

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice
H. G. Smith

MUSAMMAT BOOTA (PLAINTIFF-APPELLANT) v. GUR
PRASAD AND ANOTHER (DEFENDANTS-RESPONDENTS)*

1936
July 28

Transfer of Property Act (IV of 1882), section 67—Civil Procedure Code (Act V of 1908), Order XXXIV, rules 4 and 6—Suit under section 67—Mortgagee entering into compromise with subsequent transferee from mortgagor and releasing mortgaged property from all liability—Personal decree against original mortgagor for balance, if can be passed.

No personal decree under Order XXXIV, rule 6, C. P. C., can be passed in a suit under section 67, Transfer of Property Act, until the mortgaged property has been put to sale and has failed to realise the entire amount due on the mortgage-deed. If a mortgagee, in a suit brought by him under section 67, Transfer of Property Act, against the original mortgagor and a subsequent transferee from the latter, enters into a compromise with the subsequent transferee, and in lieu of certain amount of money releases the mortgaged property from all liability under the deed of mortgage, then there is no provision of law which would enable the mortgagee in his suit under section 67, Transfer of Property Act, to recover the balance of the money due to him under the mortgage-deed from the original mortgagor. *Bisheshwar Nath v. Chandulal* (1), and *Arunachalam Chetty v. Ayyavayyan* (2), referred to, *Shyam Behari v. Mohan Dei* (3), relied on.

Messrs. *Radha Krishna Srivastava* and *Chandra Prakash Lal*, for the appellant.

Messrs. *Ghulam Hasan* and *Kamta Prasad Gupta*, for the respondent.

NANAVUTTY and SMITH, JJ.:—This is a plaintiff's appeal against a judgment and decree of the learned Subordinate Judge of Kheri, Mr. Mahabir Prasad, dismissing the plaintiff's suit. This is the second time

*First Civil Appeal No. 64 of 1934, against the decree of Babu Mahabir Prasad Varma, Subordinate Judge of Kheri, dated the 3rd of April, 1934.

(1) (1927) I.L.R., 50 All., 321.

(2) (1898) I.L.R., 21 Mad., 476(F.B).

(3) (1930) I.L.R., 6 Luck., 202.

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Naravutty
and Smith,
J.J.*

that the plaintiff Musammat Boota has come up to this Court in appeal, and the facts leading up to the filing of the present appeal (No. 64 of 1934) are as under :

Musammat Boota as the widow of Jodha Sah filed on the 18th of September, 1930, a suit on the basis of a mortgage-deed executed by Ram Dayal, father of defendants 1 and 2, on the 20th of September, 1922, in favour of her husband Jodha Sah for a sum of Rs.4,000. The mortgage property consisted of half of a *pucca* house, with shops, situate in the town of Lakhimpur. Defendant 3, Seth Mohan Lal, was impleaded as a subsequent transferee, and defendant 4, Kunj Behari Lal, was also impleaded as a subsequent transferee.

The claim of Musammat Boota for a decree for sale was founded upon section 67 of the Transfer of Property Act, and her plaint for a decree for sale was drafted strictly according to the model form No. 45 of Appendix A to the Code of Civil Procedure, with an additional prayer that if the sale proceeds of the mortgaged property be found insufficient to pay off the full amount due to the plaintiff then "the plaintiff be authorised to get a money decree drawn up against the defendants 1 and 2 through an application", as contemplated by Order XXXIV, rule 6 of the Code of Civil Procedure.

A preliminary issue was framed by the then learned Subordinate Judge of Kheri as to whether the mortgage debt remained outstanding on the death of the mortgagee Jodha Sah. He decided this issue against the plaintiff and accordingly dismissed her suit.

The plaintiff appealed to this Court, and while her appeal was pending in the Chief Court, she entered into a compromise with defendant No. 3, Seth Mohan Lal, by which Seth Mohan Lal agreed to pay Rs.6,100 to the plaintiff within three months from the date of the compromise. It was stipulated in the compromise that if the sum of Rs.6,100 was paid to the plaintiff within three months, then she would have no claim against the

mortgaged property which was the subject-matter of the suit and in the possession of defendant No. 3, and the latter was to be discharged from the suit without having to pay any costs to the plaintiff.

In case defendant No. 3, Seth Mohan Lal, failed to pay the sum of Rs.6,100 within three months to the plaintiff, then the mortgaged property as well as defendant-respondent No. 3, Seth Mohan Lal, personally would be liable to pay the sum of Rs.6,100 with interest thereon at 12 per cent. per annum from the date of the suit till the date of realisation.

The plaintiff's suit for sale filed in accordance with the provisions of section 67 of the Transfer of Property Act was decreed against defendant No. 3, Seth Mohan Lal, by this Court under Order XXXIV, rule 4, of the Code of Civil Procedure in accordance with the terms of the compromise entered into by her with Seth Mohan Lal, defendant No. 3.

