

L. Tulsi Ram And Ors. vs Maiku Lal And Ors. on 20 March, 1951

Equivalent citations: AIR1952ALL163, AIR 1952 ALLAHABAD 163

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Bench: Ghulam Hasan

JUDGMENT

Ghulam Hasan, J.

1. This appeal arises out of a suit for sale on the basis of a mortgage. The mort-gage in question (Ex. 1) was executed on 13-1-1930, by Lachhman Prasad and Tulsi Ram in favour of Lalta Prasad and Manni Lal for Rs. 18,000 at 11 annas per cent. per mensem interest. The property covered by the mortgage consisted of five items (vide list A attached to the plaint). Item 1 consists of a shop in Deorhi Agha Mir, Lucknow. Item 2 is a double storeyed house in muhalla Astabal Yahiaganj. Ahata Janashinan, Thana Chauk/Lucknow. Item 3 is a three storeyed house in Finas waligali, Lucknow. Item 4 consists of four shops with plots Nos. 32 and 95 situate at Canning Street, Lucknow, and item 5 is one anna 9 pies 6 3/4 karant zamindari share in muhalla Ismailganj, pargana tahsil and district Lucknow. Of these items 3 and 4 were admittedly redeemed and are no longer the subject-matter of controversy. The only items with which we are concerned are Items 1, 2 and 5. Exhibit 12 is the sale deed dated 20-11-1950 executed by the mortgagors in favour of defendants 3 and 4 in respect of the residential house mentioned in item 2 for a sum of Rs. 5000. Rs. 1500 were made dehanid by the vendees in favour of the mortgagees with the direction that on payment of the dehanid the property sold was to be exempted from the mortgage. Exhibit 13 is the sale dated 22-11-1930 made by the mortgagors in favour of the same vendees for Rs. 4875 in respect of the shop in Deorhi Agha Mir (item 1) to the extent of twelve annas. Rs. 750 were made dehanid to be paid by the vendees to the mortgagees. Exhibit 14 is another sale deed of the same date in respect of the remaining four annas share of item 1 in favour of Baijnath for Rs. 1625. Rs. 250 were made dehanid under this deed.

2. The suit was brought by the mortgagees or recovery of. Rs. 18,000 with future interest and costs against the mortgagors by sale of the aforesaid property. Besides the mortgagors, defendants 3 to 6 were impleaded as representatives of the purchaser of items 1 and 2 of List A from them. Lachhman Prasad and Lalta Prasad died during the pendency of the appeal and were substituted by their legal representatives.

3. There were various pleas raised in the suit but the main defences now surviving for decision are that there was an agreement between the parties to the mortgage after its execution that the mortgagors shall sell a portion of the mortgaged property leaving an agreed amount of the sale

consideration to be paid to the mortgagees who will thereupon release the property Bold from the mortgage on receiving that amount. In pursuance of this agreement, the mortgagors sold items 1 and 2 with the permission of the mortgagees to defendants 3 to 8 making Rs. 2500 payable by them to the mortgagees. The mortgagees did not accept the amount offered to them by the vendees and the mortgagees are, therefore, not entitled to get any interest upon it from the date of the execution of the sale deed. It is also pleaded that the mortgagees are creditors and not having furnished statements of account as required by the U. P. Agriculturists' Relief Act, they are not entitled to get costs and interest.

4. The vendees from the mortgagors supported the latter and averred that the mortgagees had agreed to piecemeal redemption in pursuance of an arrangement arrived at between them and the mortgagors and the vendees agreed to purchase item Nos. 1 and 2 on that understanding but when Rs. 1,500, which were left as dehanid with them were offered to the mortgagees, they refused to take it. The vendees further pleaded that they were assured by the mortgage that even if redemption was not allowed by the mortgagees on payment of Rs. 1,500, the remaining property was ample to satisfy the mortgage debt and in any case the property in their hands should not be sold unless the other properties upon sale were found inadequate to satisfy the mortgage. The plea of ratable contribution was also raised by the vendees.

5. The controversy arising between the parties was embodied in several issues of which the following alone are important:

2. (a) Are the plaintiffs creditors and defendants 1 and 2 agriculturists under the Agriculturists Relief Act?

