**RAJASTHAN HIGH COURT**

Jankidas

Vs.

Laxminarain

Civil Revn. No. 161 of 1953
(Wanchoo, C.J.)

13.09.1956

**ORDER**

**Wanchoo, C.J.**

1. This is a revision by the plaintiffs whose suit has been dismissed by the Judge, Small Cause Court, Jodhpur.

2. The plaintiffs' suit was briefly this: Laxminarain defendant had mortgaged his house usufructuarily for Rs. 700/- to the plaintiffs on 27-6-1953. On the same day, the plaintiffs mortgagees in their turn gave a lease of the house to the defendant mortgagor at Rs. 3/8/- per month, and put the lessee in possession. As the rent was not paid, the plaintiffs filed a suit for arrears of rent and ejectment in the court of Joint Kotwal No. 2, Jodhpur. That suit was fought up to the High Court of the former State of Marwar, and the High Court gave a decree for arrears of rent, but decided that the lessee could not be ejected and the prayer for ejectment was not allowed. The present suit was filed by the plaintiffs in February, 1953, claiming arrears of rent amounting to Rs. 126/- for 3 years preceding the date of suit. The suit was resisted by the defendant, who among other pleas raised the objection that the suit was barred under Order 2, R. 2, Civil Procedure Code A preliminary issue appears to have been framed by the Judge, Small Cause Court, on this point, and he held that the suit was barred by Order 2, R. 2, and dismissed it. The present revision is by the plaintiffs against this dismissal.

3. The case of the defendant that the suit was barred under Order 2, R. 2, is put in this way. It is said that the mortgage deed and the deed of lease were executed on the same day, and the amount of rent was equal to the amount of interest on the principal sum

assured. These were therefore parts of the same transaction, and as the plaintiffs had already sued for what was in fact interest alone when they brought the earlier suit for arrears of rent, they could no longer sue again either for interest in the shape of rent or interest and principal.

4. The contention of the plaintiffs, on the other hand, is that this was a usufructuary mortgage, and they were entitled to sue the defendant, who became a tenant by virtue of the deed of lease, as and when the rent fell in arrears, and there was no question of the application of Order 2, R. 2, in this case.

5. It is necessary to consider the terms of the mortgage in order to decide whether the suit is barred under Order 2, R. 2. The mortgage deed shows that Rs. 700/- formed the principal money, and interest was fixed at 6 per cent. per annum. In order to secure principal and interest, the house was mortgaged with possession to the plaintiffs, and the mortgagor had taken back its possession by executing a deed of lease. It was also said that if the mortgagor made any objection to repayment of the money in court, it would be considered to be false. It may be deduced from this last provision that a suit for sale was also contemplated. The mortgage was thus an anomalous mortgage, i.e., a combination of a simple as well as a usufructuary mortgage. There is, however, no doubt that possession was given to the mortgagees, and they in turn transferred the property by a deed of lease to the mortgagor.

6. The question, therefore, that arises for determination is whether, in these circumstances, the fact that on a previous occasion the mortgagees brought a suit for arrears of rent, and did not sue for the principal bars them from bringing a suit again for arrears of rent which in this case was certainly equal to the interest due on the principal money.

7. The principles which govern cases of simple mortgages are well settled by two decisions of their Lordships of the Privy Council namely - *'Muhammad Hafiz v. Mirza Muhammad Zakariya',* [1] and - *'Kishan Narain v. Pala Mal',* [2] In 'Muhammad Hafiz's case, there was a simple mortgage which provided that if interest was not paid for six months, the creditors would be competent to realize either the unpaid amount of the interest, or the amount of principal and interest both. When the interest remained unpaid, the creditor brought a suit only for interest. It was then held that as he could have brought a suit for the principal also, his subsequent suit for principal and interest

was barred under Order 2, R. 2. The same principle was further explained by their Lordships in 'AIR 1922 PC 412', in these words at p. 414 :

> "It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country (i.e. England), for an independent obligation to pay the principal and the interest in a suit brought to obtain a personal judgment in respect of the interest alone, the rule would have prevented a subsequent claim for payment of the principal.

