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Court : Allahabad

Decided On : Jun-04-1912

Reported in : 16Ind.Cas.435

Judge : Banerji, J.

Appellant : Rahamatullah Beg

Respondent : Yusuf Ali and ors.

Judgement :

Banerji, J.

1. This appeal arises out of a suit for redemption of a mortgage made on the 7th of July 1891, by one Musamrnat Munga Bibi, now represented by the plaintiff and some of the defendants. The principal amount secured by the mortgage was Rs. 35. The plaintiff offers to pay that amount, but claims Rs. 30 as damages for injury done to the mortgaged premises, which was a house. The mortgagee claimed, in addition to the principal amount of the mortgage, certain sums alleged to have been spent on repairs of the house and in re-building portions of it which had fallen down, and also water rates paid by him together with interest. The plaintiffs denied that any constructions had been made and that the mortgagor had assented to such constructions.

2. The Court of first instance awarded to the mortgagee costs of repairs, together with interest, the amount of rates and cesses paid, as also interest thereon; and costs of constructions, which it found had been made with the consent of the mortgagor.

3. The lower Appellate Court agreed with the Court of first instance as to the amount of costs incurred in repairing the houses and also as to the amount of rates and cesses paid, but disallowed interest on these amounts. As to the costs of additions made to the house, the learned Judge did not consider the question whether any such additions had been made or whether they were reasonable and necessary, but he was of opinion that it had not been proved that the constructions had been made with the assent of the mortgagor, and, on this ground alone, disallowed the claim of the mortgagee for the costs of constructions and improvements.

4. The mortgagee has preferred this appeal.

5. As to the costs of repairs, the lower Appellate Court has, as I have mentioned above, found in concurrence with the first Court that the amount of such costs was Rs. 145. The learned Judge, however, is of opinion that the defendant mortgagee is not entitled to interest on the costs inasmuch as although the mortgage-deed provides for payment of costs of repairs, it contains no provision for payment of interest, and this, according to the learned Judge, is 'a contract to the contrary' within the meaning of Section 72 of the Transfer of Property Act. That section provides that the mortgagee may spend such money as is necessary for, among other things, the preservation of the mortgaged property from destruction, forfeiture or sale, and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal,--and where no such rate is fixed, at the rate of 9 per cent, per annum. In the present case, there was ^no rate of interest fixed in the mortgage deed. Therefore, the mortgagee was entitled to interest on the amount spent for repairs effected with the object of preserving the property in pursuance of the terms of the mortgage, at the rate of 9 per cent, per annum. I do not agree with the learned Judge that the mere circumstance that in the mortgage deed it was not specifically mentioned

that interest would be paid on costs of repairs, is a contract to the contrary in respect of interest. Apart from the provisions of the mortgage-deed, the mortgagee is entitled to costs of repairs as being costs necessarily incurred for the preservation of the property, and on such costs, unless it is provided that interest would not be paid, interest is chargeable under the provisions of Section 72 at 9 per cent, per annum. On this point, the Court below is, in my opinion, clearly wrong, and it ought to have allowed interest on Rs. 145, at the rate of Rs. 9 per cent, per annum.

6. Next, as to rates and cesses the learned Judge has allowed the principal amount paid, namely, Rs. 8-11-3. He has disallowed interest on the ground that the defendant-mortgagee had not, claimed interest. The learned Judge, apparently, overlooked the first paragraph of the statement in which the defendant distinctly stated that he was legally entitled to receive the costs of repairs and construction, as well as the amount paid as water rate 'together with interest.' The defendant ought, therefore, to have been allowed interest on the amount of the rates and cesses, and this should be allowed now.

7. There remains the question, of the costs of constructions. I have already stated that, it was denied by the plaintiff that any constructions had been made, and it was also denied that the constructions were made with the mortgagor's permission. The learned Judge has not gone into any point except the question of assent. The Court of first instance, which had the witnesses before it, and which was in a better position than the learned Judge to judge of their credibility, came to the conclusion that the statements of the witnesses on the point were true and believed them. The probabilities were also in favour of the constructions having been made with the mortgagor's consent. It was most unlikely that the mortgagee would have spent any large sum in making additions and improvements unless he had obtained the consent of the mortgagor to his doing so. However, this Court, as a Court of second appeal, must accept the finding of fact of the lower Appellate Court, and it must be taken upon that finding that the constructions were made without the express or implied permission of the mortgagor. In the written statement, it was stated that the mortgagee had spent Rs. 280-6-6 on repairs to the house and on building portions thereof which had fallen down. If the

