Fulchand Rakhabdas MahaJan Vs Kanhaiya Lal Daluram and another

Court: Madhya Pradesh High Court (Indore Bench)

Date of Decision: Jan. 31, 1961

Acts Referred: Evidence Act, 1872 â€" Section 92
Transfer of Property Act, 1882 â€" Section 60

Citation: (1962) JLJ 962 : (1962) MPLJ 423

Hon'ble Judges: H.R. Krishnan, J

Bench: Single Bench

Advocate: K.A. Chitale, for the Appellant; S.D. Sanghi, for the Respondent

Final Decision: Dismissed

Judgement

H.R. Krishnan, J.

This is a second appeal by the defendant-mortgagee from the concurrent decisions of the lower Courts decreeing the redemption suit by the legal

representatives of the original mortgagor. The sheet anchor of the defendant-mortgagee"s ease was that in 1938, seven years after the mortgage in

1931, the mortgage entered into an independent transaction dehorns the mortgage, by which he surrendered to the mortgagee the equity of

redemption for no fresh payment, but in consideration of his not bringing a suit for the mortgage principal and the costs of repairs. This has been

disbelieved as a fact and further, the lower Courts have held that even assuming for the sake of argument that there was an agreement or

transaction of the kind pleaded by the defendant, it could not be proved in the absence of a formal registered instrument conveying the equity of

redemption. The points for consideration, therefore, are, whether on the facts the story set up by the defendant should have been believed, and

whether the findings of fact could be permitted to be challenged in second appeal; secondly, whether the documents produced by the defendant,

assuming them to be genuine to really support the conveyance of the equity of redemption to the mortgagees and amount to an independent

transaction outside the mortgage; and thirdly, whether in the event of these documents being genuine and having the effect of conveying the equity

of redemption to the mortgagee, they are sufficient to prove it in a Law Court in the absence of a formal registered deed.

Stated thus, the questions are simple and a negative decision on the first question would naturally conclude the controversy against the defendant-

appellant. However, the case has been argued at considerable length, elaborately with great ability and citation of a quantity of case-law.

The broad facts are common ground, except for the alleged surrender of relinquishment of the equity of redemption by the mortgagor in favour of

the mortgagee and the genuineness of two petitions said to have been filed by the mortgagor. The predecessor. in-interest of the plaintiff-

respondent Daluram, father of plaintiffs 1 and 2 and the husband of plaintiff No. 3, created a mortgage with possession by a registered deed (Ex.

D/9) dated 5-9-1931 on a house, the identity and the extent of which are not in dispute. The consideration was Rs. 1,771 and among other

incidents we have-

The coat of repairs in excess of Rs. 3 per annum shall be added on to the principal and be payable as such by me. that is to Bay, the mortgagor

would not be liable personally to anything by way of cost of repairs;

I shall repay the principal and redeem the mortgage within seven years...but if

I am not able to repay it, the house would be deemed to have been sold to you for the same amount.

It may be noted even here that the mortgagee is not resisting the suit (and in fact, cannot resist) on the strength of this clog, which cannot take effect

even in the absence of the Transfer of Property Act at that time in the State of Indore containing an express provision such as is indicated in section

60 of the Indian Transfer of Property Act; this being, in fact a recognised principle of equity and good conscience to which the Courts should give

effect. The mortgagee took possession and nothing particular is said to have happened till in 1938.

It is common ground that at the end of the seven year period the mortgagee pressed for payment of the principal Rs. 1,771 and in addition Rs. 800

in round figures said to have been spent by him in repairs. The mortgagor did not pay and redeem. There is a slight difference between the two in

regard to details, namely, whether it was the mortgagee who started pressing and whether the mortgagor offered the bare principal and demurred

to the sum of Rs, 800. Any way, it is also suggested that the mortgagee threatened to go to the law Court. After 1938 the municipality began to

claim and collect the house tax of Re. 4 per annum from the mortgagee, having in fact entered his name in the assessment register as the -

person from whom the tax is to be collected along with parentage (c) to.

