

CASE NO.:
Appeal (civil) 319 of 2002

PETITIONER:
M.R. Satwaji Rao (D) by L.Rs.

RESPONDENT:
B. Shama Rao (Dead) by L.Rs. & Ors

DATE OF JUDGMENT: 09/04/2008

BENCH:
Dr. Arijit Pasayat & P. Sathasivam

JUDGMENT:
JUDGMENT

REPORTABLE

CIVIL APPEAL NO. 319 OF 2002

P. Sathasivam, J.

1) This appeal is directed against the final judgment dated 11.12.1998 of the High Court of Karnataka at Bangalore in R.F. A. No. 465 of 1990 by which the High Court allowed the first appeal filed by the respondents herein.

2) The facts, in a nutshell, are as under:
The legal representatives of defendant No.2 are the appellants in this appeal. On 19.2.1948, the plaintiffs' predecessor executed a usufructory mortgage in favour of the appellants herein for a sum of Rs.10,000/-. The terms of the said mortgage deed were that the mortgagee shall remain in possession of the mortgaged property without paying rent and that the mortgage amount of Rs.10,000/- shall carry no interest. The period of redemption was five years from the date of mortgage. However, the mortgagors continued in possession of the mortgaged property as tenants of the mortgagee on a monthly rent of Rs.97.50. As the mortgagors failed to pay the rent, on 19.5.1952, the mortgagee filed suit being O.S. No. 120/51-52 on the file of the Ist Munsif, Bangalore for arrears of rent. The said suit was decreed. In pursuance of the said decree, the mortgagee (2nd defendant) filed Execution Petition No. 1002/51-52 and the property was put on auction sale by the executing Court. Mortgagee being the highest bidder purchased the schedule property in court auction. Sale was confirmed. The respondents/mortgagors neither objected for the sale nor confirmed the sale or taken any steps to set aside the sale over three decades. On 18.2.1983, the plaintiffs/respondents, after nearly three decades, filed a suit being O.S. No. 632 of 1983 on the file of the III Addl. City Civil Judge, Bangalore for a decree of redemption of the mortgage of the suit schedule property sold in public auction as long back as on 11.9.1952. The Civil Judge, after considering both oral and documentary evidence, dismissed the suit with costs on 31.7.1990. Aggrieved by the said order, the plaintiffs filed R.F.A. No. 465 of 1990 before the High Court. The High Court allowed the appeal decreeing the suit for redemption. Against the impugned judgment of the High Court, the defendants filed the present appeal by way of special leave.

3) Heard Mr. S.B. Sanyal, learned senior counsel appearing for the appellants, Mr. P. Vishwanath Shetty, learned senior counsel for the contesting respondent Nos. 1(i) to (vii) and 7 and Mr. R.P. Wadhvani, learned counsel appearing for

respondent Nos. 2,3,5,6,8 & 9.

4) Mr. Sanyal, learned senior counsel for the appellants mainly contended that the money decree (O.S.No 120/51-52) obtained is an independent one and not connected with the mortgage claim and in execution of the money decree the property was sold on 11.09.1952, the relationship of mortgagor and mortgagee is not subsisting, in such circumstances, Order XXXIV Rule 14 CPC is not applicable and the trial Court rightly dismissed the suit, however, the High Court committed an error in granting preliminary decree for redemption as if the original mortgage subsists. According to him, the application of Order XXXIV Rule 14 CPC is wholly illegal and setting aside the sale of 1951-52 is inequitable especially in view of the fact that there was no objection from the respondents for sale or confirmation of the sale and of the fact that they have not taken any steps to set aside the sale for over three decades. On the other hand, Mr. Vishwanath Shetty, learned senior counsel for the contesting respondents submitted that O.S. No 120/51-52 brought by the appellants was very much for seeking satisfaction of the claims patently arising under the mortgage of the suit schedule property and the same not being a suit for sale instituted in enforcement of the mortgage in question clearly comes under the pale of the bar under Order XXXIV Rule 14 CPC. He further submitted that their purchase in the circumstances amounts to a mere trust and they cannot be allowed to exploit the adversity of the appellants. He further pointed out that the property in question is worth of Rs. 100 lacs and for non-payment of rent of just less than Rs.1,200/-, the sale took place and was purchased by the mortgagee. Finally according to him, even on equity, the appellants are not entitled to any relief.

