

CASE NO.:
Appeal (civil) 3902 of 1999

PETITIONER:
Mangal Prasad Tamoli (Dead) By Lrs.

RESPONDENT:
Narvedshwar Mishra (Dead) By Lrs. & Ors.

DATE OF JUDGMENT: 24/02/2005

BENCH:
K.G. Balakrishnan & B.N. Srikrishna

JUDGMENT:
J U D G M E N T

Srikrishna, J.

One Harbans Mishra filed a civil suit No. 1070 of 1950 impleading as defendants Kesho Ram, Mst. Sukh Dei, Mst. Danpati, Sukhi Lal and Nageshwar Kalwar. The suit was one for redemption of a mortgage and with a chequered history.

One Mst. Toranto had mortgaged the suit property on 26.1.1908 in favour of Kesho Ram for a period of 60 years. This property is said to have been inherited by Smt. Sukh Dei, who on 1st April 1950 executed a sale deed selling her right of redemption in favour of Narvedshwar Mishra (original plaintiff and respondent herein). Sukh Dei had only a limited interest being a Hindu widow not in possession of the property. The plaintiff contended in the suit that the period of 60 years was fixed as the period of mortgage amounted to a clog on the equity of redemption and hence, null and void, and therefore, the plaintiff was entitled to redeem the mortgaged property without waiting for expiry of the mortgage period. Mst. Toranto died leaving her son Harbans Kalwar and daughter Harkali. Harbans Kalwar also died leaving behind his widow Sukh Dei the only heir. Mst. Dhanpati filed a suit No. 904 of 1951 for redemption and possession of the mortgaged property (the property which was the subject matter of suit No. 1070 of 1950) on the basis that she was the daughter of Mst. Toranto and had inherited the property in dispute after the death of Mst. Toranto and was, therefore, entitled to exercise the right of redemption of the same. Similarly, one Sukhi Lal also filed a suit no. 1486/1953 for redemption of the same property on the basis that he had purchased the right of redemption from Nageshwar who was the son of Smt. Toranto and the only heir. Mangal Prasad Tamoli, Bindeshwari & Sarjoo Devi, the legal heirs of the original mortgagee Keshav, contested all the three suits on various grounds.

By judgment dated 30.11.1955 the First Additional Munsiff, Gorakhpur dismissed all the three suits holding as follows: That Smt. Danpati and Sukhi Lal had no right to the property aforesaid, the aforesaid Plaintiff in Suit O.S.No. 904 of 1951 and 1486 of 1953 have failed to prove that they were the heirs of Smt. Toranto or purchasers from the heirs of Toranto; that Smt. Toranto had a limited interest in the mortgaged property and the mortgage became void after her death in the year 1908. The heirs of Smt. Toranto having not claimed any redemption within 12 years of the death of Smt. Toranto, the mortgagee became the possessor of the mortgaged property and the mortgage did not remain permissive and the suit for redemption filed by the plaintiff was dismissed inter alia on the ground that the Plaintiff had no right to redeem the property; held that

Harbans Kalwas son of Toranto died after Smt. Toranto and Sukh Dei was the wife of Harbans Kalwar who claimed the property of Smt. Toranto after the death of Harbans Kalwar; the conditions of mortgage did not amount to clog on redemption and the suit was premature.

Narvadeshwar Mishra heir of the original plaintiff filed Civil Appeal No. 44 of 1956 arising out of suit No. 1070 of 1950. Smt. Dhanpati and Sukhi Lal did not file any appeal against the dismissal of their Suit No. 904 of 1951 and 1486 of 1953, in view of the finding of trial court that suit was premature. On 23.4.1958 the Additional Civil Judge, Gorakhpur dismissed the appeal on the sole ground that the suit was premature and the terms of the mortgage were not a clog on redemption. The other points urged in the appeal were left open. On 18.1.1996 the High Court allowed the second appeal of Narvadeshwar Mishra and others (the heirs of plaintiff-respondents herein) holding that the finding of the courts below to the effect that the terms of the mortgage was not a clog on redemption and that the suit was premature was correct. The High Court, however, went further to hold that as appellant had made a statement before it that he would not take the possession of the property before actual expiry of the mortgage time, i.e. before 26.11.1968, the suit could be decided on merit. In this view of the matter, the High Court partly allowed the second appeal and remanded the suit to the first lower appellate court. Although, according to the present appellants, this order of remand was erroneous in law and contrary to the judgment of this Court in Gangadhar vs. Shankar Lal, they were advised that there was no need to challenge the judgment at that stage as their rights were not finally adjudicated and the effect of the High Court judgment was that the suit for redemption could not have been brought before 26.1.68. Sometime in 1965 Sukh Dei died. She was original defendant 2 in O.S.No.1070 of 1950 and arrayed as a respondent in the appeal before the lower appellate court. There was failure to bring the legal representatives of deceased Sukh Dei on record. The heirs of Sukh Dei not having been substituted, the suit abated. An appeal carried by the plaintiff against the abatement order was also dismissed by the District Judge for default. An application for restoration was filed in the appeal. An attempt to serve notice issued for restoration of the appeal elicited the report that three of the respondents had died in 1965-66. The Additional Civil Judge, Gorakhpur held that the appeal stood abated against respondents 4 and 6 in the appeal.

