1937

GOODALL v. GOODALL

this Court to relieve him from his liability under the decree because he has been compelled by another court to make payments in discharge of an earlier liability which he had failed to discharge. His failure to maintain his wife before the suit was clearly unlawful and because he has now been made to discharge that liability such should not relieve him of his liability under the decree for alimony. The applicant has filed a statement showing his total income and total deductions made therefrom during the period March, 1935, to April, 1937. It appears to me that even after payment of the monthly instalments due under the decree for maintenance the applicant had ample funds to discharge his liability under the order of this Court for alimony . . . In my judgment it has not been established that the husband cannot pay the alimony due under the order of this Court and that being so this application must fail.

For the reasons which I have given this application is dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah, Acting Chief Justice, and Mr. Justice Verma

1937
November, 17

RAM KUMAR AND ANOTHER (PLAINTIFFS) *v.* MAHIPAL SINGH AND OTHERS (DEFENDANTS)*

Transfer of Property Act (IV of 1882), *sections* 67, 68(*a*)—*Anomalous mortgage—Usufructuary mortgage with power to recover the money after* 25 *years—Suit for sale—Transfer of Property Act, section* 68(*c*)—*Depriving mortgagee of his security—Stoppage of payment of rent to usufructuary mortgagee by mortgagor in possession of mortgaged sir land—Practice and pleading—New case raised for the first time in second appeal.*

A usufructuary mortgage of zamindari property including sir land was executed in 1884. Possession was delivered to the mortgagee but the sir land was either left in the possession of

*Second Appeal No. 72 of 1936, from a decree of D. C. Hunter, Dist ict Judge of Cawnpore, dated the 10th of October, 1935, modifying a decree of Manzoor Ahmad Khan, Second Civil Judge of Cawnpore, dated the 26th of November, 1934.

the mortgagor, or was let to him by the mortgagee, at a rent of Rs.23 a year. This rent was paid up to 1928. In or about that year the mortgagee applied in the revenue court that the mortgagor, who had been entered as tenant of the sir land, should be entered as sub-tenant, but upon contest by the mortgagor the application was dismissed; the mortgagor, however, did not deny the mortgagee's right or his own liability to pay rent as a tenant. After 1928 there was no payment of rent, and in 1934 the mortgagee sued for recovery of the mortgage money, by sale of the mortgaged property, on the ground that he had been deprived of a part of his security. In second appeal the plaintiff raised a new case that as the mortgage deed contained a stipulation that after the expiry of 25 years it would be open to the mortgagee to recover the mortgage money, he was therefore entitled to a decree for sale:

Held that the mere non-payment of rent by the mortgagor tenant, without any denial of the right of the mortgagee to receive rent and the liability of the mortgagor to pay it,—the only dispute between them being as to the class of tenancy,—could not be considered to be a wrongful act depriving the mortgagee of a part of his security so as to entitle him to a decree under section 68(*c*) of the Transfer of Property Act. *Hira Lal* v. *Ghasitu* (1), distinguished.

Under the covenant in the mortgage deed giving the mortgagee a right to recover the mortgage money after the expiry of 25 years, the mortgagee was entitled to a decree for recovery of the money by sale of the mortgaged property, by virtue of section 68(*a*) read with section 67 of the Transfer of Property Act.

As regards the raising by the plaintiff of a new case at the stage of second appeal it was *held* that the plaintiff should be allowed to do so inasmuch as the covenant in the mortgage deed, on which that case was founded, was clear and no conceivable defence on any ground of fact or law could be put forward by the defendant, and multiplicity of proceedings would thereby be avoided.

Mr. *Panna Lal*, for the appellants.

Mr. *S. N. Katju*, for the respondents.

NIAMAT-ULLAH, A. C. J., and VERMA, J.:—This is a second appeal from the decree passed by the learned District Judge of Cawnpore on appeal from a decree of the Second Civil Judge of that district in a suit by the

(1) (1894) I.L.R. 16 All. 318.

