

Nagaratnamma Vs. Range Gowda

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Court : Karnataka

Decided On : Apr-03-1995

Reported in : ILR1995KAR1880

Judge : Venkataraman, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58, 76 and 77

Appeal No. : R.S.A. No. 148 of 1990

Appellant : Nagaratnamma

Respondent : Range Gowda

Advocate for Def. : R.B. Brahmavar, Adv. for R-1

Advocate for Pet/Ap. : K.S. Srinivasa Lyer, Adv.

Disposition : Appeal allowed

Judgement :

Venkataraman, J.

1. This Appeal is filed by the first defendant in O.S.No.6/83 on the file of the Principal Munsiff, Arasikere, against the concurrent judgments and decrees of the trial Court and the first appellate Court in R.A.No. 19/89 decreeing the plaintiff's suit for redemption of the mortgage in favour of the defendant without the plaintiff

depositing the mortgage amount.

2. The parties will be referred to by the rank they held in the trial Court.

3. The plaintiff has filed the suit for redemption of the mortgage effected by him in respect of the suit house for a sum of Rs. 3,000/-. The plaintiff's case is that as per the Agreement between the plaintiff and the first defendant (hereafter referred to as 'defendant'), the plaintiff had to continue in possession of the suit house paying interest at the rate of 1.5% per month; that the plaintiff paid the interest accordingly for two years; that the defendant however in execution of the decree obtained in HRC. No. 22/73 against the plaintiff's son unlawfully took possession of the suit house and has let out to tenants; that he has realised a sum of Rs. 13,450/- by way of rent and that after adjusting the principal sum of Rs. 3,000/- the defendant himself is liable to refund to the plaintiff Rs. 10,450/-. He therefore claimed that he was entitled to redemption without making any payment towards the principal.

4. The defendant denied that there was any agreement between him and the plaintiff to pay interest. On the other hand his case was that the suit property was mortgaged with possession in his favour for Rs. 3,000/-: that after taking possession he let out the suit house to the plaintiff's son Shivalingegowda on 21.8.1968; that as Shivalingegowda failed to pay the rents he filed eviction petition in HRC.No.22/73 and in execution of the order passed therein he took possession of the premises and subsequently let it out to tenants. He has contended that as per the terms of the mortgage the plaintiff had to pay the principal sum of Rs. 3,000/- and redeem the mortgage and that he was not liable to adjust the principal amount out of the rents realised from his tenants.

5. Both the Courts relying on the Decision of this Court in KAMALAMMA v. RAMABHADRA GUPTA : ILR 1988 KAR20 , have held that as the Mortgage and Lease Deed were contemporaneous, the rent of Rs. 45/- payable under the rent agreement was meant to secure interest at 15% per annum and that the defendant who had taken possession of the property was liable to adjust the interest at that rate and also the principal amount out of the rents realised by him. Both Courts have held that the amount realised by the defendant by way of rent from the suit house exceeded the principal and interest payable by the plaintiff and as such the

plaintiff was entitled to redemption and possession of the suit house without making any payment towards the principal amount.

6. The following substantial Questions of Law have been formulated while admitting this appeal:-

'1. Whether the recital in the Mortgage Deed Ex.P.2

entitles the mortgagee to enjoy the usufruct from the mortgaged property in lieu of interest on the principal sum?.

2. Whether the lower Courts were justified in law in holding that mortgagee is liable to account for the usufruct from the property'.

7. It is contended on behalf of the defendant/appellant that the mortgage is not a self redeeming mortgage; that in this case the property was leased to the plaintiff's son the next day after the date of mortgage; that there was neither plea nor evidence to show that the mortgage and the lease constituted one transaction and that what was payable was only interest by way of rent; that the Decision in Kamamma's case, has no application to the facts of this case and that the terms of the Mortgage Deed indicate that the possession of the mortgaged property was given to the mortgagee-defendant to enjoy the income in lieu of interest and that as such the defendant was not liable to account for the income received by him or to adjust the principal and interest out of that income. He pointed out that the Mortgage Deed clearly shows that the plaintiff had to pay the principal sum of Rs. 3,000/- without any interest to redeem the mortgage and that the Courts below have seriously erred in granting redemption without the principal being paid by the plaintiff.

