Gopiram Kashiram and Another Vs Shankar Rao and Others

Court: Madhya Pradesh High Court

Date of Decision: April 25, 1950

Acts Referred: Transfer of Property Act, 1882 â€" Section 105, 108, 83

Hon'ble Judges: C.J. Kaul, J; Abdul Hakim Khan, J

Bench: Division Bench

Advocate: Bhagwandas Gupta, for the Appellant; Surajnath Bhan and Ganga Sahai Garg, for the Respondent

Final Decision: Dismissed

Judgement

Abdul Hakim Khan, J.
This is a second appeal against the judgment and decree dated 24th July 1947 passed by the learned District

Judge, Gwalior in Appeal No. 26 of samvat 2003 confirming the judgment and decree of the trial Court, which dismissed the Plaintiff"s suit.

2. The facts of this case are that Defendant 3 (Khawaja Pazal Gani) mortgaged a house with possession to the Plaintiffs (Gopiram and Jagannath)

on 12th July 1929, for a sum of Rs. 1500. The same day Plaintiffs executed a lease of the mortgaged property in favour of Defendant 3 for a

monthly rent of Rs. 16 and thus Defendant 3 became a tenant of the Plaintiffs. Five years subsequent to this transaction, on 31st July 1934,

Defendant 3 sold the house to Gheesalal, Defendant 3 and Major Shankarlal Pawar (Defendant 1). The sale-deed contains a recital of the

previous mortgage and Defendant 3 also gave possession of the house, which he held as a tenant, to the purchasers (Defendants 1 and 3). After

the purchase Gheesalal, Defendant 2 gave a notice to the Plaintiffs on 11th August 1984 asking them to take the mortgage money, but the Plaintiff

did not acknowledge it.

3. On 8th April 1936 the Plaintiffs served a notice on Defendants 2 and 3, demanding rent at Rs. 15 a month and also the possession of the house.

To this Defendant 2 replied that he had already given to Plaintiffs a notice to take the mortgage-money and hand over the mortgage-deed and that

they were at liberty to come and take away the money. Furthermore, it was said in the reply that if the Plaintiff did not comply within a week, the

Defendant shall deposit the sum in the Court and bring a suit for redemption. But the Plaintiff did not go to the Defendant to take the money, nor

did Defendant 3, deposit the sum in its Court, nor did he file a suit of redemption.

4. The Plaintiffs again served the Defendants with a notice on 20th December 1937, demanding rent and possession of the house and on 25th

August 1938 brought this suit to obtain possession and mesne profits. Defendant 1 said that his name in the sale-deed, was merely in name and

that Defendant 3 is the real purchaser.

5. Defendant a said that soon after the purchase, he served the Plaintiffs with notices to take the mortgage-money and that they never came to him,

that he was prepared to pay the money, and as such the Plaintiffs could neither get possession from him nor the mesne profit.

6. Defendant 8 has been impleaded in the suit as pro forma Defendant.

7. The trial Court dismissed the suit with costs but added that Plaintiffs could get Rs. 1500. On appeal the District Judge confirmed the decree of

the trial Court and dismissed the appeal with costs.

8. In the memo of appeal, grounds Nos. 2 and 3 are as follows:

esnbZ eqjrgu dkfCt tk;nkn jgu ftUnk gksusrd tk;nkn ejgwuk ij dCtk j[kus vkSj ikus dk eqLrgd gS vkSj dksbZ dkj.k fdjk;snkj ;k mlds }kjk Ã¯Â¿Â½

tfj;s Ã¯Â¿Â½ dCtk j[kusokys ds fo:} dCtk vkSj fdjk;s dh ukfy"k [kkjht djus ds fy;s ugha gS A

ds fo:} dCtk vkSj fdjk;s dh ukfy"k [kkjht djus ds fy;s ugha gS A ** dh okdbZ dkjokbZ vkSj [kkl dj eqrgu ls dCtk okihl ysus dh ls ifgys ---- gks

x;s ,slk le>uk vkSj dks vnkyr dk }kj can dj nsuk dkuwuh dh dkuwuh vnkyrksa esa lgh vkSj iwjh dher djus ls badkj gS A

9. I must confess that even after reading them over and over, I have not been able to make either head or tail of them. They are a jumble of words,

which as a whole make no sense and may be regarded as a perfect example of rigmarole. But happily, the learned Counsel for the Appellant has

come to our rescue and in the course of arguments he told us that he rests his claim on his right to obtain ""Mortgagee"s possession"". When asked

to be more exploit, he said that he insists on his right as a mortgagee to recover possession.

