

Mhadagonda Ramgonda Patil and Others

Vs

Shripal Balwant Rainade and Others

Civil Appeal No. 750 of 1973

(M.M. Dutt, K.N. Singh, M.H. Kania JJ)

22.04.1988

JUDGMENT

DUTT, J. –

1. This appeal by special leave is at the instance of the defendants in a suit for redemption of two mortgages and is directed against the judgment and decree of the Bombay High Court affirming those of the Joint Civil Judge, Senior Division, Kolhapur, decreeing the suit.
2. On June 16, 1925, the predecessors-in-respect of the respondents executed a possessory mortgage bond for Rs. 5000 in favour of the predecessor-in-interest of the appellants. The mortgage bond contained a recital that the mortgagee should appropriate the income of the property consisting of some plots of land towards the sum of Rs. 3000 and was entitled to interest @ 9 per cent per annum for the balance sum of Rs. 2000. By a second mortgage bond, which was by way of a simple mortgage executed on September 3, 1928, the mortgagors mortgaged the same property to the same mortgagee to secure repayment of a further loan of Rs. 2000 with interest @ 9 per cent per annum.
3. The respondents filed a suit for redemption of the two mortgages in the court of the Subordinate Judge, First Class Ichalakaranji, being Suit No. 3 of 1947. A preliminary decree for redemption was passed on September 20, 1948 and it was declared that the amount of Rs. 12,125 and odd and a further amount of Rs. 236 being the cost of the suit, were due from the mortgagors to the mortgagee. The mortgagors were directed to pay the amount within six months and on such payment to get the property redeemed; failing which liberty was given to the mortgagee to apply for a final decree for sale. As the mortgagors failed to make payment within the specified period, on an application made by the mortgagee, a final decree for sale was passed in the suit on March 21, 1952. The decretal dues, as declared in the final decree, were Rs. 12,361 and odd plus cost amounting to Rs. 41 for which the mortgaged property or sufficient portion thereof was directed to be sold. In other words, a preliminary decree and a final decree in accordance with the provision of Order 34, Rules 7 and 8 were passed.
4. Although the final decree for sale of the mortgaged property was passed, the mortgagee did not execute the final decree and allowed the same to be time barred. The mortgagee and after him, his heirs and legal representatives, however, continued to be in possession of the mortgaged property.
5. The respondents, who are the successors-in-interest of the original mortgagors, filed a second suit for redemption of the mortgages, being Special Civil Suit No. 6 of 1968 in the court of the Joint Civil Judge, Senior Division, Kolhapur, on January 9, 1968 against the appellants, who are the heirs and legal representatives of the original mortgagee. It was claimed by the respondents that in spite

of the passing of the final decree for sale in the earlier suit, being Suit No. 3, 1947, the mortgage still subsisted, and that they were entitled to redeem the same and get possession of the mortgaged property. Accordingly, they prayed for a decree for redemption, accounts and possession of the mortgaged property from the appellants.

6. The appellants contested the suit by filing written statement. It was contended by them that as the mortgagors did not pay the decretal dues under the decree passed in the previous suit, their right of redemption had been extinguished. They denied the respondents' claim for accounts. It was claimed by appellants 3, 4 and 5 that their predecessors-in-title were tenants of the suit land from before 1925 and, as such, they had become protected tenants under the Bombay Tenancy and Agricultural Lands Act. Alternatively, it was contended that even if the respondents were held to be entitled to redeem the mortgages, they were not entitled to obtain physical possession of the mortgaged property, as the appellants had become protected tenants.