8. The learned Counsel for the plaintiff contended that under the mortgage the possession is delivered to the defendant and as such under Section 76(h) of the Transfer of Property Act (hereafter referred to as the 'Act') the defendant was liable to account for the income realised by him and to adjust that income towards the interest and principal; that in this case the Rent Deed taken by the defendant is in lieu of interest at 15% per annum; that the two Courts below have rightly held

that the income realised by the defendant is more than the principal and interest due to him and that as such there was no need for the plaintiff to pay the mortgage money. He also relied on the Decision in Kamamma's case and cited the Decision in HAJI FATMA BEE v. PRAHLAD SINGH : AIR 1985 MP1 , in support of his contention.

9. The two Courts below have not at all applied their mind to the relevant provisions of the Act while dealing with the question whether on the terms of the Mortgage Deed the mortgagee-defendant was liable to account for the rents and profits realised by him from the mortgaged property and to adjust the principal out of the income. What is usufructuary mortgage is defined in Section 58(d) of the Act.

'Section 58(d); Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.'

The above definition clearly shows that in all usufructuary mortgages when possession of the mortgaged property is delivered to the mortgagee it does not necessarily follow that the mortgagor has to appropriate the income from the properties both towards interest and principal, Whether the income from the mortgaged property has to be taken by the mortgagee in lieu of interest only or in lieu of interest and partly towards principal or in lieu of both interest and principal, is a question which has to be decided with reference to the terms of the document.

10. Section 76 of the Act lays down the liabilities of a mortgagee in possession and Section 76(h) reads as hereunder:-

'Section 76(h):- His receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after

deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest, and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor.'

Section 77 is in the nature of exception to Section 76 and it reads as hereunder:-

'Section 77:- Nothing in Section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.'

Thus, it is clear that when as per the terms of the mortgage the mortgagee is to remain in possession and enjoy the income in lieu of interest there is no liability for the mortgagee to account for the income or to adjust the income towards principal.

11. In the present case, the Mortgage Deed Ex.D,2 recites that the schedule property was given in mortgage with possession (Bhogya) for a sum of Rs. 3,000/-; that the mortgaged property was delivered to the possession of the defendant on the same day and that the mortgagor would pay after two years without any interest (nibbaddi) the principal amount and take back the document with due endorsement. This is a case where the mortgagor has undertaken to pay only the principal amount and redeem the mortgage after a period of two years, and has given possession of the property to the mortgagee. There is no stipulation regarding the rate of interest in the document, The specific recital that the mortgagor would pay principal without any interest clearly shows that possession of the property was given to the mortgagee in lieu of interest. This is not a case where under the terms of the mortgage the mortgagee who is put in possession of the property is required to appropriate the income from the property towards interest at any particular rate and the balance towards principal. Even the learned Civil Judge has held that this is not a self redeeming mortgage. The clear intendment of the parties as could be gathered from the terms of the document is

that the mortgagor has to pay only the principal of Rs. 3,000/- in order to redeem the mortgage and the mortgagee has to be in possession of the property in lieu of interest. As such Section 77 of the Act applies to this case and Section 76(h) is not applicable. The mortgagee is not required to adjust the income from the property not only towards interest but also towards principal.

12. The Courts below have made much of the circumstance that on the very next day after the mortgage the defendant had leased the property to the plaintiff's son on a rental of Rs. 45/- per month which works out to 15% p.a. on the mortgage money to hold that the defendant was entitled to interest at 15% per annum and that as he subsequently took possession of the premises from the plaintiff's son and leased it out at higher rates he has to adjust 15% towards interest and balance towards principal.

