

Soli Pestonji Majoo and Others

Vs

Gangadhar Khomka

Civil Appeal No. 24 of 1966

(J. C. Shah, V. Ramaswami-I, A. N. Grover JJ)

06.12.1968

JUDGMENT

RAMASWAMI, J. -

1. The appellant is the executor of the estate of Pestonji Sorabji Majoo deceased, hereinafter referred to as the 'mortgagor'. During his lifetime the mortgagor was the owner of one-third share in premises No. 50, Chittaranjan Avenue, Calcutta. On November 21, 1938, the mortgagor executed a deed of mortgage in respect of his one-third share in favour of Shew Balak Pandey for Rs. 7,500. On December 3, 1945, he executed another deed of mortgage in respect of his one-third share in favour of one Sudhinder Nath Mitter for Rs. 8,350/-. On May 6, 1947, he executed the third deed of mortgage in respect of his one-third share of the premises in favour of the respondent, Gangadhar Khemka for Rs. 12,000/-, carrying interest at the rate of 12 per cent. per annum with monthly rests. On January 13, 1948, Shew Balak Pandey filed a suit on his mortgage, being Suit No. 136 of 1948, impleading the puisne mortgagees as parties to the suit. On December 12, 1949, a preliminary mortgaged decree in Form 9 of Appendix 'D' in the First Schedule to the Code of Civil Procedure was passed in the said suit. Since the mortgagor did not pay, a final decree was passed on December 4, 1952 in the suit. The decree directed that the mortgaged property should be sold. It contained a further direction for the disbursement of the sale proceeds and it was stated that if any balance was left after payment of the amounts due to Pandey and Mitter, "that shall be applied in payment of the amount payable to the defendant Ganga Dhar Khemka under the aforesaid preliminary decree and in payment of any amount which may be adjudged due to the said defendant Ganga Dhar Khemka for such costs of the suit". On July 4, 1954, the mortgagor, without having the property put to sale, paid off the decretal dues of Pandey. On August 5, 1955, the respondent filed the suit out of which this appeal arises, being Suit No. 2218 of 1955, jointly against the appellant and his mother Mrs. Majoo for a mortgage decree in Form 5-A. The appellant and Mrs. Majoo filed a joint written statement. The suit ultimately came for hearing before Law, J., on June 2, 1958. Several issues were raised in the suit and Law, J., decreed the suit and passed a preliminary decree in Form 5-A of Appendix 'D' in the First Schedule to the Code of Civil Procedure and declared that a sum of Rs. 41,172.6 was due to the respondent on June 2, 1958. The appellant and Mrs. Majoo took the matter in appeal before the Division Bench consisting of Bachawat and Das Gupta, JJ., who partially allowed the appeal and varied the decree by reducing the amount declared due in the decree, dated July 10, 1958, from Rs. 41,172.6 to Rs. 38,207.

2. This appeal is brought, by special leave, from the judgment of the Division Bench of the Calcutta High Court, dated January 17, 1962.