As against defendants Nos. 1 and 2, Gur Prasad and Sri Ram, the sons of Ram Dayal deceased, the original mortgagor, the plaintiff's appeal was decreed, and her suit was remanded under Order XLI, rule 23, of the Code of Civil Procedure, for trial according to law after the framing of necessary issues.

When the case went back to the Court of the Subordinate Judge of Kheri, the defendant No. 1 filed a fresh written statement contending, "*inter alia*", that the compromise entered into by the plaintiff with defendant No. 3 was collusive and not binding upon him and defendant No. 2, as they were not parties to it, and urging that the mortgaged property was primarily liable for the payment of the money due on the mortgage-deed (exhibit 1), and that the plaintiff could not recover any money from him personally and that she must first put up the mortgaged property for sale before she could get any decree for money under Order XXXIV, rule 6, of the Code of Civil Procedure, passed in her favour against him.

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

Nanavutty
and Smith,
JJ.

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Nonavutty
and Smith,
JJ.*

Upon the pleas raised on behalf of the defendants 1 and 2, the learned Subordinate Judge framed the following issues:

(1) Can the plaintiff not proceed against the defendants personally without putting the property to sale?

(2) Can the plaintiff proceed against the defendants personally, i.e. against their separate property also for the recovery of the costs?

(3) To what relief is the plaintiff entitled?

(4) Is the plaintiff not entitled to sue for reasons alleged in paragraph 13 of the written statement?

The learned Subordinate Judge decided issue (1) in favour of the defendants 1 and 2 and against the plaintiff. He decided issues 2 and 4 in favour of the plaintiff, and issue (3) against her and he accordingly dismissed the plaintiff's suit with costs. The plaintiff has therefore filed this appeal. We have heard the learned Counsel for the plaintiff at considerable length.

His main contention is that every simple mortgage by its very nature must of necessity contain a personal covenant to pay back the money borrowed under the mortgage-deed, and that there is nothing in law to prevent a mortgagee from suing only on the personal covenant and giving up his or her remedy to recover the money borrowed by sale of the mortgaged property. In support of his contention the learned Counsel for the plaintiff invited our attention to section 68 of the Transfer of Property Act, which lays down in clause (a) that a mortgagee has a right to sue for the mortgage money where the mortgagor binds himself to repay the same.

It was further argued that under sub-section (2) to section 68 of the Transfer of Property Act, where a suit is brought under clause (a) of sub-section (1) the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available

remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security, and if necessary, retransfers the mortgaged property. With reference to this sub-section (2) of section 68 of the Transfer of Property Act, it was pointed out by the learned Counsel for the plaintiff that the latter after entering into the compromise with defendant No. 3, Seth Mohan Lal, abandoned her security which was the mortgaged house and elected to sue on the personal covenant contained in her mortgage-deed (exhibit 1).

He has strongly relied upon a Bench ruling of the Allahabad High Court reported in *Bisheshwar Nath v. Chandulal* (1), in which it was held that where property, the subject of a suit for sale on a mortgage, had ceased to be available for sale owing to no fault of the mortgagee, the latter was entitled to a personal decree, the whole right to which he had had all along, but which right had been merely suspended owing to the fact that his remedy against the mortgaged property had not yet been shown to have been exhausted or to have been otherwise unavailable, and that such a personal decree did not come within the purview of Order XXXIV, rule 6 of the Code of Civil Procedure. We have listened with interest to the ingenious arguments elaborated by the learned Counsel for the plaintiff at great length. We regret, however, we are unable to accept his contentions.

The remedies legally available to a mortgagee are:

- (1) A suit based on the personal covenant.
- (2) A suit for a decree for sale, and
- (3) A suit for a decree for foreclosure.

There is a remedy on the covenant only if the mortgage imports a personal liability, express or implied. Such a suit is brought under section 68(a) of the Transfer of Property Act. A suit under section 68 of the Transfer of Property Act is not a suit on the mortgage, and the only decree that can be passed is a decree for money. See *Arunachalam Chetty v.*

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Nanavatty
and Smith,
JJ.*

(1) (1927) I.L.R., 50 All., 321.

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Nanavutty
and Smith,
JJ.*

Ayyavayyan (1). A suit on the mortgage is a suit for a decree for sale or foreclosure brought under section 67 of the Transfer of Property Act.

As early as 1930 the plaintiff elected to sue on her mortgage under section 67 of the Transfer of Property Act, and filed her plaint in strict accordance with the model plaint set forth in Form 45, Appendix A of the Code of Civil Procedure, and in this suit she not only impleaded the sons of her original mortgagor, but also the subsequent transferees defendants Nos. 3 and 4. If she had been suing only on the personal covenant she need not have impleaded defendant No. 3, Seth Mohan Lal, for the personal liability of defendants 1 and 2 could not be enforced against defendant No. 3, Seth Mohan Lal, the purchaser from the mortgagor Ram Dayal. The personal covenant does not run with the land, and no personal decree can be passed against a purchaser of the equity of redemption.

