

Muhammad Ali Vs. Kadma Pasin

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Court : Allahabad

Decided On : Feb-07-1919

Reported in : (1919)ILR61All399

Judge : Piggott and ;Walsh, JJ.

Appellant : Muhammad Ali

Respondent : Kadma Pasin

Judgement :

Piggott, J.

1. In this case the two courts below have differed upon a question of law of some difficulty regarding the application of the provisions of Order XXXIV, Rule 14, of the Code of Civil Procedure to the facts of this particular case. The respondent obtained from the original judgment-debtor appellant a possessory mortgage in respect of certain property. That property comprised a fixed-rate holding and also the right to collect a portion of the dues received at a certain temple. Under the terms of the mortgage the mortgagee was entitled to possession over the holding and to realize for himself the share of the temple dues specified in the document. We are informed that he obtained possession over the fixed-rate holding. With regard to the temple dues the respondent, who is a Muhammadan, seems to have found some difficulty about realizing them himself. He entered into a further contract with his mortgagor which may be described as a lease or farm of the right

secured to the mortgagee of collecting these dues. The mortgagor undertook to pay to the mortgagee a sum of Rs. 700 a year in return for the latter's permission to realize what she could for herself out of the dues in question. The mortgagor having made default, a suit was brought on the basis of this contract of farm or lease, and a decree obtained. In execution of this decree the respondent has attached, and seeks to bring to sale, the equity of redemption in respect of the whole of the property which formed the subject-matter of the original mortgage in his favour. The question is whether an order for the sale of this property is or is not forbidden by Order XXXIV, Rule 14, of the Code of Civil Procedure. The court of first instance held that, on the plain words of the said rule, the decree for money obtained by the respondent was a decree for the payment of money in satisfaction of a claim arising under the mortgage and that the sale of the equity of redemption in the mortgaged property was therefore prohibited under the terms of the rule. The learned District Judge has reversed this finding on appeal, being evidently influenced by the decision of this Court in *Haribans Rai v. Sri Niwas Naik* (1913) I.L.R., 35 All., 518. That case undoubtedly comes very close to the case now before us, and I am not surprised that the learned District Judge felt obliged to treat it as a decisive authority in favour of the decree-holder. At the same time the present case is distinguishable on the facts, and I very much doubt whether the learned Judges who decided the case of *Haribana Rai v. Sri Niwas Naik* (1913) I.L.R., 35 All., 518 would have been in favour of the respondent in the appeal now before us. They seem to have held that the decree for costs which was sought to be executed in the case then before them represented, not money due to the decree holder as mortgagee, but merely a sum of money to which he was entitled as a successful litigant. They, therefore, held that the decree in the case then before them was not one for the payment of money in satisfaction of a claim arising under the mortgage. It must be remembered that there has been an alteration in the law since the provisions of Order XXXIV, Rule 14, of the present Code of Civil Procedure (Act No. V of 1908) were substituted for those of Section 99 of the Transfer of Property Act (No. IV of 1882). It is, therefore, of very little use to refer to rulings anterior in date to this change in the law. For instance, there has been considerable controversy before us as to the bearing on the present case of the principles laid down by learned Judges of this Court in two cases, one reported

in *Altaf Ali Khan v. Lalta Prasad* (1897) I.L.R., 19 All., 496 and the other in *Chimman Lal v. Bahadur Singh* (1901) I.L.R., 23 All., 338. The former case is relied upon by the appellant and the latter by the respondent. It seems sufficient to say that both these cases were decided at a time when the mortgagee could in no event have brought the mortgaged property to sale in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not. The question which we have now to consider was, therefore, not present to the minds of the learned Judges who decided those two cases. They had to determine whether, under particular circumstances, the remedy of a particular mortgagee was or was not confined to a suit for sale upon his mortgage and whether or not it was open to him, at least as an alternative relief, to obtain a simple money decree, by way of arrears of rent or the like, against his mortgagor. No question could be raised under the law as it then stood as to the right of the mortgagee to execute such decree, when obtained, by attachment and sale of the mortgaged property. Apart from the case which the learned District Judge has treated as decisive, there seem to be only two other decisions since the passing of Act No. V of 1908 which deserve notice. One of these is the case of *Ganesh Singh v. Debi Singh* (1910) I.L.R., 32 All., 377 and the other is *Tarak Nath Adhikari v. Bhubaneshwar Mitra* (1914) I.L.R., 42 Calc., 780. Both these cases seem to me a good deal in favour of the appellant. In the former it is true that the usufructuary mortgagee there concerned was permitted to bring the mortgaged property to sale in execution of a simple money decree. The learned Judges, however, laid particular stress on the fact that the decree then in question was passed upon a compromise. In effect, as it seems to me, they regarded the compromise decree under which the mortgagor became liable to the mortgagee for the payment of a certain sum of money as a contract superseding and abolishing the previous contract of mortgage. On this view of the case there remained no mortgage in existence which could be set up by the judgment-debtor so as to invoke the provisions of Order XXXIV, Rule 14, of the Code of Civil Procedure. I think that the way in which the learned Judges laid stress upon the fact that the decree in the case before them had been passed upon a compromise, and was therefore the result of a fresh agreement or contract between the parties, suggests that their decision would have been different if they had had to deal with a decree for money passed after contest. The Calcutta case

