

(1930) 02 AHC CK 0008

Allahabad High Court

Case No: None

Sheopati Singh and Others

APPELLANT

Vs

Jagdeo Singh and Another

RESPONDENT

Date of Decision: Feb. 25, 1930

Judgement

1. This is a defendants' appeal arising out of a suit for recovery of Rs. 12,000, the principal amount of mortgage-money, and Rs. 6,000 as damages on account of a breach of contract. It appears that on 23rd September 1922, the plaintiffs Jagdeo Singh and Bishnath Singh, father and son, executed a document which represented a compound transaction of sale and mortgage for Rs. 20,050 in favour of the defendants-appellants. This deed is printed at page 35. Under it 5 annas 21/2 pies share in Mudila Khurd in all was transferred, out of which 2 annas 1 pie share was sold for Rs. 11,050 and the remaining 3 annas 11/2 pies share was mortgaged with possession for a period of twelve years in lieu of Rs. 9,000. The payment of consideration was not split up for the two transactions of sale and mortgage separately, but was stated as a consolidated sum of Rs. 20,050. Out of this amount the mortgagees had to pay Rs. 12,000 to one Ram Krishan a previous mortgagee of the property not covered by this deed, and the balance of the consideration was to be set off against another mortgage-deed as well as two promissory notes and a small amount which had been advanced as earnest money. On the same date a security bond was executed by the transferors in favour of the transferees, agreeing to indemnify the latter and pay interest at 2 per cent. in case they suffered loss on account of any portion of the property going out of their possession.

2. At the time when the deed's were executed a suit for the redemption of the property in the hands of Mathura Kurmi who was a prior mortgagee of the property transferred, was pending, and the present plaintiffs had already deposited the entire mortgage-money due to him u/s 83, T. P. Act. But later on 24th October 1923, Mathura Kurmi filed a written statement pleading that the transaction was not one of mortgage but of a sale out and out. This suit was decreed by the trial Court on 2nd May 1925, and Mathura's appeal was dismissed by the High Court on 21st

December 1926.

3. It is an admitted fact that the defendants have not made the payment to Ram Krishan and they justify their nonpayment by the circumstances that the money was payable on 30th April 1923, by which date the suit in the trial Court had not been decided, and that the final adjudication was not made till December 1926. The claim was contested on various grounds, but it has been decreed by the learned Subordinate Judge. In appeal several points have been urged before us. The first is that according to a correct interpretation of the sale-deed time was not of the essence of the contract and the defendants were not bound to pay the amount to Ram Krishan so long as Mathura Kurmi's suit had not been finally disposed of, but in any event the defendants would be liable to make compensation : Section 55, Contract Act. We are unable to accept this interpretation of the deed. The condition contained in the deed relating to the first item of the said consideration on page 38 is clear and is to the effect that the mortgagees had taken upon themselves the responsibility to pay the whole amount of the mortgage-money due to Ram Krishan at the proper time, i. e., Baisakh Sudi 15th, 1380 Fasli (corresponding to 30th April 1923). There was a clear undertaking to pay this amount on the date mentioned. As Mathura Kurmi was in possession of the property belonging to the executants, it was in their interest and for their benefit that the amount should be paid to Ram Krishan promptly, so that the executants might recover possession of the property. In these circumstances it cannot be urged that time was not of the essence of the contract and that the defendants could pay it at any future time according to their wish and pleasure. Even if no time had been fixed it was the clear duty of the defendants to pay the amount within a reasonable time : Section 46, Contract Act.

4. Section 92, Evidence Act, precludes the defendants from proving any contemporaneous oral agreement varying the condition entered in the deed that the amount should be paid on 30th April 1903. Although no subsequent oral agreement was expressly set up in the written statement, the defendant's pleader made a statement on 2nd October 1925, that such was the case, and oral evidence was led to that effect. That evidence has not been believed by the learned Subordinate Judge. So far as the other witnesses are concerned they speak of an oral contemporaneous agreement at the time when the sale deed was executed; but the evidence of Hanuman Prasad the defendants' mukhtar-i-am is to the effect that even subsequently, after Mathura Kurmi had filed his written statement, he spoke to one of the plaintiffs Jagdeo Singh and told him that the money left in the hands of the mortgagees would not be paid till that case had been finally decided and that he agreed to it. Jagdeo Singh has not been examined, but his son Bishnath has been examined, and he denies any such agreement. It is not suggested that there was any fresh consideration given for this subsequent promise. We are unable to take a different view of the evidence from that which has been taken by the Court below, and we accordingly hold that the subsequent oral agreement has not been proved.

5. The next point urged on behalf of the defendants is that inasmuch as the plaintiffs have not paid off Ram Krishan they are not entitled to recover the amount from the defendants, and that in any case they cannot compel the defendants to pay the amount to them personally when it was left in their hands for payment to Ram Krishan.

6. The first difficulty is that the payments of various items of consideration have not been separately allocated in the deed. But it may be assumed in favour of the appellants that the amount which they have already discharged has gone to pay off the bulk of the sale consideration, inasmuch as part of the property has been transferred to them absolutely, and that the amount unpaid which is still in their hands represents a portion of the sale consideration and the whole of the mortgage-money. We are entitled to assume this in favour of the defendants because there is at least the legal evidence of Ram Subhag, one of the plaintiffs, that this was the arrangement, and there is no evidence to contradict his statement. As the deed is silent about this allocation oral evidence to clear up this ambiguity is certainly admissible.

7. It follows that Rs. 3,000 representing a part of the sale consideration and Rs. 9,000 representing the whole of the mortgage money have remained unpaid.