5) Before advertng to necessary provisions, it is useful to refer certain factual details. It is seen that the deceased second defendant had taken the suit property under possessory mortgage dated 19.02.1948 on payment of Rs.10,000/- for a period of five years from the plaintiffs. However, the plaintiffs/mortgagors continued in possession as tenants on monthly rent of Rs.97.50. As the plaintiffs/mortgagors failed to pay rents, O.S. No.120/51-52 was filed for recovery of Rs.1,225/- towards arrears of rent. The suit was decreed and the property was put in auction in execution No. 1002/51-52 and the mortgagee/second defendant purchased the schedule property in court auction on 11.09.1952. The sale was confirmed under Order XXI Rule 92 CPC. The second defendant became the absolute owner of the schedule property. It is the claim of the mortgagee that the sale held on 11.09.1952 was the sale of the right of plaintiffs in the mortgaged property in question which came to be purchased by him/second defendant, the said sale having become final, there was no right of redemption subsisting on the date of confirmation of sale as mortgage came to an end. In this way, it was contended that the suit which was filed for redemption of the schedule property is mis-conceived and not maintainable in law. It was also claimed that the property once mortgaged was sold in court auction and consequently the property never subsists as a mortgaged property. It was also argued that the auction sale is not void, but voidable unless the mortgagor avoids such a sale by taking recourse to legal proceedings in the absence of which he will not be entitled to exercise his right of redemption as there is no such right exist. It was also pointed out that though it was open to the plaintiffs to take such steps as was necessary to prevent the sale being held or to institute such proceeding as was necessary to get the sale set aside, the plaintiffs failed to avail the remedy available to them in law within the time available

under the Limitation Act and thus allowed the sale to become final. Therefore, the plaintiffs waived their rights. Though the trial Court dismissed the suit and rejected the claim of redemption of the mortgaged property, the appellate Court/High Court on appreciation of oral and documentary evidence and on the basis of relevant provisions, namely, Civil Procedure Code, Transfer of Property Act and Indian Trusts Act granted preliminary decree for redemption which is now challenged in this appeal.

6) Chapter IV of the Transfer of Property Act, 1882 refers various kinds of mortgage of immoveable property. Section 58 defines that mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument by which the transfer is effected is called a mortgage-deed. In the case on hand, it is not in dispute the mortgage in question is a usufructuary mortgage which is defined in sub-section (d) of Section 58 as under:

"(d) Usufructuary mortgage.- Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

Section 60 refers to 'right of mortgagor to redeem' which reads thus:

"Section 60 - Right of mortgagor to redeem.- At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished: Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money."

Order XXXIV CPC speaks about suits relating to mortgages of immoveable property. Among the other provisions, we are

concerned about Order XXXIV Rule 14 CPC which reads as under:-

"14. Suit for sale necessary for bringing mortgaged property to sale.- (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2."

It is useful to refer Section 90 of the Indian Trusts Act, 1882 which reads as under:-

"Section 90 - Advantage gained by qualified owner.-

Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

Illustrations

(a) A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

(b) A village belongs to a Hindu family. A, one of its members, pays Nazrana to Government and thereby procures his name to be entered as the inamdar of the village. A holds the village for the benefit of himself and the other members.

(c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses property incurred as mortgagee, B holds the land for the benefit of A.

A perusal of the various clauses in the mortgage deed dated 19.02.1948, second mortgage dated 12.12.1948, pleadings in O.S. No. 120/51-52 filed for arrears of rent which was decreed on 19.05.1952, order passed in E.P.No. 1002/51-52 dated 11.09.1952 as well as pleadings in O.S. No.632/1983 on the file of third Additional City Civil Judge, Bangalore filed for redemption of mortgage and the reasoning of the High Court in RFA No. 465/1990 dated 11.12.1998 which is impugned in this appeal clearly support the stand taken by the contesting respondents/plaintiffs. Though learned senior counsel for the appellants contended that the claim and the decree in O.S.No.120/51-52 has nothing to do with the mortgage dated 19.02.1948 or 12.12.1948, a perusal of all the details referred to above leads to an irresistible conclusion that the decree in favour of the appellant mortgagee in O.S. No. 120/51-52 was not an independent money decree against respondents but merely for satisfaction of the rents accrued on the mortgaged property, leased back to the respondents on 19.02.1948 itself up to 12.12.1948 and thereafter which was secured by a second mortgage deed dated 12.12.1948 executed by the respondents in favour of the appellants. We have already referred to Rule 14 of Order XXXIV CPC which prohibits the mortgagee to bring the mortgaged property to sell otherwise