1937

RAM KUMAR v. MAHIPAL SINGH

appellants for recovery of Rs.2,000 by sale of property specified at the foot of the plaint in enforcement of a mortgage deed dated the 8th of January, 1884, executed by Nanhe, who is now represented by his heirs, defendants 1 and 2. Defendants 3 and 4 have purchased half of the mortgaged property under a deed dated the 25th of May, 1933. The property mortgaged consisted of 3 pies and odd share in thok Kalloo Singh, village Gajner, district Cawnpore, with sir and khudkasht. The principal sum advanced was Rs.2,000. The stipulation as regards interest was that the mortgagee would be given possession of the mortgaged property and he would have the right to appropriate all the rents and profits in lieu of interest and that at the time of redemption the mortgagee would not have a right to claim any interest, nor would the mortgagor be entitled to claim any mesne profits. A period of 25 years was fixed for redemption. During that time the mortgagor was not entitled to redeem and the mortgagee was not entitled to call in his money. It appears that appertaining to the mortgaged share there was some sir land of the mortgagor which was either left in his possession at the time when the mortgage deed was executed or was subsequently let by the mortgagee at a rent of Rs.23 a year. The mortgage deed however does not make any reference to this transaction. It recites, on the other hand, that the share including the sir was mortgaged and would be handed over to the mortgagee. It is no longer in dispute that the mortgagor and his legal representatives have been in possession of the sir all along. The lower courts have found that the mortgagee was in receipt of Rs.23 a year from the mortgagor or his representatives up to 1335 Fasli, after which no payment of rent has been made.

The suit which has given rise to this appeal was brought by the Court of Wards representing the estate of the mortgagee on the 15th of March, 1934, on the allegation that the defendants deprived the mortgagee of part of the security and that the plaintiffs were entitled to

recover the sum of Rs.2,000, the amount originally advanced, and Rs.115 being the profits of the sir for 5 years before the suit, by sale of the mortgaged property. No appearance was entered on behalf of the defendants in the trial court. The suit was however dismissed by that court on the finding that the plaintiff had not been dispossessed from any part of the mortgaged property, nor was there any evidence to show that the mortgagor had failed to give possession of the mortgaged property. The first court considered that as the mortgage was usufructuary the mortgagee was not entitled to sue for the mortgage money unless it was established that section 68(*c*) of the Transfer of Property Act, under which the suit was apparently brought, was applicable. The plaintiffs appealed to the District Judge. Defendants 1 and 2 did not put in appearance even at that stage, but defendants 3 and 4 contested the appeal. The learned District Judge held that as the mortgagor failed to pay rent after 1335 Fasli and because of certain other circumstances noted in his judgment the mortgagor should be considered to have withheld possession of the sir land, at any rate since 1335 Fasli. Accordingly the learned District Judge held that section 68(*c*) of the Transfer of Property Act was applicable and that the plaintiffs were entitled to sue for their mortgage money. The learned Judge went on to hold that the mortgagee was entitled only to a personal decree under section 68(*c*) of the Transfer of Property Act and that no decree for sale of the mortgaged property could be passed. He also held that as defendants 3 and 4 were not responsible for the dispossession of the mortgagee from the sir land the plaintiffs were not entitled to any decree against them. In the result the learned Judge passed a personal decree for Rs.2,115, claimed by the plaintiffs, only against defendants 1 and 2. The present second appeal has been preferred by the plaintiffs.

The learned advocate for the appellants has addressed a twofold argument in appeal. He maintains that in the

1937

RAM KUMAR v. MAHIPAL SINGH

circumstances of the case section 68(*c*) of the Transfer of Property Act is applicable and that the plaintiffs are entitled to a decree for sale, having regard to the provisions of section 67 of the same Act which should be read with section 68(*c*). For this contention he relies upon *Lal Narsingh Partab* v. *Yaqub Khan* (1). Secondly, it is contended that there is an express covenant in the mortgage deed which entitles the mortgagee to recover the mortgage money after the expiry of 25 years. It is said that consequently section 68(*a*) is also applicable.

In our opinion there is no evidence on which it can be held that the mortgagee was deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor as provided by section 68(*c*). The plaintiffs rely on the fact that in the year 1335 Fasli or thereabout an application was made by them to the revenue court for the entry of the names of defendants 1 and 2 as sub-tenants of the sir land which was in their possession. It is not disputed that defendants 1 and 2 were entered in the Khatauni as tenants. The plaintiffs' case was that the land should be considered to be the mortgagee's sir and that the actual cultivators, namely, defendants 1 and 2, should be considered and recorded as sub-tenants. The result of the recognition of this position of the parties would have been that defendants 1 and 2 would be liable to ejectment as tenants at will at the instance of the mortgagee who in relation to defendants 1 and 2 should in that view be considered to be the landholder entitled to eject the cultivator of their sir land. Defendants 1 and 2 contested this application. No copy of their objection has been produced in this case, but we have the order of the Collector who decided the case in appeal. He held that the land could not be regarded as the sir of the mortgagee and that defendants 1 and 2 should not be considered to be sub-tenants. There is nothing to show that defendants 1 and 2 denied the plaintiffs' right as mortgagees

(1) (1929) I.L.R. 4 Luck. 363.

