In Re : Vanraj Vallabhdas

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Court : Mumbai

Decided On : Oct-03-1944

Reported in : AIR1945Bom161; (1944)46BOMLR921

Judge : Bhagwati, J.

Appeal No. : Insolvency No. 38 of 1944

Appellant : In Re : Vanraj Vallabhdas

Judgement :

Bhagawati, J.

1. One Vallabhdas Vandrawandas died on September 15, 1918, leaving him surviving his son, the insolvent, his widow Bai Velabai, and his daughter Bai Kusum. Before his death he made and published his last will and testament dated July 31, 1918, under which he directed that a sum of Rs. 125 per month should be paid to his widow, Bai Velabai, during her lifetime, and a sum of Rs, 50 per month should be paid to his daughter, Bai Kusum, during her lifetime. He also directed that the executors and trustees of his will should, in order to provide for the payment of the said sums of Rs. '125 and Rs. 50 per month, purchase an immoveable property, the rents and profits whereof should be charged with the payment of the said sums to his widow and daughter. The immoveable property, which is the subject-matter of this application, was accordingly purchased by his executors and trustees, and on December 7, 1926, the said Ihnmoveable property

was assigned by the executors and trustees of his will to the insolvent, subject to the charges created under the provisions of the said will in favour of Bai Velabai and Bai Kusum. The insolvent appears to have come into financial difficulties thereafter, and in about October, 1938, borrowed a sum of money on the equitable mortgage of the said immoveable property from the applicants, the Bank of India, Ltd. In so far, however, as the said immoveable property was charged with the payment of the said sums of Rs. 135 and Rs. 50 per month in favour of Bai Velabai and Bai Kusum, the applicants insisted that the charges in favour of Bai Velabai and Bai Kusum should be postponed to their equitable mortgage, and accordingly on October 28, 1938, at the time when the said equitable mortgage was created, an agreement was executed between Bai Velabai of the first part, Bai Kusum of the second part, the insolvent of the third part and the applicants of the fourth part, whereby inter alia Bai Velabai and Bai Kusum agreed to postpone their charges to thefrights created in favour of the applicants under the said equitable mortgage.

2. Particular reliance has been placed by Mr. Rege for the applicants on Clauses 2, 3, 4 and 5 of this agreement, and he contends that the right to redeem which Bai Velabai andtBai Kusum had under the provisions of Section 91 of the Transfer of Property Act, 1882, was thereby extinguished and that under the terms of the said agreement there is no right of redemption left in Bai Velabai and Bai Kusum so that they can resist the application which is made by the applicants under Rule 18 of the Second Schedule to the Presidency-towns Insolvency Act, 1909, to bring the said immoveable property for sale. It is contended, on the other hand, by Mr. Munshi appearing for Bai Velabai and Bai Kusum that the right to redeem which Bai Velabai. and Bai Kusum had got in law under Section SI of the Transfer of Property Act was not extinguished by any act of the parties, and therefore, in considering the application of the applicants, whether an order shoilld be made under Rule 18 for the sale of the property as asked for, regard should be had to the right to redeem which Bai Velabai and Bai Kusum have got vested in them, and no order should be passed as asked for by the applicants,, because the granting of such an order would be tantamount to depriving them of the said right to redeem which has not been extinguished by any act of the parties' as contended by Mr. Rege. It is further contended by Mr. Munshi that Rule 18 does

not apply to a case, like the present where the rights of the subsequent incumhrancers or persons having a right to redeem under Section 91 of the Transfer of Property Act 'are sought to be affected, but would only apply where the contest was merely between the mortgagee and the estate of the insolvent represented by the Official Assignee.

3. Dealing with the first point as to whether the right to redeem has been extinguished by act of the parties as contended by Mr. Rege, one finds on going through the terms of Clauses 2, 3, 4 and 5 of the agreement dated October 20, 1938,. that the effect of those clause? is to postpone the charges created in favour of Bai Velabai and Bai Kusum to the rights of the applicants as equitable mortgagees. Whatever rights the equitable mortgagees had either at law or under the terms of the document of equitable mortgage were to have priority over the rights which Bai Velabai and Bai KuSum had as charge-holders under the terms of the said will as also under the terms of the indenture of assignment dated December 7, 1926. Bai Velabai and Bai Kusum also agreed on a sale by the applicants, their successors or assigns, or through the Court, to execute all necessary documents so that the property sold by the applicants in exercise of their rights either through the Court or under the terms of the document of equitable mortgage may effectively vest in the purchaser. They further agreed that whatever surplus monies that might remain in the hands of the applicants by exercise of the power of sale by them should be handed over to the insolvent in accordance with the terms of Clause 5 thereof. The effect of those clauses, however, was not to extinguish the right which Bai Velabai and Bai Kusum had, as charge-holders under the terms of the said will as also under the terms of the indenture of assignment dated December 7, 1926, to redeem the equitable mortgage which had been created on October 20, 1938, in favour of the applicants. If that is the position on the construction of the agreement dated October 20, 1938, can it be said that Bai Velabai and Bai Kusum have no right to redeem the said equitable mortgage at any time prior to the sale by the applicants of the immoveable property in question Under Section 60 of the Transfer of Property Act the only way in which the right to redeem can be extinguished is, as provided there, by act of the parties or by a decree of the Court. There is no decree of the Court here nor, as I have stated above, is 'there any act of the

parties by which that right to redeem has been extinguished. It, therefore, remains to consider whether under Rule 18 it is open to the applicants to ask for an order that the said immoveable property should be sold by the Official Assignee as prayed for in the; notice of motion so as to preclude Bai Velabai and Bai Kusum from exercising their right to redeem which they have got in law and which has not been extinguished as I have already stated above.