10. After studying the record, I am of the opinion that the case suffers from a lot of confusion. There is confusion in the mind of the Plaintiffs, there

is confusion in the attitude which Defendant 3 has adopted, and last but not least there is no clear thinking by the lower Courts either. In order to

tear this veil of confusion, it is necessary that facts should be analysed and put in a proper sequence so as to enable one to see things in their true

perspective.

11. Facts as they emerge from the analysis of the case may be enumerated as under: (1) That Defendant 3 mortgaged his house with possession to

Plaintiffs for a sum of Rs. 1500, and thereby a relation of the mortgagor and mortgagee was established between them, (a) That Defendant 3 took

out a lease of the mortgaged property at Es. 15 a month from the Plaintiffs and thereby the relation of the tenant and landlord came to exist

between them, (3) That Defendant S sold the house to Defendants 1 and 2 and transferred possession thereof to the purchasers. (4) That

Defendant 2 served Plaintiffs with a notice asking them to come to him and take away the mortgage money, but the plain, tiffs did not comply. (6)

That Plaintiffs served Defendant 3 with two notices demanding possession and rent of the house, but the Defendant beyond showing readiness to

pay off the mortgage debt did not liqudiateit. (6). That the Plaintiffs brought this suit to recover possession as a mortgagee and ask for mesne

profits. I shall examine the above facts in the sequence in which they have been given.

12. Facts Nos. 1 and 2 are undisputed and they have been stated merely because they form a link. They are admitted and no one contests them.

13. Fact No. 8 forms the bone of contention, and propose to consider it along with fact No. 6.

14. The Plaintiff in Para 4 of the plaint complain about it in the following words:

eqÃ¯Â¿Â½bZ;ku cgSfl;r eqrZghu dkfCt tk;nkj ejgwuk Fks vkSj eqÃ¯Â¿Â½kvysg ua- 3 dk okdbZ dCtk egt crkSj fdjk;snkj Fkk A ,slk bYe gksrs gqos

Hkh eqÃ¯Â¿Â½kvysg ua- 1 o 2 us tk;nkj ejgquk ij rkjh[k 31 & 7 & 1934 dks dCtk eqÃ¯Â¿Â½kvysg ua- 3 ls ys fy;k gS A

15. Naturally the question which arises is: Was the act of Defendant 8 wrongful or illegal and can the Plaintiffs have any grievance about it?

16. From the facts given above, it is dear that Defendant 8 held two positions with regard to the property in question. First, he was the mortgagor,

and, secondly he possessed a lease of the house.

17. With regard to his position as a mortgagor, it cannot be said that he was not competent to sell the equity of redemption. He possessed the right

which he exercised, and he sold the equity of redemption to Defendants 1 and 2, and this can give no cause for offence to the Plaintiff.

18. With regard to his position as a leases he held a lease and according to Section 108(i) T.P. Act in the absence of a contract to the: contrary

(and no contract to the contrary has been alleged the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of

his interest in the property.

19. In order to appreciate the position, let-us see what the incidents of a lease are. The term ""lease"" it defined in Section 105, T.P. Act and; it need

not be set out her. It has been held that a lease is not a mere contract, but is a transfer of an interest in land and creates a right im rem, Raghunath

Das v. Morarji, 16 Bom 568. According to the terms of English law, the estate so transferred is called the leasehold and the estate remaining in the

lesser is called the reversion. As an incident of the lease, it may be noted that before the lease, the owner has the right to enjoy the possession of

the land and afire the lease, the owner excludes himself: during its subsistence from that right and that the determination of the lease removes that,

barrier. The estate of the lesser and lessee are estates of inheritance and also of transfer inter vivos.

20. The act of Defendant 8 in handing over; the house to Defendants 1 and a must be regarded; as an act of the assignment of the lease. Such an

assignment creates privacy of interest between the lesser and the assignee, and the assignee/becomes liable to the lesser for the covenant to-pay

rent Satdanha v. Subraya 30 Mad. 410 : 17 M.L.J. 258. In Purchase v. Lich field Brevery Co. (1916) 1 K.B. 184 : 84 L.J.K.B. 742, it has been

held that as between himself and the lessor, the assignee stands in the place of the lessee, acquiring his rights and being subject to his liabilities and

in fact becomes a. tenant.

