Tajpal Singh And Ors. vs Ganga Sahai on 28 January, 1952

Equivalent citations: AIR1952ALL808

JUDGMENT

Mushtaq Ahmad, J.

1. Both these are appeals by the applicants in a case under Section 12, U. P. Agriculturists' Relief Act XXVII [27] of 1934.

2. The appellants applied under the said section for redemption of a usufructuary mortgage dated 10.7.1928 made by their father Tikam Singh in favour of one Ganga Sahai, the original respondent, after whose death his legal representatives were brought on the record. The mortgage was for Rs. 6,337 and was executed to pay off a decree No. 140 of 1926 of the Court of the Subordinate Judge, Bulandshahr, which had been passed on foot of a simple mortgage bond dated 4-11-1920, executed by the same mortgagor in favour of the same mortgagee. This earlier mortgage too had been executed in lieu of amounts due on certain promissory notes of previous dates.

3. The appellants' case was that the entire mortgage money had been paid off from the usufruct of the property, whereas the mortgagee pleaded that a sum of Rs. 5059-9-7 was still due on that account from the present appellants as their rate able share of liability under the mortgage sought to be redeemed.

4. The question of the appellants' rate able liability was raised in view of certain previous proceedings, under the Encumbered Estates Act. The mortgagor, Tikam Singh, had applied under Section 4 of that Act, impleading his sons, the present, appellants, in the array of opposite parties. It was held in that case that Tikam was liable to pay 1/5th and the sons 4/5ths of the family debts and, so far as the amount due under the mortgage now in question is concerned, the liability of the appellants was fixed at Rs. 5059-9-7, which is precisely the amount claimed by the mortgagee in, his defence in the case under Section 12, Agriculturists Relief Act. In the proceedings under the Encumbered Estates Act the relative position of the title of the father and the sons was also fixed, the proportion being 1/5th for the father and 4/5tha for the sons.

5. The Court below had first allowed the claim for redemption without the mortgagors having to pay anything at all, on the finding that the entire mortgage money had been paid up from the usufruct of the property mortgaged. This Court, on an appeal (First Appeal No. 401 of 1941), filed by the mortgagee Ganga Sahai, set aside that decree and sent the case back for a fresh trial, holding that the mortgage money had not been paid up as claimed by the mortgagors. The Court then passed the decree now under appeal, holding that Rs. 4131-14-9 were still due from the appellants in respect of their 4/5ths liability under the mortgage in suit.

6. Only three points were urged by the learned counsel for the appellants in this appeal : (1) that certain repayments made to the mortgagee had been wrongly disallowed by the Court below, (2) that a larger amount had been paid as interest to the mortgagee than what he was entitled to receive under the present law, and (3) that the appellants were not liable to pay to the mortgagee the amount which their father Tikam Singh mortgagor might have failed to pay as theka money for the Sir plots of which he (Tikam Singh) had taken a theka for 12 years from the mortgagee on the date of the mortgage. The amount annually payable under that theka, it, may be mentioned, was Rs. 378.

7. We propose to consider these points seriatim.

8. As regards the first point, the only evidence produced by the appellants was the statement of Tikam Singh, the mortgagor. He no doubt stated that he had repaid to the mortgagee five different amounts, viz. Rs. 117 on 29-6-1919, Rs. 156-15-0 on 29-6-1920, Rs. 111 on 28-1-1920, Rs. 246 on 29-6-1919 and Rs. 243-15-0 on 29-6-1920. To rebut that statement the defendant examined Bishambhar Das, son of the mortgagee, who denied the repayments alleged. There was thus oath against oath on this vital question of repayment of a fairly substantial amount alleged to have been made by the mortgagor to the mortgagee. The Court below was not satisfied with the uncorroborated testimony of Tikam Singh on whom surely the burden lay to prove these repayments.

Learned counsel has criticised the finding of the learned Judge primarily on the ground that the mortgagee had failed to produce the promissory notes, which, if filed, would have disclosed the endorsements made on them of all these repayments It is admitted that no attempt was made by the mortgagor to summon those promissory notes, nor was any question put to Bishambhar Das examined for the mortgagee as to whether those promissory notes were still in existence and traceable. It is quite possible that, after the earlier mortgage deed of 4-11-1920 had been executed in lieu of the amounts due under those notes, the same had been destroyed as being of no further use, and it is also possible that if a question in this behalf bad been put to the witness just mentioned, he might have given an answer to the same effect.