The process by which this is said to be done has been called ""a mutation proceeding"" but it is common ground that no formal procedure was

indicated in the law or the rules, and no such procedure was adopted.

As years passed, in 1943 the mortgagee applied to the municipality for permission to reconstruct or repair the structure and actually obtained it. It

is not clear what work he actually did; but certainly at about the same time, he also obtained the so called certified copies from the municipality of

two petitions he alleged had been given by the mortgagor to the municipality in 1938 itself. The existence of such petitions is controversial, but the

fagot is that in 1943, the mortgagee was trying to obtain documents to strengthen his claim to be fall owner of the house.

In 1944, the original mortgagee, Daluram died, not having taken any steps for the redemption of the property; but about four years later his heirs

sought to redeem it by notice and tender of the principal. Now the mortgagee asserted that the property had become exclusively his in 1938 itself

by the surrender of the equity of redemption to him by the mortgagor. This led to the present litigation. Besides resisting the redemption, the

mortgagee claimed a considerable amount of the cost of repairs. Actually, a portion of it-about Rs. 800 in round figures-has been awarded by the

lower Courts and there is no controversy about it raised by either party in this Court.

The mortgagee''s account of the happenings in 1938 is based on oral evidence coming among others, from the mortgagee as well as from his son,

and sought to be supported by a number of documents, in particular, the municipal register entries D/l and D/2 which are no doubt genuine, and

alleged certified copies of the mortgagor''s petitions Ex D /4 and Ex.D/5 which are controversial, and other incidental documents which are not of

much independent value either way. It is also pointed out on behalf of the mortgagee that in 1938 there was no Transfer Property Act in force in

the Indore State, but there were the Registration Act and the Evidence Act substantially in the same terms as the corresponding Acts in the British

India of that time. Admittedly there was some discussion between the parties. It is alleged by the mortgagee that the mortgagor told him that in

return for the claim of Rs. 2,500, that is to say, the principal plus the cost of repairs, the latter might retain the entire property now as full owner,

and that the mortgagor would not lay any claim to it thereafter. He also invited the mortgagee to get mutation in the books of the municipality and

take over the responsibility for the house tax, which the mortgagor had been paying till that time. He petitioned the municipality to that effect.

As against it, it is urged by the plaintiff that the entry in the municipal registers while being no doubt, genius, has nothing to do with the ownership

and in fact describes only the person from whom the tax could be collected; in other words, the occupant, as the authorities were competent to

levy tax either from the owner-and if the owner was not occupying-from the occupant himself, the latter procedure being obviously more

convenient. The register itself does not say anything about mutation proceedings, with notice to the person formerly entered in the books. No

doubt, the mortgagee''s name was introduced after seven years but it was a matter for arrangement between the owner and his occupant and there

is nothing unusual in the mortgagor''s acquiescing in it for years when the amount payable van very small. As for the so called petitions Ex. D/4 and

Ex.D/5, which are not public documents, and of which the mortgagee has produced the so called certified copies obtained in 1943, the plaintiffs

deny their genuineness and further urge that even on their face-value, they do not amount to a surrender or conveyance by an independent

transaction. Apropos of this, the absence of the original petitions has been pointed out by the plaintiffs, while the defendant''s explanation is that

somebody interested in the success of the plaintiffs in this litigation has secreted them in of Be of the municipality, though the defendant had really

seen them in that office in 1948. The defendant has taken the trouble of producing certified copy of his application Ex. D/3 for these copies. On the

other hand, the plaintiffs have produced the list of contents of the petitions filed during that period, and have pointed out the non-mention in that of

such petitions.

Considering all this, the first appellate Court in substantial agreement with the trial Court has held-

The result is, the defence has failed to prove the oral agreement which he baa set up, by which the mortgage was converted into a sale and further,

it is legally impossible to establish by an oral agreement that the mortgagor''s aright of redemption WBB completely extinguished.