4. Mr. Munshi has drawn my attention to Rules 18 and 20 of the Second Schedule to the Presidency-towns Insolvency Act and has urged that the only proceedings which are contemplated under Rule 18 are where a single mortgagee, whether legal or equitable, comes before the Court and asks for a sale to be effected under the orders of the Court, so that he might realise his security in a more expeditious arid cheaper mode than by filing a suit which he would otherwise have to do, in the absence of any provision contained in the document creating the mortgage in his favour empowering him to sell the mortgaged property without the intervention of the Court; for if he had such a power of sale reserved to him in the document creating the mortgage, he- need not come to Court and make any application of this nature. It is only when the document creating the mortgage in his favour contains no such power of sale that he needs come before the Court and either file a suit in order that he may realise his mortgage security, or seek the aid of the Court under the provisions of Rule 18. If the Court makes an order under Rule 18 and the immoveable property is sold under the orders of the Court, Rule 20 lays down how the sale proceeds have to be applied, and the only case contemplated there is that of the payment of the net sale proceeds to the mortgagee and the payment over of the surplus sale proceeds to the Official Assignee. A similar statement of the legal position is also to be found in Baldwin's Law of Bankruptcy, 11th edn., p: 627, where it is stated :-

If his claim to be considered a mortgagee of any part of the bankrupt's real or leasehold estate be disputed, he should apply to the Court by motion,...for an inquiry as to his rights ; and if it be found that the creditor is such mortgagee, the Court may direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, or of the rents and profits,, or dividends, interest, or other proceeds received by him, or on his behalf, and should the Court direct a sale, the moneys arising therefrom are first to be applied in payment of the trustee's costs and expenses of and occasioned by the sale and application, and, in the next place, in payment and satisfaction, so far as the same may extend, of what may be found due to the mortgagee for principal, inta-est and costs. If there be a surplus, it belongs to the estate ; if there be a deficiency, the creditor may prove therefor, but not so as to disturb any dividend already declared.

5. This shows that the proceedings contemplated under Rule 18 are to be adopted where there are no subsequent incumbrancers or persons having the right to redeem under Section 91 of the Transfer of Property Act; because if the Court ordered a sale under Rule 18 under those circumstances, it would be tantamount to depriving the subsequent incumbrancers or persons having the right to redeem under Section 91 of the Transfer of Property Act of their right to redeem even though that right to redeem was not extinguished either by act of the parties or by a decree of the 'Court. No such consequence could have been contemplated by Rule 18. Even if the construction put by me on Rules 18 and 20 above be not adopted and it be held that in cases where there are subsequent incumbrancers or persons having the right to redeem under Section 91 of the Transfer of Property Act, the Court has power to act under Rule 18, the necessary safeguard has been provided by enacting that the Court should only act if satisfied that there ought to be a sale, and it would only be in exceptional circumstances that the Court acting under Rule 18 would order a sale at the instance of a mortgagee, legal or equitable, where there are subsequent incumbrancers or persons having the right to redeem under Section 91 of the Transfer of Property Act. I have, therefore, come to the conclusion that in those cases where there are subsequent incumbrancers or persons having the right to redeem under Section 91 of the Transfer' of Property Act, the procedure laid down under Rule 18 is not the procedure which sh'ould be ordinarily adopted.

6. In the present case, however, there are exceptional circumstances having regard to which I am inclined to exercise my discretion in the matter of the order which is asked for by the applicants. The second mortgagees Jamnadas Jethabhai, in whose favour a second mortgage was created by the insolvent on

October 7, 1943, support the application made by the applicants for a sale of the immoveable property by the Official Assignee under Rule 18. They are vitally interested in the preservation of as much of the sale proceeds of the said property as they can for themselves so that they might be'repaid a substantial amount of their claim out of the net sale proceeds in the hands of the Official Assignee. Mr. Rele who appears for the petitioning creditors is submitting to the orders 6f the Court, though whatever the petitioning creditor who are unsecured creditors of the insolvent, may urge would have very little influence with the Court in arriving at its decision. Having regard, therefore, to the interests, of the second mortgagees, Jamnadas Jethabhai, in so far as the exercise by the applicants of their rights in the ordinary way, viz. by filing a suit for sale, would involve the property into considerable costs and might not leave a sufficient balance in the hands of the Official Assignee after paying off the claims of the applicants and making due pro-Vision fot satisfying the charges, in favour of Bai Velabai and Bai Kusum and also having regard to the conclusion which I have already arrived at that no order should be passed which would have the effect of depriving Bai Velabai and Bai Kusum of the right to redeem the equitable mortgage of the applicants, it would serve the ends of justice if I order that Bai Velabai and Bai Kusum should be at liberty, if they so desired, to file a suit for redemption of the equitable mortgage in favour of the applicants within eight weeks from today, in which event there would be no order on the nofice'of motion. In the event, however, of Bai Velabai and Bai Kusum not filing stich a suit within the said period of eight weeks, there will be an order in terms of the notice of motion. The costs of the applicants, of Bai Velabai and Bai Kusum and of the second mortgagees, Jamnadas Jethabhai, of this application will be taxed and tacked on to their respective claims. The costs of. the petitioning creditors will come out of the surplus, if any, of the sale proceeds of the said immoveable property after satisfying the claims of the applicants, of Bai Velabai and Bai Kusum and of the second mortgagees.