(b) If so, are plaintiffs entitled to costs and interest?

3. Was there an agreement between the plaintiffs and defendants 1 and 2 that the plaintiffs would redeem such portion of the property mortgaged as would be sold by defendants 1 and 2 on receipt of the amount of dehanid?

4. Did the plaintiffs agree to redeem items Nos. 1 and 2. of list A attached to the plaint on payment of Rs. 2500 by defendants Nos. 3 and 4 and Baijnath as alleged by defendants 1 and 28.

5. Are plaintiffs not entitled to receive more than Rs. 1,500 and its interest from item No. 2 of list A?

6. Are items Nos. 1, 2 and 5 of list A liable to pay of the debt in question ratably as alleged by defendants 3 and 47? If so, at what rate?

8. Are defendants 3 and 4 entitled that the plaintiffs should recover the debt above Rs. 1,500 first from item No. 4 and then, if necessary, proceed against items Nos. 1 and 2 of list A, attached to the plaint?

5. The trial Court held under issue No. 2 that the mortgagees are creditors and the mortgagors are agriculturists and the mortgagees, not having supplied the accounts as required by Section 82, U P. Agriculturists' Belief Act, they are not entitled to costs and interest as against the mortgagors from 30-4-1935.

6. Issues Nos. 3 and 4 were found in the negative. Under issue Mo. 5 the Court held that as the oral agreement was not proved, the plaintiffs' right to receive the mortgage dues cannot be limited to Rs. 1500. Under issue no. 6, the right to contribution was negatived and so was the right to marshalling under issue No. 8. As a result of these findings, the trial Court decreed the suit for RS. 18,000 less the amount credited in the list attached to the plaint with interest at 4 1/2 per cent. per annum simple from the date of the mortgage till April 30, against defts. NOS. 1 and 2 who were not made liable to pay the costs & subsequent interest, but with interest & costs against the other defendants. Aggrieved by this decree, the defendants have preferred a first appeal.

7. The principal contention raised in the case on behalf of the appellants is that the trial Court was wrong in holding that there was no agreement between the parties for redemption of portions of properties sold on acceptance of the dehanid amount and that items Nos. 1 and 2 were not sold with the consent of the mortgages and thus they are liable for the satisfaction of the entire mortgage debt. In order to decide this contention it would be necessary to refer to the pleadings.

8. In paragraph 10 of the written statement of defendants Nos. 1 and 2 it was pleaded that after the execution of the mortgage-deed it was settled between the mortgagees and mortgagors that the latter by selling a portion of the mortgaged property would make a dehanid of the amount settled between the parties and that the mortgagees shall accept the dehanid amount from the vendees and exempt the mortgaged property sold from the burden of the mortgage. In paragraph 11 it was stated that the mortgagors after taking the consent of the mortgagees sold items Nos. 1 and 2 in list to defendants NOS. 3 to 8 and left Rs. 1,500, the amount between them and defendants Nos. 3 to 8. The mortgagees promised that, after receiving the dehanid, they would exempt the property from the burden. The mortgagees did not realise the amount and they are therefore, not entitled to any interest on that amount from the date of the execution of the sale deed.

9. In paragraph 10 of the written statement filed by defendants Nos. 3 and 4 it was stated that the mortgagors were heavily indebted, that they proposed to transfer portions of their property which stood mortgaged to the plaintiffs mortgagees with a view to releasing the property so transferred from the burden of the mortgage. In paragraph 11 it was stated that the vendees accepted the proposal and took a sale deed of the house in suit from the mortgagors leaving Rs. 1,500 for payment to the plaintiffs. They offered this amount to them but it was refused. These paragraphs were verified upon the personal knowledge of the answering defendants.

