

PANCHANAN SHARMA

v.

BASUDEO PRASAD JAGANANI AND ORS.

MARCH 22, 1995

[K. RAMASWAMY AND S. SAGHIR AHMAD, JJ.]

*Transfer of Property Act, 1882:*

*Sections 58(d), 76 and 79—Usufructuary mortgage—Mortgagee to pay land revenue—Default in payment by mortgagee—Property sold in auction for recovering the arrears—Suit filed by mortgagor for redemption—Held: Mortgagor does not lose his right of redemption by lapse of time.*

The father of the appellant - Plaintiff hypothecated certain property by usufructuary mortgage on 10.7.1911 for a sum of Rs. 261. One of the terms was that the mortgagee should pay the land revenue. There was default in payment and for recovery thereof the property was brought to sale. One of the respondents 'R' purchased the property.

Appellant filed a suit for redemption of the mortgage property. The trial Court decreed the suit. But the appellate Court dismissed the suit on the finding that the appellant had lost his title since the property was sold to 'R' at the auction sale, and therefore the appellant was not entitled to redeem the property. The second appeal was dismissed. Hence this appeal.

Allowing the appeal, this Court

**HELD: 1.** By operation of s.76(c) of the Transfer of Property Act, the mortgagee is enjoined to pay land revenue to the Government and for the default committed by the mortgagee, when the property was sold, the mortgagor had not lost his right of redemption by the conduct and actions of the mortgagee. If the deed gives time for redemption or adjustment of the rent or profits and liabilities in terms of the contract read with the relevant provisions of the Act stood discharged, the limitation for redemption would run from the date fixed in the mortgage deed. Otherwise, there is no limitation for redemption of usufructuary mortgage. The usufructuary mortgagor does not lose his title to the property or right to redemption by lapse of time. [945-D-E]

2. By operation of the last para of s.76, the mortgagor is entitled to the accounting of the loss occasioned to it. At best the auction-purchaser, on redemption, would look to the mortgagee who had committed default in terms of the mortgage and the court would give suitable direction in that behalf. The possession of the purchaser must be on behalf of the mortgagee and becomes liable to accounting etc. Instead, the court held that the mortgagor lost his title due to misfeasance committed by the mortgagee and the property was sold on account thereof to the third parties. The High Court has committed grave error of law in dismissing the appeal in limine. The first appellate court also committed same error of law in reversing the decree of the trial court without appreciating the correct legal position. [945-F-G]

3.1 It is stated that the appellant had already deposited the sum of Rs. 261. Therefore, the trial court is directed to verify whether the said amount has been deposited or not. If the amount is deposited, there shall be a decree redeeming the mortgage. In case, the amount was not deposited or proved to have been deposited, three months' time shall be given for deposit and on its deposit the mortgagee shall deposit within one month thereafter the mortgage deed and title deeds with the court. Then the court shall pass final decree. [946-A-B]

3.2 There shall be a money decree against the first defendant-mortgagee to the extent of sale price paid by the auction purchaser. [946-C]

3.3 The auction-purchaser is entitled to recover the amount of the money paid in the auction sale from the first respondent. [946-C]

3.4 The sale certificate does not bind the appellant and, therefore, the mortgage does not stand extinguished by reason of the sale. It is inoperative as against the appellant. [946-D]

3.5 There shall be a direction for delivery of the possession of the property by the first defendant or 11th defendant or any person in possession, to the appellant within a period of three months from the date of the receipt of the judgment or passing the final decree. [946-E]

3.6 The mortgagee shall account for profits or benefits received by him in terms of usufructuary mortgage. [946-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1046 of 1979.

From the Judgment and Order 17.7.78 of the Patna High Court in Second Appeal No. 562 of 1977.

S.N. Misra, Manish Misra and D.P. Mukherjee with him for the Appellant.

D. Goburdhan for the Respondent.

The following Order of the Court was delivered :

This appeal by special leave arises from the judgment of the Patna High Court in Second Appeal No. 762/77 dated 17.7.78, which was dismissed in limine. The father of the appellant-plaintiff hypothecated the plaint schedule property of 5 bighas 3 kathas 16 dhoors by usufructuary mortgage on 10.7.1911 for a sum of Rs. 261. One of the terms of the mortgage, as found by the courts below, was that the first respondent-mortgagee should pay the land revenue. It would appear that the mortgagee committed default in its payment for recovery of which the property was brought to sale. Under Ex.C-II dated 3.8.46, the property was purchased by Ramtahal Singh, 11th defendant/19th respondent herein. Though the trial court decreed the suit, the appellate court in Title appeal No. 8/71 by judgment and decree dated 28.7.77 dismissed the suit on the finding that the appellant had lost his title since the property was sold and Ramtahal Singh became the owner of the property at the auction sale. Consequently, the appellant is not entitled to redeem the property.

