

Haji Muzahir Ali vs Lachman Prasad And Ors. on 2 December, 1953

Equivalent citations: AIR1954ALL559, AIR 1954 ALLAHABAD 559

JUDGMENT

Randhir Singh, J.

1. This is a plaintiff's appeal against the judgment of the District Judge of Barabanki who allowed the appeal instituted by the defendants against the decree of the Munsif of Barabanki in a suit for possession.

2. In order to appreciate the controversy in this case, a brief reference to facts may be made at the outset. One Irshad Husain made a simple mortgage of his property on 10-7-1923, in favour of defendants 1 and 2. He subsequently made a usufructuary mortgage of the property in favour of the appellant on 13-1-1928, but this is not very relevant for the purposes of this appeal. The defendants 1 and 2, who were the simple mortgagees, obtained a decree on the basis of their mortgage dated 10-7-1923 against the mortgagor but in the suit, however, they failed to implead the subsequent usufructuary mortgagee, who is the appellant in the present appeal. After obtaining the decree on the basis of the prior mortgage dated 10-7-1923, defendants 1 and 2 put it into execution against the mortgagor and this execution was transferred to the Collector.

The Collector granted a self-liquidating mortgage for 20 years in respect of the property under Section 17 of the Debt Redemption Act, and in execution of this order the defendants 1 and 2 on 21-9-1945, obtained actual possession of the plots which were in the possession of the appellant. The appellant filed an objection under Order 21, Rule 100, C. P. C. but this objection was dismissed and he was ordered to seek his remedy in the proper forum. He then instituted the suit which has given rise to this appeal on 17-10-1946.

3. Defendants 1 and 2 contested the suit and contended that they were entitled to use their earlier mortgage as a shield in defence of the suit for possession although they did not implead the plaintiff, who was the subsequent transferee in the suit brought by them on the basis of their mortgage. It was further contended on their behalf that the plaintiff could not obtain possession of the property except on payment of the amount due to defendants 1 and 2 under the mortgage held by them.

4. The learned Munsif who tried the case found in favour of the plaintiff and decreed the suit. The defendant, however, went up in appeal. The lower appellate court reversed the finding of the learned Munsif and came to the conclusion that the plaintiff ought to redeem the mortgage on the basis of

which the self-liquidating mortgage was granted by the Collector in execution of the decree passed on the basis of that mortgage. He, therefore, remanded the case to the trial court with directions to find the amount payable by the plaintiff to the defendants under the prior mortgage. The plaintiff has come up in second appeal against this order of remand.

5. A preliminary objection has been taken on behalf of the respondents on the ground that an appeal against the order of remand passed by the lower appellate Court was not competent. The learned counsel relies on the provisions of Order 41, Rule 23 C. P. C. and it is contended that the case has not been decided by the trial court on any preliminary point and as such the remand made by the lower appellate Court should be deemed to be a remand under the inherent powers of that Court and not under the provisions of Order 41, Rule 23 C. P. C. It is now a well settled law that a remand not made under the provisions of Order 41, Rule 23 or under Order 41 Rule 25, C. P. C. would be a remand under the inherent powers of the appellate Court and as such an appeal would not lie against such an order of remand. The only point which arises for consideration, therefore, is whether the order passed by the lower appellate Court was an order under Order 41, Rule 23, C. P. C. The trial court had framed three issues in this case and one of the issues was: "Is the plaintiff entitled to possession without paying the prior mortgage, as alleged?"

No issue was framed by the trial Court as to what amount was payable under the prior mortgage if the plaintiff was allowed possession on his paying off that mortgage. Order 41, Rule 23 was amended by the Allahabad High Court and this rule as applicable to this State is as follows: "Where an appellate Court has reversed a decree and all questions arising in the case have not been decided the appellate court may if it thinks fit...."

The amended rule, therefore, clearly shows that wherever it is found that all points arising in the case have not been decided by the trial court, it would be open to the appellate Court to remand the case under Order 40, Rule 23, C. P. C. A remand under Order 41, Rule 23 C. P. C. would, therefore, be competent even if an issue has not been specifically framed but the question did arise and has been left undecided. The contention of the learned counsel for the respondents that no issue has been left undecided has, therefore, no force.

Admittedly the question did arise in the Court below as to what amount would be payable in case the contention of the defendants that the plaintiff should, pay up their mortgage before seeking possession was held to be well-founded and this question was not decided by the trial Court. It was precisely on account of this omission of the trial Court that the case had to be remanded by the lower appellate Court to the trial Court for a finding on this point when the lower appellate court came to the conclusion that the plaintiff was liable to redeem the mortgage held by the defendants before being put in possession of the property.

