Narandas Karsondas Vs S.A. Kamtam and Another

Appeal Civil 1020 of 1975

Court: Supreme Court of India

Date of Decision: Dec. 7, 1976

Acts Referred:
Contract Act, 1872 â€" Section 202, 203, 204#Registration Act, 1908 â€" Section 17#Transfer of Property Act, 1882 â€" Section 40, 5, 54, 58, 60

Citation: AIR 1977 SC 774 : (1977) 3 SCC 247 : (1977) 2 SCR 341

Hon'ble Judges: A. N. Ray, C.J; M. Hameedullah Beg, J; Jaswant Singh, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

A.N. Ray, C.J.
This appeal by special leave is from the judgment dated 18 April 1975 of the Maharashtra State Co-operative Appellate

Court.

2. The question for consideration in this appeal is whether a mortgagor can exercise his right of redemption after a mortgagee under an English

Mortgage with power to sell mortgaged property without the intervention of the court gives notice to the mortgagor to sell the mortgaged property

by public auction and sells it by public auction.

3. The appellant is the auction purchaser. The respondents are Flora Co-operative Housing Society in liquidation the mortgagors (hereinafter

referred to as the Society) and the Maharashtra Co-operative Housing Finance Society Ltd., the mortgagee (hereinafter referred to as the

mortgagee).

4. In 1964 the Society was registered as a Housing Society with 12 members. The paid up capital of the Society was Rs. 21,000/-. The society

wanted 12 flats to be constructed in one structure of ground and two up per floOrs. The Society purchased plot No. 153 in Santa Cruz at

Bombay, measuring 1002 sq. yards. The price was Rs. 1,02,000/-.

5. In 1966 the Society mortgaged the land and the incomplete structure in favour of the mortgagee. The mortgage was for the sum of Rs. 70,000/-.

It was an English mortgage. In 1968 the mortgagee advanced a further sum of Rs. 42,000/-.

6. In 1966 Fair Deal Builders entered into a contract with Society to build. The work was stopped Thereafter in 1967 the Society entrusted the

work to Maharaja Builders. In 1968 the contract with Maharaja Builders was terminated. The work was given in 1969 to Kamal Construction

Company, who abandoned it in incomplete stage.

7. On divers dates between 29 August 1967 and 29 November 1970, notice was given by the mortgagee to the Society for non-payment to the

mortgagee and to sell the property by public auction.

8. On 9 March 1971 the Assistant Registrar of Co-operative Societies. Maharashtra, appointed a Special Liquidator of the Society tinder Section

102 of Maharashtra Co-operative Societies Act, 1980. The Assistant Registrar communicated the order of appointment of liquidator to the

mortgagee on 22 April 1971. The order of appointment of a liquidator was published in Maharashtra Government Gazette on 29 April 1971.

9. The mortgagee advertised through Government auctioneer for public auction of the property. The auction was held on 14 April 1971. The claim

was for Rs. 1,22,888.22 paise. The appellant was declared the highest bidder for Rs. 1,31,001/-. The terms of sale inter alia were that 25 per cent

was to be paid in advance and the balance in 30 days. The sum of Rs. 33,000/- was paid as 25 per cent advance and the balance purchase price

of Rs. 98,001/- was paid to attorneys of the mortgagee. The auction purchaser took possession on 17 April 1971.

10. On 13 August 1971 the Society filed a dispute before the Officer on Special Duty under the Maharashtra Co-operative Societies Act against

the auction purchaser and the mortgagee for injunction against completing sale. The Society obtained an ex parte injunction restraining transfer. On

29 September 1971, the interim injunction was vacated.

11. Thereafter the Society filed an appeal against the said order before the Appellate Tribunal.

12. In the meantime the appellant filed a writ petition in the Bombay High Court under Article 227 of the Constitution.

13. On 16 June 1972 there was an interim order by the High Court in the writ petition. The Society undertook not to dispose of property until

disposal of dispute. Both parties were allowed to keep watchmen.

14. The Society borrowed a sum of Rs. 1,31,000/- and paid the same to the mortgagee on 15 October 1972.

15. On 16 January 1975 the Officer on Special Duty delivered judgment. He held that the dispute was maintainable u/s 91 of the Maharashtra Co-

operative Societies Act The Society was held not competent to challenge the auction sale held on 14 April 1971. It was also held that the validity

of auction was not affected. The mortgagee was held entitled to exercise power of tale as a secured creditor without being affected by the winding up order against the Society. It was also held that the mortgagee did not commit any breach of the statutory provisions of Section 69 of the

Transfer of Property Act. The sale was not vitiated. It was found that there was no irregularity at the auction and there is no ground for setting

aside the sale. The society was entitled to redeem the property because the conveyance was not complete.

