(1938) 12 AHC CK 0020

Allahabad High Court

Case No: None

Bishan Datt Singh and Another		APPELLANT
	Vs	
Mathura Prasad and Another		RESPONDENT

Date of Decision: Dec. 8, 1938

Hon'ble Judges: Collister, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Collister, J.

This is a defendant''s second appeal arising out of a suit for enforcement by foreclosure of a mortgage by conditional sale. The mortgage in question was executed on 19th October 1929 for Rs. 2400 by Randhir Singh, defendant 1, and his son Bishanpal Singh, defendant 2. The plaintiff impleaded both the mortgagors and also the two minor sons of defendant 2; and the latter alone contested the suit. They are the appellants before us. Defendant 1 died during the pendency of the appeal in the lower Appellate Court. The suit was mainly contested on the ground that the mortgage was executed without legal necessity and was not for the benefit of this joint Hindu family. Both Courts have found that there was no legal necessity and that the transaction was not for the benefit of the family. The trial Court found further that the plaintiff was not entitled to a personal decree, but the learned Judge of the lower Appellate Court has reversed the decree of the trial Court and has passed a personal decree against defendant 2 as heir of defendant 1 and also against defendants 3 and 4 "if they are also heirs of Randhir Singh." The learned Judge of the lower Appellate Court observes:

The learned Subordinate Judge was of opinion that a personal decree cannot be given, because there was no express personal covenant in the mortgage and the conditions in the mortgage were inconsistent with an implied personal covenant. But it appears to me that where a person obtains money for purposes of speculative investment by offering security, which is in fact illusory, he makes it impossible for

himself to contest a suit for return of the money on the ground that the lender''s only remedy under the terms of the illusory security bond was to proceed on the bond, and it appears to me that it is particularly impossible where the speculation has actually turned out successful, or successful to a certain extent, and the borrower or taker of the money is actually in possession of property bought with that very money itself.

2. It is on these grounds that the learned Judge has passed a personal decree in this suit. The only question before us in this second appeal is whether the Court was or was not competent to decree the suit personally against the defendants-appellants. We have read the mortgage-bond in suit and ascertained its terms and conditions. We find that the mortgagors covenanted to repay the principal and interest within three years from the date of execution, and it was stipulated that in default of such payment within the time specified the mortgagee would be entitled to sue for fore-closure; the mortgage bond would be regarded as a deed of sale, the consideration whereof would be the unpaid portion of the money advanced under the mortgage. Learned Counsel for the defendants appellants relies upon the first condition prescribed u/s 58(c), T.P. Act. He pleads that, apart from any objection as regards the validity of the transaction, sale became absolute on the expiry of three years subject to a suit for foreclosure by the mortgagee in which the mortgagor would have one last opportunity of redeeming the mortgage and there was no personal liability. Various authorities have been cited before us and we will proceed to discuss thorn. In Mt. kuraishi Begam v. Mumtaz Mirza (1909) 12 O.C. 275 a suit was brought upon a, mortgage bond, the terms of which were as follows:
I hereby write and agree to pay within one year the said money with interest to the said Mumtaz Mirza Saheb. If perchance I fail to pay the said money with interest within the year, the said Mirza Saheb shall be competent to realize the entire amount with interest from the said house. Neither I nor my heirs shall have any objection. This deed of mortgage shall be deemed to be a deed of sale.

3. It was held by the learned Judicial Commissioner of the Oudh Chief Court that upon a true construction of these terms the mortgage created by the instrument was a mortgage by way of conditional sale and that it contained no personal contract to pay the mortgage money. The learned Judge at p. 277 observed:

...the real question on which the decision of the case turns is whether there is any personal covenant to pay money on this mortgage. As a general role, it may be said that a mortgage ordinarily also implies a personal covenant to pay the money on part of the mortgagor. This is however not so in the ease of a mortgage by way of conditional sale. In that case the only mode provided for the in payment of the money is by the transfer of the mortgaged property to the mortgagee, who has to take the property (whatever may be its value) in full discharge of the amount due on the mortgage.