10. The only evidence in support of the agreement is to be found in the statement of Moolchand (D. w. 2), the former munim of the mortgagors. The plaintiffs mortgagees produced one of themselves, viz., Lalta Prasad, to rebut the evidence. The learned trial Judge scrutinised the evidence of both these witnesses and preferred the evidence of Lalta Prasad plaintiff to the evidence of Moolchand. We have been taken through the evidence of these witnesses and have considered it in the light of

the criticism offered by the trial Court. We see no reason to differ from the view taken by the trial Judge on this point. There is no doubt that the burden of proving the agreement lay heavily upon the defendants who set it up in variation of the written contract of mortgage. It is clear that in discharging this burden they relied only upon the evidence of their munim and withheld the best evidence from the Court. The pleading was verified on the personal knowledge of the defendants. One of the defendants, Lala Shambhu Nath, defendant 3, was no doubt dead, but there was no reason for not producing Lachman Prasad, Tulsi Ram and Hari Kishen who were alive. Lalta Prasad, plaintiff, has come into the witness-box to disprove the existence of any such agreement. Under the circumstances the learned trial Judge is perfectly justified in not accepting the evidence of Moolchand munim as against the evidence of Lalta Prasad. It is true that Moolchand was an attesting witness to all the deeds, but that is no ground for not producing the defendants who were alive and who were parties to the alleged agreement.

11. On behalf of the plaintiffs-respondents objection was taken to the admissibility of such an agreement in view of the provisions of Section 92(4), Evidence Act, but that point is purely academical in view of the fact that we do not see any reason to alter the finding of the trial Court upon a pure question of the appraisal of the evidence. In concurrence with the view taken by the Court below, we hold that no such agreement was made between the parties that upon redemption of portions of the property as would be sold by the mortgagors the mortgagees would be bound to accept the dehanid and exempt the property from the burden of the mortgage.

12. The next contention put forward is that the trial Court should not have excluded the defendants other than defendants I and 2 from the benefits of the Debt Acts namely that the costs and interest should have been disallowed against them in the same way as against defendants 1 and 2. This plea was not raised in the lower Court. It was nowhere stated by defendants 3 and 4 that because the accounts were not supplied to defendants 1 and 2, therefore, costs and interest should be disallowed against them as well. Section 32, U. P. Agriculturists' Relief Act enjoins upon a creditor after the date of the enforcement of the Act to "(a) regularly record and maintain a correct account of each agriculturist debtor of all transactions relating to each loan advanced to the debtor . . . and '(b) supply each agriculturist debtor every year with a full and correct statement of account signed by the creditor or his agent of any balance or amount that may be outstanding against such debtor on account of each separate loan on such date"

The relevant portion of Section 34 is as follows:

"34. Notwithstanding anything contained in any other enactment for the time being in force-

(a) in any suit or proceeding relating to a loan against an agriculturist, if the debtor objects that the creditor has not complied with the provisions of Section 32, the Court shall determine such objection before deciding the claim on the merits;

(b) if the Court finds that the provisions of Clause (a) of Section 32 (1) have not been complied with by the creditor, it may, if the creditor's claim is established in whole or

in part, disallow the whole or a portion of the interest, found due, as it may deem reasonable in the circumstances of the case, and shall disallow the creditor's costs,"

It is obvious from a plain reading of the section that Section 34 applies to a suit against an agriculturist debtor by a creditor. The word "debtor" in Section 34 means an agriculturist debtor and not his transferee or vendee. Section 34 refers back to Section 32 which requires a creditor to maintain the account against the agriculturist debtor, and it is for failure to observe this provision that a penalty is imposed by Section 34. Defendants 1 and 2 are agriculturists debtors and a suit is brought against them by the creditors to enforce the mortgage. Not having supplied the account; to the debtors they are not entitled to the costs and interest but it is not open to defendants 3 and 4, who are not agriculturists debtors to claim any such benefit. Section 34 confers the benefit upon the agriculturist debtor and not upon their transferees. Reference was made on behalf of the appellants to *Misri Lal v. Alexander Gardner*, A. I. B. (23) 1936 ALL, 697, *Bireshwar v. Uma Kant*, A. L B. (24) 1937 ALL, 297 and *Faiyaz Ahmad v. Jamal Uddin*, A. I. r, (27) 1940 ALL. 337. Learned counsel conceded that these causes are under Section 30, U. P. Agriculturists' Relief Act, and not under Section 34. Section 30. does not use the words "agriculturist debtor" as Section 32 does. The word "debtor" in Section 30 has been construed in a wide sense so as to include a person who is not an agriculturist and it has been held that a debtor can apply under Section 30 even if he is a non-agriculturist in order to get the benefit of that section. These cases, however, have no bearing upon the application of Section 34 to the transferees of the agriculturist debtor. We can see no ground, therefore, for interfering with the decision of the trial Court on this point.