The discussion of which this passage is the conclusion and summary, has proceeded on two lines; firstly an examination of the factual allegation and

secondly, (assuming that such an agreement had been made) its legal effect in the absence of a registered deed of conveyance. On behalf of the

mortgagee -appellant, it is urged that the first appellate Court was in fact inclined to hold that there was an oral agreement, but has held on a point

of law that it could not effect any transfer of the property to the mortgagee or the extinguishment of the equity of redemption. A study of the

judgment does not support this view; the factual finding is also that there was no such oral agreement. The appellant cannot reopen it in second

appeal.

The difficulty for the mortgagee is that even if it is possible for him (as he has tried) to reopen these factual findings at this stage, the evidence

adduced by him is altogether insufficient to prove any such oral agreement. Small variations between the evidence of the mortgagee and his son in

this regard have been pointed out, but apart from these details, any surrender by the mortgagor of the equity of redemption without any additional

payment or consideration is altogether unimaginable. It is perfectly conceivable that in time of depression a mortgagor may not be keen on

redeeming the mortgage. But an equity of redemption is properly, that which will come in handy when he is able to redeem on a turn of events for

the better and nobody would give it away literally for nothing. It is common ground that the mortgagee was demanding an additional sum of Rs.

800 but there was no danger to the mortgagor; the worst the mortgagee could have done by taking him to the Law Court was to add this amount

to the principal and put the house for sale or take it away in satisfaction of the decree without any further damage to the mortgagor. But that was

all. The mortgage deed does not enable the mortgagee to hold the mortgagor personally liable. In these circumstances, it passes one''s belief to be

told that the mortgagor just agreed to wash his hand off whatever he had by way of equity of redemption without getting any additional advantage.

The papers produced at Exs. D/4 and D/5 are inadmissible in evidence because originals are not public documents, being only petitions supposed

to have been addressed by a private individual to a local authority. The copyist has been examined but his evidence is not of much value. Possibly

the vice-president who has ostensibly certified the truth of the copies might, if he had been summoned as a witness, have shed some light on the

existence or otherwise, and in fact on the genuineness of the certificates; but he has not been examined. Similarly, the fact of the appellant having

obtained certified copies of these BO called petitions in 1943 itself, after he got the permission for rebuilding, make it more suspicious. The story of

his having seen the papers in 1948 and their having been secreted is altogether absurd. Considering everything, the originals of these two

documents D/4 and D/5 do not Beam to have existed.

On behalf of the appellant, it is urged that after all, in 1938 for the first time the appellant''s name was noted in the assessment register and as such

something must have happened that led to it, and the two petitions D /4 and D/5 fit in with this happening. It is difficult to agree. For one thing, the

house tax was a very small amount and, for another, local bodies are known to make these alterations of convenience at their own leisure. After all,

it was open to them to collect the tax either from the owner or the occupant leaving it to them to make a mutual adjustment and where the owner is

not the occupant it is definitely more convenient to collect from the occupant. Be that as it may, the entry has nothing to do with the ownership. It

speaks of ""the person from whom the tax may be collected""; in the register itself there is no column to How separately the owner and the occupant.

Nor is there anything in the last column by way of remarks to show that there was some proceeding for mutation. I find nothing in the rules of the

municipality or the notifications of the Government of that time, prescribing any procedure for the mutation of names in the assessment register. In

fact, such procedure was unnecessary for the mere mention of the name of the occupant as the person from whom the tax was leviable, did not

give him any more rights than that of the person actually on the premises.

The oral agreement is certainly spoken of by the witnesses on the side of the mortgagee and by the plaintiffs; but the broad probabilities show that

it was altogether impossible in that context. This is exactly what the appellate Court has said in the first portion of its conclusion which I have

already set out. Thus it is a finding of fact arrived at due consideration of the evidence, and is further in itself quite proper; it is unnecessary to

discuss it any further.