4. Further on he says:

A more promise to pay the money within a certain fixed period does not import a personal liability, for such a covenant is entered into in every form of mortgage. The test is what is the remedy provided for the satisfaction of the mortgage debt in each case?

5. This decision was approved and followed by the same Court in Nazim Husain v. Mahabir Prasad A.I.R (1915) Oudh 147. Then we have some cases from Nagpur. In Harlasa v. Shaikh Rahim A.I.R.(1924) Nag. 53 there was a mortgage deed which provided as follows:

I have duly received in all Rs. 2000. On this amount I shall pay interest at 2 per cent, per mensem at compound rate and agree to repay the whole amount with principal and interest within two years. If I fail to repay the amount at the stipulated time, the aforesaid immovable property shall be foreclosed in your favour, that is the right of redeeming the mortgage shall cease.

6. It was held by a Bench of the Nagpur J. C.''s Court that these words did not amount to a stipulation binding the executant to repay the money within Clause (1)(a) Section 68, T.P. Act, but merely fixed a date by which the mortgagor undertook to pay the mortgage money; the only remedy mentioned in the deed as available to the mortgagee was foreclosure, and the claim for a personal decree therefore failed.

7. A different view was taken by a learned Single Judge of the same Court in Gopikishan v. Mt. Mankuar A.I.R (1924). Nag. 97 where it was held that every mortgage includes a personal covenant to repay the money lent, unless it is negatived expressly or by necessary implication by the terms of the bond or the circumstances of the case; express agreement to repay the debt is not necessary. Reliance was placed on observations of their Lordships of the Privy Council in Ram Narain Singh v. Adhundra Nath Mukerji AIR (1916) P.C. 119. The view expressed however by this learned Judge was overruled by a Full Bench of the same Court in AIR 1929 254 (Nagpur) Jackson Ag. C.J., who delivered the main judgment, observed at page 256, column 2:

In opikishan v. Mt. Mankuar A.I.R (1924) . Nag. 97 he (i.e. the learned Judge who decided that case) seems to have misapplied his own judgment and to have omitted to consider that the provision of foreclosure and no other remedy in a deed might imply the absence of a personal covenant. I am of opinion that opikishan v. Mt. Mankuar AIR (1924) Nag. 97 has been inaccurately decided...

8. We will now refer to the decision of their Lordships of the Privy Council in Ram Narain Singh v. Adhundra Nath Mukerji AIR (1916) P.C. 119 of which mention has already been made. The question for determination before the Board was whether the mortgagees were entitled to recover from the mortgagor the balance due on a usufructuary mortgage, dated 14th April 1896, where it was alleged that they had

been deprived of part of their security by the wrongful acts of the mortgagor. It had boon calculated that the amount borrowed with interest would be paid off by the rents of the properties mortgaged on 14th January 1903 when the properties were to be returned to the mortgagor. Both parties acted on the deed, but on the date mentioned it wan found that the mortgagee in possession had not by the collection of the fonts received sufficient to discharge the principal of the loan with interest, as mentioned in the deed. In a suit brought by the mortgagee on 13th January 1909 the deficiency was attributed in paras. 6 and 7 of the plaint to the facts that the defendant (mortgagor) had taken rents which should have gone to the mortgagees, but which had not been paid over to him by the mortgagor, and that the rents in some cases were less than those mentioned in the deed, and it was alleged that they were wrongful acts. The claim was for a mortgage decree under Order 34, Rule 4, Civil P.C., or in the alternative for a decree for the amount duo on the footing of the personal liability of the mortgagor. The mortgage deed had not been attested, and so it could not be enforced as a mortgage, and the sole question remained whether the mortgagor was personally liable. Their Lordships hold that the nature and terms of the deed were such as to show that it was not originally intended that the mortgagor should be personally liable; but they sent the case back for further trial in order that the mortgagor might have an opportunity of proving the allegations in paras. 6 and 7 of his plaint and of establishing that those facts wore sufficient to bring Section 68, T.P. Act, into operation. This decision of the Privy Council is clear authority for the proposition that a usufructuary mortgagee is not entitled to a personal decree against hit; mortgagor, unless the latter has covenanted to repay the money or unless Clauses (h), (o) or (d) of Section 68, T.P. Act, can be brought into operation.

