

Gyarsi Bai and Others

Vs

Dhansukh Lal and Others

Civil Appeal No. 257 of 1963

(K. Subha Rao, Raghuvar Dayal, N. Rajgopala Ayyangar JJ)

18.11.1964

JUDGMENT

SUBBA RAO, J. –

This appeal by special leave is directed against the judgment of a Division Bench of the Rajasthan High Court in S.B. Civil Revision No. 181 of 1956.

The plaint-schedule properties originally belonged to one Noor Mohammad, his wife and son. On September 14, 1936, they mortgaged the said properties with possession to B. F. Marfatia for a sum of Rs. 25,000. On February 22, 1938, the said mortgagors executed a simple mortgage in respect of the same properties to one Novat Mal for Rs. 5,000. On December 21, 1942, Radha Kishan, Har Prasad and Pokhi Ram acquired the equity of redemption in the said properties in an auction sale held in execution of a money decree against the mortgagors. On February 14, 1950, and March 13, 1950, Seth Girdhari Lal, the husband of Appellant No. 1 herein, purchased the mortgagee rights of Novat Mal and Marfatia respectively. On May 1, 1950, Girdhari Lal was put in possession of the mortgaged properties. On July 22, 1950, Respondents 9 to 11 purchased the equity of redemption of the mortgaged properties from Radha Kishan, Har Prasad and Pokhi Ram. On August 10, 1950, Girdhari Lal instituted Civil suit No. 739 of 1950 in the Court of the Senior Subordinate Judge, Ajmer, for enforcing the said two mortgages. In the suit he claimed Rs. 48,919-12-6 as the amount due to him under the said two mortgages. On April 25, 1953, the Senior Subordinate Judge, Ajmer, gave a preliminary decree in the suit for the recovery of sum of Rs. 34,003-1-6 with proportionate costs and future interest; he disallowed interest from September 14, 1936, to March 13, 1950, on the mortgage of Rs. 25,000. The plaintiff-mortgagee preferred an appeal, being Civil Appeal No. 71 of 1953, to the judicial Commissioner, Ajmer, against the said decree in so far as it disallowed interest to him. The defendants preferred cross-objections in respect of that part of the decree awarding costs against them. On July 25, 1953, the defendants filed an application under O.XXXIV, r. 5(1), of the Code of Civil Procedure, seeking permission to deposit the decretal amount in court and praying that possession of the properties may be directed to be delivered to them and also for directing the decree-holder to render accounts of the profits of the mortgaged properties received by him. On July 29, 1953, the respondents deposited Rs. 35,155-2-6 in the Trial Court. On August 17, 1953, the decree-holder filed objections to the said deposit on the ground that it was much less than the decretal amount. On August 27, 1953, the Trial Court made an order permitting the decree-holder to withdraw the said amount with the reservation that the question as to what was due under the decree would be decided later. On August 25, 1954, both the appeal of the decree-holder and the cross-objections of the defendants were dismissed. On December 7, 1954, the defendants filed an application in the Trial Court for the determination of the amount due under the decree and for directing the decree-holder to render accounts of all the realizations from the mortgaged properties.

On March 14, 1955, the Supreme Court granted special leave to the decree-holder for preferring an appeal against the judgment of the Judicial Commissioner dismissing Civil Appeal No. 71 of 1953. On February 15, 1956, the Trial Court dismissed the application filed by the defendants for directions on the ground that the mortgage deed had merged in the preliminary decree and that the said decree contained no directions to the plaintiff to render accounts. On February 29, 1956, the defendants applied to the Judicial Commissioner, Ajmer, under section 152 of the Code of Civil Procedure for amending the preliminary decree by including therein a direction against the plaintiff for rendition of account in respect of the profits received by him from the mortgaged properties. On April 12, 1956, the Judicial Commissioner dismissed the said application. On April 25, 1956, the defendants filed a revision petition against the order of the Trial Court dated February 15, 1956, in the Court of the Judicial Commissioner, Ajmer. As by that time the Supreme Court had given special leave to appeal against the decree of the Appellate Court confirming the preliminary decree, the Judicial Commissioner, on August 1, 1956, made an order adjourning the hearing of the revision petition till after the decision of the Supreme Court in Civil Appeal No. 383 of 1956. On February 17, 1957, the decree-holder died, and his legal representatives, who are the appellants herein, were brought on record. On December 16, 1960, this Court delivered judgment in the said appeal modifying the preliminary decree made in the suit and directing the Trial Court to pass a fresh final decree. On April 5, 1961, the High Court accepted the revision petition filed by the defendants, remanded the case to the Trial Court and directed it to take an account of the receipts from the mortgaged properties and expenses properly incurred for the management etc. of the said properties as contemplated under section 76(g) and (h) of the Transfer of Property Act and to determine what sum remained to be paid to the mortgagees taking into account the decision of this Court. Hence the present appeal.

