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Court : Madhya Pradesh

Decided On : Apr-30-2007

Reported in : 2007(3)MPHT316

Judge : N.K. Mody, J.

Appellant : Abde Ali

Respondent : HakumuddIn and ors.

Advocate for Pet/Ap. : Mr. V.K. Jain

Judgement :

N.K. Mody, J.

1. Being aggrieved by the judgment and decree dated 18-4-2000 passed by ADJ, Indore in Civil Regular Appeal No. 14/99 whereby the judgment and decree dated 18-4-2000 passed by VI Civil Judge Class II, Indore in Civil Suit No. 366-A/96 was set aside, the present appeal has been filed which has been admitted for final hearing on 22-1-2001 on the following substantial question of law:

Whether the First Appellate Court has committed a patent illegality in reversing the judgment and decree passed by the Trial Court on the ground of not asking for any declaration in the suit?

2. Short facts of the case are that appellant filed a suit for redemption of mortgage and possession on 11-3-87 against the respondents alleging that suit property bearing House No. 20/4 situated at Ushaganj, Indore was of the ownership of Mulla Ibrahim Bhai, whose L.Rs. are respondent Nos. 6 and 7. It was alleged that suit property has been purchased by the appellant from Mulla Ibrahim vide registered sale deed dated 16-10-84. It was further alleged that appellant asked the respondent Nos. 1 to 5 to vacate the suit accommodation vide registered notice dated 14-8-86 and 19-9-86 on the basis of sale deed. It was alleged that notice were replied by respondent Nos. 1 to 5 on 25-8-86 and 29-9-86 wherein the ownership of the appellant was denied and it was alleged that possession was given as owner of Mulla Ibrahim, predecessor-in-title of respondent Nos. 6 and 7 to Mohd. Hussain, father of respondent Nos. 1 to 5. It was also alleged that only execution of sale deed was to take place. It was further alleged that appellant later-on came to know from Mulla Ibrahim, predecessor-in-title of respondent Nos. 6 and 7 who was also the brother of the appellant that suit property was mortgaged with the father of respondent Nos. 1 to 5 on 27-4-1976 for a consideration of Rs. 8,500/- and the possession was given to the father of respondent Nos. 1 to 5 on the condition that no interest shall be payable by the father of respondent Nos. 6 and 7 to the father of respondent Nos. 1 to 5 on the mortgage money and no rent shall be payable by the father of the respondent Nos. 1 to 5 to the father of respondent Nos. 6 and 7. It was also alleged that as per the terms of the mortgage, the mortgage was required to be redeemed on or before 30-7-1977. It was alleged that thereafter, Mulla Ibrahim, father of respondent Nos. 6 and 7 asked Mohd. Hussain, father of respondent Nos. 1 to 5 to take back the mortgage money and hand over the possession of the suit house vide notice dated 8-4-77 which was replied by Mohd. Hussain on 23-4-77 and 26-4-77 wherein Mohd. Hussain admitted the mortgage and submitted that because of non-payment of mortgage money, the possession could not be handed over. Further case of the appellant was that vide dated 20-1-1987, appellant asked redemption but the same was not replied by respondent Nos. 1 to 5. On the basis of these allegations it was alleged that decree of redemption be passed in favour of appellant against the respondents after settlement of mortgage account and respondent Nos. 1 to 5 be directed to hand over the possession of the suit

property.

3. The written statement was filed by respondent Nos. 1 to 5 wherein it was alleged that Mohd. Hussain entered into an agreement to purchase the suit property from Mulla Ibrahim and possession was given to their father. Rest of the allegations were denied. It was also denied that the suit property was ever mortgaged. It was alleged that in fact possession was given by Mulla Ibrahim to the father of respondent Nos. 1 to 5, Mohd. Hussain as owner, hence it was prayed that the suit be dismissed.

4. On the basis of pleading of parties, learned Trial Court framed the issues, recorded the evidence and decreed the suit, against which appeal was filed by respondent Nos. 1 to 5, which was allowed and the suit was dismissed, hence this appeal.