13. It must be made clear that there is no bar for a mortgagee who has secured possession of mortgaged property leasing it back to the mortgagor and the fact that the property is leased back to the mortgagor does not by itself alter the character of the usufructuary mortgage into a simple mortgage, the rent being treated as interest nor does it make the mortgagee liable to adjust the income derived by him from the mortgaged property towards interest and principal, even though the terms of the mortgage do not require the mortgagee to do so and on the other hand the mortgagor has undertaken to pay the principal and redeem the mortgage. In this connection, the Decision of the Supreme Court in *MATHURALAL v. KESHAR BAI AND ANR.* : [1970]3SCR724 , can be referred to. In that case, on the same day a mortgage with possession was effected, the mortgagor took back the premises on lease from the mortgagee. The mortgagee filed a suit for recovery of mortgage money and a preliminary decree was also passed. But no application for final decree was filed by the mortgagee in time and the application became barred by time. However, the mortgagee filed a suit for recovery of arrears of rent and ejection of the mortgagor, Though the trial Court dismissed the suit it was decreed in appeal and the High Court confirmed the decree. One of the points urged before the Supreme Court was that the rent note executed simultaneously with the mortgage was a mere device to secure payment of interest and did not record an independent transaction; that it did not create any relationship of

landlord and tenant, The Supreme Court after referring to the various Decisions of the High Courts on this point, referred to the following passage in the Decision of Rajasthan High Court in LALCHAND v. NENURAM . which reads as hereunder:-

'Whether the two documents represent one transaction or two different transactions, a Court of law should be anxious to give effect to the terms in both the documents instead of being unduly critical about them.Having secured the possession of the mortgage, the mortgagee is further entitled to lease it out even to the mortgagor. It is in the interest of the mortgagor that the property is leased out to him as he can better look after it. There is nothing objectionable in this, nor is there any statutory prohibition for such transaction. Now if the parties do this by executing proper documents, it is the duty of the Court of law to give effect to them'.

The Supreme Court approving the above view of the Rajasthan High Court has observed as hereunder:-

'The reasoning of the Rajasthan judgment seems to be logical and commends itself to us. In all such cases the leasing back of the property arises because of the mortgage with possession but we find ourselves unable to hold that the mortgagee does not secure to himself any rights under the deed of lease but must proceed on his mortgage in case the amount secured to him under the deed of lease is not paid. If the security is good and considered to be sufficient by the mortgagee there is no reason why he should be driven to file a suit on his mortgage when he can file a suit for realisation of the moneys due under the rent note. The position of the creditor is strengthened whereas in this case the interest on the amount of the mortgage is not the same as the rental fixed. If during the continuance of the security the mortgagee wants to sue the mortgagor on the basis of the rent note and take possession himself or to induct some other tenant thereby securing to himself the amount which the mortgagor had covenanted to any there can be no legal objection to it.'

14. The above Decision shows that in a case where the mortgagee leases back the mortgaged property to the mortgagor, he can enforce his rights under the lease transaction and recover rent as well as get back possession.

15. In Kamalamma's case the question that arose for consideration was whether the Mortgage Deeds dated 1.12.1961 and 21.11.1962 were usufructuary or anomalous mortgages. On 1,12:1961 itself on which date the first mortgage was executed, a Lease Deed was executed by the mortgagor taking the property on lease on a rent of Rs. 250/- per month and again on 21.11.1962 when the second mortgage was executed in respect of the same property the mortgagor executed another lease deed simultaneously taking the same property on lease on rent of Rs. 312.50 paise. This Court taking into consideration that the same property was mortgaged on two occasions, the same property was purported to be leased back on the Same day fixing the rent which approximately worked out to a particular rate of interest that the Mortgage Deeds and Lease Deeds were attested by same witnesses; that the lease period coincided with the period stipulated in the Mortgage Deeds during which period mortgagors were not entitled to redeem, held that the lease transactions were not separate and they formed part of the mortgages in question and that the mortgages were therefore not usufructuary mortgages but were anomalous mortgages and the mortgagee was not liable to account for rents and profits received by him.