A reading of these two petitions Ex. D/4 and D/5 shows that even if these were written by the mortgagor, they do not indicate any act of parties

independent of the mortgagor; it was only an expression of opinion about the legal consequence of a condition in the deed. (Petition addressed to

the President Municipal Committee)

...I have in this municipal area a house which I have mortgaged to Phoolchand Rakbabdae, the annual house tax of which is payable by me. I pray

that ib may be ordered that the said tax and the house be removed from under my name and from this year onwards be entered in the name of the

said Fboolchand Rakhabdas as the owner...dated 8-12-1938 (D/4).

But the mortgagor alleges that the petitioner thought this was not clear enough and accordingly quali6ed it by another petition on the 9th-

...I have in this municipality...which I have mortgaged to Phoolchand Rakhabdae on this condition that in the event of my not redeeming the house

within a period of seven years, the house would be considered to have been sold by me to the said Foolchand Rakhabdas. Further, at the end of

this term, I have not redeemed the house. So in accordance with the said condition, I consider that the house has been sold to the said Phoolchand

Rakhabdas. Therefore, I pray that the house may be removed from my name and this year onward may be put in he (Phoolehand"s)name.

Yesterday, I have given a petition but there is no mention in it of this condition. So, y on will please take that it includes, this statement...dated 9-

12-1938.

The petitions are to be read together, and show that the mortgagor did nothing new to divest himself of his property; he has only act out his

impression on the legal effect of a term of the mortgage.

Merely by saying-""BIKRI HUA AISA 8AMAJKHAR"" (I understand that there has been a sale according to the condition in his deed) the

mortgagor cannot be deemed to have consciously and legally conveyed the equity of redemption to the mortgagee. In this connection, the

mortgagee has placed the ruling reported in Ibrahim v. Munshi 27 I C (All.) 87(1). It was a formal proceeding before a revenue Court in an

application by the mortgagee for mutating his name in place of the mortgagors. The latter appeared and Stated- ""they were willing that the name of

the mortgagee should be entered as absolute owner instead of as mortgagee.

When subsequently the same mortgagors sought to redeem, the High Court held-

It is thus manifest that the mortgagors consented to the mortgagee being regarded as absolute owner and abandoned their right of redemption,

Apparently, they had no means to redeem the mortgagee and accordingly consented to the mortgagee taking the property as absolute owner. The

right of redemption was thus extinguished by act of parties and it is no longer open to the appellant to sue for redemption of the mortgage.

I5. By analogy, it is argued that the petitions to the municipality in the present case, had the same effect as the admission before the revenue

authorities in the Allahabad case, and it Shouted be held that it was an act of the parties by which the right of redemption was extinguished. Apart

from the incomplete quotation of the admission by the mortgagor in the Allahabad case, I doubt whether that High Court has not stated the

principle far too widely. The circumstances also show that the two cases are not analogous. There at least there was a tribunal competent to

enquire under statute as to the status of the person seeking mutation and was holding a formal judicial or quasi-judicial proceeding. Here the

authority-that is-the municipality-was not really interested in investigating who was the owner of the house, being concerned only with the most

convenient way of realizing the house tax which it was competent to realize either from the owner or from the occupant as well. Besides it bad

recorded the mortgagee as the person ""from whom the house tax was to be collected"" and not as the owner. Again we do not know why and in

what manner the mortgagor in the Allahabad case said that he was willing that the name of the mortgagee should be entered as that of the owner. If

it was an independent act of open relinquishment, the Allahabad decision is altogether unexceptionable. If, on the other band, the mortgagor had

only said that, as he understood the legal position, he had lost his right of redemption, then I would respect fully differ from the Allahabad view;

because it was not a case of surrender of conveyance of a right by an independent transaction, but only a misapprehension as to the legal effect of

certain circumstance, which did not in that case amount to either estoppel or acquiescence, ugly when there is an act of the parties subsequent to

and independently of the mortgage is the proviso to (sic) attracted.