3. The first question presented for determination in this appeal is whether a puisne mortgagee in

respect of whose mortgage a decree has already been made in a prior mortgagee's suit to which he is made a party, is entitled to institute a separate suit in respect of his mortgage and ask for a decree in Form 5-A, when the claim of the prior mortgagee made in the prior mortgagee's suit has been satisfied by payments made by the mortgagor defendant and as a result thereof no sale takes place in the suit. It was argued on behalf of the appellant that the respondent was not entitled to file the suit because of the preliminary decree passed in Suit No. 135 of 1948, in which he as a puisne mortgagee was made a party defendant and the only course open to him as such puisne mortgagee was to apply for a final decree for sale and thereby realise his dues from the surplus sale proceeds of the mortgaged property. It was submitted that the appellant was not entitled in the circumstances to bring a fresh suit on his mortgage. We are unable to accept this argument. Clause 5 of the decree in Form 9, clearly states that "if the defendant No. 2 (puisne mortgagee) pays into court to the credit of the suit the amount adjudged due to the plaintiff (prior mortgagee), but the defendant No. 1 (mortgagor), makes default in the payment of the said amount, then the defendant No. 2 (puisne mortgagee), shall be at liberty to apply to the court to keep the plaintiff's (prior mortgagee's), mortgage alive for his benefit and to apply for a final decree ? In other words, if the puisne mortgagee redeems the prior mortgage then he can step into the shoes of the prior mortgagee and apply for final decree. The puisne mortgagee cannot apply for the sale unless he pays off the prior mortgage. It is manifest that the puisne mortgagee is added as a defendant in a suit of this description only with the purpose of redeeming the prior mortgage, if he wished and proving his mortgage and having the accounts taken. Such account of the puisne mortgagee is taken because if there is any surplus sale proceeds after meeting the prior mortgagee plaintiff's claim, he can participate in such surplus sale proceeds as may be available for the satisfaction of the claim of the puisne mortgagee. Essentially therefore the rights of puisne mortgagee defendant in a prior mortgagee's suit are, first the right to redeem the prior mortgage, and, secondly the right to participate in the surplus sale proceeds. This view is borne out by the decision of the Madras High Court in *Vadeyasa Iyer v. The Madhura Hindu Sabha Nidhi Co. Ltd.*, (ILR 42 Mad 90) in which it was held that the rights of the subsequent mortgagees are contingent on the property being brought to sale for non-payment of the sum due to the plaintiff mortgagee and decree drawn up in Form 7 of Appendix "D" of the Code of Civil Procedure cannot be read as a decree directing the mortgagor to redeem each of the puisne encumbrances within the time limited for redeeming the first mortgagee. It was accordingly held that the puisne mortgagee was not entitled to execute the decree for the amount due to him when no sale was held for the realisation of the amount due to the prior mortgagee and the remedy of the puisne mortgagee was a suit for sale and Section 47, Civil Procedure Code, was no bar to the suit. The same view has been taken *Shiv Kumur Porsad v. The Trustees for the Improvement of Calcutta* (51 CWN 798), in which Chakravartti, J., observed at page 802 as follows :

"It is true that he (puisne mortgagee), gets a free adjudication of his rights but the only practical relief which the decree gives him is that he is declared entitled to obtain satisfaction of his dues out of the surplus sale proceeds, if any, be left after satisfying the plaintiff's dues (see Form No. 9). The puisne mortgagee cannot apply for a final decree unless he himself pays off the prior mortgagee and the right to apply for a sale arises only if the plaintiff's dues are not paid but not if the puisne mortgagee's due are not."

The learned Judge proceeded to observe :

"When he is impleaded as a defendant in a prior mortgagee's suit he is brought before the court whether he wishes to come or not and his rights are adjudicated on by the

court under the compulsion of Order 34, Rule 4(5)."

4. Some uncertainty in this branch of law has been caused by the English practice as mentioned in *Flatt v. Mandal*, (1884 27 Ch D 246) and *Daniel's Chancery Practice*. But having regard to the provisions of the Transfer of Property Act and the present Civil Procedure Code, the Indian practice is quite different. The distinction has been pointed out by Fugh, J., in *Sarat Chandra Roy Chowdhry v. M. M. Nahapiat*. (ILR 37 Cal 907) It was observed by the learned Judge that prior to the Code of Civil Procedure, 1908, there was a recognised practice on the original side of the Calcutta High Court to treat the preliminary mortgage decree as being in favour not only of the first mortgagee, but also in favour of the second mortgagee. (See the decision of Sale, J., in *Kissory Mohun Roy v. Kally Churn Ghose*, (ILR 22 Cal 100) and in *Kissory Mohun Roy v. Kally Charan Ghose*. (ILR 24 Calo 190) But in a later case, in the matter of *Kissory Mohan Roy v. Kally Charan Ghose*, (1 CWN 106) Sale, J., allowed a second mortgagee, who was a defendant, under the liberty retained to him by the preliminary decree, to come in and obtain an order for sale of the property outside Calcutta, which was subject only to the second mortgage, not to the first. This practice of treating the suit as one for the benefit of the second mortgagee was based on the English practice as it appears from the case of *Platt v. Mandal*, (1884 27 Ch D 246) (supra). But under the Transfer of Property Act, the proper procedure is different and the effect of incorporation of the relevant sections in the Transfer of Property Act under Order 34 of the new Code of Civil Procedure was to put an end to any independent practice on the original side of the Calcutta High Court based on the old procedure. The legal position, therefore, is that the second mortgagee is merely made a party to the suit in order that he might have an opportunity of redeeming if he wished and in order that he might receive his mortgage money, or part of it, out of the surplus sale proceeds after satisfaction of the first mortgage, but the decree was not really a decree in his favour, and he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before the sale. We accordingly reject the argument of the appellants on this aspect of the case.

