Govindram Bros. Ltd. Vs. Official Assignee

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SooperKanoon Citation : sooperkanoon.com/330833

Court : Mumbai

Decided On : Apr-05-1949

Reported in : AIR1950Bom49

Judge : Chagla, C.J. and ;Shah, J.

Acts : Dekkhan Agriculturists' Relief Act, 1879 - Sections 15D and 15D(3); Transfer of Property Act, 1882 - Sections 69 and 69(1)

Appeal No. : First Appeal No. 133 of 1947

Appellant : Govindram Bros. Ltd.

Respondent : Official Assignee

Advocate for Pet/Ap. : A.G. Desai, ;P.A. Mahale and G.A. Desai, Advs.

Disposition : Appeal allowed

Judgement :

Chagla, C.J.

1. This is an appeal from a judgment of the Civil Judge, Senior Division, Thana, in a suit filed by the plaintiff under Section 15D, Dekkhan Agriculturists' Relief Act, 1879. The plaintiff had executed two mortgages in favour of the defendant, one on 16th September 1943, for the amount of Rs. 3,00,000 and another on 18th December 1943, for the amount of Rs. 60,000. Some of the properties were

situate in Bombay and some in the istrict of Thana. Both these mortgages were in the English form and conferred on the mortgagee the right to sell the property in the event of there being a default on the part of the mortgagor to pay the amount on the due date and also if ertain amount of interest remained in arrears. The defendant, as the mortgagor was in default, threatened to sell the mortgaged properties under his power of sale and advertised the sale in the papers. Thereupon the plaintiff filed a suit n the Thana Court under Section 15D claiming an account under the mortgage and asking for a declaration that he was an agriculturist and for a declaration of the amount due to the defendant at the foot of the account that might be aken with regard to the mortgage and also asking for an injunction restraining the defendant from taking possession or selling the property. The learned Judge who tried the case came to the conclusion that the plaintiff was an griculturist within the meaning of the Dekkhan Agriculturists' Relief Act. On taking accounts he declared that a sum of Rs. 1,72,563-12-9 was due by the plaintiff to the defendant till the date of the suit. Ho refused the injunction asked or by the plaintiff restraining the defendant from taking possession of the mortgaged property, but he granted the injunction restraining the defendant from selling the property without the intervention of the Court. It is from this order ranting the injunction that the defendant company has come in appeal before us.

2. The defendant company does not dispute the finding of the trial Court that the plaintiff was an agriculturist or the declaration that a sum of Rs. 1,72,563-12-9 was due by the plaintiff to the defendant company at the date of the suit. Now, the reason why the learned trial Judge granted an injunction to the plaintiff restraining the defendant from exercising his power of sale was that, according to him, looking to the scheme of the Dekkhan Agriculturists' Relief Act, any agreement between an agriculturist and a mortgagee whereby a power of sale without the intervention of the Court was conferred upon the mortgagee was invalid and not in accordance with law.

3. Now, Section 15D, Sub-section (1), Dekkhan Agriculturists' Relief Act, gives certain rights to an agriculturist and those rights are that he can sue his mortgagee for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount; and Sub-section (2) of Section

16D provides that the amount remaining unpaid shall be determined under the same rules as would be applicable under this Act if the mortgagee had sued for the recovery of the debt. Then Sub-section (3) gives a certain option both to the mortgagor and to the mortgagee; the option given to the mortgagor is that at any time before the decree in the suit is signed, he may apply to the Court to pass a decree for the redemption of the mortgage; and the option given to the mortgagee is that if he would then have been entitled to sue for foreclosure or sale, he may apply to the Court to pass a decree for foreclosure or sale, and it is competent to the Court on the exercise of such option either by the mortgagor or by the mortgagee to grant that application and pass a decree accordingly.

4. Now in this case it is important to note that after the amount was declared and the decree was passed, neither the mortgagor nor the mortgagee exercised the option respectively given to them under Section 15D (3) of the Act. Therefore, the position to day is that a decree declaring the sum due on the mortgage is passed by the trial Court, but neither a decree for redemption nor a decree for sale has been passed as neither the mortgagor nor the mortgagee exercised his respective rights given under the mortgage deed.

5. The learned Judge has also referred to Section 13 as suggesting that the scheme of the Act is not to permit the mortgagee of an agriculturist to sell the mortgaged property without the intervention of the Court. In my opinion, Section 13 has no bearing on the question that we have to consider in this appeal. Section 13 merely provides for a special mode of taking accounts when the debtor is an agriculturist and that method of accounting has got to be resorted to notwithstanding any agreement between the parties. Section 13 does not deal with the question at all as to whether a mortgagee can exercise his right of sale without the intervention of the Court even though the mortgagor may be an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act. Now, the right of the mortgagee to exercise his power of sale without the intervention of the Court arises out of Section 69, Sub-section (1), T. P. Act. As part of the property is situate in the town of Bombay and as the power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage deed, Section 69(1)(c), T. P. Act, entitles the mortgagee to exercise the power of sale without the

intervention of the Court, and when the trial Court restrained the mortgagee from exercising that power, the Court ought to have been satisfied that there was some provision in any other legislation which deprived the mortgagee of a right which the law had conferred on him under the Transfer of Property Act. In my opinion, it is not sufficient to say as has been said by the learned Judge below that the general scheme of the Dekkhan Agriculturists' Relief Act makes it highly probable that the Legislature did not intend that the mortgagee in the case of an agriculturist should exercise his power of sale without the intervention of the Court. Mere probabilities are not enough. Where a legal right is conferred, there must be some substantive legislation which takes away that specific legal right given to the mortgagee where a power of sale is conferred upon him under the mortgage deed. I find no provision either in the Dekkhan Agriculturists' Relief Act itself or in any other legislation which has taken away this right conferred upon the mortgages under Section 69(1)(c), T. P. Act, and in the absence of any such provision, I see no reason why the Court should by an injunction deprive the mortgagee of his rights. The only consequence of Section 16D (3), Dekkhan Agriculturists' Relief Act is that up to the date of the passing of the decree it may be that the mortgagee cannot exercise his power of sale because till the decree is passed the Legislature has given the option to the mortgagor to ask for a decree for redemption and such option cannot be exercised if the mortgagee were to exercise his power of sale. Therefore once a suit is filed by a mortgagor who is an agriculturist under Section 15D, Dekkhan Agriculturists' Relief Act, the mortgagee cannot exercise his power of sale if such a power of sale is given to him under the mortgage deed so long as the suit remains pending and so long as the decree is not passed. But once the decree is passed declaring an amount and the mortgagor has not exercised his option of redemption and the mortgagee has not exercised his option to ask for a decree for sale, then the mortgagee cannot be prevented from exercising his power of sale.

6. The appeal must, therefore, succeed and the decree passed by the trial Court will be modified by deleting from it the provision with regard to the injunction restraining the defendant from selling the property without the intervention of the Court. The mortgagee will be entitled to his mortgage debt.

7. With regard to costs, defendant 1 will be entitled to his costs in the suit, his costs to be tacked on to the mortgage claim. He will also be entitled to the costs of the appeal, this also to be tacked on to the mortgage claim.