Other High Courts have also dealt with similar cases. As long ago as 1890. the Bombay High Court held included afraid v. Madhavrao I L R 14

Bom. 78, that a statement by a party that ht understood that his tights have been to 817does not operated as an estoppel. In that case, there was a

conditional sale clause and the parties understood that the mortgage had been converted into a sale and the property had passed to the mortgagee-

defendant by purchase, and as such the plaintiffs-mortgagors were prevented from redeeming. Later on, they did seek to redeem and the Court

held that such understanding did not operate as estoppel or prevent the mortgagors from redeeming the property. The same principles have been

set out and discussed at some length in the later Bombay ruling in Kankaiyalal v. Narhar I L R 27 Bom. 287. That ease was quite similar to the

present one and there was what is called the ""Gahan Lahan"" clause in that locality, which provided that if the mortgagor did not redeem within the

time fixed, he should for ever be foreclosed. As it was, he did not redeem within the time fixed; he understood that under the ""Gahan Lahan"" clause

his right to redeem had been extinguished. Subsequently, on a better understanding of the provision, he claimed to redeem the property. The High

Court held that there was no fresh transaction independent of the mortgage; but all that had happened was the enforcement of the Gahan Lahan

clause,-

It cannot be contended in such a case that the principle of either estoppel or acquiescence concludes the mortgagor and bare his right to redeem....

The parties did indeed, act for several years upon the understanding that the mortgage had been converted into a sale, but, as held in Abdul Rahim

v. Madhavrao (1), that is not sufficient to extinguish the mortgagor''s equity of redemption where he understanding and the conduct of the parties

was solely due to their belief as to the gahan lahan clause and was not the consequence of any transaction independent of the mortgage.

There are other rulings also to the same effect; but one need only refer to the relevant passage in the Supreme Court Ruling in Kalidas v. The State

of Bombay AIR 1950 8 C 82.

When the facts are fully set out and admitted, a party''s opinion about the legal effect of those facts is of no consequence in construing the section.

No estoppel arises by reason of the admission of the party as to such effect.

In all such cases, we should distinguish between an independent bargain between the parties subsequent to and independent of the mortgage which

would attract the proviso in section 60, Transfer of Property Act, and a bare statement of the legal effect as the party conceives it. The same

question has come up for consideration in the single Bench decision Dhulckand v. Dharnidkar Appeal No. 76 of 1958 disposed of on 29-8-1950

the judgment of which, however, has not been reported. Thus, I would find that even on the assumption that the petitions attributed to the

mortgagor were really filed by him, the mortgagee does not succeed in resisting the redemption.

The third difficulty for the mortgagee is that any transaction debarring the mortgagor conveying the equity of redemption should, even under the law

in force in the Indore State in 1938, in the circumstances of the case, bad to be evidenced by a registered deed. Though the Transfer of Property

Act was not in force at that time, there were the Registration Act and the Evidence Act. Section 92, proviso (4) applied to a case like this where

the original transaction was by a written and registered instrument. The subsequent transaction averred by the mortgagee is one converting the

mortgage into a sale; in other words, to effect that the old disposition shall no more be a. mortgage but will be a sale outright. It is clearly a

modification of that disposition and as such, cannot be evidenced in a Law Court by anything short of a deed, which like the deed of the original

disposition should be registered. This is the view taken by the lower Court; but on behalf of the mortgagee it is urged that what happened in 193S

was not a modification of the original disposition but something altogether outside it. It is difficult to agree. That may also, the mortgagee will not be

able to prove what he alleged.

In the result we have the altogether unacceptable nature of the defendant''s evidence on the facts, the inability of the two petitions, even if accepted

to be genuine, to establish a surrender of the equity of redemption as an act of the parties, and, thirdly, the inadmissibility for the purpose of proving

in this regard anything short of a registered deed, which does not exist. The appeal is found to be without substance and is dismissed with costs

and pleader''s fee according to rules payable by the appellant to the respondents.