than by instituting a suit for sale in enforcement of the mortgage. Admittedly, the said suit by the mortgagee was not in terms of Rule 14 of Order XXXIV. Therefore, bringing the mortgaged property for sale by the appellants in execution of the decree passed in O.S. No. 120/51-52 and purchasing the same by the appellants in public auction is clearly barred under Order XXXIV Rule 14 CPC. It is useful to point out that D.W.1 has specifically stated in her examination that though the suit schedule property was mortgaged by the respondents with the appellants by way of possessory mortgage deed dated 19.02.1948, the respondents never parted with the possession thereafter, as the appellants chose simultaneously on 19.02.1948 to let the respondents continue in possession as tenants on a monthly rental of Rs.97.50. The High Court has also referred to the fact that on 12.12.1948 a second mortgage deed for Rs.3,000/- was executed in favour of the appellants by the respondents towards arrears of rent for the period from 19.02.1948 to 12.12.1948. In those circumstances, we agree with the conclusion of the High Court that in O.S. No. 120/51-52 brought by the appellant was very much for seeking satisfaction of claims arising under the suit schedule property and the same not being on a suit for sale instituted in enforcement of the mortgage in question, the same is barred under Order XXXIV Rule 14 CPC. Further, we are satisfied that all the relevant materials have been specifically pleaded in the plaint in O.S. No. 632 of 1983 on the file of third Additional City Civil Judge, Bangalore.

7) We have already referred to Section 90 of the Indian Trusts Act. Illustration (c) of Section 90 is applicable to the case on hand. The purchase by the mortgagee in the circumstances narrated above amounts to a mere trust and either himself or his legal representatives cannot be allowed to exploit the adversity of the appellants.

8) In view of the factual scenario, though learned senior counsel for the appellants relied on decisions of various High Courts, we are of the view that there is no need to refer the same.

9) In *Mritunjoy Pani and Another vs. Narmanda Bala Sasmal and Another*, [1962] 1 SCR 290, the legal position as to right of redemption in a usufructuary mortgage and Section 90 of the Indian Trusts Act have been clearly explained. The following discussion and conclusion are relevant:

"The following three conditions shall be satisfied before s. 90 of the Indian Trusts Act can be applied to a case : (1) the mortgagee shall avail himself of his position as mortgagee; (2) he shall gain an advantage; and (3) the gaining should be in derogation of the right of the other persons interested in the property. The section, read with illustration (c), clearly lays down that where an obligation is cast on the mortgagee and in breach of the said obligation he purchases the property for himself, he stands in a fiduciary relationship in respect of the property so purchased for the benefit of the owner of the property. This is only another illustration of the well settled principle that a trustee ought not to be permitted to make a profit out of the trust. The same principle is comprised in the latin maxim *commodum ex injuria sua nemo habere debet*, that is, convenience cannot accrue to a party from his own wrong. To put it in other words, no one can be allowed to benefit from his own wrongful act. This Court had occasion to deal with a similar problem in *Sidhakamal Nayan v. Bira Naik A.I.R. 1954 S.C. 336*. There, as here, a mortgagee in possession of a tenant's interest purchased the said interest in execution of a decree for arrears of rent obtained by the landlord. It was contended there, as it is contended here, that the defendant, being a mortgagee in

possession, was bound to pay the rent and so cannot take advantage of his own default and deprive the mortgagors of their interest. Bose, J., speaking for the Court, observed at p. 337 thus:

"The position, in our opinion, is very clear and in the absence of any special statutory provision to the contrary is governed by s. 90, Trusts Act. The defendant is a mortgagee and, apart from special statutes, the only way in which a mortgage can be terminated as between the parties to it is by the act of the parties themselves, by merger or by an order of the Court. The maxim "once a mortgage always a mortgage" applies. Therefore, when the defendant entered upon possession he was there as a mortgagee and being a mortgagee the plaintiffs have a right to redeem unless there is either a contract between the parties or a merger or a special statute to debar them." These observations must have been made on the assumption that it was the duty of the mortgagee to pay the rent and that he made a default in doing so and brought about the auction sale of the holding which ended in the purchase by him. The reference to s. 90 of the Indian Trusts Act supports this assumption.

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The legal position may be stated thus: (1) The governing principle is "once a mortgage always a mortgage" till the mortgage is terminated by the act of the parties themselves, by merger or by order of the court. (2) Where a mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of court or in execution of a mortgage or money decree obtained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue for redemption without getting the sale set aside. (3) Where a mortgagee purchases the mortgaged property by reason of a default committed by him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the equity of redemption is only in trust for the mortgagor.

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\005\005\005 The said findings clearly attract the provisions of s. 90 of the Indian Trusts Act. In view of the aforesaid principles, the right to redeem the mortgage is not extinguished and in the eye of law the purchase in the rent sale must be deemed to have been made in trust for the mortgagor. In the premises, the High Court was right in holding that the suit for redemption was maintainable."

10) In Jayasingh Dnyanu Mhoprekar and Another vs. Krishna Babaji Patil and Another, (1985) 4 SCC 162, again considering similar claim with reference to Section 83 of the Transfer of Property Act and Section 90 of the Indian Trusts Act, this Court held:

"6. The only question which arises for decision in this case is whether by reason of the grant made in favour of the defendants the right to redeem the mortgage can be treated as having become extinguished. It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property

when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely "Once a mortgage, always a mortgage".....

