

Prithi Nath Singh and Others

Vs

Suraj Ahir and Others

Review Petition No. 26 of 1962

(K. C. Das Gupta, Raghuvar Dayal JJ)

10.12.1962

JUDGMENT

RAGHUBAR DAYAL, J. -

We allowed Civil Appeal No. 533 of 1960 on May 4, 1962, by our judgment dealing with the facts of the case and giving the reasons for the opinion expressed. It is not necessary to repeat them.

Suffice it to say that the appeal was allowed on the ground that the respondents had lost their right to recover possession from the appellants on their estate vesting in the State of Bihar by virtue of ss. 3 and 4 of the Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950), hereinafter called the Act, and their having no subsisting right to recover possession from the appellants. It was also held that they could not get advantage of the provisions of cl. (c) of sub-s. (1) of s. 6 of the Act as amended by the Bihar Land Reforms (Amendment) Act, 1959 (Act XVI of 1959) as no mortgage subsisted on the date of vesting. The amended cl. (c) read as follows :

"(c) lands used for agricultural or horticultural purposes forming the subject matter of a subsisting mortgage on the redemption of which the intermediary is entitled to recover khas possession thereof."

It is contended for the respondents, who applied for the review of our judgment, that our view that the mortgage was not subsisting on the date of vesting was wrong. The contention is that even though the respondents-mortgagors had paid up the mortgage money in 1943, the mortgage continued to subsist till the date of vesting as by that time the right of redemption given by s. 60 of the Transfer of Property Act had not come to an end. That right, according to the respondents' contention, would not come to an end so long as the mortgagors' right to ask the mortgagees to perform any of the acts mentioned in s. 60 continues. In support of the contention that the mortgage continues till the right of redemption comes to an end, reliance is placed on the case reported as Thota China Subba Rao v. Mattapalli Raju. [(1949) F.C.R. 484, 498.] We do not agree with these contentions.

Section 58 of the Transfer of Property Act defines 'mortgage' to be a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. It also defines various varieties of mortgage and, in clause (d) defines 'usufructuary mortgage' thus :

"Where the mortgagor delivers possession or expressly or by implication binds

himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

When the mortgage money is paid by the mortgagor to the mortgagee, there does not remain any debt due from the mortgagor to mortgagee, and therefore the mortgage can no longer continue after the mortgage money has been paid. The transfer of interest represented by the mortgage was for a certain purpose, and that was to secure payment of money advanced by way of loan. A security cannot exist after the loan had been paid up. If any interest in the property continues to vest in the mortgagee subsequent to the payment of the mortgage money to him, it would be an interest different from that of a mortgagee's interest. The mortgage as a transfer of an interest in immoveable property for the purpose of securing payment of money advanced by way of loan' must come to an end on the payment of the mortgage money.

Further, the definition of usufructuary mortgage itself leads to the conclusion that the authority given to the mortgagee to remain in possession of the mortgaged property ceases when the mortgage money has been paid up. The usufructuary mortgage, by the terms of its definition, authorises the mortgagee to retain possession only until payment of the mortgage money, and to appropriate the rents and profits collected by him in lieu of interest or in payment of the mortgage money, or partly in lieu of interest or partly in lieu of payment of the mortgage money. When the mortgage money has been paid up, no question of appropriating the rents and profits accruing from the property towards interest or mortgage money can arise. It is clear therefore that on the payment of the mortgage money by the mortgagor to the mortgagee the mortgage comes to an end and the right of the mortgagee to remain in possession also comes to an end.

The relevant portion of s. 60 on which the respondents rely reads :

"60. 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 to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession of power of the mortgagee where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and 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 (where the mortgage has been effected by a registered instrument to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided 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 this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

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It is to be noted that these provisions do not state when a mortgage ceases to be a mortgage. They simply describe the right of a mortgagor to redeem. Now, what is this right and, in what circumstances does it arise? The right arises on the principal money, payment of which is secured by the mortgage deed, becoming due. The right entitles the mortgagor, on his paying or tendering to the mortgagee the mortgage money to ask him (i) to deliver to him the mortgage deed and other documents relating to the mortgaged property; (ii) to deliver possession to the mortgagor, if the mortgagee is in possession; and (iii) to re-transfer the mortgaged property in accordance with the desire of the mortgagor. If the mortgagee receives the money and does not perform any of the three acts required of him to be done, the question arises whether this non-compliance with the demands will make the mortgage continue. The provisions of the section do not say so and there appears no good reason why the mortgage should continue. If the mortgagee is not to perform these acts, the mortgagor is not to pay the amount. If, however, the mortgage money has been received by the mortgagee and thereafter he refuses to perform the acts he is bound to do, the mortgagor can enforce his right to get back the mortgage document, the possession of the mortgaged property and the reconveyance of that property through Court. A new right to get his demands enforced through the Court thus arises as a result of the provisions of s. 60 of the Act.