The gist of the arguments of Mr. B. D. Sharma, learned counsel for the appellants may be stated thus : (i) A preliminary decree settles the rights of parties by deciding all the controversies between them relating to a mortgage transaction and gives all necessary directions for carrying into effect those rights, while a final decree concerns itself with the working out of those rights; further, the mortgage merges into the preliminary decree and thereafter no relief can be given on the terms of the mortgage; on the basis of the said two principles it must be held that, as the preliminary decree in the present case did not give a direction to the mortgagee for rendition of an account of the profits of the mortgaged properties, the Court has no jurisdiction to direct such a rendition of accounts on an application filed by the mortgagors after the preliminary decree was made. (2) The High Court went wrong in holding that the appellants were estopped from raising the plea that the mortgagee was not liable to render accounts for the period between the date of the filing of the plaint and that of the preliminary decree. And (3) the High Court should have taken into consideration the equities in favour of the mortgagee.

The arguments of Mr. A. Viswanatha Sastri, learned counsel for the respondents, may be summarized thus : The relationship of mortgagor and mortgagee continues upto the date of the final decree. The statutory liability of a mortgagee to account for the profits received by him and credit the same towards the mortgage debt also subsists till that date and, therefore, the fact that the amounts realized by the mortgagee were not given credit to in ascertaining the amount due to him under the mortgage at the time of the making of the preliminary decree would not relieve the mortgagee of his liability to account for the same. It is further contended that though the rents realized could have been taken into account at the time the preliminary decree was made, the mortgagee was not bound to appropriate the amount towards the debt before the preliminary decree, for he could do so after the decree though the amounts were realized before the decree. In any view, it is contended, as the mortgagee did not deny his liability to account for the profits realized by him

from the mortgaged properties before the preliminary decree was made, he could not evade his statutory liability to account for the profits realized and to appropriate the same towards the mortgaged debt till the relationship of mortgagor and mortgagee came to an end.

The main question in the appeal is whether the preliminary decree passed in the suit debars the mortgagors from claiming that the mortgagee has to account for the profits realized by him from the mortgaged properties in his possession; if he is not so debarred, what is the period for which the mortgagee could be compelled to render accounts in respect of the said profits? The suit was filed on August 10, 1950; the preliminary decree was made under O. XXXIV, r. 4, of the Code of Civil Procedure on April 25, 1953. The preliminary decree does not contain direction directing the mortgagee to account for the profits realized from the mortgaged properties in his possession. The contention briefly stated is that, as there is no direction in the preliminary decree, the mortgagee escapes his statutory liability to render accounts under section 76 of the Transfer of Property Act. To appreciate this contention the relevant provisions of the Code of Civil Procedure and those of the Transfer of Property Act may be considered. Under O. XXXIV, r. 4, of the Code of Civil Procedure, in a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in cls. (a), (b) and (c) (i) of sub-r. (1) of r. 2; under r. 2, in a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree ordering that an account be taken off what is due to the plaintiff at the date of such decree for (i) principal and interest on the mortgage. From No. 5 of Appendix D to the First Schedule to the Code prescribed the form for directing the accounts to be taken and From No. 5A thereof provides for a decree which by itself declares the amount due to the plaintiff on the mortgage. Section 76(h) of the Transfer of Property Act says :

"When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount, if any, from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor."

