only contention of the learned Counsel for the appellant had been that if the Suit was filed by mortgagor Ibrahim, for redemption of mortgage and preliminary decree for redemption was passed by the trial Court necessary consequential order was to direct the mortgagee to deliver possession of the mortgaged property to the mortgagor which was done in the instant case by the trial Court, but the lower Appellate Court committed an error of law in reversing the portion of the decree of the trial Court, which directed delivery of possession of the mortgaged property to the mortgagor. The learned Counsel for the respondent on the other hand urged that the lower Appellate Court did not commit any illegality. According to his contention the entire property was not mortgaged and under the Mahomedan law keeping in

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view the heirs left by deceased Ismail the share of Ibrahim, one of his sons, could be only 1 /12th and not more and hence the mortgage deed executed by Ibrahim will be confined to his 1/12 undivided share in the joint property in which the other co-sharer had interest and share. He contended that unless the share of Ibrahim is partitioned through a separate suit the decree for redemption may be preliminary or final, is incapable of execution and no Court would pass futile decree which may not be executed by the executing Court. The learned Counsel for the appellant has urged that share of Ibrahim was not mortgaged rather entire property was mortgaged and possession of entire property is to be delivered. However, in the midst of the argument he conceded that only share of Ibrahim was mortgaged. He made unsuccessful attempt from the judgment of the trial Court to show that the entire property was mortgaged. The lower Appellate Court has at more than one place has mentioned that it is admitted case of the parties that only share of Ibrahim was mortgaged. The lower Appellate Court further observed that the counsel for the present appellant in the first appellate Court conceded to the legal position that only Ibrahim''s share could be and was mortgaged. There is intrinsic evidence to show that only the share of Ibrahim could be mortgaged and was mortgaged. The other son of Ismail, viz. Abdul also executed similar mortgage on the same date for the same amount to the same mortgagee. If Abdul had no share in the property he could not have executed such mortgage. Abdul has not filed so far any suit for redemption. Husena, daughter of deceased, is also entitled to share in the property left by her father Ismail. Widow and other sons of the deceased Ismail have likewise share in the joint property. Of course the Decree for redemption can be passed. Preliminary Decree was passed, but it was ambiguous. It did not specify what property is to be delivered by the mortgagee to the mortgagor Ibrahim or by the respondent to the appellant Ibrahim.

15. The learned Counsel for the appellant then contended that there was no justification for the lower Appellate Court to withhold delivery of possession of appellant''s 1/12 share in the property to him. This contention was refuted by the learned Counsel for the respondent. In the absence of partition by metes and bounds no preliminary or final decree for undivided share to the extent of 1/12 share will be capable of execution. Such vague decree is liable to create problem at the time of execution and it will be difficult for the executing Court to go behind the Decree passed by the competent Court. No attempt has been made till now after the decision of the first Appeal to file a Suit for partition. The said contention was accepted in the lower Appellate Court that in the absence of partition, redemption decree cannot be executed. However, there is no reason to refuse the order of delivery of possession of 1/12 share of Ibrahim in the mortgaged property. The direction to deliver the possession of the entire property would be unjust because the mortgage deed executed by the other son Abdul is yet-to be redeemed and there are other co-sharers whose interest and shares have also to be determined. The mortgaged property has changed hands by sale and the purchaser cannot be compelled to part with possession of entire

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property in favour of the appellant. However, at the same time total refusal to give any direction to the respondent to deliver possession of undivided 1/12 share to Ibrahim also seems to be unjustified.

16. In the result I find that the lower Appellate Court committed error in refusing to direct delivery of possession even to the extent of 1 /12 share of Ibrahim appellant to him. The substantial question is, therefore, answered in negative.

17. In the result the Appeal succeeds. The judgment and Decree of the lower Appellate Court is modified to the extent that while confirming the decree of the trial Court it is ordered that the respondent shall deliver possession of 1/12 share in the mortgaged property to the appellant. The other portion of the decree of the trial Court is confirmed. It is, however, made clear that final decree proceedings can go on, but final decree will not be executed till 1/12 share of appellant -Ibrahim is separated by metes and bounds in a separate suit for partition which may be filed by him in a competent Court. Till then the execution of final Decree shall remain suspended. In view of this the parties shall bear their own costs.

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