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Court : Rajasthan

Decided On : Sep-17-1962

Reported in : AIR1963Raj100

Judge : I.N. Modi, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58 and 68; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 20, Rule 5

Appeal No. : Second Appeal No. 66 of 1957

Appellant : Chhingam Ram and anr.

Respondent : Nihalsingh and ors.

Advocate for Pet/Ap. : P.C. Bhandari, Adv.

Judgement :

I.N. Modi, J.

1. This is a plaintiffs' second appeal in a suit for money which has been dismissed by both courts below.

2. The facts giving rise to this appeal are within a short compass. The plaintiffs' case was that the defendants respondents borrowed a sum of Rs. 700/- from them on the 20th December, 1951 (the date mentioned by the learned Civil Judge in his

judgment under appeal as 20th October, 1951 is wrong) and had agreed to pay interest at the rate of Rs. 1/8/- per cent, per mensem thereon. As a security for this loan, the defendants mortgaged a 'Bara', belonging to them (and which is fully described in the document Ex. 1 dated the 20th December, 1951,) to the plaintiffs. It was further stipulated in this document that if the defendants should fail to pay the entire amount of the loan together with interest due on it at the end of two years from the date of the loan, the plaintiffs would be entitled to take possession of the Bara. The document containing the terms aforementioned was somehow not registered, and, therefore, the plaintiffs instituted the suit, out of which this appeal arises, and claimed a simple money decree for Rs. 700/- as principal plus a further sum of Rs. 378/- as interest at the stipulated rate and Rs. 1/8/- as notice charges, the total amounting to Rs. 1079/8/-. The suit was instituted in the court of the Munsiff Dholpur on the 16th December, 1954.

3. The defendants resisted the suit. They eventually admitted that they had executed the document which was the foundation of the suit of the plaintiffs, but they denied that they had received any consideration for it. The defendants further contended that the document of the 20th December, 1951, being unregistered was inadmissible in evidence and that no personal liability whatsoever on the footing of that document could be fastened on them in law.

4. The trial court framed four issues on the pleadings set out above. These were as follows :

(1) Whether Ex. 1 was admissible in evidence?

(2) If the decision of issue No. 1 be against, the defendants, then was Ex. 1 not supported by consideration ?

(3) Was the plaintiffs' suit not maintainable on the footing of Ex. 1, and

(4) To what relief the plaintiffs were entitled? The trial court took up issues Nos. 1 and 3 as preliminary issues, and held on the first issue that the document Ex. 1 was inadmissible in evidence, and, on the third issue, that Ex. 1 did not contain any personal covenant to pay and dismissed the plaintiffs' suit without deciding the

issue as to consideration. The plaintiffs went up in appeal which came for disposal before the Civil Judge, Dholpur. The learned Judge upheld the decision of the trial court and also dismissed the suit of the plaintiffs. Consequently, the plaintiffs have come up in second appeal to this Court.

5. It is to be regretted that the defendants respondents have not cared to appear in this Court in spite of service.

6. It may be stated at the outset that the finding of the courts below that the document Ex. 1 was compulsorily registerable, and, therefore, not admissible in evidence has not been questioned before me in this appeal and, therefore, it must be accepted that that finding is correct. This document would however be admissible for the collateral purpose of seeing whether thereby the defendants entered into a personal covenant to pay or not.

7. Learned counsel for the plaintiffs has strenuously contended before me that, the Courts below had fallen into a grave error of law in holding that the plaintiffs were not entitled to a simple money decree on the footing of the document in question. Now, the main ground which seems to have prevailed with the learned Civil Judge in the Court of first appeal in coming to the conclusion to which he did was that the document in question purported to create a usufructuary or an anomalous mortgage and therefore the personal liability of the mortgagees contained in the earlier part of Ex. 1 was negated by its subsequent part wherein it was agreed between the parties that, if the defendants failed to pay the entire amount of the loan together with the interest due thereon at the end of two years from the date thereof, the plaintiffs would be entitled to get possession of the Bara which had been mortgaged to them as a security for the said loan. In coming to this conclusion, the learned Judge seems to have placed his reliance on certain observations in *Bhikham Lal v. Mt. Janak Dulari*, AIR 1937 Oudh 517, *Ramnarain v. Adhindra Nath*, AIR 1916 PC 119 and *Om, Prakash v. Mukhtar Abroad*, AIR 1940 Lah 486.

8. Now learned counsel for the plaintiffs appellants has raised a two-fold contention before me. In the first place, he contends that fully accepting that Ex. 1 in this case was invalid and therefore inadmissible in evidence, it embodies a

transaction which must be held to have been discovered as void within the meaning of Section 65 of the Contract Act and it must, therefore, be held that the person who received any advantage under such agreement was bound to restore it, or to make compensation for it to the person from whom he received it.