5. Learned Counsel for appellant submits that learned Court below committed error in allowing the appeal and dismissing the suit. It is submitted that suit was dismissed on the ground that mortgage-deed was unregistered, appellant was not a bonafide purchaser as appellant was knowing right from the beginning that suit property is mortgaged with the father of respondent Nos. 1 to 5. It was also held that father of respondent Nos. 1 to 5 and thereafter respondent Nos. 1 to 5 are in occupation of the suit property since last more than 30 years. Suit was also dismissed on the ground that appellant has not filed the suit for declaration. It is submitted that it makes no difference whether the suit has been filed for declaration or not. It was further submitted that since the suit has been filed for redemption and possession, therefore, the suit could not be dismissed on the ground that there was no prayer of declaration. Learned Counsel further submits that even if mortgage deed was not registered, the suit could not have been dismissed as the mortgage deed can always be looked into for collateral purposes.

6. Learned Counsel for the respondent Nos. 1 to 5 submit that the suit was for redemption. When it was found that there is no valid mortgage, therefore, the learned Appellate Court has rightly dismissed the suit. It is submitted that no interference can be made by this Court in this regard.

7. Mr. Amit Agrawal placed reliance on a Full Bench decision of Lower Burma Chief Court in the matter of MA. HTwe v. MaungLun reported in Indian Cases Vol. XXXIII 163, decided on 10-1-1916, wherein it was held that:

In a suit for redemption, in which the defendant denies the mortgage alleged by the plaintiff and sets up a sale to him, the plaintiff cannot recover possession when by reason of the provisions of the Transfer of Property Act the plaintiff cannot prove the mortgage sued on and the defendant cannot prove the sale relied upon by him.

It is in accordance with the principles of sound common sense and justice that a man who brings a case and fails to prove it should not get a decree on a different cause of action from that alleged by him.

8. Further reliance was placed on a decision in the matter of Ma Kyi v. Maung Thon reported in AIR 1935 Rangoon 230, wherein a Full Bench of Rangoon High Court has held that-- 'where a usufructuary mortgage for over Rs. 100/- is not registered, a suit by the owner for the possession of the property on redemption is not competent as the plaintiff pleads and relies on an oral mortgage nor are the defendants entitled to prove the alleged mortgage for an additional sum'. It was further observed that -- 'the proper course for the plaintiff would be to sue for possession relying on his title which was not and could not be disputed. To such a suit there cannot be any defence, for the only ground upon which the defendants can have claimed to remain in possession would be based upon the alleged rights which they had acquired under the oral mortgage on which it is not permissible for them to rest their title and which could not be proved'.

9. Reliance was also placed on a decision in the matter of Hansia v. Bakhtawarmal , wherein a Division Bench of Rajasthan High Court has observed that where the plaint was a pure and simple plaint in a suit for redemption, the issues framed also were issues in a suit for redemption and the mortgagees never raised the question of twelve years adverse possession as they might very well have done if it was a suit for possession. It was further held that the character of the suit would be completely changed if it was turned into a suit for possession. Nor would it be right and after so many years to permit the plaintiff to amend the plaint and convert it

into a suit for possession. Therefore, the plaintiffs must file a separate suit for possession.

10. Further reliance was placed on a decision in the matter of Muni Lal v. Oriental Fire & General Insurance Co. Ltd. : AIR 1996 SC642 , wherein a suit was filed for declaration and separate application was filed without seeking consequential relief. It was dismissed by the Trial Court as being not maintainable. Application filed under Order VI Rule 17, CPC at appellate stage seeking consequential relief by amendment of pleading, it was held that after the suit was barred by limitation during pendency of the appeal, the application cannot be allowed. Lastly reliance was placed on a decision in the matter of Nirmal Chandra v. Vimal Chand : [2001]3SCR571 , wherein the Hon'ble Apex Court has observed that--

there is no automatic merger of two rights where mortgage is executed in favour of a tenant and on redemption of mortgage, the tenancy rights kept in abeyance would revive and entitle the tenant to continue in possession even after the redemption of the mortgage. On execution of mortgage, tenancy rights would terminate only if it is clear expressly or impliedly by conduct or other related circumstances that the parties had intended so which would be a question of fact. Thus as a normal rule except in intention being to the contrary, mortgage and lease operate independent of each other and on mortgage coming to an end by redemption, tenancy would revive.

11. On the strength of aforesaid position of law, learned Counsel for respondent Nos. 1 to 5 submits that the suit was for possession on the basis of mortgage deed which was not found proved, hence no relief can be granted to the appellant on the basis of title. It was also submitted that even appellant cannot be permitted to amend the suit.