9. The same view had already been expressed a good many years ago by the Calcutta High Court in Bunseedhur v. Sujaat Ali (1889) 16 Cal. 540. In that case the mortgagor had stipulated that if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property was sold for arrears of Government revenue or for other causes, the mortgagee might in such cases recover the money advanced by execution against the person or other property of the mortgagor. It was held that since no sale took place under the second stipulation, the mortgagee could only obtain a decree against the mortgaged property.

10. Learned Counsel for the plaintiff-respondent has drawn our attention to a Bench decision of the Oudh Chief Court in AIR 1927 315 (Oudh) In that case it was held that, where a mortgage deed provides that the principal amount will be repaid with interest on a certain date and that on default the mortgagee would be at liberty to obtain possession of the hypothecated property by foreclosure, there is a personal covenant to pay on the part of the mortgagor, and that in the event of the mortgage being unenforceable against the properties, the mortgagee can sue upon the covenant for damages for breach of a contract in writing registered within six years

from the date of the default. That case undoubtedly supports the plaintiff, but the judgment is very brief and no authorities are cited; and with the utmost respect we think that it is not in consonance with the observations of their Lordships of the Privy Council which we have already quoted, as well as being at variance with other decisions of the Oudh Chief Court itself and of other High Courts.

11. Having considered the terms of the mortgage bond in suit and the provisions of the Transfer of Property Act and having paid due regard to the authorities which we have mentioned in the earlier part of this judgment, and particularly the authority of the Privy Council in Ram Narain Singh v. Adhundra Nath Mukerji AIR (1916) P.C. 119 we are clearly of opinion that in the present case there was no personal covenant on the part of the mortgagors. Learned Counsel for the plaintiff-respondent however referred us to Ganesh Singh v. Sujhari Kuar (1888) 10 All. 47 on the strength of which he pleads that he is entitled to invoke Clause (c) of Section 68 of the Transfer of Property Act, which provides that "where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor," the mortgagee has a right to sue for the mortgage money. In that case a cultivatory holding was mortgaged, but soon after wards the zamindar sued for cancellation of the mortgage deed on the ground, that the mortgagor was his occupancy tenant of the mortgaged property and that the mortgage was contrary to the provisions of Section 9, N.W.P. Rent Act (Act 12 of 1881). That suit was decreed, and thereafter the mortgagee, being unable to obtain possession under the mortgage bond, sued to recover the money from his mortgagor. It was held by this Court that, since the mortgagor must have known that he was mortgaging an estate not legally transferable while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security within the meaning of Section 68(b) - which is the same as (c) of the present Act - of the Transfer of Property Act, and the mortgagee was therefore entitled to succeed. One obvious distinction between that case and the case with which we are now concerned is that there the transaction was void, whereas here it was voidable and not void. Nor do we think it can be said that the mortgagee was deprived of his security by or in consequence of the wrongful act or default of the mortgagors. The mortgagee was presumably aware that the security which he was accepting for his loan was property belonging to a joint Hindu family, and he advanced the loan knowing that it was not for legal necessity and that it was not apparently even for purposes which were for the benefit of the family. He went into the transaction with his eyes open. He took a risk and lost. Even so, the result may appear somewhat inequitable, but no principles of equity can prevail where the law is clear as we here regard it. In the circumstances, we do not think that this plea can prevail. In the result we allow this appeal with costs, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance.