
Bajnath Singh and Another Vs Board of Revenue and Others

Civil Miscellaneous Writ No. 833 of 1976

Court: Allahabad High Court

Date of Decision: Nov. 9, 1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 41 Rule 33, 35A#Constitution of India, 1950 " Article 226#Transfer of Property Act, 1882 " Section 60, 65, 65A, 67, 68#Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 " Section 176

Citation: (1977) AWC 155

Hon'ble Judges: H.N. Seth, J

Bench: Single Bench

Advocate: R.N. Singh and K.P. Singh, for the Appellant; K.B. Garg, Namwar Singh and S.C., for the Respondent

Final Decision: Dismissed

Judgement

H.N. Seth, J.

Baij Nath Singh and Mst. Pandhari, who were Defendants in a suit for partition, instituted in the year 1956 before the

revenue courts, u/s 176 of the UP ZA and LR Act, by Ashwani Kumar (Respondent No. 2), have filed this petition under Article 226 of the

Constitution. The Petitioners challenge the validity of the order of the Board of Revenue dated 23-1-1976 and pray that the same be quashed.

2. Respondent No. 2 Ashwani Kumar filed two suits on 6-10-1956 and 6-12-1956 claiming partition of his 1/3 share in the properties situated in

villages Dheerhara, Poha and Pipari. Whereas one suit related to the properties situated in villages Dheerhara and Poha, the other related to

properties situated in village Pipari. In both the suits preliminary decrees declaring that Plaintiffs had 1/3 share in the properties were passed in the

year 1958. However, the Defendants agitated the matter upto the Board of Revenue and thereafter before this Court by means of a petition under

Article 226 of the Constitution. Ultimately his writ petition was dismissed by this Court in the year 1966, and thereafter proceedings for

preparation of final decree for partition were commenced. In due course, the Patwari prepared the lots in the year 1967 and submitted the same

before the Court. Lots prepared by the Patwari were ultimately approved by the Court.

3. At this stage, the Petitioner pointed out that in the suit they had raised an objection to the effect that Plaintiff's father had mortgaged his share in

the property, which was redeemed by Komal Singh. Further Plaintiff's grand mother had during the minority of Plaintiff's father mortgaged his

share with Komal Singh which had not been redeemed so far. Accordingly, Plaintiff was not entitled to partition and separate possession of his

share till he paid up the debt due under aforementioned mortgages. The trial court had framed issue No. 7 in this regard, but while passing the

preliminary decree it left this issue open to be decided at a later stage.

4. Subsequently, while deciding issue No. 7 the trial court held that so far as the suit relating to village Pipari was concerned, it had, because of the

provisions of the Consolidation of Holdings Act, abated. So far as the other suit was concerned, it relied upon the statement of Kuber and held

that the family of the parties had remained joint throughout. According to it, any redemption of mortgage by a member of joint Hindu family was for

the benefit of the entire family and the person redeeming could not derive any advantage from it. Moreover, the mortgage said to have been

executed by Smt. Sahodre appeared to be fictitious. Apparently one member of the family had mortgaged the property with another member of

the joint family with a view to defeat the claim of the creditors. Claim of the Petitioner that the Plaintiffs were not entitled to claim possession of the

property till they paid up the entire loan, therefore, was liable to be rejected.

5. In the result, the trial court, by its order dated 5-5-1973 directed that final decree for partition with regard to properties situated in village

Dhaurahara and Poha be prepared in accordance with the lots prepared by it, and it did not make any order with regard to property situated in

village Pipri. According to it property situated in village Pipri could be partitioned only by Consolidation Courts.

6. Petitioner then filed two appeals before the Addl. Commissioner who by his judgment dated 23-1-1974 held that so far as the appeal relating to

village Pipri was concerned, it was brought to his notice that village Pipri had not come under Consolidation operations. Additional Commissioner,

therefore, held that issue No. 7 which had been left to be decided in the proceedings had not been decided in that suit. So far as the appeal relating

to properties situated in other two villages was concerned, he held that the view of the trial court that the family was joint when the first mortgage is

said to have been executed did not appear to be correct. According to him material on the record indicated that the family, at that time, was not

joint, and the view of the trial court that benefit of any redemption would go to all members of the joint family was, on the face of it, erroneous.

Unless the amount to be paid by one party to the other was not ascertained, it was not possible to put any party in actual possession of the share

allotted to him. In the result, he allowed both the appeals and sent the cases back to the trial court for taking steps for preparing the final decree

afresh.