21. It may be asked--did the Plaintiff misconceive their position? The answer is ""No."" The Plaintiffs gave two notices to Defendants 1 and 2, one

dated 6th April 1935 and the other dated 20th December 1987 and in both of these they demanded the rent. This undoubtedly: goes to show that

they had a fairly correct ideas about their position.

22. In view of this legal position, the grievance of the Plaintiffs is more imaginary than: real Defendants 1, 2 and 8 did nothing which was illegal and

whatever mortification or disappointment the PlaintiffÃ¯Â¿Â½s might have felt, that affords them no ground for: this action. The position which emerges

from the above discussion may be summarized as thus: (1) After the sale instead of Defendant 8 Defendants 1 and 2 became the mortgagors, but

Plaintiffs continue to be the mortgagees; (2) and on account of the transfer of the lease, instead of Defendant 8, Defendants 1 and a became the

tenants; but the Plaintiffs continued to be the lessors.

23. At this stage it may be asked, what is now the case of the Plaintiffs?

24. It has been contended by the learned Counsel for the Appellant that they insist on their right to mortgagee possession and also want mesne

profits.

25. In the first place there is no such thing in law as the term employed by the learned Counsel ''mortgagee-possession.'' It has been explained to

mean ''possession as a mortgagee.'' But in the sequence of events that have been narrated above, the question of possession as a mortgagee does

not at all arise.

26. We see that Defendant 8 mortgaged the property with possession to the Plaintiffs and in the mortgage-deed it is admitted that possession was

given to the mortgagees and they do not complain that initially possession was not given to them. We also see that subsequently the Plaintiffs leased

the house to Defendant 3 and in the circumstances it may be well assumed that they gave back the possession to Defendant 3 as their tenant. We

find that Defendants 1 and 2 are successors in title to Defendant 3. In its ultimate analysis, the position may be stated as thus: (1) That Defendants

1 and 2 are the mortgagors, in place of Defendant 3. (2) That Defendants 1 and 2 are the tenants of the Plaintiffs by reason of the transfer of the

lease, in place of Defendant 3.

27. In the circumstances, asking for possession as a mortgagee is out of the question. Of course, the Plaintiffs can bring a suit according to law for

the eviction of the Defendants and thereby gain possession--an end which they devoutly wish. But things as they stand, this is not a suit for eviction

by the landlord against his tenant.

28. The learned Counsel for the Appellant, in the course of his argument appeared to shift the ground and requested us to treat this suit as one of

eviction.

29. But in the first place, the plaint as constituted, discloses no cause for eviction, and secondly the case has not been treated alike by the two

lower Courts, and thirdly, objections open to the Defendant in a suit for eviction have not been taken and are not before us. Add to this, the law as

contained in Accommodation Control Orders, and, it is obvious that without giving an opportunity to the Defendant the suit cannot be decided by

us as one for eviction.

30. The learned Counsel for the Appellant in support of recovering possession as a mortgagee, has referred us to (1933) 1 ITR 219 (Privy

Council) The facts of the present case and the facts of the ruling no doubt bear resemblance but in one material particular they differ. In the ruling,

the mortgagee leased the property for ten years and after the efflux of the period, the mortgagee sued for possession as mortgagee, but in the

present case, the lease is for an indeterminable period or at any rate no period is fixed in the case covered by the ruling after ten years, the relation

of the landlord and the tenant came to an end and the term of the lease having expired the mortgagee was held entitled to possession. But in the

present case, the tenancy has not come to an end, but'' continues and in the circumstances the question of the recovery of the property as a

mortgagee does not at all arise. Because of the above distinction, I am afraid, the ruling is inapplicable.

31. I shall now deal with facts Nos. 4 and 5 together. We have to consider the effect of notices which one party gave to the other. It seems that

the lower Courts have been misled by the exchange of notices, and though it has not been said in so many words, yet the mind of the learned

Courts seems to run in the direction that if the mortgagor showed willingness to pay the money to the mortgagee, the mortgage comes to an end.

32. Defendant 2 after the purchase of the house served Plaintiff with a notice dated 11th August 1931 to come to him and take away the mortgage

money and said that failing this, Defendant 2 would money-order the amount after deducting the money-order commission. To this the Plaintiffs

returned no reply, and it is on record that the Defendants never sent any money to the Plaintiffs. The question is, what is the effect of this notice?

