

Gulab Singh Vs. Risal Singh and ors.

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Court : Allahabad

Decided On : Aug-26-1949

Reported in : AIR1950All187

Judge : Malik, C.J. and ;Wali Ullah, J.

Acts : Uttar Pradesh Debt Redemption Act, 1940 - Sections 21; Code of Civil Procedure (CPC) - Order 34, Rule 6; Debt Law

Appeal No. : L.P.A. No. 9 of 1947

Appellant : Gulab Singh

Respondent : Risal Singh and ors.

Advocate for Def. : Lalta Prasad, Adv.

Advocate for Pet/Ap. : J. Swarup, Adv.

Judgement :

Malik, C.J.

1. This is a decree-holder's appeal. There was a mortgage dated 14th March 1925, in favour of Thakur Gulab Singh, the appellant. The mortgagee brought a Suit No. 622 of 1929 on the basis of his mortgage which was decreed on 31st March 1930. He executed his decree and sold the mortgaged property, but the decree not being satisfied a decree under Order 34, Rule 6, Civil P. C. was passed

on 12th August 1932. The decree was executed more than once after 1932 but the present application for execution was filed on 6th March 1943. An objection was taken on behalf of the judgment-debtor that the decree under Order 34, Rule 6, Civil P. C. must be deemed to have been satisfied under Section 21, U. P. Debt Redemption Act (XIII [13] of 1940) and the decree was, therefore, not executable. The case of the decree-holder, however, was that the mortgage in his favour not being a first mortgage Section 21, Debt Redemption Act was not applicable. The decree-holder relied on the fact that there was a prior mortgage dated 16th June 1920, registered on 17th June 1920, in favour of one Jhamman Lal for Rs. 600, and the property included in that mortgage was one of the three items included in the mortgage dated 14th March 1925. On behalf of the judgment-debtors it was pleaded that the first mortgage dated 16th June 1920 was satisfied and was not in existence on 14th March 1925. A lease had been executed on 16th June 1925 by the mortgagors in favour of Tori Ram, nephew of Jhamman Lal, for a period of five years and it was provided in this lease that the lessee would pay Rs. 214 each year to the mortgagee towards his mortgage. The contention of the judgment-debtor was that these sums were regularly paid and the mortgage was satisfied.

2. The trial Court decided in favour of the judgment-debtors. The lower appellate Court, however, held that, though the first mortgage dated 16th June 1920, had been satisfied by reason of payments made by the lessee, it was not proved by the witnesses produced on behalf of the judgment-debtors that the last instalment of Rs. 214 was paid prior to 14th March 1925, the date on which the mortgage in favour of the appellant was executed. It was, therefore, of the opinion that the mortgage in favour of the appellant being a second mortgage as regards one item of property it was not a first mortgage-within the meaning of that term in Section 21, Debt Redemption Act, and the decree-holder was entitled to execute the decree passed in his favour under Order 34, Rule 6, Civil P. C.

3. In second appeal a learned single Judge of this Court came to the conclusion that two items of properties having been mortgaged for the first time to Gulab Singh the fact that the third item had been previously mortgaged did not matter as there was no evidence to show the respective values of the three items and full benefit of the section should, therefore, be given to the agriculturists debtors. The

learned Judge, set aside the order passed by the lower appellate Court and restored that of the learned Munsif. The learned Judge, however, gave leave to file an appeal and this Letters Patent appeal has been filed on behalf of the decree-holder,

4. Section 21, Debt Redemption Act, provides that:

'Notwithstanding anything contained in Rule. 6 or RULE 8A of Order 34 of Schedule 1, Civil P. C., 1908, where in a suit based on a loan secured by a first mortgage a decree for sale has been executed and the net proceeds for the sale of the mortgaged property are found insufficient to pay the amount due to the plaintiff or to the defendant, as the case may be, no decree shall be passed for the balance due to such plaintiff or defendant, as the case may be, and if any decree for such balance has been passed before the commencement of this Act, it shall be deemed to have been satisfied.'

It must be admitted that the section was not very carefully drafted and it was probably not taken into consideration that cases are very frequent where in a second or a third mortgage executed by the same mortgagor there may be items of property which may not have been included in the previous mortgages and no clear provision was made in this section for such a case. Learned counsel for the appellant has admitted that if there is a mortgage of a property X in favour of one mortgagee and there is another mortgage executed by the same mortgagor at a later date of an entirely different property Y in favour of the same mortgagee or another mortgagee then it cannot be said that the mortgage later in date is a second mortgage. A mortgage is said to be a second mortgage only if it is a mortgage of a property which is subject to a previous mortgage. Looking at the mortgage in question dated 14th of March 1925, if the questions were put whether it was a first mortgage one would have to admit that it might be a first mortgage as regards two items of properties but it was a second mortgage as regards the third and, as the mortgage must be taken as one unit and it cannot be split up into different mortgages according to the number of properties included in it, either the mortgage is a first mortgage or it is not. If, therefore, it is not a first mortgage in respect of any item of property, it is difficult to hold that it comes under the section

and can be called a first mortgage. We are, therefore, of the opinion that the mortgage dated 14th March 1925, could not be called a first mortgage if the prior mortgage dated 16th June 1920, was still subsisting though in the mortgage dated 14th March 1925, there were two other properties which had not been previously mortgaged.