7. It is thus evident that the Additional Commissioner had fully accepted the Petitioner's case and held that possession of the property allotted to

the Plaintiff could not be delivered unless a provision in the decree for payment of the loan was made. The Additional Commissioner had after

holding that the Plaintiffs were bound by the mortgages, remanded the case for ascertainment of the amount due from them under those mortgages.

Curiously enough, the Petitioner challenged the order of remand made by the Additional Commissioner by filing two second appeals before the

Board of Revenue. The only reason as to why the Petitioner adopted this course, apparently was to delay as far as possible proceedings for

preparation of final decree in a suit instituted as far back as the year 1956, and in the meanwhile to continue to remain in possession of more than

their share of property. However, this time their calculation misfired and the Board of Revenue held that the question whether the mortgages set up

by the Petitioners had been executed by or on behalf of Plaintiff's predecessor in interest, while he was a member of joint Hindu family, was wholly

immaterial for the purposes of the suit for partition u/s 176 of the U.P. Z.A. & L.R. Act. The dispute regarding the mortgage transaction should

accordingly be separated from the partition proceedings and be decided afresh by the trial court after going into and dealing with the objection with

regard to its jurisdiction. In the result, it allowed both the appeals, set aside the orders of the Additional Commissioner and again remanded the

two cases back to the trial court for preparation of final decree in accordance with law. Result of the order passed by the Board of Revenue was

that even the finding of the Additional Commissioner (viz. that equities arising out of redemption of mortgage, which mortgage appeared to be

valid, could be adjusted in the present partition proceedings), which was in Petitioner's favour, was set aside in his own appeal.

8. Learned Counsel for the Petitioner contended that the Board of Revenue erred in holding that the equities arising from redemption of mortgage

by one of the co-sharers could not be adjusted in a partition suit filed u/s 176 of the U.P. Zamindari Abolition and Land Reforms Act. According

to him, the Plaintiff was not entitled to claim separated possession over his share in the property so long as he did not pay the amount paid by his

co-sharers for redeeming the share of property which had been mortgaged by or on behalf of his predecessor in interest.

9. Even if, for the sake of argument, it is accepted that the share belonging to the Plaintiff had been mortgaged by and on behalf of his predecessor

in interest, and that one of the mortgages had been redeemed by the Defendants or their predecessor, the question that would still arise for

consideration is whether the Defendants, either as mortgagees or as persons redeeming an earlier mortgage, have any right to prevent the

preparation of final decree for partition so long as the amount secured under the mortgage deeds is not paid up.

10. In the instant case, the precise nature of mortgages set up by the Defendants is not known. The arguments before me have proceeded on the

footing that both the mortgages i.e. one executed in favour of Komal Singh and the other which was redeemed by Komal Singh were simple

mortgages and I proceed to decide the case accordingly.

11. Section 65 of the Transfer of Property Act lays down as to what would be the terms of implied contract between the mortgagor and the

mortgagee. Section 65A of the Act then lays down certain restrictions on the power of the mortgagor to execute leases of the mortgaged property.

Section 60 enjoins upon the mortgagor not to commit any act which is destructive or permanently injurious to the mortgaged property. Section 67

of the Act thereafter confers upon the mortgagee a right to foreclose the mortgage or to get the mortgaged property sold for the realization of his-

dues. Section 68 gives the mortgagee a right to sue for the recovery of money advanced by him in certain leases. Section 69 and 69A of the Act

enable the mortgagee to, in cases specified therein, sell the mortgaged property for realization of the amount due to him. It will thus be seen that in

the case of a simple mortgage, the only right which a mortgagee has is either to sue for recovery of money advanced by him or to get the

mortgaged property sold for realization of the amount for which the property had been mortgaged. The obligations placed upon the mortgagor do

not contemplate that either the mortgagor who has a share in the property, or any other co-sharer, cannot get his share in the joint property

partitioned. It may be that despite partition amongst the co-sharers, the share mortgaged in the entire property may, continue to be liable for the

amount secured by the mortgagor, but then the Defendants as simple mortgagees cannot stand in the way of the mortgagor and his co-sharers in

getting the properties partitioned. Accordingly, as mortgagees of the share of Plaintiff's father, the only right which Komal Singh and the

Defendants had in the mortgaged property, was either to sue for recovery of money advanced to Plaintiff's father and or to sue for the sale of the

share of Plaintiff's father" for realization of their dues. Simply because they happened to be co-sharers along with Plaintiff or his predecessor in

interest, they did not get a right to resist proceedings for partition of the joint property till such time as the amount secured by the mortgagee was

not paid up.