16. The auction purchaser filed before the Maharashtra State Co-operative Appellate Court an appeal against the said order. In appeal the plaint

was allowed to be amended and prayer for redemption was allowed to be introduced. On 18 April 1975 the Maharashtra State Co-operative

Appellate Court dismissed the appeal and held that the dispute as initiated by the Society fell within the ambit of Section 91 of the Maharashtra

Co-operative Societies Act. The Appellate Court further held that there was no complete sale within the meaning of Section 69(3) of the Transfer

of Property Act, and the equity of redemption was therefore not lost. It was further held that the auction price was grossly inadequate. The auction

sale was not a sale after a fair competition.

17. The Mortgage Deed provided inter alia as follows:

It is hereby agreed and declared that it shall be lawful for the mortgagees at any time without any further consent on the part of the mortgagors to

sell the said mortgaged premises.... The afore said power shall be deemed to be a power to sell or concur in selling the said mortgaged premises in

default of payment of the mortgage money without the intervention of the court within the meaning of Section 66 of the Transfer of Property Act.

18. Clauses (7), (8) and (33) in the Conditions of Sale may be referred to.

19. Clause (7) provided as follows. Upon payment of the balance of the purchase price, the purchaser shall be entitled to a conveyance from the

vendOrs. The vendors shall in the conveyance of the property purchased by purchaser give the usual covenant required of a limited owner against

encumbrances. The vendors shall give no other covenant required of an absolute full owner. The vendors shall not be required to procure the

consent of the mortgagors or of any other person in the conveyance.

20. Clause (8) was as follows. After payment of the balance of the purchase money the purchaser shall be entitled to the rents and profits of the

said property. The vendors as the mortgagees are not in possession of the property and will not do any thing to deliver possession of the property

to the purchaser. The vendors as the mortgagees shall not be able to give vacant or symbolic possession of the property to the purchaser. On

payment of the balance of the purchase price the purchaser shall at his own cost be at liberty to take such steps as the purchaser may deem

necessary for obtaining possession of the property from the mortgagOrs.

21. Clause (33) provided as follows. If the mortgagors shall deposit all the amounts due to the vendors as mortgagees in court or pay the same to

the vendors or their attorneys between the date of sale and the completion thereof and if as a result thereof the vendors have to reconvey the

property to them or if the vendors cannot thus proceed with the sale and the sale is not completed on that account the vendors shall return the said

deposit to the purchaser without any interest and/or costs and the vendors as such mortgagees shall not be held liable for any damage.

22. Counsel for the appellant advanced these contentions. First, u/s 69 of the Transfer of Property Act a mortgagor confers on the mortgagee a

power of sale through Court or without intervention of Court. The power of sale is of the entire legal estate of the mortgagor. Second, when such a

power is conferred it is agency coupled with interest u/s 202 of the Indian Contract Act. The agency cannot be revoked without payment to

mortgagee. Third, if the power is acted upon, revocation even on payment cannot nullify acts pursuant to powers. Reliance was placed on Sections

203 and 204 of the Indian Contract Act. Fourth, if the act done pursuant to power is that the property is put up for sale and it is knocked down it

is an act done by the Mortgagee for mortgagor. In other words it is as if an act done by the mortgagor. The sale pursuant to the power is a

subsequent act within the meaning of Transfer of Property Act and this subsequent act will extinguish the mortgagor''s right of redemption. Fifth, in

a suit for specific performance by auction-purchaser the purchaser will be entitled to specific performance because it is a sale by mortgagor.

23. Counsel for the appellant relied on two English decisions. These are : Waring (Lord) v. London and Manchester Assurance Co. (1935) Ch

310 and Property & Bloodstock Ltd. v. Emerton (1968) Ch 94, in support of the propositions that the mortgagor''s right to redemption would be

extinguished when the mortgagee exercised the power of sale and the third party entered into a binding contract to purchase the property.

24. The English decisions are based on the provisions of the English Law of Property Act. The provisions create a statutory power of sale, which

gives to a mortgagee power to sell the mortgaged property and it means that the mortgagee has power to sell out and out by private contract or by

auction, and subsequently to complete the conveyance. The English decisions are that if a mortgagee exercises power u/s 100(1)(i) of the Law of

Property Act, 1925 to sell the mortgaged property by public auction or by private contract it is binding on the mortgagor before completion unless

it is proved that he exercised it in bad faith.

25. It was said in the Property & Bloodstock case (1968 Ch 94) (supra) that the contract for sale by the mortgagees to the purchaser precludes

the mortgagor from his right of redemption pending completion even if the property is sold subject to one or more conditions. The English decision

naturally notices distinction between condition precedent and the terms of contract of sale, namely, conditions dealing; with matters of title for

carrying out the contract The mere fact that the label ""condition"" happens to be attached to conditions does not preclude its being in latter category of ""condition"" or matter of title. The condition that the sale is subject to the reversioner''s licence being obtained where necessary is held in the

English decision to be commonly regarded as no more than a term of the contract relating to title.

26. The provisions in the Transfer of Property Act relevant to the purpose of present appeal are Sections 54, 60 and 69. u/s 54 of the Transfer of

Property Act, sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such transfer in the case of

tangible Immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing can be made

only by a registered instrument. A contract for the sale of Immovable property is a contract that a sale of such property shall take place on terms

settled between the parties.