The only question that arises for consideration is whether by reason of purchase made by Ramtahal Singh, the auction-purchase, the appellant has lost right of redemption of the hypotheca? Under s.58(d) of the Transfer of Property Act, (for short, 'the Act') where the mortgagor delivers possession to the usufructuary mortgagee, the latter is authorised to retain possession of such property until the payment of mortgage money made and to receive the rent and profits accruing from the property or in part of such rents and profits and to appropriate the same in lieu of interest or partly in lieu of payment of the mortgaged money subject to the terms and conditions mentioned in the mortgage deed. Section 76 of the Act enjoins the usufructuary mortgagee, during the continuance of the

mortgage to remain in possession of the mortgaged property subject to his managing the same as a person of ordinary prudence would, as if it were of his own, subject to the conditions envisaged therein. If the loss was occasioned for his failure to perform any of the duties imposed on him by s.79, he is enjoined while redeeming the property or otherwise to account for the same or the court is empowered under the Act to make a decree for account and/or in pursuance of decree the loss occasioned by his failure would be debited to his account.

It would be seen that in terms of the mortgage, possession was delivered to the first respondent under the usufructuary mortgage for its enjoyment till its redemption subject to other terms. When he was enjoined to enjoy the usufruct due to misfeasance committed by the first defendant due to his default committed to pay land revenue, the property was brought to sale. Though it is not necessary for the purpose of this case to go into the question whether Ramtahal Singh is a benamidar for the first defendant, suffice to state that by operation of s.76(c), he is enjoined to pay land revenue to the Government and for the default committed by the mortgagee, when the property was sold, the mortgagor had not lost his right of redemption by the conduct and actions of the mortgagee. If the deed gives time for redemption or adjustment of the rent or profits and liabilities in terms of the contract read with the relevant provisions of the Act stood discharged, the limitation for redemption would run from the date fixed in the mortgage deed. Otherwise, there is no limitation for redemption of usufructuary mortgage. The usufructuary mortgagor does not lose his title to the property or right to redemption by lapse of time. By operation of the last para of s.76, the mortgagor is entitled to the accounting of the loss occasioned to it. At best the auction-purchaser, on redemption, would look to the mortgagee who had committed default in terms of the mortgage and the court would give suitable direction in that behalf. The possession of the purchaser must be on behalf of the mortgagee and becomes liable to accounting etc. Instead, the court held that the mortgagor lost his title due to misfeasance committed by the mortgagee and the property was sold on account thereof to the third parties. Accordingly, we are of the considered view that the High Court has committed grave error of law in dismissing the appeal in limine. The appellate court also committed same error of law in reversing the decree of the trial court without appreciating the correct legal position. Accordingly, the appeal is allowed. The decree shall be as under:

1. It is stated across the Bar that the appellant had already deposited the sum of Rs. 261. Therefore, the trial court is directed to verify whether the said amount has been deposited or not. If the amount is deposited, there shall be a decree redeeming the mortgage. In case, the amount was not deposited or proved to have been deposited, three months' time shall be given for deposit and on its deposit, the mortgagee shall deposit within one month thereafter the mortgage deed and title deeds with the court. Then the court shall pass final decree.

2. There shall be a money decree against the first defendant-mortgagee to the extent of sale price paid by the Ramtahal Singh, the auction purchaser-defendant No. 11.

3. The defendant No. 11 is entitled to recover the amount of the money paid in the auction sale from the first respondent.

4. The sale certificate, Ex.C-II does not bind the appellant and, therefore, the mortgage does not stand extinguished by reason of the sale. It is inoperative as against the appellant.

5. There shall be a direction for delivery of the possession of the property by the first defendant or 11th defendant or any person in possession, to the appellant within a period of three months from the date of the receipt of the judgment or passing the final decree as mentioned in clause (1).

6. The mortgagee shall account for profits or benefits received by him in terms of usufructuary mortgage.

In the circumstances, parties are directed to bear their own costs throughout.

G.N.

Appeal allowed.