12. So far as position of Komal Singh and his descendants, with regard to redemption of mortgage executed by Plaintiff's father in favour ""of some

outsider, is concerned, the position is not very much different from their position as simple mortgagees. It may again be assumed that Komal

Singh, being a co-sharer of the property, was one of the persons who was entitled, u/s 91 of the Transfer of Property Act to redeem the mortgage

executed by Plaintiffs" father. Section 92 of the Act provides that any person referred to in Section 91, and any co-mortgagor shall, on redeeming

property subject to the mortgage have, so far as regards redemption, forecloser or sale of such property, the same right as the mortgagee whose

mortgage he redeems may have against the mortgagor or any other mortgagee. Thus on redeeming the mortgage, Komal Singh and his

descendants got subrogated to the rights of the mortgagee and with regard to the share of the mortgaged property, they got the same rights which

the original mortgagee had. As discussed above, the original mortgagee merely had the right to sue for recovery of and/or sale of the mortgaged

property, which right would subsist despite partition of property. Neither the original mortgagee nor the person who is subrogated to his rights had

any locus standi to prevent a partition of property amongst the co-sharers of the property.

13. Learned Counsel for the Petitioner has not been able to place any law or authority which may support his contention that the Plaintiffs were not

entitled to partition of property till such time as they did not pay up the mortgage amount.

14. In this view of the matter, the Board of Revenue was perfectly justified in holding that the question with regard to determination of the amount

payable under the two mortgages set up by the Defendants or of adjusting the equities in respect thereof does not arise in a suit for partition. Order

of the Board of Revenue, therefore, has the effect of bringing in a situation which is perfectly in accordance with law.

15. Learned Counsel for the Petitioners next contended that so far as the Plaintiffs were concerned, they neither questioned the finding of the

Additional Commissioner, according to which, the equities arising under the mortgages in question had to be adjusted before a decree for separate

possession of Plaintiffs" share could be granted, nor did they file an appeal or cross objection against the order of remand. In the circumstances, it

was not open to the Board of Revenue to make an order in the appeal filed by the Petitioner, which made their position worse than what it was

under the impugned order of the Addl. Commissioner. According to him, the Board of Revenue could either accept or reject the appeal. It could

not, while accepting the appeal, make an order to Appellants prejudice.

16. I am unable to accept this argument. Order 41 Rule 33 of the CPC which admittedly, is applicable to appeals filed in revenue courts, runs thus:

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make

such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to

part only of the decree and may be exercised in favour of all or any of the Respondents or parties although such Respondents or parties may not

have tiled any appeal or objection.

Provided that the Appellate Court shall not make any order u/s 35-A in pursuance of any objection on which the Court from whose decree the

appeal is preferred has omitted or refused to make such order.

This provision specifically empowers the appellate court to, while disposing of an appeal, made an order which ought to have been passed or

made in the case, and that this power can be exercised in favour of all or any of the Respondents, notwithstanding that such Respondents may not

have filed any appeal or objection. It is true that case law on the subject indicates that the power has, in the light of other provisions contained in

the Code, to be exercised with certain amount of circumspection. However, in a case where the Appellate Court comes to the conclusion that the

effect of a particular part of the order under appeal, which is in favour of the Appellant, will be to perpetrate an action without jurisdiction, there is

no reason why the Appellate Court should not exercise its power under the rule, and prevent such erroneous exercise of jurisdiction. As discussed

above, the revenue courts, while dealing with the suit for partition had no concern with the two mortgages set up by the Petitioners. Any attempt on

the part of the revenue courts to deal with any controversy arising in connection with the two mortgages would be completely without jurisdiction.

The Board of Revenue was, therefore, quite justified in requiring the trial court to proceed to pass the final decree without taking into account the

two mortgages and to leave the parties to get their dispute with regard to them resolved in appropriate proceedings.

17. Moreover, even if for arguments sake it be assumed that the order passed by the Board of Revenue was defective, in the sense that it had no

jurisdiction to interfere with that portion of Additional Commissioner's order which was in Petitioner's favour, I, as observed above, find that it

had the effect of bringing incorrect legal position. In my opinion this Court should not exercise its extraordinary jurisdiction under Article 226 of the

Constitution so as to restore a position which is not tenable in law. In this case the effect of setting aside the order of the Board of Revenue, as

prayed for by the Petitioner, will be to restore the order of the Additional Commissioner which in effect requires the trial court to do something

which cannot be done in a suit instituted u/s 176 of the U.P. Zamindari Abolition and Land Reforms Act.

18. For all these reasons I find no force in this petition, which is dismissed with costs. The interim order dated 20-2-1976 is vacated.