12. Mr. V.K. Jain, learned Counsel for the appellant placed reliance on a Full Bench decision of this Court in the matter of Sardar Amar Singh v. Smt. Surinder Kaur AIR 1975 MP 230, wherein Full Bench of this Court has observed that Section 49 of Registration Act does not say that an unregistered document which requires to be registered, shall not be received in evidence. The only bar is that such a document cannot be received as evidence of any transaction affecting the

property. As a matter of fact, the proviso to Section 49 clearly empowers the courts to admit any unregistered document as evidence of collateral transaction not required to be registered. An unregistered lease deed is admissible to prove the nature and character of possession of the defendant and that Section 49 does not come in the way. Learned Counsel submits that suit property was mortgaged by the predecessor in title of respondent Nos. 6 and 7 in favour of predecessor in title of respondent Nos. 1 to 5. It is submitted that appellant was transferee (purchaser) hence appellant was also mortgagee. For this contention reliance was placed on a decision in the matter of Haridar v. Jagannath AIR 1939 Nagpur 256, wherein it was held that mortgagee includes subsequent purchaser. In the matter of Madangopal v. Shrinarayan AIR (33) 1946 Nagpur 226, it was held that in view of Section 59A of Transfer of Property Act include the subsequent purchaser of the mortgaged property. Learned Counsel submits that the suit for possession on unregistered mortgage is maintainable and the Court can pass a decree for possession on the basis of title, even if it was not prayed. For this contention reliance was placed on a decision in the matter of LacchmiNarain v. Kalyan AIR 1960 Rajasthan 1, wherein a Full Bench of Rajasthan has held that the rights of the parties can be regulated by law if no valid agreement exists. It is not substituting a new contract but giving effect to a relationship created by the operation of law. The provisions of Section 49 of the Registration Act or Section 91 of the Evidence Act also are not affected because an unregistered document can be availed for the purpose of showing character and nature of possession if the possession is transferred under such document. In the matter of V.R. Pandya v. P.N. Lavar AIR 1972 Gujarat 204, wherein it was observed that-- 'if a person claiming as mortgagor sues for redemption of such mortgage under an unregistered mortgage deed and is able to establish that such a mortgage transaction was effected and the person alleged to be mortgagee is entered into possession of such property as a mortgagee and has held the property as a mortgagee having a limited interest for a period of 12 years without claiming any higher right or interest in the said property, a suit for redemption is maintainable'.

13. Reliance was placed on a decision in the matter of K. Variath v. P.C.K. Haji : AIR 1974 SC689 , wherein it was held that -- 'where a plaintiff cannot regain possession on the basis of an oral mortgage as it cannot be proved in a Court of

law for want of registration, it is open to him to recover possession on the strength of his title'.

14. Further reliance was placed on a decision in the matter of Pomal v. Vrajlal : AIR 1989 SC436 , wherein Hon'ble Apex Court has observed that-- 'it is a settled law that a mortgage cannot be made altogether irredeemable or redemption made illusory. The law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and just and unless there is anything to the contrary in the Statute, law must take cognizance of that fact and act accordingly. In the context of fast changing circumstances and economic stability, long-term for redemption makes a mortgage an illusory mortgage, though not decisive. It should prima facie be an indication as to how clogs on equity redemption should be judged.

15. Lastly, reliance was placed on a decision of this Court in the matter of Narendra Prasad v. Manju Lata 2002 (5) M.P.H.T. 216 : 2002 (1) MPLJ 16, wherein it was observed that where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument. An unregistered mortgage deed is inadmissible to prove the terms of the mortgage, but it is definitely admissible to establish the nature and character of possession of the mortgagee. Where a person obtained possession under an unregistered mortgage, his possession is permissive. Once a mortgage must always remain a mortgage. The owner of the house cannot lose his title to the house because the document by which he created the mortgage is unregistered.

16. Learned Counsel for the appellant submits that prior to filing the suit a notice was given by the appellant to the respondent Nos. 1 to 5, wherein it was alleged that a sum of Rs. 8,500/- was taken by the previous owner who was predecessor in title of respondent Nos. 6 and 7 and the possession of the suit property was given without any rent in lieu of interest of mortgage money. The reply was given vide Exh. P-16 by the predecessor in title of respondent Nos. 1 to 5 through Advocate Mr. R.D. Joshi, wherein it was alleged that father of respondent Nos. 1 to 5 is elder brother of father of respondent Nos. 6 and 7. In the reply it was also

alleged that Mohd. Hussain, predecessor in title of respondent Nos. 1 to 5 was misguided and a sum of Rs. 8,500/- was taken from him after giving possession to Mulla Ibrahim, father of respondent Nos. 6 and 7 of a small part of property which can hardly fetch rent Rs. 30/- per month while the amount of interest of the amount of Rs. 8,500/- is approximately Rs. 130/- per month which shows that intention of Ibrahim was to put his elder brother, Mohd. Hussain at loss. In the said notice, a demand was made for Rs. 8,500/- and it was also alleged that on receipt of amount, Mohd. Hussain shall vacate the suit accommodation.