mortgagee made the constructions in question in order to re-build portions which had fallen down, they would come within Section 72(6), being constructions necessary for the preservation of the property from destruction. The Court of first instance was of opinion that the house was in a dilapidated condition, that the Municipal, Board had issued orders to the defendant to re-construct the house, and that by the constructions made the house was made habitable. If this was a correct finding, the case would clearly come, as I have said above, within the provisions of Section 72, Clause (6). But if as the other side urges, there were additions made to the house, two questions would arise; first, whether the additions were necessary for the preservation of the mortgaged premises, and, secondly, whether they were lasting improvements, reasonably made for the beneficial enjoyment of the mortgaged premises. As observed by Lord Langdale in the leading case of *Sandon v. Hooper* (1843) 6 Beav. 246 : 49 C.R. 820 : 12 L.J. Ch. 309 : 63 R.R. 72 a mortgagor could not be improved out of his estate, that is to say, the mortgagee has no right to spend money in increasing the value of the property in such a way as to prevent the mortgagor from redeeming. The law on the subject is thus summarised in *Fisher on Mortgages*, VI Edition, page 897: 'The improvements must always be reasonable, having regard to the nature and value of the estate, for, if it were not so, a weapon would be put in the mortgagee's hands with which' he might greatly clog the right of redemption, which he has no right to make more expensive than is necessary to keep the estate in good repair and working order and to protect the title.' Farther on, he says, the mortgagee will not 'lose his right to re-payment' for improvements made for want of giving notice, if the improvement was reasonable and beneficial.' To the same effect is a passage in *Coote on Mortgages*, page 1224. The case of *Sandon v. Hooper* (1843) 6 Beav. 246 : 49 C.R. 820 : 12 L.J. Ch. 309 : 63 R.R. 72 was considered by the Court of Appeal in the later case of *Shepard v. Jones* (1882) 21 Ch. D. 469 : 47 L.T. 604 : 31 W.R. 308. In that case, *Jessel, M.R.* held that where the mortgagee can prove that the selling price was increased by reason of the outlay, then to the extent to which the selling price has been so increased, the mortgagor cannot get the benefit of it without paying for the outlay. He adds that notice of the improvement is not necessary if it is a reasonable one and produces a benefit. In the same case, *Brett, L.J.*, observed that if the mortgagee gave *prima facie*

evidence that the improvement would be a lasting improvement and that the expenditure incurred by him on the improvement was a reasonable expenditure, the mortgagee would be entitled to an inquiry, and no question of notice will arise. Cotton, L.J., made the following remarks: 'in a case of this sort, where there has been no alteration in the nature of the property, which a mortgagee must not make but merely an expenditure prima facie increasing the saleable value of the estate for the purpose for which it was intended, it is, in my opinion, if it can be shown that there has been an increase in the sale value of the estate, an expenditure which the mortgagee is entitled to have re-paid to him as a reasonable expenditure.' The additions might come under the head of accessions within the meaning of Section 63 of the Transfer of Property Act. But whether they, were accessions or whether they were necessary for the preservation of the property, or whether they were lasting improvements reasonably made for the benefit of the property which added to the selling value of it, in all these cases, the mortgagee would be entitled to the value of the additions. A similar view appears to have been held in this Court in *Durga Singh v. Naurang Singh* 17 A. 282 : A.W.N. (1895) 69. The Madras High Court, no doubt, held in *Arunachella Chetti v. Sithayi Ammal* 19 M. 327 that the mortgagee is not at liberty to effect improvements and charge the mortgagor therewith, notwithstanding the consent of the mortgagor. In view of the authorities to which I have referred, I am unable to agree with the ruling, and, as pointed out by Dr. Ghose in his work on Mortgages, page 549, the learned Judges laid down the law somewhat broadly.

8. For the above reasons, it is necessary to obtain from the Court below findings on the following issues, which I refer to that Court under the provisions of Order XII, Rule 25 of the Code of Civil Procedure:

- (1) Were any constructions and additions made by the mortgagee in the mortgaged premises; and, if so, what, and at what cost?
- (2) Were those constructions necessary for the preservation of the mortgaged property from destruction?
- (3) Were the additions, if any, lasting improvements reasonably made, having regard to the nature and value of the property, and were they beneficial thereto?

9. The Court will take such additional evidence as the parties may adduce. On receipt of its findings, the usual ten days will be allowed for filing objections.

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