Abdul Rahman and Others Vs Sheo Dayal and Another

Court: Allahabad High Court

Date of Decision: Nov. 1, 1933

Hon'ble Judges: Sulaiman, C.J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Sulaiman, C.J.
This is an appeal by the defendants mortgagors arising out of a suit for sale on the basis of a mortgage-deed dated 27th,

August 1924,executed by the father of the defendants in favour of the plaintiff and another person who is now dead. The mortgage-deed was for

Rs. 25,000 and a period of five years was fixed for payment. It carried interest at 12 per cent per annum, interest being payable every quarter. If

there was a default in the payment of interest in any quarter that interest had to be added on to the principal and the consolidated amount had to

bear interest. There was a further provision that

if default in payment of interest and compound interest be made for six months the mortgagees shall be at liberty to bring a mortgage suit and

realize the entire amount due to them on account of the principal, interest and compound interest, costs in the suit and pendente lite and further

interest, from the property mortgaged or from the person of the'' executants and the other properties either in the case of default made in payment

of interest for six months as aforesaid or after the expiry of the period mentioned in this document, i.e., five years in short in the event of any of the

two defaults being made in payment.

2. According to the plaintiff, interest was paid regularly up to 1st March 1927, but the first default for two consecutive quarters, that is, for an

unbroken period, of six months, occurred in September 1927. This entitled the plaintiff to bring: a suit for the recovery of the whole amount. He

filed a suit within two years of that date. The main pleas in defence were, that there had been no breach of the covenant and the plaintiff had no

right to sue and that the rate of interest was excessive, exorbitant and unreasonable. The Court below has held that the suit was not premature and

that the plaintiff is entitled to a decree. But it has reduced the rate of interest to one of 12 per cent per annum compoundable every six months

instead of quarterly. The: defendants have accordingly appealed and the plaintiff has filed a cross-objection. The same two points are urged in

appeal before us. As regards the first point the contention is that in view of the pronouncements of their Lordships of the Privy Council in Pancham

v. Ansar Husain AIR 1926 P.C. 85 and AIR 1932 207 (Privy Council) the default in payment of interest for six months did not make the mortgage

money become due, and that therefore without doing some act showing that the mortgagee exercised his option and without communicating

information of it to the mortgagors, the suit could not be filed.

3. So far as the terms of the mortgage-deed are concerned there cannot be any manner of doubt that there was an express contract giving the right

to the mortgagee to sue for the recovery of the entire amount due to him, principal, interest and costs, in the event of there being a default in the

payment of two successive instalments of interest. The deed itself does not contain any stipulation that before the right to sue accrues there must be

a notice or a demand or any other act indicating that the option was going to be exercised. Going therefore by the express contract entered into

between the parties under this document the defendants would have no case and it cannot be seriously contended on their behalf that the suit is

premature and is not maintainable without proof that previous to its institution the mortgagee had done some act showing the exercise of his option.

But great reliance has been placed by the learned advocate for the appellants on the observations of Lord Blanesburgh in Panahan''s case AIR

1926 P.C. 85 quoted above which is to be found at p. 464 (of 48 Ali.). His Lordship observed:

Whatever else in relation to such provisos as the present may be open to debate, one thing is clear, viz., that such a default on the part of the

mortgagors as was here relied upon by the High Court gave to the mortgagees a right by appropriate action to make the mortgage moneys

immediately due.

4. It is contended that the appropriate action which would make the mortgage money immediately due must be some action prior to the suit in the

form of a notice of demand for the money. It may however be pointed out that his Lordship in that case held that the amendment of the plaint was

in itself a sufficient action. In the later case of AIR 1932 207 (Privy Council) their Lordships overruled the view taken by the two Full Benches of

this Court as to the point of time from which limitation under Article 132 begins to run. The view which had prevailed in this Court previously was

that if a mortgage deed provides a period for payment and further provides that the mortgagee would have a right to sue for the money earlier as

soon as a particular default took place time to sue begins to run from the date of such default or the expiry of the period, whichever is earlier. The

view expressed seems to have been that the mere fact that the mortgagee does not exercise his option would not help to keep the period of

limitation suspended.

