

Autar Singh and Another Vs. Sir Mohammad Ejaz Rasool Khan and Others

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Court : Privy Council

Decided On : Dec-06-1949

Judge : LORD SIMONDS, LORD RADCLIFFE & SIR LIONEL LEACH

Appeal No. : Privy Council Appeal No. 43 of 1948 (From Oudh)

Appellant : Autar Singh and Another

Respondent : Sir Mohammad Ejaz Rasool Khan and Others

Advocate for Pet/Ap. : J.M. Pringle and J. Chinna Durai, for Appellants; W.W.K. Page and L.M. Jopling, for Respondents. Solicitors for Appellants, Hy. S.L. Polak and Co.; Solicitors for Respondents, Barrow Rogers and Nevill.

Judgement :

SIR LIONEL LEACH:

This is an appeal by special leave from a decree of the Chief Court of Oudh, dismissing an appeal from an order passed by the Civil Judge of Lucknow in execution proceedings. The questions which arise are whether the Court's equitable jurisdiction to grant relief against penalties and forfeitures extends to the granting of relief in proceedings taken for the execution of a final decree for foreclosure, the decree having been passed by consent, and, if so, whether this is a proper case for the exercise of the jurisdiction.

2. On 16th January 1934, the appellants mortgaged three houses in Lucknow to Raja Sir Mohammad Ejaz Rasul Khan to secure an advance of Rs. 32,000. Possession of the houses was given to the mortgagee, who had the right to collect the rents from the tenants and, after providing for repairs, to appropriate the balance of the money received by him as rent in satisfaction of interest on the amount advanced. The mortgagors undertook to redeem the properties after five years by the payment in one sum of the total amount due. It was stipulated that if the mortgagors did not redeem within the five years the mortgagee would have the right to obtain through the Court a decree for foreclosure. It was subsequently agreed that the mortgagors should collect the rents and, after deducting outgoings, should pay the balance to the mortgagee.

3. The mortgagors failed to redeem the mortgage at the end of the stipulated period of five years, and on 16th May 1939, the mortgagee instituted a suit in the Court of the Civil Judge, Lucknow, claiming a decree for the payment of the Rs. 32,000 and in default a decree for foreclosure. He also claimed to be entitled to a further sum of Rs. 7,000, which he averred was the balance of the rents collected by the mortgagors in accordance with the arrangement made subsequent to the mortgage.

4. On 18th October 1940, an agreement of compromise was entered into and a copy of the agreement was filed in Court. Clauses 1, 2 and 6 are important. They read as follows :

"1. That the plaintiff has given up all the profits due to him and has reduced his claim to a sum of Rs. 20,300 inclusive of costs.

2. That a decree for the said sum of Rs. 20,300 shall be passed in favour of the plaintiff against the defendants in accordance with the following conditions :

(a) That the said sum of Rs. 20,300 shall be paid by the defendants to the plaintiff in two equal instalments of Rs.10,150 each on 15th February 1941, and 15th February 1942.

(b) That if the said two instalments are not paid by 15th February 1942, and a single pice remains due to the plaintiff on that date this decree shall be deemed to be a final decree for foreclosure in lieu of the full sum claimed in the suit and costs.

The plaintiff shall be entitled to obtain possession of the houses mortgaged and if there is any difficulty in his so doing he shall be entitled to obtain possession through Court in execution of this decree.

6. That if at any time the defendants do not abide by the conditions of this compromise with regard to the payment of the money and make any application for further instalments then the reduction which the plaintiff has made in his claim shall be deemed to have been withdrawn and this decree shall be deemed to be a decree for foreclosure for the full amount claimed in the suit together with costs and profits occurring due since the date of the suit."

5. On the same date a decree, described as a preliminary decree for foreclosure, was passed in accordance with the agreement.

6. On 24th February 1942, the mortgagee applied for execution of the decree by delivery of possession. This was granted and possession was duly given. On 16th March 1942, the mortgagors filed objections to the execution under S. 47, Civil P.C.. They asked the Court in exercise of its equitable jurisdiction to set aside the order for delivery of possession and the warrant issued in pursuance thereof and to give sufficient time for payment of the amount. They said that the value of the three houses was twenty-five times greater than the decretal amount of Rs. 39,000 and therefore the decree was penal. According to the mortgagee the value was about Rs. 80,000. The Civil Judge estimated the value to be Rs. 1,50 000 on the footing that property in Lucknow had greatly increased in value since 1923.

7. On 4th June 1942, the Civil Judge dismissed the mortgagors' objections. He held that the decree passed in accordance with the agreement of compromise operated as a final decree for foreclosure and therefore the mortgagee could take out execution without first obtaining a final decree; that cl. 2 (b) was not penal, as a clause providing for foreclosure in case payment was not made by a specified date could not be treated as such; and that cl. 6 did not give the mortgagors a right to claim extension of time after the decree for foreclosure had become final. He had no doubt that it was a very hard case, but relief could not be granted to the objectors.