The gist of the said provisions may be stated thus : In a suit on a mortgage for sale the Court may order an account to be taken of what is due to the plaintiff at the date of the preliminary decree and in that case the decree will be made in Form No. 5 in Appendix D to the First Schedule to the Code; or it may declare the amount so due on that date, in which case a decree will be made in Form No. 5A in the said Appendix. In a case where a decree is made in Form No. 5A, it is the duty of the Court to ascertain the amount due to the mortgagee at the date of the preliminary decree. How can the amount due to the mortgagee as on the date of preliminary decree be declared unless the net profits realized by him from the mortgaged property are debited against him? The statutory liability of the mortgagee to account upto the date of the preliminary decree would be the subject-matter of dispute in the suit upto the date of the said decree. The Court has to ascertain the amount due under the mortgage in terms of the mortgage deed and deduct the net realizations in the manner prescribed in section 76(h) of the Transfer of Property Act and ascertain the balance due to the mortgage on the date of the preliminary decree. If the mortgagor did not raise the plea, he would be barred on the principle of *res judicata* from raising the same as the said matter should be deemed to have been a matter which was directly and substantially in issue in the suit up to that stage. It is settled law that though a mortgage suit would be pending till a final decree was made, the matters decided or ought

to have been decided by the preliminary decree were final. Suppose the mortgagor paid certain amounts to the mortgagee before the preliminary decree; if these were not given credit to the mortgagor and a larger amount was declared by the preliminary decree as due to the mortgagee, can the mortgagor, after preliminary decree, reopen the question? Decidedly he cannot. This is because the preliminary decree had become final in respect of the disputes that should have been raised before the preliminary decree was made. So too, under section 76(h) of the Transfer of Property Act, the net receipts of the mortgaged property have to be statutorily debited against the mortgagee in deduction of the amount due under the mortgage from time to time in the manner prescribed thereunder. The principle underlying the said clause is that the usufruct of the mortgaged property represents the mortgagor's money. On the same analogy of voluntary payment, if a preliminary decree, by a wrong decision or by reason of an omission of the requisite plea, ignored the net realization in ascertaining the amount due to the mortgagee, it must be held that the Court refused to give credit to the said receipts. We therefore, hold that in the present case so far as the amounts statutorily debited to the mortgagee under section 76(h) of the Transfer of Property Act before the date of the preliminary decree are concerned, they could not be taken into account as the Court did not take those amounts into consideration at the time it made the said decree.

But the same cannot be said of the net receipts realized by mortgagee subsequent to the preliminary decree. None of the principles relied upon the learned counsel for the appellants helps him in this regard. It is true that a preliminary decree is final in respect of the matters to be decided before it is made: see *Venkata Reddy v. Pethi Reddy* ([1963] Supp. 2 S.C.R. 616.), and section 97 of the Code of Civil Procedure. It is indisputable that in a mortgage suit there will be two decrees, namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights: see *Talebali v. Abdul Azia* ([1930] I.L.R. 57 Cal. 1013.), and *Kausalya v. Kauleshwar* ([1945] I.L.R. 25 Pat. 305.). It cannot also be disputed that mortgage merges in the preliminary decree and the rights of parties are thereafter governed by the said decree: see *Kusum Kumari v. Debi Prosad Dhandhanian* ([1935] L.R. 63 I.A. 114.). But we do not see any relevancy of the said principles to the problem that arises in this case in regard to the liability of the mortgagee to account for the net receipts under section 76(h) of the Transfer of Property Act. A preliminary decree is only concerned with disputes germane to the suit upto the date of the passing of the said decree. The net receipts of the mortgaged property by the mortgagee subsequent to the preliminary decree are outside the scope of the preliminary decree: they are analogous to amounts paid to a mortgagee by a mortgagor subsequent to the preliminary decree.

Realizing this difficulty, Mr. Sharma contended that it must be held that the question of statutory liability of the mortgagee to account for the receipts must be deemed to have been decided in favour of the mortgagee by the preliminary decree. It is true that the mortgagee may, if he chose, have raised this untenable contention that for some reason he was not under a statutory liability to account for receipts under section 76 of the Transfer of Property Act; and if the Court wrongly decided in his favour, the finding might have been binding on the mortgagor in respect of the mortgagee's liability to account for receipts even for the subsequent period subsequent to the preliminary decree was neither expressly. He had conceded his general statutory liability, but, by some mistake, it was not quantified upto the date of the preliminary decree and deducted from the mortgage amount. His liability for the period subsequent to the preliminary decree was neither expressly nor impliedly negatived by the preliminary decree. In this context, the decision of the Judicial Committee in *Madan Theatres, Ltd. v. Dinshaw & Co. Ltd.* ((1945) L.R. 72 I.A. 277, 286.), may usefully be cited. There, the question arose whether after the preliminary decree there could be an adjustment of the suit within the meaning of O.XXIII, r. 3, of the Code of Civil Procedure. The Judicial Committee observed:

"A decree holder need not, of course, agree to any adjustment or accept payment otherwise than into court, but in their Lordships' opinion it is open to the debtor to allege and prove that an adjustment has taken place or payment in whole or in part has been made and received. .... Admittedly the suit continues until the final decree is passed, and there is no time limit for recording the agreement arrived at as there is under Or. 21, r. 2.