8. As regards the sum of Rs. 3,000 which represents a part of the sale consideration we do not see why the plaintiff's suit should be deemed to be premature merely because they have not paid Ram Krishan in the first instance. On this point there appears to have been some conflict of view in some cases. The latest case of *Lachman Das v. Ram Prasad* A.I.R 1927 All. 422 is however in favour of the respondents. We would like to point out one further consideration "which ought to decide this question of law in their favour. Part of the sale consideration represented money belonging to the executants, and it had been left in the hands of the vendees for payment to their nominees. If the amount has not been paid as directed, there seems to be no reason why the executants should not "change their mind and recover the amount themselves on the ground that, not having been paid as directed, it is their unpaid purchase money. If the transferees had made the payment it would have been a different matter, but not having paid it within the time fixed or within a reasonable time thereafter they have not performed their contract, and part of the sale consideration therefore remains unpaid to the vendors. We therefore see no reason why the plaintiffs should not now be entitled to recover this amount. Their suit to recover this part of the money can in no sense be treated as premature.-

9. As regards the amount representing the consideration for the mortgage money the matter would have been simple if the transaction were one of a simple contract to lend money. In such a case it has been held in several cases that a contract to lend money cannot be specifically enforced.

10. The case of a usufructuary mortgage however must stand on a different footing, particularly when the possession has been delivered and the stipulation is that the profits are to be set off against the interest. According to para. 2 of the deed in question the property had to be redeemed on the payment of the principal mortgage money only after the expiry of 12 years without any further accounting. The executants have delivered possession of their property to the transferees who have not paid the whole amount contracted to be paid. Thus the executants have performed the whole of their part of the contract and the transferees have not done so. It would not be fair to the executants to let the transferees remain in possession of the property although they have not paid the whole amount, and only direct an account to be taken in future when a proper suit for redemption is instituted. The suit is not really one for the specific performance of a mere contract to lend money but to compel the defendants to perform their parts of the contract when they have obtained delivery of possession of the property.

11. The cases relied upon by the learned advocate for the appellants, viz., *Phul Chand v. Chand Mal* [1908] 30 All. 252, *Sheikh Galim v. Sadarjan Bibi* [1916] 43 Cal. 59 and [Yadavendra Bhatta Vs. Srinivasa Babhu and Others](#), were not cases of possessory mortgages, the second being one for a mere contract to mortgage. No case directly in point has been brought to our notice. In none of the cases above mentioned does it appear to have been argued that a mortgage is a conveyance and not a mere contract for sale, and that by not compelling the mortgagee to pay the whole amount remaining in his hands one would be compelling the mortgagor to offer a bigger security for a much smaller amount. We think that the executants are entitled to recover the amount, and cannot be compelled to wait till they have procured sufficient money to redeem the mortgage.

12. The next point that remains for consideration is whether the relief to be granted to the plaintiffs should be a decree directing the defendants to pay the amount to Ram Krishan or whether it should be a decree for that amount in favour of the plaintiffs themselves. We have already indicated our view as to the rights of a vendor in case of a sale deed under which money is left for payment to a prior creditor. We think that the same principle would apply to the case of a usufructuary mortgage. Where the previous encumbrance creates a charge on the property transferred, the transferee is entitled to retain the amount in his own hands in order to pay off the prior encumbrance in cases where the property is transferred free from such encumbrance. That is not the case here. The discharge of Ram Krishan's mortgage would be entirely for the benefit of the executants and would not affect the property transferred to the defendants, for, as remarked above, Ram Krishan's mortgage did not cover the property transferred to the defendants.

13. The learned advocate for the appellants has strongly urged that inasmuch as a security bond was taken on the same day under which part of the property transferred to the defendants by the sale deed was again hypothecated as a

security, his client's security would be diminished or jeopardized if the amount is not paid by the plaintiffs to Ram Krishan. In the first place it is doubtful whether we should take into consideration the effect of another document which was executed separately, although on the same date, particularly when an indemnity clause without reference to any specific item of properties is to be found in para & of the deed of sale itself. In the next place it seems to us that the main purpose of the execution of the security bond was to protect the transferees from the adverse result of the redemption suit pending against Mathura Kurmi. That litigation has resulted in favour of the parties to this suit. We also do not think that the security is substantially diminished on account of any apprehended diminution of the security in future. Such a fear therefore cannot be taken into consideration in this connexion. The last question that remains for consideration is the amount of damages to which the plaintiffs are entitled on account of the non-payment of money for these years. The learned Subordinate Judge has gone into this question with care, and has ascertained the total rent received from tenants and also estimated the profits which ought to be derived from the sir and khudkasht lands. His conclusion is based on the oral evidence as well as the entries in the khatauni, and after having examined the basis of his calculation we are satisfied that his conclusion must be accepted. In his opinion Rs. 2,800 would be the fair amount of damages.

14. In order to avoid further difficulties Mr. Peare Lal Banerji on behalf of the plaintiffs has agreed to the defendants depositing the whole of Rs. 12,000 in the Court below u/s 83, T. P. Act, within two weeks from this date as deposit to the credit of Ram Krishan or his heirs on behalf of the present plaintiffs. If the amount is not deposited within the time fixed the decree of the Court below for Rs. 12,000 in favour of the plaintiffs will stand. The decree of the Court below for Rs. 28,000 with interest and costs will, of course, stand. We accordingly uphold the decree of the Court below with this slight modification : that if Rs. 12,000 are deposited in the Court below within two weeks from this date as directed above the decree will be deemed to be satisfied to that extent. The plaintiffs will have their costs of this appeal from the defendants who will bear their own costs.