In the circumstances, we cannot draw any inference adverse to the mortgagee from his not producing those promissory notes in order to show that there had been no endorsements of repayments on them in regard to the amounts alleged by the mortgagor to have been repaid to the mortgagee under those notes. It was no doubt open to the learned Judge to accept the evidence of Tikam Singh, even though it was not corroborated by any other material, but by parity of reasoning it was equally permissible to him to reject it, and he felt inclined to take the latter course. It was to meet such a situation that their Lordships of the Privy Council in Nabakishore v. Upendra kishore, 20 ALL. L. J. 22 at p. 25 made the following observation :

> "The only further observation that their Lordships desire to make is to call attention once more to the fact that in appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one aide or the other being right, he has not succeeded."

9. Following this dictum, we do not find it possible to disagree with the learned Judge of the Court below in his estimate of the evidence produced by the parties on this question of repayments, and we affirm his finding.

10. As regards the second point, it is conceded, and it is obvious too, that it will entirely depend on our finding on the first question. We having found, in agreement with the Court below, that the amounts alleged to have been repaid, by the mortgagor to the mortgagee were never repaid, there can be no question of the mortgagor having paid interest more than what the mortgagee was entitled to receive under the present law.

11. As regards the third point, the facts disclosed in the argument of the learned counsel were that, on the date of the mortgage, the mortgagor Tikam Singh had obtained a theka from the mortgagee for a period of 12 years in respect of the Sir plots covered by the mortgage on a certain annual rental, that for certain years the theka money had not been paid by Tikam Singh to the mortgagee and that the latter had to bring suits and obtained decrees against Tikam Singh in respect of the same. In the pleadings, it was further alleged, that for the subsequent years the theka money had been paid by the mortgagor to the mortgagee. The Court below found that this had not in fact been paid. The period covered by the decrees for arrears of theka money was 1339 to 1341 Fasli. The decrees for these years certainly remained unexecuted, so that the mortgagee never received any amount during that period from the mortgagor in respect of that portion of the mortgaged property which comprised the Sir plots.

12. On these facts it was contended by the learned counsel that the mortgagee having himself allowed the decrees for arrears of theka money for the years 1339 to 1341 Fasli to remain unexecuted and the same now having become time-barred, it was not open to him to claim what was due under those decrees in the shape of profits of the Sir plots for the period covered by those decrees. Reliance was placed on Section 9 (1), Debt Redemption Act. This reads :

> 'In a suit to which this Act applies or in amending a decree under the provisions of Section 8, the Court shall, notwithstanding anything to the contrary in any law, decree or contract or in any agreement purporting to close past transactions, determine the principal and take into account all sums paid by or on behalf of the debtor and in the case of a mortgage with possession, the net profits realized by the mortgagee or which with the exercise of ordinary diligence might have been realised by him. . ."
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> It is urged that the mortgagee being able, with the exercise of ordinary diligence, to realize the amounts of the decree for arrears of theka money and he having nonetheless failed to recover the same from the mortgagor, was not entitled to claim the profits in respect of the period covered by the decrees in the case under Section 12, U.P. Agriculturists' Relief Act. This contention, in our opinion, has a two-fold answer. In the first place, it was for the mortgagor to plead that the mortgagee could have realized the amounts 'with the exercise of ordinary diligence' and yet he had failed to do so. Not a word was said on the point in the statement of the appellants'

only witness, Tikam Singh. Nor was any argument on the point taken before the Court below on these lines.

The question was purely one of fact, and it should have been pleaded specifically and evidence should have been led thereon. It was not until the matter came to this Court that for the first time it was raised before us by the learned counsel for the appellants. We are loath to entertain it so late. It is a fact that the mortgagee did bring suits for the recovery of the amounts and that he even obtained decrees. Ordinarily one may expect that he should also have put those decrees into execution, unless circumstances created a situation which made it difficult, if not impossible, for him to recover his dues. Be that as it may, the important point is that the mortgagor never pleaded in this case that, 'with the exercise of ordinary diligence' within the meaning of Section 9 (1), U. P. Debt Redemption Act, the mortgagee could have realised the amounts of those decrees for arrears of theka.

The second, and perhaps the more obvious, answer to the contention is that, under the mortgage in question, it had been agreed that whatever rent would remain in arrears with the tenants would be payable by the mortgagor to the mortgagee at the time of redemption. The position of Tikam Singh was virtually that of a tenant under the theka obtained by him from the mortgagee in respect of the Sir plots. Whether decrees had been obtained against him or not the fact remains that the amounts covered by the decrees representing the arrears of rent were due from him as such on the date of the redemption. This being so, within the terms of the contract the amounts are payable by the mortgagor to the mortgagee as part of the price of redemption. Looking at the case from a broad point of view, it cannot be denied that the mortgagee did not receive any profits of the Sir plots during the years 1339 to 1341 Fasli. Those profits remained with the mortgagor, although he had no right to retain them.

