ALLAHABAD HIGH COURT

Ram Prasad

Vs.

Bishambhar Singh

(Braund, J.)

09.11.1945

JUDGMENT

Braund, J.

1. This is an appeal from the judgment of the learned Civil Judge of Fatehpur delivered in April 1942 in a suit which is compendiously described as a suit "for possession," and, when analyzed, turns out to be a suit by a usufructuary mortgagor against his mortgagee seeking to recover possession of property on the ground that, with the assistance of the U.P. Debt Redemption Act the whole of the monies sectored by the mortgage were paid off in 1940. The facts are relatively simple. We can take it that the plaintiff now represents the original mortgagors and that defendants 1, 2 and 3 now represent the original mortgagees. There is added a fourth defendant who turns out to foe a sub-mortgagee from one of the original mortgagees.

2. The history of the matter started in November 1881 when the original mortgagors who were a father named Brahma Singh and his two sons Sukhdeo, Singh and Sheo Ram Singh, executed two documents - we deliberately use a neutral word for the moment which on the face of them were instruments of sale, in the one case by the father Brahma Singh and in the other case by his two sons to the mortgagee of the zamindari and occupaney properties contained in them. That was on 1st November 1881. On the following day, however, we find a third document executed only by Beni Prasad and Din Dayal, who were the two mortgagees, which is the one which to some extent has given rise to the dispute in this ease. We do not propose to deal with it at any great length because we do not think that it is susceptible of any great controversy. It unmistakably refers to precisely the same property as was comprised in the two documents of the previous day. In effect it provided that the mortgagors should be entitled to buy the property back bit by bit and that, whenever they choose to pay any relative part of the purchase money of the property (however small), they should be entitled to demand a conveyance of a proportionate part from the two covenanting parties. There were certain other provisions which gave to Din Dayal and Beni Prasad certain rights of purchasing so much of the mortgagors' property as was not included in the documents of 1st November 1881. We think it is sufficient for us to say that,

to our minds, the instrument of 2nd November 1881 is unmistakably complementary to the two documents of the previous day. They must be taken together and, when so taken there is not, we think, the slightest doubt that they formed part and parcel of one transaction, which was in fact a mortgage by conditional sale. We should have reached that conclusion independently of any other assistance which could be had from the proceedings. But we find that in 1986 this very question was in issue between the same parties (excluding only the sub-mortgagee) in suit No. 142 of 1936 which was actually the subject of the judgment of a Bench in this Court in *Bishamber Singh v. Shankar Lal*[1] The question which was debated Was Whether these documents constituted a mortgage as opposed to an out and out sale to Din Dayal and Beni Prasad; and it was held that they did. In view of our own conclusions on the facts and of the very strong support which our views find in the previous judgment of this Court - apart altogether from any technical question of res judicata - we have not the slightest hesitation in upholding the judgment of the lower Court in this case so far as it came to the conclusion that the transaction in question was a transaction of mortgage and was not an out and out sale by Brahma Singh, Sukhdeo Singh and Sheo Ram Singh to Beni Prasad and Din Dayal.

3. That disposes of one of the points raised in the appeal. The second of the two points - and possibly the rather more difficult question - raises a matter of limitation. As we have already said, the date of this transaction, which has now been established to have been a usufructuary mortgage, was 1881. The suit out of which this appeal has arisen is dated in January 1942. It is a simple calculation to see that more than sixty years had elapsed between the date of the mortgage and the date of the present suit. What is alleged, therefore, is that this suit was barred by Article 148, Limitation Act. Against that our attention is drawn to the U.P. Debt Redemption Act (Act 13[XIII] of 1940). The effect of this, it is said, has been to give a new period of limitation from 1st January 1941, which was the date when it took effect. At first sight, this point is not altogether an easy one to understand. The purpose of the U.P. Debt Redemption Act, as everyone knows, was to enable the Court in "suits to which the Act applies" to recalculate the interest on mortgages to which agriculturist debtors were subject and to enable relief on that footing to be given to them both by the recalculation of any principal still outstanding and by the reduction of decrees, if and when necessary. The Act only applies, therefore, as Mr. Gupta has quite properly pointed out to a calculation made by the Court in a suit. Moreover, it only applies to a "suit to which this Act applies." When, however, we come to see what suits the Act does apply to, we find that it applies to every suit or proceeding relating "to a loan;" and by virtue of the definition of a "loan" contained in Section 2(9) of the Act, we are eventually able to ascertain that the Act applies to every suit or proceeding which relates to an advance in cash or kind made before 1st June 1940 recoverable from an agriculturist. In our view, it is clear that the U.P. Debt Redemption Act applies to an advance made to an agriculturist whenever it was made and whether or not it may eventually turn out by virtue of the provisions of the Act itself to have been subsequently discharged out of the usufruct of the property. For the purpose of applying the definition contained in Sub-section (17) of Section 2 of the Act, one has, we think, to look, at the nature of the transaction, i.e., of the advance, when it was made and it is immaterial for that