16. In the above Decision this Court has not purported to lay down that in all usufructuary mortgages, irrespective of the terms of the mortgage the mortgagee is bound to adjust the income from the property towards interest and principal. On the other hand, this Court has clearly observed that the test is whether under the terms of the mortgage there is a liability on the mortgagee to account for the rents and profits received by him from the mortgaged property and whether the leasing of the mortgaged property back to the mortgagor is an independent transaction not forming part of the mortgage transaction.

17. In *Haji Fatima Bee v. Prahlad Singh*², which was relied on by the learned Counsel for the respondent the Court was dealing with the question whether a mortgage in which there was no condition that on the expiry of the stipulated period, the mortgage shall be deemed to be redeemed in full without payment whatsoever by the mortgagor, as required by Section 165 (b) of the M.P. Land Revenue Code, could not be considered to be valid. It is mainly with reference to the Madhya Pradesh Land Revenue Code the validity of the mortgage has been

considered, That Decision has no application to the present case.

18. At the outset it may be noted that even if it were to be held that the lease of mortgaged property by defendant in favour of plaintiff's son is not an independent transaction and forms part of mortgage transaction, in view of the Decision of this Court in Kamalamma's case, the mortgage would be anomalous mortgage and the mortgagee is not liable to account for the rents and profits realised by him from the property. That apart, both the Courts have failed to note the case put forth by the plaintiff while dealing with the question as to whether the lease transaction was part of mortgage transaction and was intended only to ensure payment of interest at a particular rate. Both the Courts have been carried away by one circumstance namely that the rent of Rs. 45/- fixed under the Rent Deed would work out to 15% p.a. on the mortgage sum, It is not the plaintiff's case that the lease in favour of his son formed part of the mortgage transaction and the Lease Deed was executed to ensure payment of interest. On the other hand, the case put forth by the plaintiff is that there was an oral agreement to pay interest at 18% p.a. and he had not delivered possession and that the defendant had illegally taken possession of the premises. Even in evidence the plaintiff has not referred to Ex.D.3 Lease Deed executed by his son in favour of the defendant. No material is placed on record to show that the mortgage and the lease formed part of the same transaction. It is the specific case of the plaintiff that he is the owner of the property and that he alone had mortgaged it to the defendant, that his sons had only signed the Mortgage Deed, He alone claims to be mortgagor who is entitled to redeem and he has not even impleaded his sons as parties to the suit. This version of the plaintiff is not disputed by the defendant. As such though the Mortgage Deed purports to be executed by the plaintiff's son also actually the mortgage is given by the plaintiff. The lease is given on the next day to one of the sons of the plaintiff and not to the plaintiff. While under the Mortgage Deed it is not redeemable for a period of two years, under Ex.D.3 the lease is only for a period of 11 months. There is a stipulation in the Lease Deed that immediately after completion of 11 months on the next day itself the defendant can get back possession, These features clearly indicate that this lease transaction was not a part of the mortgage transaction and it was an independent transaction. It is not disputed that when the plaintiff's son committed default in payment of rent the defendant filed HRC.No.22/73 for eviction

under Section 21(1)(a) and an order for eviction was passed. In' execution of that order the defendant took possession of the property and the plaintiff at that time did not file any objection before the Court contending that he was in possession of the property and that he could not be dispossessed on the basis of the eviction order. The defendant in exercise of his rights as a lessor secured possession and has subsequently leased it out to others. Under the mortgage, the defendant was entitled to be in possession till the 'mortgage money was paid and it is in exercise of that right he has leased the property and realised rents from the tenants. The defendant was not liable to adjust the principal amount out of the rents which he realised from the suit property. The finding recorded by both the Courts below cannot therefore be sustained.

19. For the above reasons, this Appeal is allowed with costs and the judgment and decrees of the two Courts below are set aside. The plaintiff's suit for redemption is decreed directing the plaintiff to deposit the principal sum of Rs. 3,000/- together with costs of the suit within six months from this date and on such amount being deposited the defendant shall deliver possession of the suit property and hand over the Mortgage Deed with due endorsement of discharge. Draw an preliminary decree accordingly.

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