5. The reason behind the provision under Section 21, U. P. Debt Redemption Act that a first mortgagee cannot get a decree under Order 34, Rule 6, Civil P. C., must be that a first mortgagee at the time of his mortgage must be deemed to have advanced his money, having taken into account the value of the security and being satisfied that the security was sufficient for the money lent. He has the whole of the mortgaged property available to him and he should not, therefore, be allowed to fall back on other property and must recover his money only from the property mortgaged. A second mortgagee, however, is not in the same position as he can have his debt satisfied only out of what is left after the previous mortgage has been paid off.

6. The point, therefore, arises what is the material date on which the mortgage on the basis of which a decree under Order 34, Rule 6, Civil P. C. has been obtained or was intended to be obtained should be deemed to be a first mortgage. On behalf of the appellant it is said that a mortgage must be a first mortgage or a second mortgage on the date when it is executed. If on the date when a mortgage is executed there is an outstanding mortgage on the same property, no doubt the later mortgage is a second mortgage, but if the first mortgage has been paid off in full by the person liable to pay it so that there is no outstanding claim in favour of any body under the first mortgage, there is no reason why the mortgage which was a second mortgage before such payment should still be called a second mortgage.

7. The question then arises what should be the material date when a mortgage should be a first mortgage for consideration of the question whether a decree under Order 34, Rule 6, is affected by the provisions of Section 21, U. P. Debt Redemption Act. There is no reason why the material date should be the date of the mortgage; there appears to be no reason Why the material date should even

be the date on which the suit is brought. The material date should be the date when the property is sold so that if there is no property subject to a prior mortgage at the time of the sale, the decree-holder should not be allowed to get the benefit of a decree under Order 34, Rule 6. Without, however, a clear finding about the date when the mortgage dated 16th June 1920, was paid off, we do not at this stage wish to express any final opinion.

8. Coming to the question whether the mortgage dated 16th June 1920, was or was not paid off, we have the finding of the learned Additional Civil Judge that the mortgage was paid off by payment of the sum of Rs. 214 annually mentioned in the lease. The learned Additional Civil Judge was, however, of the opinion that the mortgage being for a period of five years, the five years expired on 30th June 1925, and if the last instalment of Rs. 214 was not paid by the lessee to the mortgagee on or before 14th March 1925, the previous mortgage could not be taken to have been paid off on the date when the second mortgage was executed. The decree-holder had given no evidence in the case. The judgment-debtors had produced two witnesses to prove that payments were made to the mortgagee in accordance with the terms of the lease. The witnesses did not mention any dates and the learned Judge was, therefore, of the opinion that it was not established that the payments were made prior to 14th March 1925.

9. Reliance was also placed on the fact that in 1931 Jhamman Lal, mortgagee, had filed an application before the learned Munsif executing the decree and had claimed that his mortgage money was still outstanding. The decree-holder filed an application and an affidavit in reply, that the mortgage debt had been paid off, but on the date fixed for hearing the decree-holder did not appear and learned counsel appearing for the decree-holder made a statement that he had no instructions. The learned Judge directed that the mortgage of Jhamman Lal may be proclaimed. Unfortunately, however, the learned Munsif had not issued any notice to the judgment-debtors of this application of Jhamman Lal and, therefore, the judgment-debtors could not be bound by the order passed by the learned Munsif. The lease does not mention the time when the payment of Rs. 214 should be made. The lease is no doubt in favour of the nephew of Jhamman Lal and in the affidavit filed by the decree-holder it is mentioned that the arrangement was that the mortgage

shall be paid off by the execution of the lease. And there is a further fact that in the mortgage deed executed in favour of the appellant dated 14th March 1925, there is no mention that there was any prior encumbrance on any item of property. The mortgaged property has been sold, but a considerable amount is being claimed by the decree-holder under Order 34, Rule 6, Civil P. C. It does not appear that the position was clearly understood by the parties in the lower Courts and it may, therefore, be necessary to get a clear finding from the lower Court whether the mortgage deed dated 16th June 1920, was paid off prior to the 14th March 1925, when the mortgage in favour of the appellant was executed or prior to the date of the suit or before the properties mortgaged were sold at auction in execution of the decree. We, therefore, remit an issue to the lower Court for a finding whether the mortgage dated 16th June 1920, was paid off and, if so, when. The findings would be returned within three months from this date. The parties are allowed ten days time to file objections. The parties may produce such additional evidence as the learned Judge may consider necessary.

10. The record may be sent down to the lower appellate Court by a very early date.

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