5. As soon as the default occurs the mortgagee is entitled to bring his suit to recover the amount and therefore the money becomes payable to him

and has thus become duo within the meaning of Article 132. We are not aware of any base in which it was held by this Court that the mortgagor

also can bring a suit to redeem the property by making a default in the payment of interest. A suit for redemption would be governed by a different

Article altogether, viz. Article 148, and a mortgagor could not be allowed to redeem the property contrary to the special contract. The word in

Section 60, T.P. Act, at that time was ""payable"", whereas now under the amendment of 1929 the word ""due"" has been substituted, which is the

same as in Article 132, Limitation Act.

6. Their Lordships of the Privy Council have now made it clear that under Article 132, Limitation Act, money can become due only when the

mortgagee can sue for his money and also the mortgagor can redeem the mortgaged property. Their Lordships have further thought that the

necessary result of holding that the money has become due owing to default would be to give an option not only to the mortgagee to sue for

money, but also an option to the mortgagor to redeem it, and that it would be an impossible result if the mortgagor can claim to redeem the

property by having broken his own contract on refusing to pay the interest. Their Lordships have accordingly laid down that the money does not

become due under Article 132 for the purposes of limitation so long as the mortgagor also has not acquired the right to redeem the property, that is

to say, there should be mutuality. If therefore the mortgagee alone is given an option either to wait for the full period or to sue immediately the

money has not really become due. Their Lordships however have indicated that the position might have been different if the words in the third

column of Article 132 had been cause of action arises"" in place of the words ""become due."" But their Lordships have not laid down that the

mortgagee who has such an option is not entitled to maintain a suit unless and until before such suit he does some act indicating that he is going to

exercise his option and informs the mortgagor of such an exercise. It has been merely laid down that the option to sue in case of default is for the

benefit of the mortgagee exclusively, and if he does not choose to exersise it time does not begin to run against him. The learned advocate for the

appellants has placed strong reliance on a case decided by a single Judge of the Oudh Chief Court in AIR 1933 237 (Oudh) where the learned

Judge appears to have indicated that what is necessary is that the mortgagee must take some appropriate step to exercise the option reserved to

him and suggested that this may be done by means of a notice. The point did not arise directly in that case as a notice had in fact been given by the

plaintiff before instituting the suit. We are unable to hold that without previous notice or without the doing of some other act to the knowledge of

the mortgagors a suit by the mortgagee is not maintainable when a default is made. Even under the old Full Bench rulings of this Court it was

considered to be the duty of the mortgagee to sue if default occurred. Indeed, if he waited for more than 12 years it was thought that his claim

would be barred by limitation. Under the authority of the rulings of their Lordships of the Privy Council he has the option of either suing or waiting.

But there is no authority in support of the contention that he cannot sue unless and until he has first done some act indicating the exercise of the

option independently of the act of suing.

7. We find that in cases where the legislature has thought it necessary that there should be some independent and antecedent act done by a person

before suing, it has expressly provided therefor. We may, for instance, refer to Section 111 (g), T.P. Act, where forfeiture cannot take place unless

in addition to the fulfilment of the conditions mentioned, the lessor gives notice in writing to the lessee of his intention to determine the lease. But

where there is : as such statutory enactment we cannot hold that a suit would be premature if no such notice has been given in advance. There are

many cases in which there can be an option or election. One may cite the instances of voidable contracts or the right of reversioners to avoid

voidable transfers made by Hindu widows or the right of creditors to appropriate payments made to any of several debts if not already earmarked

by the debtor. In no such case has it ever been held that without first serving a notice on the defendant or doing Some act and informing the

defendant of it, a suit in the exercise of the option is not maintainable. Indeed, in all such cases the option is deemed to have been exercised when

the suit is instituted. We may refer to the case of Bijoy Gopal Mukerji v. Krishna Maheshi Debi (1907) 34 Cal. 329 where their Lordships of the

Privy Council at p. 92 (of 34 I.A.), observed:

Her alienation is not therefore absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or

he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action

to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent; the right of

action of the reversionary heir.

