

L. Hazari Lal vs L. Ram Kumar And Anr. on 7 December, 1950

Equivalent citations: AIR1951ALL572, AIR 1951 ALLAHABAD 572

JUDGMENT

Agarwala, J.

1. This is a decree-holder's appeal. Four persons Siraj Ahmad, Abdul Salam, Shamsul Salam and Mt. Saidunnisa executed a simple mtge of three items of property on 31-5-1922, in favour of the applt L. Hazari Lal for rupees two thousand. One of the items of the mtged properties was a share in Patti Sabz Mahal Wazirunnissa. On 2-12-1926, the mortgagors, Siraj Ahmad & others, executed a second mortgage of all the three items of property in favour of Ram Kumar & Raghubir Saran, resps 1 & 2, for a sum of rupees four thousand. The entire mtge money due under the first mtge of 1922 was left in the hands of the mtgees to be paid to the prior mtgee, Hazari Lal. In 1931 a suit was filed on the basis of the first mtge the subsequent mtgees Ram Kumar & Raghubir Saran were impleaded as defts & a final decree for sale was obtained by Hazari Lal on 4-7-1936. During the pendency of this suit Ram Kumar & Raghubir Saran purchased, in execution of a simple money decree as against Saidunnisa, one of the mtgors, a portion of what has been described in the sale certificate as Mahal Sabz. There is controversy between the parties whether the property purchased under this sale certificate was part of the mtged property or not. According to the resps Ram Kumar & Raghubir Saran, it was part of the mtged property. On 2-1-1941, Hazari Lal applied for execution of the decree. This appln was dismissed for default. The date of dismissal is not material. On 8-7-1943, Hazari Lal filed a second execution appln. At this stage Ram Kumar & Raghubir Saran objected to the execution of the decree on the ground that the decree was barred by limitation. Their case was that the first execution appln made on 2-1-1941, was barred by limitation because it had been presented more than three years after the date of the final decree & that, consequently, the first execution appln could not be treated as a step in aid of execution in respect of the second execution appln.

2. On behalf of the applt it is argued that the execution appln was within time as he could not have executed the decree from 1-1-1938, to 31-12-1940, on account of Section 5, U. P. Temporary Postponement of Execution of Decrees Act X (10) of 1937. The reply of Ram Kumar & Raghubir Saran to this contention was that their case was covered by Section 6 (c) of that Act & that the decree could have been executed against them. Both the Cts below upheld the objections of Ram Kumar & Raghubir Saran & dismissed the execution appln as time barred. The decree-holder, therefore, has come up in second appeal to this Ct.

3. In holding that Section 6 (c) applies to the case the Cts below relied upon the fact that Ram Kumar & Raghubir Saran had taken a second mtge of the entire mtged property with a stipulation that the entire mtge debt due to Hazari Lal would be paid up by them.

4. When this appeal was argued before us on the first occasion it was urged on behalf of the applt that the mere fact that Ram Kumar & Raghubir Saran were mtgees did not help them & their case was not covered by Section 6 (c) because a recent F. B. decision of this Ct in 'Bharat Singh v. Mt. Chadi', 1946 A L J 377: (A I R (34) 1947 All 27 F B), had decided that a mere mtgee is not a subsequent transferee within the meaning of Clause (c) of Section 6. This contention was countered on behalf of Ram Kumar & Raghubir Saran by the plea that they were not merely mtgees but were auction purchasers of part of the mtged property. As this question had not been considered by the Cts below but as it had been raised in the objections filed by Ram Kumar & Raghubir Saran it was thought necessary to call for a finding upon the point from the Ct below. The Ct below has returned its finding. It has held that the objectors are purchasers of part of the mtged property.

5. It is now contended by Mr. Shabd Saran, on behalf of the applt, that even this finding is not conclusive of the matter. His case is that even so, since the objectors are not purchasers of the entire mtged property, their case is not covered by Section 6 (c) & in support of this contention he has relied upon the observations of Malik, J., as his Lordship then was, in 'Bharat Singh v. Mt. Chadi', 1946 ALJ 377: (A I R (34) 1947 All 27 F B) & upon two recent D. B. decisions of this Ct reported in 'Ashfaul Nabi Khan v. Syed Raza Husain', 1947 A L J 554: (A I R (35) 1948 All 62) & Sahu Bhagwati Prasad v. Shiam Chandra', 1948 ALJ 538: (A I R (36) 1949 All 68).