In appeal the First Additional District Judge took the view that though one of the appellants Smt. Godawari (one of the heirs of the original plaintiff) had died, and her heirs were not brought on record, the appeal did not abate. An application for amendment moved on behalf of the defendants to amend the written statement, raising the contention that Smt. Sukh Dei had only limited interest, was rejected with the observation that the point could be urged at the time of arguments.

On 26.3.1982 the first Additional District Judge, Gorakhpur allowed appeal No. 44 of 1956 and decreed suit No.1070 of 1950 setting aside the judgment of the First Additional Munsif, Gorakhpur dated 30.11.1955. Aggrieved thereby, Mangal Prasad Tamoli filed second appeal No.1259/82 in the High Court of Allahabad. The second appeal was dismissed by the High Court on 17.9.1996. Aggrieved thereby, the heirs of the said Mangal Prasad Tamoli are in appeal before this Court by special leave. Although the facts are somewhat convoluted, the disposition of this appeal does not require traversing the maze. The learned counsel appearing for the appellant urged only one contention in favour of the appellant and we are satisfied that the appeal must succeed thereupon.

Learned counsel contended that the position in law is that when

a mortgage suit is filed prematurely it is not open to the Court to continue with the suit on the ground that the plaintiff has agreed not to take possession before the due date. The suit has to be necessarily dismissed, though it may be open to the plaintiff to bring the suit after the period of the mortgage is over.

The learned counsel invited our attention to the order of the High Court dated 18.2.1966 in second appeal No.3033/58 and contended that this order is wholly erroneous. Though the said order was not challenged in the year 1966, the appellants were entitled to canvas the correctness of the said order in the present appeal. We shall presently examine these contentions.

In Seth Ganga Dhar v. Shankar Lal & Ors. (at p.512), following the view taken by the Privy Council in Bakhtawar Begum v. Husaini Khanam, it was held that "Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period."

In Gangadhar (supra) the term of the mortgage was 85 years and there was no stipulation in the deed which entitled the mortgagor to redeem during the said term. The suit had been admittedly filed before the expiration of the term of the mortgage. After perusing the authorities cited at the Bar and after taking the view that the period of redemption of 85 years was neither oppressive nor so unreasonably long as to amount a clog on redemption. It was then held: "we then come to the conclusion that the suit was premature and must fail"

Relying strongly on the authority of Gangadhar (supra), the learned counsel contended that as the suit filed by the plaintiff was premature, it ought to have been dismissed and there was no justification for the High Court to have made an order of remand in suit No. 3033/58 by its judgment dated 18.1.1966.

When we put to the learned counsel as to how he could in the present appeal filed in the year 1999 challenge the order of remand made by the judgment of the High Court on January 18, 1966 in second appeal No.3033/58, the learned counsel drew our attention to the decision of this Court in Kshitish Chandra Bose v. Commissioner of Ranchi as authority for the proposition that an order of remand by the High Court being an interlocutory judgment, which did not terminate the proceedings, it is open to the aggrieved party to challenge it after the final judgment. This Court in Satyadhan Ghosal and ors. v. Smt. Deorajin Debi & anr., under similar circumstances, took the view that an order of remand was an interlocutory judgment which did not terminate the proceedings and hence could be challenged in an appeal from the final order. This view was again reiterated in KC Bose (supra) wherein it is observed (p. 767)

"Mr. Sinha appearing for the respondent was unable to cite any authority of this Court taking a contrary view or overriding the decisions referred to above. In this view of the matter we are of the opinion that it is open to the appellant to assail even the first judgment of the High Court and if we hold that this judgment was legally erroneous then all the subsequent proceedings, namely, the order of remand, the order passed after remand, the appeal and the second judgment given by the High Court in appeal against the order of remand would become non-est."

Having considered the questions urged by the learned counsel, which appear to be backed by the two decisions of this Court, in the

background of the facts of the case before us, we are satisfied that the appellants are entitled to succeed on both counts.

The trial court and the first appellate court had held that the suit for redemption brought by the plaintiff was premature and rightly dismissed it. It is the High Court, by its judgment dated 18.1.1966 in second appeal No.3033/58, which took an erroneous view that because of the plaintiff's advocate had stated that he would not seek delivery of possession before stipulated time (26.1.1968), the suit could be continued. It was on this wrong understanding of the legal position that the remand order dated January 18, 1966 came to be made by the High Court pursuant to which the appeal and further proceedings continued. If this remand order was bad in law, then all further proceedings consequent thereto would be non-est and have to be necessarily set aside. That the appellants are entitled to urge this point even at this point of time, is supported by the authority of this Court in Gangadhar (supra).

For the aforesaid reasons, the appellants are entitled to succeed. The appeal is allowed. The judgment and order of the High Court of Allahabad in second appeal no. 3033/58 rendered on 18.1.1966 remanding the appeal to the first Appellate Court is set aside. Consequently, all proceedings and orders of the first Appellate Court consequent to the remand are declared to be bad and non-est and set aside. The original judgment of the trial court and the first appellate court dismissing the suit No. 3033 of 1958 as pre-mature is reaffirmed.

The appellants are entitled to costs of the appeal.