9. An analysis of Section 90 of the Indian Trusts Act, 1882 set out above shows that if a mortgagee by availing himself of his position as a mortgagee gains an advantage which would be in derogation of the right of a mortgagor, he has to hold the advantage so derived by him for the benefit of the mortgagor. We are of the view that all the conditions mentioned in Section 90 of the Indian Trusts Act, 1882 are satisfied in this case. The mortgagees i.e. Dnyanu, the father of Defendant 1 and Ananda the second defendant could each get one-fourth share in the total extent of land measuring 22 Acres and 13 Gunthas only by availing themselves of their position as mortgagees. The grant made in their favour is an advantage traceable to the possession of the land which they obtained under the mortgage and that the said grant is certainly in derogation of the right of the mortgagors who were the permanent Mirashi tenants entitled to the grant under the Government Orders referred to above. The defendants could not have asserted their right to the grant of the land when the plaintiffs had deposited the requisite occupancy price well in time. It is seen that the mortgagees obtained the grant in their favour by making an incorrect representation to the Government that they were permanent Mirashi tenants although they were only mortgagees. Section 90 of the Indian Trusts Act, 1882 clearly casts an obligation on a mortgagee to hold the rights acquired by him in the mortgaged property for the benefit of the mortgagor in such circumstances as the mortgagee is virtually in a fiduciary position in respect of the rights so acquired and he cannot be allowed to make a profit out of the transaction\005.."

11) In *Namdev Shripati Nale vs. Bapu Ganapati Jagtap and Another*, (1997) 5 SCC 185 in a similar situation this Court held thus:

"6. \005 \005 We are of the view that in the totality of the facts and circumstances, the provisions of Section 90 of the Indian Trusts Act are attracted. The first respondent-mortgagee gained an advantage by availing himself of his position as a possessory mortgagee and obtained the regrant. This he did by committing a wrong. He committed a default in not paying the occupancy price within the time limited by law for and on behalf of the mortgagor. The regrant was obtained in his name by posing himself as a tenant, which was possible only because he was in possession of the land (as a possessory mortgagee). The advantage so gained by him in derogation of the right of the mortgagor should attract the penal consequences of Section 90 of the Indian Trusts Act. We hold that the default committed by a possessory mortgagee, in the performance of a statutory obligation or a contractual obligation, which entails a sale or forfeiture of right in the property to the mortgagor, will attract the provisions of Section 90 of the Indian Trusts Act. In such cases any benefit obtained by the qualified owner, the mortgagee, will enure to or for the benefit of the mortgagor. The right to redeem will subsist notwithstanding any sale or forfeiture of the right of the mortgagor. We are of the view that the law on this point has been laid down with admirable clarity by this Court in *Mritunjoy Pani v. Narmanda Bala Sasmal* (1962) 1 SCR 290 and by *K.K. Mathew, J.* (as his Lordship then was) in *Nabia Yathu Ummal v. Mohd. Mytheen*. [1963 KLJ 1177]. The said

decisions have our respectful concurrence.

12) Though Mr. Sanyal, learned senior counsel heavily relied on a decision of three-Judge Bench in Sachidanand Prasad vs. Babu Sheo Prasad Singh, [1966] 1 SCR 158, on going through the factual scenario, we are satisfied that the same is not helpful to the stand taken by the appellants.

13) Though the mortgagee purchased the mortgaged property pursuant to the decree in O.S. No. 120/51-52, as explained and interpreted the provisions of Order XXXIV Rule 14 CPC and Section 90 of the Indian Trusts Act, in the absence of recourse to Rule 14 of Order XXXIV, we hold that the relationship of mortgagor and mortgagee continues to subsist even thereafter, and his purchase is only in trust for the mortgagor. In view of the same, the right to redeem the mortgage is not extinguished and in the eye of law the purchase of the mortgaged property in pursuance of the decree for rent arrears must be deemed to have been made in trust for the mortgagor. In such circumstances, the High Court was right in granting preliminary decree for redemption. Insofar as the period of limitation is concerned, article 61 of the Limitation Act, 1963 applies and for a mortgagor to redeem or recover possession of immoveable property mortgaged; the period of limitation provided is 30 years when the right to redeem or to recover possession accrues. In view of the same, since the mortgagee purchased the mortgaged property in court auction on 11.09.1952 and the suit for redemption of mortgaged property was filed within the time prescribed, the High Court cannot be faulted for granting preliminary decree for redemption.

14) In view of the above discussion and conclusion, the appeal fails and the same is dismissed with no order as to costs.