The present section 68 of the Transfer of Property Act was substituted for the old section by the Amending Act No. XX of 1929. It was realised by the legislature that a mortgagee under this section while executing his decree against the mortgagor personally could carefully preserve his rights under the mortgage. This would, no doubt, in many cases work great hardship on the mortgagor, who would find himself pressed to pay back the amount borrowed with interest while all the time his property would remain liable under the mortgage. To obviate this hardship, sub-section (2) of section 68 of the Transfer of Property Act was enacted so that in cases where the mortgagor was not in default, i.e., in the cases of clauses (a) and (b) of section 68, the suit under that section would have to be stayed until the mortgagee had exhausted his remedy against the security or what remained of it. The mortgagee, however, could avoid the stay order, and could proceed with his suit for a personal decree under section 68 of the Transfer of

(1) (1898) I.L.R., 21 Mad., 476(F.B).

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD*Na. Venkty
and Smith,
JJ.*

Property Act, if he surrendered his security, for a mortgagee, who abandoned his security was competent to bring a simple suit for the money advanced by him. It is obvious that when the security was released from liability under the mortgage-deed, the enforcement of a money decree could be no hardship on the mortgagor. The mortgage, as a mortgage, would then no longer be subsisting, and Order XXXIV, rule 14 of the Code of Civil Procedure would then be no bar to the sale of the mortgaged property in execution of the decree for money based on a personal covenant.

These considerations have absolutely no applicability to the facts and circumstances of the present case.

Musammat Boota chose to bring her suit on the mortgage against the mortgaged property under section 67 of the Transfer of Property Act. A suit for sale of the security is a statutory remedy and avoids the hardship of the forfeiture of a security which may perhaps exceed in value the mortgage debt. To this suit Musammat Boota not only impleaded the sons of the mortgagor, Ram Dayal, but also two persons who were subsequent transferees. After she had entered into a compromise with the subsequent transferee, defendant 3, Seth Mohan Lal, and had realised Rs.6,100 from him, she discharged him and gave up her remedy against the mortgaged property, and by an application dated the 8th of January, 1934, she prayed for a simple money decree against defendants 1 and 2, and released the mortgaged property and gave up her right to a decree for sale of that mortgaged property. By so doing, Musammat Boota split up her claim under the mortgage-deed into two heads; she made the mortgaged property which was security for her loan liable to the extent of Rs.6,100, and for the balance of the amount due on her mortgage, she wanted to make the sons of the mortgagor, Ram Dayal, personally liable. There is no provision of law by which she could do so; and her learned Counsel, who argued the appeal on her behalf

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Narainy
and Smith,
JJ.*

at considerable length and with great forensic skill, was not able to point to any law which would justify the plaintiff in the course of action that she has chosen to pursue in the present case. Neither section 68(a) of the Transfer of Property Act nor sub-section (2) of that section nor section 67 of the said Act, as we have shown above, would justify the plaintiff in splitting up her claim in this way. Before entering into the compromise, it was open to her to give up the mortgaged property and to ask for a personal decree against defendant 1 and defendant 2 under section 68(a) of the Transfer of Property Act and to give up relief (b) entered in her plaint, but she could not, after realising Rs.6,100 from defendant 3 Seth Mohan Lal, who was the transferee of the mortgaged property, turn round and claim the rest of the amount due on her mortgage personally from the sons of the mortgagor, Ram Dayal.

The mortgaged property was clearly liable primarily for payment of the amount due under the mortgage-deed (exhibit 1); plaintiff as well as defendant No. 3, Seth Mohan Lal, knew that, and deliberately defendant 3, Seth Mohan Lal, in order to free the mortgaged property from the burden of this mortgage debt, paid Rs.6,100 to the plaintiff, and the latter equally deliberately accepted that amount and released the mortgaged property from the burden of the encumbrance due under the mortgage without any reference at all to the sons of the deceased mortgagor, Ram Dayal, whose property it originally was. The conduct of Seth Mohan Lal (defendant 3) who is said to be a well-to-do and shrewd business-man, shows that in his eyes at least the property was worth considerably more than the amount for which it was mortgaged, for it is proved on the record that he paid without demur Rs.12,100 for this half share of a three-storeyed *pucca* house, with shops, and yet considered the transaction a profitable one from his point of view. If the plaintiff chooses deliberately to give up such a valuable piece of property which

had been expressly hypothecated in her husband's mortgage-deed for the satisfaction of the sum borrowed under that mortgage-deed, she cannot in equity and in law turn round and ask a Court of law to help her to recover a portion of the amount due on the mortgage-deed from the sons of the mortgagor on the personal covenant contained in the deed of mortgage.