17. Learned Counsel for the appellant submits that the suit was for possession on the basis of title and also for redemption from mortgage on the basis of alleged unregistered mortgage. Learned Counsel for appellant submits that on technical ground the suit of the appellant could not have been dismissed. For this contention, reliance is placed on a decision in the matter of Kedar Lal Seal and Anr. v. Hari Lal Seal : [1952]1SCR179 , wherein it was held that:

The Court would be slow to throw out a claim on a mere technicality of pleading, when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasion no prejudice to the other side beyond what can be compensated for in costs.

18. Further reliance was placed on a decision in the matter of Kashi Choudhary v. Mujataba Hassan : AIR1982 Pat42 , wherein in a suit for ejectment and arrears of rent, title of house found with plaintiff and defendant found to be licensee and not tenant, it was held that suit itself need not fail for not mentioning the case of a license. It was further observed that in such a case, the Court has discretion under Order 7 Rule 7 to grant an equitable relief of ejectment on the basis of title.

19. In the matter of Shri Ram v. Smt. Kasturi Devi : AIR1984 All66 , wherein in a suit for eviction on the basis of title alleging relationship of landlord and tenant, title proved but relationship of landlord and tenant not proved, it was held that still plaintiff is entitled to succeed.

20. Reliance was also placed on a decision in the matter of Karam Dass v. Som Prakash , wherein it was held that:

No doubt, as a general rule no plaintiff is entitled to a relief for which there is no foundation in the plaint but when on the pleadings and the issues and the evidence adduced the relief is clear, this general rule does not apply because it is the duty of the Court to grant relief as the circumstances of the case would warrant even though it may not be asked for. The primary duty of Courts, after all, is to do justice. Rules of procedure are intended only to advance the cause of justice rather than to impede the same.

21. From perusal of record, it is evident that owner of the house was Ibrahim, predecessor in title of respondent Nos. 6 and 7 who sold the suit property to the appellant. The suit property was mortgaged by Ibrahim to his elder brother, Mohd. Hussain, predecessor in title of respondent Nos. 1 to 5 vide mortgage deed dated 27-4-1976. This fact was not known to the appellant who purchased the suit property.

22. From perusal of the plaint, it is evident that appellant has alleged his title in the suit property and has prayed the ejectment of respondent Nos. 1 to 5. Learned Appellate Court has allowed the appeal and dismissed the suit on the ground that mortgage deed is unregistered, suit is for redemption of the suit property from the mortgage, therefore, no relief can be granted to the appellant on the basis of title, appellant is not a bonafide purchaser and respondent Nos. 1 to 5 are in occupation of the suit property since last more than 30 years.

23. It is a settled position of law that for collateral purposes, the document can be looked into. From perusal of the document, Exh. P-4, it is evident that suit property was mortgaged for a sum of Rs. 8,500/-. There is no reason to hold that appellant was not a bonafide purchaser. Even if it is assumed that appellant was having a knowledge of mortgage, then too it cannot be said that appellant was not a bonafide purchaser. Appellant has pleaded his title in the plaint and has prayed for ejectment, therefore, it cannot be said that appellant is not entitled for ejectment of respondent Nos. 1 to 5 on the ground that it was not a title suit.

24. From perusal of the reply, the notice, Exh. P-6, which was given by Mohd. Hussain to Ibrahim through his Advocate, it was admitted that suit property was mortgaged for a sum of Rs. 8,500/-. In the facts and circumstances of the case, learned Appellate Court committed error in dismissing the suit. However, since the suit property was mortgaged by respondent Nos. 6 and 7, therefore, learned Trial Court committed error in holding that appellant is not entitled for the relief of redemption. In view of this, the appeal stands allowed. The judgment and decree passed by the Appellate Court is set aside and the judgment and decree passed by the Trial Court is modified to the extent that upon depositing a sum of Rs. 8,500/- by the appellant which is the mortgage money, the appellant shall be entitled to take back the vacant possession of suit property from respondent Nos. 1 to 5.

25. With the aforesaid modification, the appeal stands disposed of.

No order as to costs.

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