or their own liability to pay rent as tenants. The mere fact that they did not pay any rent after 1335 Fasli does not necessarily show that their possession was in any way adverse to the plaintiffs. Mere non-payment of rent by the mortgagor tenant cannot be considered to be a wrongful act of the mortgagor depriving the mortgagee of possession of the land which is held by the mortgagor as tenant of the mortgagee. The case of *Hira Lal* v. *Ghasitu* (1) was relied on before the learned District Judge and is relied on also before us. In that case the whole of the mortgaged property was let by the mortgagee to the mortgagor a day after the date of the execution of the mortgage deed. The lease was for a term of $5\frac{1}{2}$ years. The mortgagor paid rent in terms of the lease during that period but after the expiry thereof refused to pay rent and refused to execute a fresh quabuliat in favour of the mortgagee. He also denied the mortgagee's right to receive rent in respect of the mortgaged property. In those circumstances it was held that the mortgagee was deprived of his security by the wrongful act and default of the mortgagor. In circumstances like those there could be no doubt that the mortgagee had been completely kept out of possession of the mortgaged property to which he was entitled under the mortgage deed. The only manner in which the mortgagor could dispossess the mortgagee was to withhold payment of rent, the property being already in his possession. The mortgagor denied the right of the mortgagee to take actual possession of the mortgaged property though the term for which the lease had been executed had expired. In the case before us the position is quite different. The mortgagor has not been proved to have ever questioned the right of the mortgagee to receive rent. The mortgagee himself never desired to take actual possession of the land, nor did he call upon defendants 1 and 2 to execute a quabuliat. The only dispute between them seems to have been whether the plaintiffs were entitled

(1) (1894) LL.R. 16 All. 318.

1937

RAM KUMAR v. MAHIPAL SINGH

to treat them as sub-tenants, as the plaintiffs maintained they were, or whether they were statutory tenants as they seem to have alleged. The dispute between them being merely as regards the nature of the tenancy, which itself was never repudiated, it cannot be said that the plaintiffs were deprived of part of their security. Accordingly we hold that section 68(*c*) is not applicable and that the plaintiffs are not entitled to a decree under that section.

The alternative ground on which the plaintiffs claim the mortgage money by sale of the mortgaged property is unanswerable. We have referred to the terms of the mortgage deed and find that there is an express provision that after the expiry of 25 years it would be open to the mortgagee to recover the mortgage money. The term of 25 years expired in 1909. Though the suit which has given rise to this appeal was brought more than 12 years after 1909 it cannot be said to be barred by limitation in view of the provisions of section 20(2) of the Indian Limitation Act which lays down that "where mortgaged land is in the possession of the mortgagee the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1)", that is to say, the receipt of rent and profit should be considered as payment of interest as such. Assuming this rule is applicable only when it appears that the rent or produce of the entire mortgaged property is received by the mortgagee, there is no doubt that it applies to the admitted facts of this case. Rent of the sir land was paid up to 1335 Fasli. The rest of the mortgaged property was also in possession of the mortgagee. The suit was brought well within 12 years after 1335 Fasli. In this view no question of limitation can arise.

It is strenuously contended by the learned advocate for defendants 3 and 4 that this is a new case which the plaintiffs should not be allowed to raise at this stage. That this ground of claim is new and was not put forward in any of the two courts below is true, but as the covenant in the mortgage deed is clear and no conceivable defence

can be put forward by the defendants we think that it should be allowed to be raised even at this stage. If we had considered that the defendants can possibly meet it on any ground of fact or law we would not have allowed the plaintiffs to rely upon it in second appeal. But we feel that multiplicity of proceedings should be avoided and that if we dismiss the present suit there is nothing to prevent the plaintiffs from successfully suing the defendants on the covenant already referred to. In these circumstances we think that the right course is to allow the plaintiffs to put forward this new ground. As already stated, the claim based on the covenant is unanswerable. The plaintiffs are entitled to a decree for sale under section 68(*a*) read with section 67 of the Transfer of Property Act. The two sections taken together justify a decree for recovery of money by sale of the mortgaged property as was held by their Lordships of the Privy Council in *Lal Narsingh Partab* v. *Yaqub Khan* (1). Defendants 3 and 4 are the transferees of half the mortgaged property from defendants 1 and 2. The property in their hands is as much liable as that left with their transferors.

The result is that this appeal is allowed, the decree of the lower appellate court is discharged and in place of it a decree for sale of the entire mortgaged property under order XXXIV, rule 4 of the Code of Civil Procedure for recovery of Rs.2,000 is passed. We dismiss the plaintiffs' suit so far as it relates to the sum of Rs.115 which in substance is a claim for arrears of rent and not for any part of the mortgage money. As the plaintiffs have succeeded on a ground which was taken for the first time in second appeal we direct that the parties should bear their own costs throughout.

(1) (1929) I.L.R. 4 Luck. 363.