Great stress, as we have said, has been laid by the learned Counsel for the plaintiff on the ruling of the Allahabad High Court reported in *Bisheshwar Nath v. Chandu Lal* (1). The facts, however, of that case were entirely different from those of the present case, which we have set forth above at some length; in more than one part of their judgment in the ruling cited above, the learned Judges of the Allahabad High Court emphasise the fact that the remedy against the mortgaged property under a sale decree was in that case shown to be no remedy at all, and that owing to a chain of events over which the mortgagee had no control whatsoever, and through no fault of his, the mortgaged property was not available for sale by him. In such a case the learned Judges of the Allahabad High Court held that the mortgagee was entitled to a personal decree, though such a decree was not one under Order XXXIV, rule 6, of the Code of Civil Procedure. In the suit before us the plaintiff, Musammat Boota, by her own deliberate act in entering into a compromise with defendant 3, Seth Mohan Lal, and getting a compromise decree against him, made the whole of the property mortgaged under the deed (exhibit 1), executed in favour of her husband Jodha Sah, cease to be available to her for sale under a decree for sale which she could have secured under Order XXXIV, rule 4, of the Code of Civil Procedure, not only against defendant 3, Seth Mohan Lal, but also against defendant 1 and defendant 2, the sons of the original mortgagor, Ram Dayal, and against defendant No. 4, another subsequent transferee.

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Narainuttj
and Smith,
JJ.*

(1) (1927) I.L.R., 50 All., 321.

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Nanavatty
and Smith,*
JJ.

Having chosen to forgo this legal right conferred on her by statute for the sake of securing a compromise decree against defendant 3, Seth Mohan Lal, behind the backs of defendants 1 and 2, it is not open to the plaintiff now to turn round and claim a personal decree against defendants 1 and 2, and the ruling of the Allahabad High Court reported in *Bisheshwar Nath v. Chandulal* (1) can be of no help to her in the circumstances of her case.

Moreover, as pointed out by the learned Subordinate Judge in his very lucid judgment, the period of limitation for the two kinds of suits under sections 67 and 68 of the Transfer of Property Act is different. The plaintiff by her application dated the 8th of January, 1934, sought in effect to convert her suit against the mortgaged property under section 67 of the Transfer of Property Act into one under section 68(a) of the said Act for a personal decree against defendants 1 and 2, the sons of the original mortgagor, but on the 8th of January, 1934, when she applied for a personal decree against defendants 1 and 2, her claim for a simple money decree against them was clearly time-barred. Placed in this dilemma, the learned Counsel for the plaintiff-appellant contended before us that the plaintiff's application dated the 8th of January, 1934, was not for an amendment of the plaint so as to convert the suit from one under section 67 to one under section 68 of the Transfer of Property Act. If, however, no such amendment is desired, then the suit remains a suit against the mortgaged property under section 67 of the Transfer of Property Act, and no personal decree can be passed in such a suit until the mortgaged property has been put to sale and has failed to realise the entire amount due on the mortgage-deed. This is the view of the Full Bench of this Court reported in *Shyam Behari v. Musammat Mohan Dei* (2). It was there laid down that "as a pure question of interpretation there

(1) (1927) LL.R., 50 All., 321.

(2) (1930) I.L.R., 6 Luck., 202.

can be no doubt that an application for a personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure is not maintainable unless a sale in pursuance of the preceding rule (Order XXXIV, rule 6, C. P. C.) has, as a matter of fact, taken place."

Confronted with this difficulty, the learned Counsel for the plaintiff contended that his client did not ask the Court to give her a personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure. But if the plaintiff does not seek for a personal decree under Order XXXIV, rule 6 of the Code of Civil Procedure and if she does not want her suit for a decree for sale of the mortgaged property under section 67 of the Transfer of Property Act to be amended by her application of the 8th of January, 1934, and if she chooses to release the mortgaged property from all liability under the deed of mortgage (exhibit 1), then we know of no provision of law which would enable the plaintiff in her present suit under section 67 of the Transfer of Property Act to recover the balance of the money due to her under her husband's mortgage-deed from the sons of the mortgagor, Ram Dayal. There is no question here of the pious obligation of sons under the Hindu Law to pay off their father's debt.

Looking at the matter from every point of view, we find that the plaintiff, by her own act and by the line of conduct that she took in entering into the compromise with defendant 3, Seth Mohan Lal, virtually terminated all her rights under the mortgage-deed (exhibit 1), and this Court cannot help her out of the difficulty in which she has placed herself by her own acts.

For the reasons given above, we uphold the finding of the learned Subordinate Judge on issue No. 1.

The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1936

MUSAMMAT
BOOTA
v.
GUR
PRASAD

*Nanavutty
and Smith,
Jj.*