In support of this argument, learned counsel relies on *Raja Mohan Manucha v. Manzoor Ahmad*, AIR 1937 Oudh 410 and *Harnath Kuar v. Indar Bahadur*, AIR 1922 PC 403. The submission of learned counsel on the basis of these authorities is that Section 65 of the Contract Act not only applies to agreements and contracts but also to transfer of property and therefore where a mortgage is found invalid, a mortgagee can recover the mortgage money under Section 65 if he prays for such relief in the mortgage suit. In the second place, the contention of learned counsel is that the courts below were entirely wrong in holding that the mortgage which was sought to be created in the present case was a usufructuary mortgage and that in reality it was nothing more than a simple mortgage, and, in any case, the condition which had been agreed to between the parties that in case the defendants failed to pay the entire mortgage money together with the interest due thereon at the end of two years from the date of the loan the plaintiffs would be within their power or would be entitled to get into possession of the Bara which had been mortgaged to them, did not affect the personal covenant which had been clearly expressed in the document Ex. 1 earlier. Consequently, learned counsel contended that it was open to the plaintiff to bring a suit for possession, or for their mortgage money and if they did not and/or could not bring a suit for possession, there was nothing to prevent them in law from suing for the recovery of the loan as a simple money debt.

9. I shall take up the second question first, and it seems to me that there is a good deal of force in what learned counsel submits on this aspect of the case. Ex. 1 clearly says that the defendants had borrowed a sum of Rs. 700/- from the plaintiffs and had stipulated to pay interest thereon at the rate of Rs. 1/8/- per cent, per mensem, and it was further mentioned that they would repay the principal and interest in a period of two years from the date of the loan. The document then goes on to state that, as a security for this loan, they had mortgaged their Bara, the boundaries of which were mentioned in, the document,, and then follows the

recital around which a considerable controversy has arisen in this case. That recital is to the effect that if the defendants failed to pay the amount of the principal¹ together with the interest as stipulated, then the plaintiffs would be free to go into possession of the said Bara.

Even the learned Civil Judge has accepted that the document in its earlier part clearly purported to create a personal obligation to pay. But on the score of the recital to which I have invited special attention above, he felt persuaded to hold that that obligation was clearly negatived, and, therefore, he came to the conclusion that the document read as a whole did not contain any personal covenant to pay, and, therefore, the plaintiffs' suit for a simple money decree deserved to be dismissed. The crucial question for determination therefore is: what is the precise character of the transaction in question? If this was a usufructuary mortgage, then on the . decision of their Lordships of the Privy Council in AIR 1916 PC 119 (Supra), the personal covenant to pay must stand negatived. It may be as well to bear in mind here the broad principles which their Lordships have laid down in this case. These are: (1) that a loan prima facie involves a personal liability; (2) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; (3) that the nature and terms of such security may however negative any personal liability on the part of the borrower and (4) that even if the mortgagor be in the first instance under no personal liability, such liability might arise under Section 68(b) or (c) of the Transfer of Property Act. Now this is not a case under Section 68 of the said Act, and so far as the first two factors adverted to by their Lordships are concerned, they do not operate adversely to the plaintiffs.

10. The only further question, therefore, which arises for determination is whether the nature and terms of the security offered by the defendants go to negative the personal liability which they had undoubtedly assumed in the earlier part of Ex. 1 on account of what they went on to state in the subsequent part of the same.

11. Having given this matter my most careful and earnest consideration, I have come to the conclusion that, in all fairness, there was no negating of such responsibility in this case. The defendants had expressly undertaken to pay the

principal together with interest at the end of two years from the date of the loan. Thereafter they further agreed that in case such payment was not made, the plaintiffs would be free to take possession of the Bara which had been mortgaged to them as a security for the loan. There is authority for holding that such an agreement does not destroy the personal covenant to pay. It was held in *Annaswami v. Narranaiyan*, 1 Mad HCR 114 that the provision in the bond by which the defendant had agreed to place the plaintiff in possession of the land, that is, upto the time he paid the debt with interest, was not a condition of a compulsory nature which could be held to bind the plaintiff to accept the land and forego his right to sue for the money on failure of payment within the stipulated time, and it was further held that the latter right remained absolutely in the plaintiff, and, therefore,, on the mortgagor's default, it was perfectly competent for him to sue for money. The document in that case was a registered one but is unregistered in the present case. That, however, cannot make any difference as to the decision on the point under consideration.

12. Again, it was held in *Mangal v. Indar Kuar*, AIR 1919 Oudh 270 that where the mortgagor had, after entering into a personal covenant to pay, also agreed to deliver possession of the mortgaged property in case of non-payment of the mortgage money within the period fixed by the mortgage, such mortgage did not cease to be a simple mortgage and the plaintiff would not be disentitled from claiming the money due on the mortgage.

13. Similarly in *Puna v. Laxman Prasad*, AIR 1923 Nag 161 (1) the facts were that according to the terms settled between the parties, the (mortgage-money including interest should be paid in two instalments which was clearly a personal covenant to pay and that the mortgagor failing to pay any one instalment, the mortgagee was entitled to take possession of the property and pay himself the principal and interest out of the usufruct. It was held that the mortgage did not become usufructuary on the score of such an agreement and that it continued to be a simple mortgage and that the mortgagor had a right to re-deem.