5. We pass on to consider the second contention raised on behalf of the appellants, namely, that even if the respondent is entitled to institute a second mortgage suit the High Court ought not to have granted interest to the respondent at the rate of 12 per cent. per annum with monthly rests even after the date of the suit and the maximum interest which should have been allowed was not more than six per cent. per annum simple on the principal sum adjudged. In our opinion this argument is well-founded and there was no justification for the High Court to allow interest at the contractual rate from the date of the suit on the amount adjudged. Prior to 1929 the legal position was that under Section 34 of the Civil Procedure Code in granting a decree for payment of money the court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit onwards. But Order 34, Rules 2 and 4, which applied to a mortgage suit enjoined the court to order an account to be taken of what was due to the plaintiff at the date of such decree for principal and "interest on the mortgage". The special provision in Order 34 has therefore to be, applied in preference to the general provision in Section 34. Till the period for redemption expired therefore the matter was considered to remain in the domain of contract and interest had to be paid at the rate and with the rests specified in the contract of mortgage but after the period for redemption had expired the matter passed from the domain of contract to that of judgment. The right of the mortgagee would henceforth depend not on the contents of his bond but on the directions of the decree. (See the decision in *Jagannath Prosad Singh Chowdhury v. Surajmul Jalal*) (AIR 1927 PC 1). By Act 21 of 1929, Order 34 of Civil Procedure Code was amended and a new Rule 11 was inserted which deals specially with interest and which states :

"11. In any decree passed in a suit for foreclosure, sale or redemption, where interest

is legally recoverable, the court may order payment of interest to the mortgagee as follows, namely -

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage -

(i) on the principal amount found or declared due on the mortgage - at the rate payable on the principal or, where no such rate is fixed, at such rate as the court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee at such rate as the court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage security up to the date of the preliminary decree and added to the mortgage money at the rate agreed between the parties or, failing such rate (at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum); and

(b) subsequent interest up to the date of realisation or actual payment at such rate as the court deems reasonable -

(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause; and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under Rule 10."

6. This rule further amended by the Code of Civil Procedure Amendment Act, 1956, but we are not concerned with this further amendment in the present case. It is apparent that the new Rule 11 as inserted by the Amending Act 21 of 1929, provides that the court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It was held by the Federal Court in Jaigobind Singh v. Lachmi Narain Ram (AIR 1940 PC 20), that the language of the rule gives a certain amount of discretion to the court so far as interest pendente lite and subsequent interest is concerned and it was no longer absolutely obligatory on the courts to decree interest at the contractual rates up to the date of redemption in all circumstances even if there is no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. In view of the principle laid down by the Federal Court in this decision we are opinion that in the circumstances of the present case the respondent should be granted interest on the principal sum due at the contractual rate till the date of the suit and simple interest at 6 per cent. per annum on the principal sum adjudged from the date of the suit till the date of the preliminary decree and also at the same rate till the date of realisation.

7. We accordingly allow this appeal to the extent indicated above and modify the decree of the Calcutta High Court. The plaintiff respondent will be awarded costs proportionate to his success in the present suit as between attorney and client. He is entitled to the costs he has incurred in the previous suit i.e., suit No. 135 of 1948, in which he was made a party. The order of the High Court with regard to costs is also modified to this extent. There will be no order as to costs of this appeal.

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