8. Similarly in Cory Brothers v. Owners of Turkish Steamship Mecca (1897) A.C. 286 Lord Maonaghten observed as follows:

But it has long been held and it is now quite settled that the creditor has the right of election up to the very last moment and he is not bound to

declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain.

9. We find no authority for the view that where there is no statutory enactment requiring any antecedent action or any previous notice as a

condition precedent to the suit, the suit for sale brought on the basis of an express contract under which the option to sue is given is not

maintainable. We would further point out that even if there were such defect that defect must now be deemed to have been cured because the

period of five years fixed in the deed expired in 1929. The suit cannot therefore be thrown out on the simple ground that the suit should not have

been brought without a previous notice.

10. As regards the second point, namely, whether the rate of interest is excessive and unconscionable, we find that the rate was 12 per cent, per

annum and the accumulation of interest is due principally to the default in the payment of interest. The mere fact that there was a compound rate

fixed would not necessarily show that it was excessive, exorbitant or unreasonable. In this particular case, the Court below has no doubt

considered that the quarterly rests were unreasonable, but apparently no materials were placed before the Court to show that the security offered

was Rs. 25,000, the defendants have failed to shew that the security offered was sufficient according to this standard. We are unable to hold that it

was more than ample which might indicate that the rate of interest was excessive. In the absence of any such proof we cannot accept the finding of

the Court below that the rate was extortionate or unreasonable and we must accordingly allow the full contractual rate.

11. The last point urged is that the property mortgaged was the whole of the house which bears the present municipal No. 44/409. But the house

mortgaged as shown by the mortgage-deed was a house bearing No. 44/429. It is an admitted fact that the father of the defendants had purchased

several houses under separate deeds and he rebuilt them. If we go by the boundaries the house bearing the present No. 44/409 includes a bigger

block than the old No. 44/429. This is indicated by the circumstance that in the mortgage-deed the eastern boundary of the house mortgaged was

shown to be the house of Haji Abdul Ghafur Khan and then the house of Ata Husain Peshkar. In the absence of the correspondence register

showing what block was renumbered as 44/409 the only satisfactory basis would be the admitted boundaries as given in the mortgage, deed and

the plaint. The learned Subordinate Judge has accordingly held that a part of the block was left outside the mortgage-deed. It is also clear that in

the body of the mortgage-deed the property mortgaged was described to be that which had been acquired under the two specific sale-deeds of

Abdul Ghafur Khan. It was not the entire property owned by Abdul Ghafur Khan which was mortgaged. It is admitted that to the east of the entire

block of houses owned by Abdul Ghafur Khan there are houses of Ata Husain and Amin-ud-din. The learned Subordinate Judge is, therefore,

right in holding that had the entire block been intended to be mortgaged the eastern boundaries should have been shown as the houses of Ata

Husain and Amin-ud-din land not the house of Abdul Ghafur. The question what portion was mortgaged is substantially a question of fact and we

see no reason to differ from the view taken by the Court below on this point. We think that its conclusion is right.

12. The result, therefore, is that this appeal fails and must be dismissed with costs; the cross-objection of the plaintiff is allowed with costs and the

rate at which interest should be calculated on the mortgage money should be 1 per cent. per mensem payable with quarterly rests and

compoundable as provided in the deed. As we are increasing the amount of the mortgage money we must fix a fresh date for payment. We fix to-

day as the date of payment. Interest will run at the contractual rate up to this day and simple interest at 6 per cent, per annum will run on the

consolidated amount hereafter till realization. A fresh preliminary decree will accordingly be prepared in the terms of our directions.