was the converse of the present one and as a matter of fact resulted in an order in favour of the decree-holder, but the principle laid down by the learned Judges was that the prohibition contained in Order XXXIV, Rule 14, would operate in respect of any decree of which it could not be said that it was unconnected with the mortgage. In the case now before us the money for which this decree was obtained represented the usufruct of the mortgaged property to which the mortgagee was entitled as part of his contract of mortgage. His right to receive this money rested upon his position as mortgagee. The mortgagor had become liable to pay the mortgagee this money in consequence of an agreement entered into between the parties subsequent to the mortgage: but it seems to me, in the first place, that the money for which the decree was passed was an essential part of the mortgage money, just as much as arrears of interest, which, if falling due on a contract of simple mortgage, become part of the mortgage money; in the second place it seems to me that it would be doing violence to the plain language of the rule to say that the claim in satisfaction of which this decree was passed was not a claim arising under the original contract of mortgage. The learned District Judge has interpreted the principle laid down in the decision of *Haribans Rai v. Sri Niwas Naik* (1913) I.L.R., 35 All., 518, as if the learned Judges had intended to lay down that the true test was whether or not the money for which a decree had been obtained was money which could have been claimed in a suit for sale upon the mortgage.

2. This goes, I think, a little beyond the actual ratio decidendi of the case in question. Moreover, although the test may be a satisfactory one in the case of claims arising out of a simple mortgage, it is not so easy to apply it to the case of a usufructuary mortgage. The provisions of the Transfer of Property Act assume that a person in whose favour a contract of usufructuary mortgage has been entered into has either been put in possession of the mortgaged property or has not. In the latter event he would have a right to sue for his money under Section 68, Clause (c), of the Transfer of Property Act (No. IV of 1882).

3. In the former event it is presumed that he would be in full enjoyment of all his rights in respect of the usufruct of the mortgaged property. Difficulties may arise, however, in applying this principle where the mortgagor has entered into a

subsidiary agreement with the usufructuary mortgagee, so that it may be said that the mortgagee is constructively in possession by virtue of his subsidiary contract with the mortgagor, but the latter is nevertheless withholding from the mortgagee the money which he had covenanted to pay. I think that this is a risk which a usufructuary mortgagee must be content to run when he chooses to enter into a transaction the effect of which is to replace the mortgagor in actual possession over the mortgaged property, or any part of it. There is nothing in law to prevent the parties to a mortgage from entering into such an agreement, but the fact that the mortgagor has become liable by reason of such subsidiary contract to make certain payments to the mortgagee does not affect the consideration that the money so agreed to be paid represents the usufruct of the property to which the mortgagee was entitled by virtue of the possessory mortgage in his favour. If the mortgagee chooses to enter into a contract of this nature, and the mortgagor fails to carry out his part of such contract, the remedy of the mortgagee is to obtain a simple money decree for the money due to him. I think, however, that it would be doing violence, both to the letter of Order XXXIV, Rule 14, of the Code of Civil Procedure, and to the principle on which that rule is based, to allow the mortgagee to take advantage of a decree of this nature in order to bring to sale the equity of redemption and deprive the mortgagor of his right to redeem the original mortgage. The courts are bound to hold that the money in respect of which the decree was passed represents, in substance, the usufruct of the mortgaged property; and that the claim to it was a claim arising under the mortgage. In my opinion, therefore, the decree of the lower appellate court must be set aside and that of the court of the first instance restored, with costs throughout.

Walsh, J.

4. I have arrived at the same conclusion. Although the circumstances of this arrangement are somewhat peculiar, as I shall mention in a moment, I think they raise in the clearest possible form the question what is the right interpretation of the words 'a claim arising under the mortgage' used in the new Order XXXIV, Rule 14? The case has been extremely well argued on both sides, and I do not think any relevant consideration or existing authority has been omitted from the discussion.