7. The learned Joint Civil Judge came to the findings that notwithstanding the preliminary decree or the final decree passed in the previous suit, being Suit No. of 1947, the mortgagors' right of redemption remained alive and was not extinguished and that, accordingly, the respondents were entitled to redeem the mortgages. The plea of protected tenancy, as raised by the appellants, was negated by the learned Joint Civil Judge. On the above findings, the learned Joint Civil Judge held that the respondents were entitled to redeem the mortgages on payment of a sum of Rs. 13,551 and odd including interest to the appellants. In arriving at the amount, he applied the rule of Damdupat in calculating the interest on the principal amount up to the date of the suit. A usual preliminary decree for redemption was passed by the learned Joint Civil Judge under Order 34, Rule 7 of the Code of Civil Procedure declaring the aforesaid amount as being due from the respondents to the appellants under both the mortgage bonds up to the date of the suit and a period of six months was granted to pay the aforesaid amount and costs of the suit and future interest on the aforesaid amount @ 6 per cent per annum from the date of the suit till realisation. It was further directed that on payment of the amount in court, the appellants would deliver actual possession of the mortgaged property to the respondents and that in default of payment as aforesaid, liberty was given to the appellants to apply to the court for a final decree for foreclosure.

8. Being aggrieved by the judgment and decree of the learned Joint Civil Judge, the appellants preferred an appeal to the High Court. At the hearing of the appeal, it was contended by the appellants that the second suit for redemption was not maintainable; that the rule of Damdupat was not applicable to mortgages and that the appellants had become protected tenants by virtue of the Bombay Tenancy and Agricultural Lands Act. It was held by the High Court that in spite of the fact that in the earlier suit a preliminary decree and a final decree were passed and the mortgagors did not redeem the mortgages by depositing the decretal dues, still the right of redemption was not extinguished. As to the applicability of the rule of Damdupat to mortgages, the High Court took the view that the learned Joint Civil Judge was justified in applying the rule following certain decisions of the Calcutta, Bombay and Nagpur High Courts, which will be referred to presently. Regarding the plea of the appellants that they had become protected tenants under the Bombay Tenancy and Agricultural Lands Act, it was held that as the plea was raised by appellants 3, 4 and 5, the amount of land which happened to be in possession of the said appellants 3, 4 and 5, would be referred to the Mamlatdar and excepting such land the learned Joint Civil judge was right in decreeing delivery of actual possession of the rest of the land in suit in favor of the respondents. Subject to this modification, the High Court affirmed the decree of the learned Joint Civil Judge and dismissed the appeal with costs. Hence this appeal by special leave.

9. In this appeal, the appellants have challenged the findings of the High Court as to the maintainability of the second suit for redemption out of which this appeal arises and the applicability of the rule of Damdupat. The finding and direction of the High Court in respect of the plea of the appellants that they had become protected tenants under the Bombay Tenancy and Agricultural Lands Act have not been challenged before us.

10. Mr Krishnamurthy, learned counsel appearing on behalf of the appellants, has urged that in view of the fact that a preliminary decree and a final decree were passed in the earlier suit in accordance with the provisions of Order 34, Rules 7 and 8 of the Code of Civil Procedure, the present suit for redemption of the selfsame mortgages, out of which this appeal arises, is not maintainable. It is submitted by him that after a preliminary and a final decree for redemption are passed in accordance with the provisions of Order 34, Rules 7 and 8 of the Code of Civil Procedure, the mortgage-debt merges in the decretal-debt and the right of redemption is extinguished. In support of his contention, the learned counsel has placed much reliance upon a decision of the Patna High Court in Sheo Narain Sah v. Mt. Deolochan Kuer [AIR 1948 Pat 208]. In that case, the appellant had purchased a share in the equity of redemption and one of the questions was whether the right of partial redemption acquired by the appellants would survive under Order 34, Rule 5 of the Code of Civil Procedure until confirmation of the same in the execution proceedings. In that context, it was observed that the mortgage-debt had merged in the decretal-debt and after the passing of the final decree for sale neither the right of total redemption nor the right of partial redemption, conferred on the mortgagor by Section 60 of the Transfer of Property Act, survived the final decree for sale; all that remained thereafter was a different right of redemption conferred by Order 34, Rule 5. The observation regarding the merger of the mortgage-debt in the decretal-debt is, in our opinion, to some extent obiter.