13. Finally it was urged that the vendees are entitled under Section 56, T. P. Act, to have the mortgage-debt satisfied from properties other than those sold to them and that the properties in their hands covered by Exs. 12 to 14 can be proceeded against only if the debt still remains unsatisfied. In the Court below contribution was claimed presumably under Section 82, T. P. Act, and the plea was embodied in issue 6 but the Court held that the principle of contribution does not apply, as Section 82 defines the relations of the mortgagors inter se and does not justify an order of the kind desired by the vendees by the application of the doctrine of contribution. In this Court reliance is placed on Section 56, T. P. Act. Section 56 refers to marshalling and reads thus :

"If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

It is conceded that this right would be open to the vendees provided there is no contract to the contrary. It is contended for the mortgagees-respondents that such a contract is to be found in the indemnity clause in the sale deeds, Exs. 12, 13 and 14. The provision referred to is to the effect that if on a claim put forward, objections raised and rights set up by any one, the sale property in part or in its entirety goes out of the vendees' possession the vendees shall have the right to realise their consideration money to the extent of the property going out of their possession with costs of the

Court from the other moveable and immoveable property of every sort as well as from the person jointly or severally of the vendors. We are not prepared to construe this clause in the sale deeds as being a contract to the contrary which can prevent the application of the principle of marshalling to the present case. Section 56 confers a statutory right upon the vendee, in the case of a property sold to him which was mortgaged by the vendor along with other properties, to have the mortgage-debt satisfied first out of the properties not sold to him and that this right can be taken away from him if it is proved that the intention was to extinguish the entire mortgage and release the property from the mortgage, but if there was no such intention evidenced by any contract, the right is not defeated or lost.

14. In *Pirthiraj Singh v. Bukmin Kunwar*, A. I. E. (13) 1926 ALL. 415 where the vendee of one of the mortgaged properties undertook, as part of a consideration for sale, to discharge the mortgage to a certain extent and it was further agreed between the vendor and the vendee that the balance of the mortgage amount should be paid by the vendor himself, on failure of which he was to be personally liable for the amount, it was held that there was a contract to the contrary and that the vendee's right as against the vendor was excluded by such contract. A similar view was taken in *Achanta Venkata Purna Shivara mayya v. Manne Venkayamma*, A I. b. (33) 1946 Mad. 59. In that case the purchaser of one of several items of mortgaged property undertook to pay and discharge out of the consideration money the mortgage debt due but did not do so. On a suit by the mortgagee for the sale of the property the purchaser claimed that the property sold to him should be directed to be sold last. It was held that from the very circumstances that the sale to the purchaser of one of the items was for the purpose of freeing the other properties from the mortgage it could be presumed there was a contract to the contrary within the meaning of Section. 56 and that the purchaser was not entitled to marshalling.

15. These cases are distinguishable on facts. In the present case there was no contract, express or implied that the object of the sale was to discharge the burden of mortgage and that as it was not carried out, the vendees could not insist on marshalling under Section 56. In the present case, the amount due under the principal deed of mortgage was Rs. 18,000 out of which only Rs. 7000 were paid and Rs. 11,000 were still payable. Rs. 1,600 which were left with the vendees could not suffice to discharge the encumbrance. The vendors never placed sufficient funds in the hands of the vendees to extinguish the mortgage under Ex. 1 and, therefore, there was no contract to the contrary. We hold, therefore, that the vendees are entitled to marshalling under Section 56, T. P. Act.

16. No other point was urged in support of the appeal. We partly allow the appeal and modify the decree of the Court below by directing that the decretal debt shall be satisfied first out of the property not sold to defendants 3 to 8 and that if, after the sale of those properties the debt still remains unsatisfied, the balance shall be recovered from the properties sold to the aforesaid defendants. Subject to these directions the appeal is dismissed with costs.