6. In 'Bharat Singh v. Mt. Chadi', 1946 A L J 377: (A I R (34) 1947 All 27 F B), a subsequent transferee who had sought the protection of Section 6 (c) was a usufructuary mtgee of a part of the mortgaged property. It was held by a majority of the Judges constituting the F. B. that a usufructuary mtgee was not a 'transferee" within the meaning of Section 6 (c), Temporary Postponement of Execution of Decrees Act. Malik, J., as he then was, had based his decision upon the ground that under Section 6 (c) the transferee must be a transferee of the entire mtged property.

7. In 'Ashfaul Nabi Khan v. Syed Raza Husain', 1947 ALJ 554: (A I R (35) 1948 All 62) the transferee was a purchaser of a part of the mtged property. It was observed:

"It appears to us that the Legislature intended that the benefit of this Act should not be given to a transferee who has undertaken to pay up the mtge . It was not intended that a transferee should be given protection against the terms of the contract entered into by him with his transferor.....We are, therefore, inclined to the view that the words "who has taken the transfer subject to the mtge" do not refer to the legal liability of a subsequent transferee for payment of his proportionate share of the liability having the right to claim contribution from the other debtors, but they refer to a case where the transferee has under-taken to pay the entire amount of the previous mtge debt."

8. In 'Sahu Bhagwati Prasad v. Shiam Chandra', 1948 A L J 538: (A I R (36) 1949 All 68) a subsequent transferee was a purchaser at auction of a part of the mtged property. It was held that Section 6 (c), Temporary Postponement of Execution of Decrees Act applied only to a case where the entire mortgaged property had been transferred & not to a case where it was a transfer of the portion only. After referring to 'Ashfaul Bibi's case' (1947 A L J 554: A I R (35) 1948 All 62) it was

observed by Malik, C.J., that :

"I see no reason to change the opinion expressed in that case & I need not, therefore, repeat the reasons set out in that decision. I may, however, mention further that it would lead to a great anomaly if it is held that the decree could be executed against the original mtgor but not against the transferee. This appears to be contrary to the provisions of Section 3. In case it is held that the decree was executable against the transferee but not against the original mtgor, the result would be that the decree would be within time against the agriculturist debtor while it would be barred by limitation against the subsequent transferees which is a result not contemplated by law. The further anomaly would be that if the decree-holder chooses not to proceed against the subsequent transferee but to wait, he can make the agriculturist debtor liable for the entire decretal amount because the fact that the decree could not be executed against the original Judgment-debtor would not entitle the agriculturist to plead that there should be a rateable reduction in the amount of the decree & the agriculturist debtor would have to pay the whole amount due under the decree."

9. These observations entirely cover the present case. It is however, urged by Mr. Saksena, on behalf of the objectors-resps that in the present case although the objectors are transferees of a portion of the mortgaged property they are liable to pay the entire mtge debt because they had stipulated to do so in the second mtge of 1926. The contention, therefore, is that the anomaly which was pointed out in the last mentioned case & the reasoning upon which the decision in 'Ashfaul Nabi's case; (1947 ALJ 554: A I R (35) 1948 All 62) was based do not apply to the present case. It is true the objectors covenanted to pay the entire mtge debt but the question is as to whether they are subsequent transferees "who had taken the 'transfer' subject to the mtge on the basis of which such decree has been obtained." The word "transfer" under this section having been held not to apply to mtges, the subsequent mtge of 1926 does not make the objectors subsequent transferees under the Act under that section; & since under the sale of a portion of the mtged property they could ultimately be liable in law only to a proportionate amount of the mtge debt, they could not be said to "have taken the transfer (the sale) subject to the mtge on the basis of which the decree had been obtained." The fact that they may, under a separate covenant which has nothing to do with the transfer i.e. the auction sale under which they are subsequent transferees be liable to pay the whole amount of the mtge debt, is immaterial, for the purposes of the correct interpretation of Section 6 (c). It must, therefore, be held that Section 6 (c) does not cover the case of a transferee who has taken a transfer of a portion of the mtged property when in taking that transfer the transferee had not under taken the liability to pay the whole of the mtge debt. In this view of the matter the decree could not be executed either against the original mtgor-judgment-debtors or against the objectors with the result that the period during which the Temporary Postponement of Execution of Decrees Act was in force had to be excluded. If this is done, it is clear that the first execution appln was within time & so is the second.

10. We, therefore, allow this appeal, set aside the decree of the Cts below & dismiss the objections of Ram Kumar & Raghubir saran, resps, with costs throughout.