If the mortgage money has been paid and then the mortgagor goes to Court to enforce his demands, that would not be to enforce his right of redemption which was really his right to make those demands on payment of the mortgage money. The right to demand the mortgagee to do certain things on payment of the mortgage money is different from enforcing the demands subsequent to the payment of the money. This is also clear from the decree for redemption. Order XXXIV, r. 7, C.P.C. provides for the preliminary decree in a redemption suit and the preliminary decree is to order that the account be taken of what was due to the defendant, viz., the mortgagee, at the date of the decree, for principal and interest on the mortgage and other matters. Rule 9 provides that if on such accounting, any sum be found due to the mortgagor, the decree would direct the mortgagee to pay such amount to the mortgagor. If the mortgage money due has been already paid by the mortgagor and has been accepted by the mortgagee in full discharge of the mortgage deed, no occasion for such accounting arises and therefore any suit to enforce the return of the mortgage deed and to get back the possession of the mortgaged property cannot be a suit for redemption.

What Thota China Subba Rao's Case [(1949) F.C.R. 484, 498.], referred to by learned counsel for the respondents, lays down is simply this that the right of redemption continues so long as the mortgage is alive. The case does not deal with the circumstances in which the mortgage ceases to exist. The following observation support, by implication, the view taken by us :

"The document passed in favour of the wife of the mortgagor can be described as a reward promised to her for bringing about the willingness of her husband to agree to convey the mortgaged lands to the mortgagees. That can in no event be considered as extinguishing the equity of redemption. The mortgagor was not even a party to that document. The second document executed by the mortgagor is an agreement to convey the lands after three months. There is however no document or evidence to show that the mortgagees agreed to accept these lands in full satisfaction of their claims or promised to pay the sum of Rs. 100 mentioned therein. This was only an agreement to convey the lands after three months, and, if at all the question of extinction of the equity of redemption could arise on the conveyance being executed but not before."

There are other cases also which throw a light on this question and go against the contention of the

respondents.

In *Samar Ali v. Karim-ul-lah* [(1886) I.L.R. 8 All. 402, 405.] it was said :

"Now, as I have said, the contract of mortgage in the present case being subject to the provisions of the Regulation, the charge would have been redeemed as soon as the principal mortgage money with twelve percent interest had been realised by the mortgagee from the profits of the property."

In *Muhammed Mahmud Ali v. Kalyan Das* [(1895) I.L.R. 18 All. 189, 192.] it was said :

"It cannot be disputed that the right of redemption pre-supposes the existence of a mortgage on certain property which at the time of redemption is security for the money due to the mortgagee. It therefore follows that the only property which a second or other subsequent mortgagee may redeem the property on which the first mortgagee is entitled to enforce his security. From the very necessity of things the right of redemption can be exercised in respect of such property only as is subject to a mortgage capable of enforcement."

There can be nothing for enforcing a mortgage when the money has been paid up and therefore the right to redeem ceases on payment of the mortgage money.

In *Balakrishna v. Rangnath* [I.L.R. 1950 Nag. 618, 621.] it was said :

"Now the right to redeem can only be extinguished by act of parties or by a decree of a Court. (See the proviso to section 60 of the Transfer of Property Act). But when it is by act of parties the Act must take the shape and observe the formalities which the law prescribes. One method is by payment in cash. In that event nothing is necessary beyond the payment."

In *Ram Prasad v. Bishambhar Singh* [A.I.R. 1946 All. 400, 402.] the question formulated for determination was whether the suit being a suit to recover possession of the mortgaged property after the mortgage money been paid off was a suit 'against the mortgagee to redeem' or 'to recover possession of immovable property mortgaged'. Braund J., said :

"Now, it is quite obvious that section (s. 60 of the Transfer of Property Act) can only refer to a case in which a mortgagor under a subsisting mortgage approaches the Court to establish his right to redeem and to have that redemption carried out by the process of the various declarations and orders of the Court by which it effects redemption. In other words s. 60 contemplates a case in which the mortgage is still subsisting and the mortgagor goes to the Court to obtain the return of his property on repayment of what is still due. Section 62, on the other hand, is in marked contrast to s. 60. Section 62 says that in the case of a usufructuary mortgage the mortgagor has a right to 'recover possession' of the property when (In a case in which the mortgagee is authorised to pay himself the mortgage money out of the rents and profits of the property) the principal money is paid off. As we see it, that is not a case of redemption at all. At the moment when the rents and profits of the mortgaged property sufficed to discharge the principal secured by the mortgage, the mortgage came to an end and the correlative right arose in the mortgagor 'to recover possession of the property'. The framers of the Transfer of Property Act have clearly recognised

the distinction between the procedure which follows a mortgagor's desire to redeem a subsisting mortgage and the procedure which follows the arising of a usufructuary mortgagor's right to get his property back after the principal has been paid off."

We therefore hold that the mortgage was not subsisting on the date of vesting, it having come to an end on payment of the mortgage money in 1943, and that the respondents cannot get the advantage of s. 6(1)(c) of the Act.

We therefore dismiss the review petition. In the circumstances of the case, there will be no order as to costs.

Petition dismissed.

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