As a suit, notwithstanding the preliminary decree, continued till the passing of the final decree any payment made by the judgment debtor to the decree-holder after the preliminary decree would go in deduction of his mortgage liability. On the same analogy, the net receipts statutorily debited to the mortgagee would equally be taken into consideration in fixing the mortgagor's ultimate liability. This question was considered by Clark, J., in *Satyanarayana v. Suryanarayana* (A.I.R. 1949 Mad. 613, 614.). There, the appellant mortgaged certain property to the respondent's father, who went into possession of the same. In the usual course a preliminary decree was made in favour of the mortgagee. After the preliminary decree the mortgagor filed an application for an account to be taken of the profits received by the mortgagee after the date of the preliminary decree and before the passing of the final decree. It was contended that in the absence of any provision in the preliminary decree for taking of any account, no such account could be ordered. Rejecting that contention, the learned Judge observed :

"That he (the mortgagor) is so entitled is well-settled law. A mortgage suit continued until the final decree is passed and the relationship of a mortgagor and mortgagee continues until then. Accordingly a mortgagee in possession has until the expiry of that period the liabilities imposed on him by section 76, T.P. Act. It is true that O. 34, r. 8 does not in terms provide that a mortgagor in a suit for redemption applying for a final decree is entitled to have an account taken of the profits received by the mortgagee in possession between the date of the preliminary decree and the date when possession is given; but the provisions of O. 34 read as a whole clearly indicate that such an account must necessarily be taken. Even if they did not, the right of the mortgagor to such an account is established beyond question by the provisions of section 76, T.P. Act. Again it is beyond question that when a suit whether for sale or redemption of a mortgage is filed it is the duty of the Court to decide in that suit all the claims of the mortgagor and mortgagee under the mortgage up to the date when the final decree is given. Such claims can and indeed must be included in the mortgage suit. If they are not included the person failing to include them is barred thereafter under the provisions of O. 2, R. 2, Civil P.C. from filing a suit in respect of them."

The learned Judge cited a number of decisions in support of his conclusion. These observations appear to be rather wide and comprehensive enough to take in the liability of a mortgagee to account for the net receipts from the mortgaged property even for the period before the preliminary decree. But the facts of that case show that the learned Judge was only considering the question of the mortgagee's liability for a period after the preliminary decree was made, even though the preliminary decree did not contain a direction that the mortgagee had to account for the said receipts. We agree with these observations with the limitation mentioned above. We, therefore, hold that as regards the net receipts from the mortgaged properties subsequent to the making of the preliminary decree the Court was right in giving credit for them to the mortgagor in fixing his

liability.

Mr. Viswanatha Sastri next argued that the mortgagee is debarred by the doctrine of estoppel from denying his liability to account for the net receipts from the mortgaged properties for the period between the date of the plaint and the date of the preliminary decree. The plea of estoppel is based upon the following facts : On July 25, 1953, the respondents filed an application in the Court of the Senior Subordinate Judge, Ajmer, wherein they mentioned that under the preliminary decree the amount due was Rs. 958-4-0, that the amount realized by the appellants as rent from the tenants up to the date of the said application was Rs. 4,250, that the costs awarded by the Court against them against which they were going up in appeal was Rs. 2,553-1-6 and the balance payable to the appellants after deducting the said amount was Rs. 35,155-2-6. The prayer in the petition was that the appellants be directed to deliver possession of the said properties to them and also be called upon to render true and correct account of the recoveries made by the mortgagee as rent from the date of suit to the date of his handing over possession of the said properties. To that petition the mortgagee filed a counter-affidavit wherein he admitted that he had realized only Rs. 4,488-2-0 towards rent from August 10, 1950, to July 28, 1953, and that he had incurred an expenditure of Rs. 1,897 in connection with the management of the said properties during the said period and that the respondents should have deposited Rs. 30,515-10-0 in the Court according to the "present" decree. The sum of Rs. 39,515-10-0 was arrived at by adding the net receipts of rents from August 10, 1950, to July 28, 1953, to the amount sought to be deposited by the respondents in Court. It is, therefore, clear that the mortgagee admitted that he had to account to the respondents for the receipts of the mortgaged properties. After depositing Rs. 35,515-2-6, the respondents filed on December 7, 1954, an application in the Court of the Subordinate Judge stating that they were prepared to deposit all the remaining amounts which would on settlement of accounts, be found duly payable to the mortgagee. They also prayed that the mortgagee be directed to produce the accounts of all the rents and profits which he had realized so that the Court, after checking the aforesaid accounts, might decide what amount was exactly due to the mortgagee. To that application the mortgagee filed a counter-affidavit, wherein he stated thus :