The ruling cited by the learned counsel for the respondents on this preliminary point, -- 'Barkat Beg v. Azim', 1943 Oudh W. N 310 (A), is of no assistance to him. In the reported case no Question had been left undecided by the trial court and it was held that the remand was not one under Order 41, Rule 23 C. P. C. but one under Section 151 C. P. C. and as such an appeal was not competent. In the

present case a question had definitely been left undecided by the trial court and the order of remand passed by the lower appellate court was evidently under the provisions of Order 41, Rule 23, C. P. C. The preliminary objection raised by the respondent has, therefore, no merits.

6. The only point pressed on behalf of the appellant in this case is that the lower appellate Court was in error in forcing the plaintiff to redeem the mortgage held by the defendants. The facts of this case are somewhat unusual and no authority bordering on the point in issue in this case has been cited by learned counsel for the parties. It is not disputed that the plaintiff was in possession of the land in dispute under a possessory mortgage made by Irshad Husain in 1923. The mortgage held by the defendants was a simple mortgage executed in 1923. No doubt the defendants were earlier mortgagees but they were simple mortgagees and on the basis of their earlier mortgage, they obtained a decree. In execution, of this decree, they were certainly entitled to put the whole of the mortgage property to auction but as they did not implead the subsequent usufructuary mortgagee, they could not obtain actual possession of the property. They put their decree into execution and the Collector without considering the claims of the usufructuary mortgagee who was no party to the execution proceedings, ordered a self-liquidating mortgage to be granted to the defendants and luckily for themselves, defendants 1 and 2 obtained actual possession of the plots.

7. The lower appellate court has put defendants 1 and 2 on the same plane as a prior mortgagee getting into possession of the property in execution of his decree. It is now well settled law that a prior mortgagee, who omits to implead a subsequent mortgagee and obtains a decree and then gets the property sold and enters into possession of the property, is entitled to set up his mortgage in defence, though right to enforce it may be time barred vide -- 'Sengamuthu Gounder v. Thayaram-mal', AIR. 1940 Mad 646 (B) & -- 'Sarda Prasad v. Kanhai Lal', AIR 1933 All 412 (C). The subsequent mortgagee, however, cannot be compelled to redeem the earlier mortgage and it is only if he institutes a suit that the prior mortgagee, omitting to implead, the subsequent mortgagee, can set up a mortgage as a shield.

8. In the present case defendants 1 and 2 were not entitled to get into possession of the property which was in the possession of the subsequent mortgagee as an usufructuary mortgagee and his possession on the property though obtained under colour of a self-liquidating mortgage is unlawful. He would be on the same level as a prior mortgagee entering into forcible possession of the property in the possession of a subsequent usufructuary mortgagee. The mere fact that somehow the prior mortgagee has succeeded in entering into possession of the property would not give him the same status as would be available if a prior mortgagee gets into lawful possession of the property. The prior mortgagee gets all the rights of the mortgagor by putting his mortgage into effect without impleading the subsequent mortgagee, but even the mortgagor was not entitled to take possession of the property in the possession of the subsequent mortgagee except in due course of law.

I am unable to agree with the view taken by the lower appellate court that as the prior mortgagee is in possession of the property and the plaintiff, who is a subsequent mortgagee, has filed a suit for possession, the plaintiff should be asked to redeem the mortgage held by defendants 1 and 2. The learned District Judge has observed that it was not open to defendants 1 and 2 to successfully defend a suit if brought by the plaintiff under Section 9 of the Specific Relief Act, but as the suit which has

given rise to this appeal was a regular suit, it was open to defendants 1 and 2 to set up their mortgage. As remarked above defendants 1 and 2 were not in lawful possession of the property, as they were not entitled to oust the plaintiff under the decree obtained by them on the basis of their earlier mortgage without impleading the subsequent mortgagee. The plaintiff asked for the simple relief of possession on the allegations that defendants 1 and 2 have entered into possession without any right inasmuch as the decree obtained by defendants 1 and 2 could not be executed against the plaintiff who was no party to the decree obtained by defendants 1 and 2.

The view taken by the trial court appears to me, therefore, to be the correct view and the plaintiff was entitled, to a decree for possession, against defendants 1 and 2 as he was wrongfully dispossessed by them.

9. As a result the appeal is allowed and the plaintiff's suit for possession is decreed, with costs in all the courts. Leave to appeal under Chap. 8, Rule 5 of the Rules of Court is granted.