purpose what may have happened to it since. The word "recoverable" appearing in the definition of a "loan" is a curious expression but we hardly think that by virtue of that only an advance secured by a usufructuary mortgage could be excluded from the definition of a loan merely because in a strictly legal sense it is not "recoverable" from any particular person. The Act itself in Section 9 speaks of the case of a mortgage with possession and it is clear that the Legislature by its own reference to a usufructuary mortgage contemplated that kind of an advance being within the definition of a loan.

[1] Second Appeal No. 923 of 1987

4. Having cleared the ground, therefore, we come to the question whether this suit is barred by the sixty year "period of limitation prescribed by Article 148, Limitation Act. Article 148 is in these words:

> 148. Against a mortgagee to redeem or to recover possession of immovable property mortgaged...sixty years...from when the right to redeem or to recover possession accrues....

5. Now, the question is whether this suit - being a suit to recover possession of the mortgaged property after (according to the law as it stood at the date the suit was begun) it had been paid off - is a suit "against a mortgagee to redeem" or "to recover possession of immovable property mortgaged." The learned Civil Judge of Fatehpur has dismissed the matter a trifle summarily by saying that "in the present case right to recover possession accrued on the passing of Act 18[XIII] of 1940 and as such the suit is within limitation." Before going further with this question, we think it right to refer shortly to those two sections of the Transfer of Property Act which are the statutory sources of the right to redeem or to recover possession at the instance of a mortgagor in this country. Section 60 says (paraphrasing it) that at any time after the principal money has become due the mortgagor may require the mortgagee to reconvey "on payment or tender at a proper time and place of the mortgage money..." and it is that right that the section expressly describes as the "right to redeem." Now, it is quite obvious that that section 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, Section 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 Section 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 authorized 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.

6. Reverting, therefore, to Article 148, it now becomes quite plain why that article has divided this particular case into two parts - the first dealing with that of a mortgagor "redeeming" and the other dealing with a former mortgagor "recovering possession" of the mortgaged property. If we apply these considerations to the matter before us, we think that the answer to this appeal becomes quite clear. This suit was started in 1942 - admittedly outside the sixty years' period if that period started in November 1881 with the creation of the mortgages themselves. But what the plaintiffs came to Court for was first to ask the Court under Section 9, U.P. Debt Redemption Act, to go through the formal steps of determining whether the mortgage had been paid off, and, assuming that it had been, of giving the plaintiffs a decree for "recovery of possession." It is neither here nor there that on the way the plaintiffs met with an unexpected obstacle, namely that their right as mortgagors was challenged altogether. But once that had been got out of the way, then the suit became nothing more nor less than a suit by the plaintiffs against the defendants as trespassers asking for recovery of possession. We think, therefore, that the matter reduces itself to very simple terms. The suit is one against a mortgagee - or rather against a person who formerly was a mortgagee - to recover possession of immovable property. The right to recover that possession did not arise until the Court had declared" what principal remained due as on the date when the U.P. Debt Redemption Act came into force. It may strike anyone as curious that the Legislature should have thought fit to extend the period for recovery of possession for as long as sixty years and till the year 2000 A.D.; but it is not for us to question the wisdom of the Legislature provided it has made its meaning clear. For these reasons we think that this appeal must be dismissed with costs.

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