11. Section 60 of the Transfer of Property Act confers a right of redemption on the mortgagor. The proviso to Section 60 reads as follows :

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

12. It is thus manifestly clear that the right of redemption will be extinguished (1) by the act of the parties or (2) by the decree of a court. We are not concerned with the question of extinguishment of the right of redemption by the act of the parties. The question is whether by the preliminary decree or final passed in the earlier suit, the right of the respondents to redeem the mortgages has been extinguished. The decree that is referred to in the proviso to Section 60 of the Transfer of Property Act is a final decree in a suit for foreclosure, as provided in sub-rule (2) of Rule 3 of the Order 34 and a final decree in a redemption suit as provided in Order 34, Rule 8(3)(a) of the Code of Civil Procedure. Sub-rule (2) of Rule 3, inter alia, provides that where payment in accordance with sub-rule (1) has not been made, the court shall, on an application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. Thus, in a final decree in a suit for foreclosure, on the failure of the defendant to pay all amounts due, the extinguishment of the right of redemption has to be specifically declared. Again, in a final decree in a suit for redemption of mortgage by conditional sale or for redemption of an anomalous mortgage, the extinguishment of the right of redemption has to be specifically declared, as provided in clause (a) of sub-rule (3) of Rule 8 of Order 34 of the Code of Civil Procedure. These are the two circumstances - (1) a final decree in a suit for foreclosure under Order 34, Rule 3(2); and (2) a final decree in a suit for

redemption under Order 34, Rule 8(3)(a) of the Code of Civil Procedure - when the right of redemption is extinguished.

13. In the instant case, the earlier suit was not a suit for foreclosure nor was either of the mortgages, a mortgage by conditional sale or an anomalous mortgage and, accordingly, there was no declaration in the final decree passed in the earlier suit for redemption that the respondents would be debarred from all right to redeem the mortgaged property. Rule 5(1) of Order 34 expressly recognised the right of the mortgagor to redeem the mortgage at any time before the confirmation of a sale made in pursuance of a final decree passed in a suit for sale. Similarly, Rule 8(1) of Order 34 permits the mortgagor to redeem the mortgaged property before the confirmation of the sale held in pursuance of a final decree in a redemption suit, unless such final decree debars the mortgagor from all right to redeem the mortgaged property which, as noticed earlier, is provided for in sub-rule (3)(a) of Rule 8 of Order 34 relating to a mortgage by conditional sale or an anomalous mortgage. Thus, the provisions of Order 34 have laid down in clear terms the circumstances when the right of redemption of the mortgagor would stand extinguished. It is also clear that in a suit for redemption, a mortgage other than a mortgage by conditional sale or an anomalous mortgage, the mortgagor has a right of redemption even after the sale has taken place pursuant to the final decree, but before the confirmation of such sale. In view of these provisions, the question of merger of mortgage-debt in the decretal-debt does not at all arise. We are, therefore, of the view that the decision in Sheo Narain case [AIR 1948 Pat 208], insofar as it lays down the merger of the mortgage-debt in the decretal-debt and the consequent extinguishment of the right of redemption of the mortgagor after the passing of the final decree in a suit for redemption, is erroneous.

14. In this connection, we may refer to a decision of the Privy Council in Raghunath Singh v. Mt. Hansraj Kunwar [AIR 1934 PC 205 : 61 IA 362] where it has been held by their Lordships that the right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. It is manifestly clear from the said observation that the right of redemption will stand extinguished only under the circumstances as mentioned in the proviso to Section 60 of the Transfer of Property Act, that is to say, (1) by the act of party or (2) by a decree of court. We have already discussed above the circumstances when by a decree of court the right of redemption is extinguished.

15. The Federal Court had also occasion to consider whether a second suit for redemption was barred. Kania, C. J. speaking for the court observed as follows [Thota China Subba Rao v. Mattapalli Raju, AIR 1950 FC 1, 6] :

The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. As held by the Privy Council in Raghunath Singh case [AIR 1934 PC 205 : 61 IA 362] the right of redemption can be extinguished as provided in Section 60, T. P. Act, and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not therefore, barred.