27. An English Mortgage is defined in Section 58(e) of the Transfer of Property Act. Where the mortgagor binds himself to repay the mortgage-

money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the

mortgagor upon payment of the mortgage-money as agreed the transaction is called an English mortgage.

28. The Rights and Liabilities of Mortgagor are dealt with in Section 60 of the Transfer of Property Act. It is true that at any time after the principal

money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the

mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or

power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property to deliver possession thereof to the mortgagor and

(c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and to

have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished. There

is a proviso that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court The right conferred

by Section 60 of the Transfer of Property Act is called a right to redeem Therefore, the said Section 60 provides for a right of redemption

provided that the right has not been extinguished by the act of parties.

29. Section 69 of the Transfer of Property Act deals with mortgagee''s power of sale. Under the said Section 69(1)(c), a mortgagee has power of

sale without the intervention of the Court where power is conferred by the mortgage deed and the mortgaged property or any part thereof was on

the date of the execution of the mortgage deed, situate within the towns of Calcutta, Madras, Bombay or in any other town or area which the State

Government may, by notification in the official Gazette, specify.

30. The principal question in this appeal is whether the right to redemption has been extinguished by any act of the parties. The English decisions

are based on the provisions of the Law of Property Act, 1925. In England sale is effected by the contract of sale, and in India an agreement for

sale is not a sale or transfer of interest. In England, a mortgagee gets an equitable interest in the property. Under the English doctrine a contract of

sale transfers an equitable estate to the purchaser. The Court does not assist the mortgagor by granting him a remedy unless there is collusion on

the part of the mortgagee.

31. In India there is no equity or right in property created in favour of the purchaser by the contract between the mortgagee and the proposed

purchaser. In India, there is no distinction between legal and equitable estates. The law of India knows nothing of that distinction between legal and

equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Under the Indian

law, there can be but one owner that is, the legal owner. See Rani Chhatra Kumari v. Mohan Bikram(1931) 58 I.A. 279

32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of

Property Act See Rambaran Prasad v. Ram Mohit Hazra & Ors [1967] 1 S.C.R. 293 . The fiduciary character of the personal obligation created

by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation

created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the

ownership of property, but not amounting to an interest or easement therein.

33. In India, the word ""transfer"" is denned with reference to the word ""convey"". The word ""transfer"" in English law in its narrower and more usual

sense refers to the transfer of an estate in land. Section 205 of the Law of Property Act in England defines : ""Conveyance"" includes a mortgage,

charge, lease, assent, vesting declaration, vesting instrument The word ""conveys"" in Section 5 of the Transfer of Property Act is used in the wider

sense of conveying ownership.

34. The right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the Mortgagor unless it has been

extinguished by the act of parties. The combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Indian Registration Act

is that a contract for sale in respect of Immovable property of the value of more than one hundred rupees without registration cannot extinguish the

equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor''s interest by registered

instrument that the mortgagor''s right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a

Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to

the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

35. The mortgagor''s right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale

of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing

requiring payment of the principal money has been served on the mortgagor. Further Section 69(3) of the Transfer of Property Act shows that

when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case

had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption.

36. It is erroneous to suggest that the mortgagee is acting as the agent of the mortgagor in selling the property. The mortgagor exercises his right

under a different claim. The mortgagee''s right is different from the mortgagor''s. The mortgagee exercises his right under a totally superior claim

which is not under the mortgagor, but against him. In other words, the sale is against the mortgagor''s wishes. Rights and interests of the mortgagor

and the mortgagee in regard to sale are conflicting.

37. In view of the fact that only on execution of conveyance, ownership passes from one party to another it cannot be held that the mortgagor lost

the right of redemption just because the property was put to auction. The mortgagor has a right to redeem unless the sale of the property was

complete by registration in accordance with the provisions of the Registration Act.

38. The decision in Abraham Ezra Issac Mansoor v. Abdul Latiff Usman I.L,R, (1944) Bom. 549 is correct law that the right to redeem a

mortgage given to a mortgagor u/s 60 of the Transfer of Property Act, is not extinguished by a contract of sale of the mortgaged property entered

into by a mortgagee in exercise of the power of sale given to him under the mortgage deed. Until the sale is completed by a registered instrument,

the mortgagor can redeem the mortgage on payment of the requisite amount.

39. The Madras decision reported in Meenakshi Velu v. Kasturi Sakunthala ILR (1967) 3 Mad 161 on which counsel for the appellant relied is

contrary to the view express ed in Ellappa Naiker and others v. Sivasubramania Maniagaran (1936) 71 Madras Iaw Journal 607. and the

aforesaid Bombay decision.

40. We are entirely in agreement with the Bombay decision. The Madras decision Meenakshi Velu v. Kasturi Sakunthala ILR (1967) Mad 161

(supra) which holds a contrary view on which counsel for the appellant relied is wrong.

41. For the foregoing reasons, the appeal is dismissed with costs to respondent No. 1.