In such a case the cause of action would have been distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action - the non-payment of the interest - gives rise to two forms of relief which the Court provides shall not be split."

8. The present, however, is not a case of a simple mortgage only. As I have pointed out, there is no doubt that the plaintiffs were put to possession as usufructuary mortgagees, and they in their turn gave a lease of the house to the defendant. Though it seems that the particular mortgage also contemplated a possible suit for recovery of the principal amount with 6 per cent. interest, the question, is whether the fact that there was a usufructuary mortgage also in this case can be completely ignored, and the principles which apply to a case of a simple mortgage must apply to a case of this kind.

9. Reliance in this connection is placed on behalf of the defendant on a decision of the Lahore High Court. In - *'Diwan Chand v. Ralla Ram',* [3] the defendant had mortgaged a shop with the plaintiff. The mortgage was with possession, but the mortgagor had executed the same day a deed of lease under which he agreed to hold the shop as tenant for certain period at a fixed rent. The mortgagee sued for rent and got a decree. He afterwards sued for principal and interest on the mortgage. It was held that the two documents formed one transaction, and the second suit was barred under Order 2, R. 2. This matter came up to the High Court, and the dismissal was upheld. In the meantime, a third suit was filed by the mortgagee for possession. This suit was also dismissed, and it was held that the suit was barred under Order 2, R. 2 as the mortgagee should have sued for possession on the earlier occasion. In the first place, the facts of that case are different inasmuch as a suit had been filed in that case for principal and interest, and had been dismissed. Further, in that case, the lease was

only for a fixed period, and it was held that after the period expired the mortgagor was in possession in his own right, so that the case was treated as more or less a case of simple mortgage after the period of lease was over. That case, therefore, is no authority for the proposition that, in the case of a usufructuary mortgage with a lease by the mortgagee in favor of the mortgagor without any fixed term, the provisions of Order 2, R. 2, apply.

10. Reference was also made in this connection to - *'Baijnath Prasad v. Jang Bahadur Singh',* [4] That was, however, not a case under Order 2, R. 2. Learned counsel, however, relied on a passage in the judgment where it was remarked that where a mortgagor took back a lease of the mortgaged properties by executing a kirayanama in favor of the mortgagee and the so called rent payable under it, in fact represented the interest payable on the mortgage money and not rent for use and occupation. The kirayanama was held to be merely a device for regular payment of interest on the mortgage money and not a lease of the properties. The mortgagor could not therefore be deemed to be a tenant of the mortgagee and the latter was not entitled to file an application for eviction of the mortgagor under the Bihar Buildings (Lease Rent and Eviction) Control Act (No. III) of 1947. With all respect, I fail to understand why, where a usufructuary mortgagee gives back the house on lease to the mortgagor, the mortgagor does not become a tenant of the mortgagee. The fact that the mortgage also mentions a rate of interest, and the rent is equal to the rate of interest, would not make the deed of lease anything less than what it is.

11. Looking, therefore, to the facts of the present case, it is, in my opinion, clear that the plaintiffs were also usufructuary mortgagees of this house, and they in their turn gave a lease of it to the defendant on a certain rate of rent. I agree that the transaction was one, but that would not mean that no tenancy came into existence by the execution of the deed of lease. A tenancy having come into existence, it follows that the lessor was entitled to the rent from the lessee if it remained in arrears. There is no specific term in the mortgage deed in suit which lays down that if the rent remains unpaid for a particular period, the mortgagee will have a right to sue for the mortgage money. In these circumstances, the right, which arose to the mortgagees to sue for rent, is an independent obligation, though it may be part of the same transaction in the sense that it was brought into existence by an arrangement made at the same time for a common purpose. There is no reason, therefore, why the mortgagees should not be able to sue for arrears on the basis of this deed of lease, and why a second suit for

arrears of rent for a different period should be barred under Order 2, R. 2. Obviously, it was not open to the mortgagees to sue for arrears of rent in the earlier suit for this period. It is also well to remember that there is no specific provision in this mortgage which gives any right to the mortgagees to sue for the principal money on default of payment of rent fixed under the lease.