16. Therefore, the contention made on behalf of the appellants that as a final decree was passed in the earlier redemption suit, there was a merger of the mortgage-debt in the decretal-debt and, as such, the second suit for redemption is barred, is without any substance and is rejected.

17. We may now consider the second question as to whether the rule of Damdupat is applicable to a mortgage transaction. Admittedly, it is an equitable rule debarring the creditor to recover at any given time the amount of interest which is in excess of the principal amount due at that time. It is urged by the learned counsel appearing on behalf of the appellants that the rule is applicable only to a simple loan transaction and not to a transaction of mortgage. We are unable to appreciate this contention. In every mortgage there are two aspects namely, (1) loan and (2) transfer of interest in immovable property. As mortgage is principally a loan transaction, we do not find any reason why the rule of Damdupat which is an equitable rule should not apply also to mortgage.

18. It has, however, been held in *Madhwa Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu* [ILR 26 Mad 662] that the rule of Damdupat is inapplicable to cases of mortgage governed by the Transfer of Property Act. The principal reason for the decision is that in Section 2 of the Transfer of Property Act, before it was amended by the Amending Act 20 of 1929, it was provided "and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu law". It was inferred that as the rules of Hindu law were saved only with regard to transfer of property as contained in the second chapter, it was not saved with regard to the mortgages of immovable property and charges as contained in Chapter IV of the Transfer of Property Act.

19. A contrary view was expressed by the Bombay High Court in *Jeewanbai v. Monordas Lachmondas* [ILR 35 Bom 199 : 12 Bom LR 992]. In that case, it has been held that it is not proper to infer that because it has been expressly enacted that nothing in Chapter II of the Transfer of Property Act shall be deemed to affect any rule of Hindu law, the legislature has deprived a Hindu mortgagor of the protection afforded to him by the rule of Damdupat.

20. The Calcutta High Court in *Kunja Lal Banerji v. Narsamba Debi* [ILR 42 Cal 826 : AIR 1916 Cal 542] has refused to follow the decision in *Madhwa Sidhanta* case [ILR 26 Mad 662], clearly pointing out that in that High Court the uniform rule has been to disallow as between Hindus' interest larger than the amount of principal in making up a mortgage account.

21. In *Bapurao v. Anant Kashinath* [AIR 1946 Nag 210 : ILR 1946 Nag 407 : 227 IC 466] a Division Bench of the Nagpur High Court has held that the rule of Damdupat is applicable to a mortgage, and that it does not in any way affect the provisions of the Transfer of Property Act inasmuch as it merely prevents recovery of interest on the loan in excess of the principal.

22. Admittedly, the rule of Damdupat was never applicable to Madras. It has been already noticed that in *Madhwa Sidhanta* case [ILR 26 Mad 662], the principal reason to hold that the rule was inapplicable to mortgages governed by the Transfer of Property Act was that in view of Section 2 of the Transfer of Property Act, before it was amended by Act 20 of 1929, the rules of Hindu law were not saved with regard to mortgages of immovable properties and charges as contained in Chapter IV of the Act. By the Amending Act 20 of 1929, Section 2 has been amended and after such amendment it reads "and nothing in the second chapter of this Act shall be deemed to affect any rule of Muhammadan law". The inference that was drawn in *Madhwa Sidhanta* case [ILR 26 Mad 662] from the provision of Section 2 about the non-applicability of the rules of Hindu law including the rule of Damdupat to mortgages cannot now be drawn from the amended provision with regard to any rule of Hindu law. Moreover, we are of the view that the law was not correctly laid down in *Madhwa Sidhanta* case [ILR 26 Mad 662] and the Calcutta, Bombay and Nagpur High Courts have rightly held in the decisions mentioned above that the rule of Damdupat is applicable to mortgages. No other point has been urged on behalf of the appellants.

23. For the reasons aforesaid, the judgment and decree of the High Court are affirmed and this appeal is dismissed with costs quantified at Rs. 3000.

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