8. The mortgagors appealed to the Chief Court of Oudh, which dismissed the appeal on 20th September 1943. The reasons are summarised at the end of the judgment in these words :

"We are clearly of opinion that the right to redeem the property on payment of the amount of Rs. 39,500 was not granted either by cl. 2 (b) or cl. 6 of the compromise. What was contemplated by the parties was that the final decree for foreclosure was to follow automatically upon default of payment of the reduced amount of Rs. 20,300. The parties could well have omitted the words 'in lieu of the full sum claimed' without interfering in any manner with the dominant intention to make the decree operate as a final and irrevocable decree upon the happening of the default. We hold, therefore, that the aforesaid clause cannot be regarded as penal in any sense."

9. The mortgagee is now dead and his estate is represented by the respondents.

10. It is common ground that the mortgage is an anomalous one within the meaning of S. 58, T. P. Act, 1882. Mr. Pringle on behalf of the appellants conceded that the decree passed in accordance with the agreement of

compromise must be treated as a final decree in a suit for foreclosure and therefore there was no need for the mortgagee to take steps to obtain a fresh final decree before proceeding in execution. On the question whether an executing Court can, in the exercise of its equitable jurisdiction, grant relief notwithstanding the passing of a final decree for foreclosure Mr. Pringle relied on the judgments in *Kandarpa Nag v. Banwari Lal Nag*, 33 CLJ 244 : (AIR (8) 1921 Cal. 356), *Mt. Nand Rani v. Durga Dass*, 2 Pat. 906 : (AIR (11) 1924 Pat. 387), *Mohi-Uddin v. Kashmiro Bibi*, 55 ALL 334 : (AIR (20) 1933 ALL. 252 F. B.) and *Sheikh Mohidin v. Vadivalagianambiah Pillai*, AIR (1) 1914 Mad. 18 : (22 IC 37). These cases are not really in point. They have no reference to the jurisdiction of an executing Court to reopen a final decree in a foreclosure suit in order to grant equitable relief. It is in fact admitted that no case has been reported in which such relief has been granted.

11. Their Lordships will assume that in the case of a decree for the payment of money a Court executing the decree has jurisdiction to grant relief against what is in fact a penalty, even when the decree has been passed by consent but in order to decide whether it has jurisdiction in a case where there has been a final decree for foreclosure it must have regard to the provisions of the Transfer of Property Act and the Code of Civil Procedure and when these are examined it is manifest that the Court has not the jurisdiction to reopen a foreclosure decree in order to extend the time for redemption.

12. Section 60, T. P. Act, relates to the rights and liabilities of a mortgagor. The section states that at any time after the principal money has become due, the mortgagor has a right on payment or tender at a proper time and place, of the mortgage money to require the mortgagee to deliver to him the title deeds and where the mortgagee is in possession to deliver possession of the mortgaged property to him and to re-transfer the property to him or such third person as he may direct and where the mortgage has been effected by a registered instrument to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished. To this is added the proviso that the right conferred by the section has not been extinguished by acts of the parties or by decree of a Court.

13. Section 98, TP Act says :

"In the case of an anomalous mortgage, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage."

14. Order 34, R. 2 (2), Civil P.C., which relates to the preliminary decree in a foreclosure suit, says that the Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time for payment of the amount found or declare due under the preliminary decree. Order 34, R. 3, which deals with the final decree in a foreclosure suit says :

"(1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-r. (1) of R. 2, the Court shall, on application made by the defendant in this behalf, pass a final decree-

- (a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and if necessary,-
- (b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree, and, also, if necessary,-
- (c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-r. (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged."

15. The form of a final decree in a foreclosure suit is given in Appendix D, Civil P.C. It contains a declaration that the defendant and all persons claiming through or under him are absolutely debarred and foreclosed of and from all right of redemption of and in the property.

16. These statutory provisions when read together leave no room for the contention that the Court had power within its equitable jurisdiction to grant relief of the nature sought. The proviso to S. 60 and the provisions of S. 98, T. P. Act in themselves may not be conclusive, but the provisions of O. 34, Rr. 2 (2) and 3, Civil P.C. put the question beyond doubt. By O. 34, R. 2 (2) the Court's power to extend the time for redemption is limited to the period between the passing of the preliminary decree and its displacement by a final decree and R. 3 expressly provides that the final decree shall declare that the mortgagor and persons claiming through or under him are debarred from all right of redemption. It is difficult to imagine clearer statutory directions precluding the reopening of a final decree for foreclosure on equitable grounds.

17. Sufficient has been said for the decision of the appeal but as the merits have been stressed in argument their Lordships are constrained to observe that even if they had the power to grant the relief sought by the appellants they would not have been inclined to interfere with the decree of the Chief Court. Apart from the sum of Rs. 17,000 which they paid over out of the rents collected by them, the appellants have made no payment to the mortgagee. By the mortgage deed they contracted to pay the debt in five years that is five years from 16th January 1934. It is now nine years since the compromise decree was passed and there has been no evidence of good faith by tender or payment into Court.

18. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will bear the costs of the appeal.

Appeal dismissed.

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