12. I may in this connection refer to - *'Krishna Kurup v. K. Mammad',* [5] which appears to be practically on all fours with the present case. In that case, there was a usufructuary mortgage for Rs. 600/-, and the rate of interest was 6 per cent. The mortgagee was to remain in possession for 3 years, and thereafter if the mortgagor failed to redeem the mortgage, the mortgagee would remain in possession appropriating the profits towards interest. There was, however, a clause that if the mortgagee was unwilling to continue in possession after 3 years, he could bring a suit to realize the mortgage amount by sale of the mortgaged properties. At the same time, the mortgagor took a lease of the property from the mortgagee, to whom he had delivered possession for 3 years, and the rent was so fixed as to include the amount that the mortgagor had to pay to the landlord of the property mortgaged, and Rs. 36/- as interest on Rs. 600/- at 6 per cent. After the three years were over, the mortgagee continued in possession as the property was not redeemed. When the mortgagor fell in arrears, the mortgagee brought a suit for arrears of rent, which was decreed. Later, he brought a second suit for principal as well as arrears of rent, and it was then pleaded that the suit was barred by Order 2, R. 2, and the contention was that it was open to the mortgagee to sue the mortgagor for the principal sum under the mortgage after the expiry of three years, and as payments under the lease were really payments of interest, the subsequent suit was barred under Order 2, R. 2. The learned Judges pointed out that the obligation to pay rent, which in that case was equivalent to interest, arose independently of the mortgage, though the two transactions might be one in the sense that they were made at the same time for a common purpose. The suit, therefore, for principal as well as interest was held to be not barred by Order 2, R. 2, for both the reliefs arose out of independent obligations - one under the mortgage which gave a right to the mortgagee to sue after three years, and the other under the lease.

The present case stands in my opinion on a stronger footing. All that the mortgagee is claiming is rent on the basis of the deed of lease. I am of opinion that where in such circumstances an anomalous mortgagee gives a lease on the same day to the mortgagor, though the transactions may be one in the sense that they arose out of a

common purpose, there is no doubt that the obligation to pay the rent arises independently out of the lease, and it is open to the mortgagee to sue for arrears of rent whenever the rent remains due. The subsequent suit for arrears would not be barred for the subsequent period could not be sued for when the previous suit was brought. It is only, if the mortgage deed specifically provides that on failure to pay rent a suit for the entire money could be filed, that it can be said that the mortgagee should file not only a suit for arrears, but also a suit for principal money, and that if he fails to do so he cannot thereafter file a suit only for arrears of rent. In the present case, there is no such specific provision. The mortgage deed is more or less a usufructuary mortgage with only this difference that the rate of interest is mentioned therein, and it is said that there would be no objection by the defendant if a suit was brought. But these two things do not, in my opinion, give a specific right to the mortgagee to bring a suit for the principal sum secured on failure of payment of rent.
In the absence of such a specific provision, the right to be sued under the mortgage deed, and the right to be sued under the lease must be taken to be independent obligations by the mortgagor, and a suit based on the lease would not bar a subsequent suit for rent for a subsequent period as no specific right to sue for the principal ever arose. The mortgage, therefore, continues to subsist, and so does the lease. The trial court was, therefore, wrong in coming to the conclusion that this suit was barred under Order 2, R. 2 because the plaintiffs did not sue for the entire mortgage money when they brought their earlier suit for arrears of rent.

13. I, therefore, allow the revision, and set aside the decree of the court below. The case will go back to the court below for trial on the merits. Costs shall abide the final result.

Revision allowed.

Cases Referred.

1. AIR 1922 PC 23
2. AIR 1922 PC 412
3. AIR 1926 Lah 559
4. AIR 1955 Pat 357
5. AIR 1932 Mad 466