14. The same view was taken in *Sochet Singh v. Hadayat Ullah*,. AIR 1932 Lah 630. It was held in this case that a usufructuary mortgage contemplates delivery

of the mortgaged property at once, or, as I might put it, as part of the initial agreement by which the security is created and where the mortgagee becomes entitled to take possession of the mortgaged property only in default of payment, such a condition would not be enough to convert a mortgage like this into a usufructuary mortgage.

15. This view appears to have the approval of their Lordships of the Privy Council in *Lingam Krishna v. Manya Sultan*, 10 Ind Cas 272 (PC). In that case a mortgage-bond contained a covenant to the effect that if the whole or a portion of the interest remains unpaid by the due date the mortgagee shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgage, and the profits shall be credited towards the interest of the mortgage. If this was not sufficient for the interest, the mortgagor shall pay off the deficit interest on the liability of the mortgaged property over other properties and himself. The bond further provided that after the discharge of the entire principal and interest of this document, the mortgagor shall receive back the mortgaged properties and the title-deeds. It was held that the bond was a simple mortgage and the mortgagee was entitled to a decree for sale.

16. Again in *Mt. Maina Bibi v. Vakil Ahmad*, AIR 1925 PC 63, the Privy Council laid down that

'The main difference between a usufructuary mortgage and an ordinary mortgage is that in the former it is part of the initial agreement by which the security is created that the mortgagee shall at once go into possession of the mortgaged property and apply the proceeds he may derive from the use and occupation of it to discharge the mortgage debt; while in the case of an ordinary mortgage of the usual sort it is in general not the initial intention of the parties that the mortgagee should go into possession of the property pledged immediately or at all although he is empowered to do so if the interest on the mortgage money be not paid.'

It only remains for me on this aspect of the case to say that the two principal cases on which the learned Judge in the court of first appeal placed his reliance namely, AIR 1937 Oudh 517 and AIR 1916 PC 119 (*supra*) have no direct application to the present case, the reason being that the first case related to a mortgage by a

conditional sale and the second one to a usufructuary mortgage, and, therefore these cases in my considered judgment do not adversely affect the conclusion at which I have arrived.

17. In this state of the law, my conclusion is that the mortgage which was ought to be created here by the defendants in favour of the plaintiffs was a simple mortgage wherein there was an express promise to pay and possession was not intended to be delivered as an initial part of the agreement between the parties. And that being so, the further undertaking given by the defendants that in case of their failure to pay the mortgage money together with interest at the stipulated time the plaintiffs would be at liberty to enter into possession of the mortgaged property was not enough to convert this simple mortgage into a usufructuary one, or, to use the phrase of their Lordships of the Privy Council in Ramnarain's case, AIR 1916 PC 119 (supra) there was nothing in the nature and the terms of the security offered in the present case whereby the personal liability undertaken by the defendants could be said to have been negatived. I, therefore, hold that the plaintiffs were not debarred in law from filing a suit for a simple money claim based on the personal covenant to pay contained in Ex. 1 and consequently the present suit was perfectly maintainable and the courts below were wrong in throwing it out as non-maintainable in law.

18. As I have come to a firm conclusion on this aspect of the case, I do not consider it necessary to give any finding on the other contention raised by learned counsel for the plaintiffs on the strength of Section 65 of the Contract Act.

19. The position, therefore, to which we come is that the decision of the courts below on issue No. 3 cannot be sustained and it must be set aside.

20. This, however, is not enough to finally dispose of this appeal, and that is indeed much to be regretted; for the defendants had raised the further question that they had not received the consideration for the document Ex. 1, and, therefore, it had not been registered. The trial court did frame an issue on that point; but having come to the conclusion to which it did on the issues of law referred to above, it did not consider it necessary to decide that issue, nor has the Court of first appeal decided it. This Court has pointed out on numerous occasions

that, in appealable cases, the trial court and the court of first appeal must decide the case on all the issues, and that principle must, as a rule, be followed even though some of the issues arising, in the case may be of law and may go to the very root of it, the reason being that there is always a possibility of the decision of the Courts below on the preliminary issues being reversed when the matter comes up to this Court, and then the appeal before it cannot be finally disposed of and the case has to be remanded because some issue or issues relating to fact have not been tried and decided by the Courts below. This short circuiting of procedure, moreoften than not, leads to considerable delay which is entirely avoidable and subjects the parties to unnecessary expense and harassment and is strongly to be deprecated.

21. In the result, I allow this appeal, set aside the judgments and decrees of both Courts below and send the case back to the trial Court with the direction that it shall allow the parties to lead evidence on the issue relating to consideration and then give them an opportunity of addressing arguments to it and thereafter dispose of the case afresh in accordance with law. I would leave the plaintiffs to bear their costs in this Court as the defendants have not put in appearance here; but so far as the costs of the trial Court and the Court of first appeal go, they will abide the result.

22. Before parting with this case, I should like to remark that as this matter is a pretty old one and has to be remanded owing to defective procedure adopted by the trial Court, that Court will give this case a high priority and dispose of it with all practicable expedition.