33. Beyond showing a readiness to pay off the mortgage debt, this notice is of no use. It is a well-known principle that the debtor should seek his

creditor. It was not proper for the debtor to ask the creditor to see him and the deduction of money order commission was not legally warranted.

34. Excepting the provisions as contained in Section 83, T.P. Act I know of no law where mere intimation to the mortgagee affords any relief to

the mortgagor the money should be deposited in the Court before relief can be sought. In this case no deposit was ever made and while I

appreciate the readiness of the debtor to pay off, I am quite certain that mere readiness does neither liquidate a debt nor extinguish a mortgage.

35. What I have said about the notice dated 11th August 1934 also holds good of the notice which Defendant 2 Bent to Plaintiffs in reply to

Plaintiffs notice dated 8th April 1985.

36. In the course of proceedings before the trial Court, Defendant 2 said that he was willing to pay BS. 1500 and requested, the Court to enquire

if the Plaintiffs were prepared to accept the amount in settlement of their claim. But the Plaintiffs refused. This incident seems to have influenced the

mind of the lower Courts, but in fact this should be looked upon merely an attempt to bring about a compromise. In order to gain some legal

benefit, Defendants ought to have acted in accordance with the provision of Transfer of Property Act referred to above.

37. The decree in this case deserves some attention. The trial Court dismissed the suit with costs and yet held the Plaintiffs entitled to a sum of Rs.

1600. This decision, I am afraid, leaves much to be desired. What does this Rs. 1600 represent? Obviously it is not the mesne profit, because the

suit in its entirety has been dismissed. Is it then, the mortgage-money? It appears that the mortgage was executed for that amount, but because the

Plaintiff did not sue for mortgage money the Court could not decree it. Then what does this signify and can this decree as it stands be executed? I

am afraid the learned Courts below did: not seriously consider these aspects of the matter and the decree needs correction in this respect. The suit

having been dismissed with costs, the order or judgment ought to have come to an end and the addition ""the Plaintiff is entitled to Rs. 1600 only"" is

besides the point and is out of tune with the case as instituted by the Plaintiff.

38. In result, I partly allow the appeal and order that from the decree of both the lower Courts words be deleted. The suit stands dismissed.

39. In view of the facts of the case, it seems just and proper to order that parties shall bear their costs in all Courts.

1. I have had the advantage of reading the judgment of A.H. Ehan J. and agree with the conclusion arrived at by him. I would confirm the decree

of the lower Court in so far as it dismisses the suit on the short ground that the suit to which this appeal relates was framed as if it was a claim for

ejectment of a trespasser. This view is confirmed by the fact that the reliefÃ¯Â¿Â½s claimed were possession and mesne profits. In the case before us

the main contesting Defendant was a person to whom the mortgaged property was sold by the mortgagor. The mortgagor had also delivered actual

possession of the property to him. It is true that the mortgage in favour of the Plaintiff purported to be with possession but under an agreement

arrived at between the mortgagor and the mortgagee simultaneously with the execution of; the deed of mortgage, the mortgagor retained

possession of the house as a tenant of the mortgagee on payment of a monthly rent of Rs. 16. Surely a person to whom the house was sold and

possession delivered by the mortgagor in these circumstances cannot be a trespasser.

41. An argument was advanced that the suit might be treated as one for ejectment of a tenant by the landlord. This was not the form in which the

plaint was cast nor did the pleadings of the parties proceed on those lines. The pleas that might be open to a tenant in such a suit under the recently

enacted laws were in view of the nature of the plaint not raised and it is too late for any attempt to change the character of the suit to succeed,

when the matter comes in the High Court in second appeal.

42. The decree passed by the lower appellate Court is open to the objection pointed out by Khan J. I would accordingly substitute for the decree

passed by the lower Court a decree in the following terms. The claim is dismissed. As to costs it appears that the Defendants were also partly to

blame for the course which this litigation took in the trial Court and as proposed by Khan J. it would meet the ends of justice if each party be

ordered to bear its own costs in all the Courts.

By the Court

43. The appeal is dismissed but for the decree passed by the lower Court will be substituted a decree in the following terms: The claim is

dismissed. Each party shall however bear its own costs throughout.