"That the plaintiff has no objection to give an account as to the amounts of rent realised by him and the expenses incurred by him in the management and preservation of the mortgaged property but he maintains that he has a right to remain in possession of the property and enjoy its usufruct till the last penny due on the mortgage in his favour is paid up to him. The plaintiff is therefore entitled to remain in possession of the property till the amount of Rs. 14,916-11-0 on account of interest wrongly disallowed by the learned Court is also paid to him alongwith the other dues or till the said interest is finally disallowed by Honourable the Supreme Court of India in appeal."

It will be seen again that the mortgagee in clear terms admitted his liability to account for the net receipts from the mortgaged properties; but he claimed that he would be entitled to be in possession till the interest amount due was also paid to him. On August 27, 1953, the Senior Subordinate Judge ordered that the amount deposited by the mortgagors less the amount attached by the Income-Tax Officer may be paid to the mortgagee. As by that time the appeal and the cross-objections filed by the mortgagee and the respondents respectively were not disposed of, the learned Subordinate Judge left open the question as to the amount that would actually be due to the mortgagee till after they were disposed of. It appears that the said amounts were drawn out by the mortgagee. From the aforesaid documents it is clear that the respondents deposited Rs. 35,515-2-6 in the Court after taking the net proceeds alleged to have been realized by the mortgagee from the mortgaged

properties and prayed that the mortgagee should be directed to render true and correct accounts from the date of the suit to the date of his handing over possession of the said properties to the respondents. The mortgagee admitted his liability to account for the receipt and only claimed that he was entitled to be in possession of the properties till the interest disallowed by the Court was paid to him. From the said facts it is argued that the respondents would not have permitted the mortgagee to draw out the amount if he had not admitted his liability to account for the net receipts from the mortgaged properties and that the mortgagee having drawn that amount subject to the liability, he is now estopped from denying his liability. Under section 115 of the Evidence Act when one person by his declaration, act or omission intentionally caused another person to believe a thing to be true and to act upon such belief, he cannot deny the truth of the thing. The doctrine of estoppel embodied in section 115 of the Evidence Act has been explained by the Judicial Committee in *C.D. Sugar Co. v. C.N. Steamship* (A.I.R. 1947 P.C. 40.) in the following terms :

"estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted upon, action on the faith of it, resulting detriment to the actor."

To invoke the doctrine of estoppel three conditions must be satisfied : (1) representation by a person to another, (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made. In the instant case it may be said that the first two conditions are satisfied : the appellant represented to the respondents that he was liable to render accounts to them in regard to the net proceeds of the mortgaged properties from the date of the plaint to the date of the preliminary decree, and on the said representation the respondents agreed to the appellant drawing out from the Court about Rs. 35,515 deposited by them. But can it be said that the respondents had in any way acted to their detriment on the basis of the representation made by the appellant ? The respondents had to pay the decretal amount to the appellant if they wanted to get possession of the properties. What they paid was less than what they had to pay under the decree. By paying the said amount they did nothing more than discharging their liability under the decree. The discharge by the respondents of their legal liability under the decree cannot in any sense of the term be described as detrimental to them. Whether the representation was made or not they had to pay that amount and by paying that amount they had secured a benefit in as much as from the date of payment the interest on that amount ceased to run. There is no scope, therefore, in this case to invoke the doctrine of estoppel. We, therefore, hold that the order of the Rajasthan High Court was correct, except in regard to the direction given by it to the Subordinate Judge to take into account all the receipts of the mortgaged properties from August 10, 1950, to July 25, 1953. The order of the High Court is accordingly modified. The parties will pay and receive proportionate costs here and in the High Court.

Order modified.

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