5. The mortgage was a usufructury mortgage to secure a debt of Rs. 8,000 in which a certain fixed-rate tenancy was hypothecated, and also a right during fourteen days in each year to collect certain dues at a temple which had been bequeathed to the mortgagor by her paramour. The mortgagor was Pasi by caste and the mistress of the Panda who bequeathed this right. The mortgagee was a Muhammadan, and the difficulties not unnaturally consequent upon his making such collections, were got over by an agreement made six months after the original mortgage, under which the woman gave to the mortgagee in lieu of the usufruct of the collections of the dues an undertaking or covenant to pay a fixed sum of Rs. 700 a year. In addition to this the agreement provided that upon default being made in the payment of that fixed sum interest should run upon the arrears at 12 per cent, per annum. Inasmuch as the mortgagee was in possession of the fixed-rate holding, although we know nothing about the actual proceeds of this security, it is obvious that such an arrangement made by the woman in discharge of her obligations under the mortgage was a most improvident bargain. These circumstances do not affect my judgment in the interpretation at which I feel myself obliged to arrive, but they do point to the necessity of holding fast to the old principle upon which this restriction imposed upon mortgagees is based and not straining the language in order to extend the mortgagee's rights over the equity of redemption. The mortgagee obtained a decree for Rs. 3,762-6-0 with costs and pendente lite interest and future interest and the question before us is whether he can execute that decree upon the property mortgaged.

6. I have come to the conclusion that he cannot. In whatever way the matter is regarded, it seems to me that a suit to enforce the agreement by which the parties stipulated how that part of the usufruct which concerned the collection of dues should be met can only be described as 'a claim arising under the mortgage.' 'A' in this connection must mean 'any.' The point really cannot be better put than it is put in the learned Subordinate Judge's judgment where he says: 'It seems to me to be drawing an unjustifiably subtle distinction to say that the claim arose, not under the mortgage, but under the separate agreement, when that agreement was made as a direct consequence of the mortgage, and as a means of giving effect to the conditions of the mortgage.'

7. The language formerly in operation under Section 99 of the Transfer of Property Act was 'whether arising under the mortgage or not.' The change effected by Order XXXIV, Rule 14, was clearly intended to improve the mortgagee's position and to remove to some extent the existing restriction, but it must be taken that it was not intended by the Legislature, otherwise very different language would certainly have been adopted, to affect the principle long established by equity courts and always acted upon in India and reiterated by the Privy Council in *Khairaj Mal v. Daim* (1904) I.L.R., 32 Calc., 296, 'that the mortgagee cannot by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage.' In my opinion the mortgagee's claim in this case, if successful, would offend against this principle. The existing rule does not confine the restriction imposed upon the mortgagee to a claim to enforce the mortgage debt as such, but expressly provides that it shall include claim arising under the mortgage. In construing such a proviso we are bound to look at the authorities which laid down the principles by which the courts were guided and which the Code was intended to codify. To escape the mischief aimed at by those principles and by this legislation the claim of the mortgagee must be distinct from, that is to say, in my opinion, unconnected with the mortgage transaction. This is the view taken by the Calcutta Bench in the decision of *Tarak Nath Adhikari v. Bhubaneshear Mitra* (1914) I.L.R., 42 Calc., 780, to which my brother has referred in which, although the Judges were dealing with the converse case, the language they use clearly applies to this case and in my opinion, is correct. The same view is taken in notes to Order XXXIV, Rule 14, in the last edition of Woodroffe and Ameer Ali's Commentary on the Code, and it is there pointed out that if the restriction were confined to cases of what, to use the English expression, are known as, 'judgments on the covenant' the benefit of the equity of redemption given to the mortgagor would be lost in respect of claims under the mortgage, and it seems to me that the Legislature has been careful to use language avoiding that result. Whether or not I should have come to the same decision as the Bench of this Court in the authority *Haribans Rai v. Sri Niwas Naik* (1913) I.L.R., 35 All., 518, to which my brother has referred and which the learned District Judge in this

case not unnaturally used to persuade himself as to the interpretation which he adopted, does not matter. The view which they took in that case undoubtedly was that a claim for costs arising out of a decree stood upon a footing of its own. The decree of a court on the claim of the mortgagee under his mortgage, and the costs in execution of its order for which the mortgagee made application, might, no doubt, be said to arise, not under the mortgage, but under the unsuccessful resistance made by the mortgagor, in the original claim which the mortgagee made against him. I do not think that case can be treated as having decided anything more than that, and it does not govern the wider question which is raised in the appeal before us. I agree with the order proposed.

8. The appeal is allowed, the decree of the lower appellate court set aside and that of the court of first instance restored with costs throughout.

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