It would be unjust to accept the contention now advanced by the learned counsel for the appellants, unless we were to put a premium on the mortgagor's own failures and omissions, He having failed to pay the theka money to the mortgagee during these years cannot now claim the benefit of his own failure, but must account for the profits to the mortgagee before he can ask for possession by redemption. From every point of view, we are satisfied that the contention of the learned counsel on this third point also has no force.

13. A preliminary objection to the hearing of the appeal was taken by the learned counsel for the respondent. As the points raised in the appeal were of some interest, we thought it desirable to deal with them first, But we may also briefly notice the grounds of the preliminary objection taken by the learned counsel for the respondent. Relying on the provisions of Section 23 (1), U. P. Agriculturists' Relief Act, he argued that the decree of the Court below could have been appealed against only to the District Judge and not to this Court. Apart from the anomaly, if it is a sound contention, that the mortgagee himself had on the earlier occasion filed an appeal against the decree first passed by the

Court below in this Court and not in that of the District Judge, we do not find much substance in the objection.

This section reads :

> "An appeal shall He to the District Judge from an order of a Collector or Assistant Collector passed under this Chapter. An appeal shall lie from the order of a civil Court passed under this Chapter to the Court to which original decrees passed by such Court are ordinarily appealable, and where such decrees are appealable to more Courts than one, to the Court of lowest jurisdiction."

14. Learned counsel argued that irrespective of the valuation of the suit, namely whether it was below or above Rs. 5000-0-0, an appeal against a decree for redemption under Section 12, U. P. Agriculturists' Relief Act, can be filed only in the Court of the District Judge and never in this Court. It cannot be denied that, under the general provisions in the Bengal and Assam Civil Courts Act XII [12] of 1887, an appeal in the latter ease shall always lie to this Court, the Court of the District Judge being entitled to entertain an appeal against a decree of a civil Judge only where the valuation is below Rs. 5000-0-0. The question is whether such a rule has been so drastically altered by the provisions of Section 23 (1), U. P. Agriculturists' Relief Act, as to lend support to the point raised by the learned counsel in support of his preliminary objection.

The answer to the question would depend upon the interpretation of the words 'ordinarily appealable in the section. In our opinion these words only mean that where in a case the appeal against a decree ordinarily lies to the District Judge, an appeal from the order of a civil Judge under chap. 3 of this Act shall lie to the District Judge, but where an appeal against a decree refer, ring of course to a case where the valuation is above Rs. 5000-0-0 lies to the High Court, an appeal in such a case shall lie to the High Court and in no other Court. This position becomes apparent on a comparative examination of the language of this section and of that of Section 5 (2) of the Act. This latter section provides :

> "If, on the application of the judgment debtor, the Court refuses to grant instalments, or grants a number or period of instalments which the judgment-debtor considers inadequate, its order shall be appealable to the Court to which Court passing the order is immediately subordinate, and the decision of the appellate Court shall be final."

15. The word 'immediately' leaves no doubt that an appeal against an order under Section 5, U. P. Agriculturists' Relief Act shall always lie to the Court to which the Court passing the order is immediately subordinate, whatever be the valuation of the case, but the same cannot be said with regard to an appeal from an order under chap. 3 of the Act, for instance, from an order of redemption under Section 12 of the Act, for the simple reason that there is nothing analogous to the word 'immediately' in Section 23 (1) of the same. This Section 5 (2) came to be considered by a Bench of the Oudh Chief Court in Raghuraj Singh v. Shankar Sahai, A. I. R. 1936 Oudh 321, where, on the basis of the implications of this word 'immediately' in the section, the Bench took the view

that whatever the valuation of the case was, an appeal from an order under it always lay to the Court to which the Court passing the order was immediately subordinate.

Section 23 (1) of the Act no doubt did not come in for consideration in that case, but the point is that it was the word 'immediately' in Section 5 of the Act which formed the basis of the view taken by the learned Judges in contradistinction to the general rule embodied in Act XII [12] of 1887, to which we have already referred. We have already said that no such word, or any other having the same effect, is to be found in Section 23 (1) of the Act, and for that reason there is no justification to hold, as argued by the learned counsel for the respondent, that an appeal in this case lay only to the District Judge and not to this Court. We therefore, see no force in the preliminary objection and reject it.

16. For the reasons already given, we dismiss this appeal with costs.

17. The connected execution appeal arose out of certain proceedings for restitution under Section 144 Civil P. C., in view of the reversal by this Court of the decree of the Court below on the earlier occasion. The main appeal having failed, this appeal also cannot succeed, and it is accordingly dismissed with costs.