ANANDRAM JIVRAJ GAGLE

v.

PREMRAJ MUKANDAS & ORS.

August 31, 1967

[J. C. SHAH, S. M. SIKRI AND J. M. SHELAT, JJ.]

Transfer of Property Act (4 of 1882), *ss.* 76(*d*) *and* 76(*h*)—*Priorities laid down in s.* 76(*h*) *whether subject to those in s.* 76(*d*).

The respondents filed a suit against the appellant for redemption of a mortgage. The suit was decreed subject to payment of a sum of Rs. 9,224-12-0 towards principal and interest within six months. A preliminary decree was directed to be drawn up. The appellant filed an appeal in the Court of the District Judge and *inter alia* urged that "the court ought to have directed the Commissioner to deduct the rent received (i) first towards taxes, then (ii) towards interest of the amount, of repairs etc., then (iii) towards interest on the principal amount, then towards (iv) amount of repairs and expenses and then towards the principal of the loan." The appeal was dismissed. A second appeal in the High Court also failed. The appellant came to this Court by special leave. It was urged on his behalf that the priorities in s. 76(h) of the Transfer of Property Act were subject to the priorities in s. 76(d) and therefore interest on the principal amount should, in the present case, have been given priority over the payment of the expenditure on maintenance and repairs.

Held: The appeal must fail.

The object of s. 76(d) is not to fix any priorities but to make it obligatory on the mortgagee, in the absence of a contract to the contrary to carry out necessary repairs to the property but the amount he can spend is limited to the difference between rents and profits and payments mentioned in cl. (c) and the interest on the principal money. It is cl. (h) which directs the mortgagee to apply the receipts from the mortgaged property in a certain manner. The order of application is (1) the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in cls. (c) and (d), (2) interest thereon, (3) the surplus, if any, has to be utilised towards reduction of interest on principal money and (4) the principal money itself. There is no contradiction between s. 76(d) and s. 76(h). The fact that s. 76(d) limits the scope of the liability has no bearing on the question whether it lays down any order of priorities inconsistent with those mentioned in cl. (h) [428B—E]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8 of 1965.

Appeal by special leave from the judgment and decree dated October 5, 1962 of the Bombay High Court in Appeal No. 598 of 1960, from Appellate Decree.

S. T. Desai and *J. P. Aggarwal*, for the appellant.

O. P. Malhotra, and *P. C. Bhartari*, for the respondents.

A The Judgment of the Court was delivered by

Sikri, J. This appeal by special leave is directed against the judgment and decree of the Bombay High Court in Appeal No. 598 of 1960, whereby the High Court confirmed the judgment and decree dated January 30, 1960, passed by the Extra Assistant B Judge, District Court, Ahmednagar, in Regular Appeal No. 300 of 1958, confirming the decree dated April 7, 1958, passed by the Joint Civil Judge, Junior Division, Ahmednagar, in Civil Suit No. 609 of 1948.

The relevant facts for the determination of the points raised before us by the learned counsel for the appellant-mortgagee, are as follows: The respondents before us filed a suit for the redemp- C tion of the mortgage of a bungalow at Ahmednagar alleging that the sale-deed in respect of this bungalow for Rs. 5,000 was in fact a possessory mortgage. One of the terms of this deed, dated August 4, 1928, was :

> "However, a condition is laid down that if we pay you within three years from this day Rupees five thousand D relating to this sale-deed, and (interest) thereon at the rate of 12 twelve annas per cent per mensem at yearly rests, and the amounts spent by you to meet the expenses for repairs, constructions, taxes, etc. together with interest (at the rate) mentioned above, ... you are to receive the same and allow us to purchase the aforesaid property back."

E

The transaction was held to be a mortgage and there is no dispute on this point. On April 7, 1958, the suit was finally decreed for redemption of the property subject to a payment of Rs. 9,224-12-0, Rs. 4,612-6-0 as principal, and Rs. 4,612-6-0 as interest thereon, within six months from that date. A preliminary decree was directed to be drawn up. The appellant filed an appeal in the Court F of the District Judge, Ahmednagar, and, among other grounds, alleged that "the Court ought to have directed the Commissioner to deduct the rent received (i) first towards taxes, then (ii) towards interest of the amount of repairs, etc., then (iii) towards interest on the principal amount, then towards (iv) amount of repairs and expenses and then towards the principal of the loan". The Extra Assistant Judge did not agree with this contention, and dismissed G the appeal. The appellant filed a second appeal to the High Court. The High Court also disagreed with the above contentions. The High Court held that the priorities had been settled by the courts below in accordance with the provisions of s. 76(h) of the Transfer of Property Act, 1882 (IV of 1882) and were, therefore, proper.

The method of accounting followed by the Commissioner ap- H pointed in the case, and which was accepted by the courts below, was as follows : Out of the income derived from the property (There is no dispute that the bungalow was fetching rent from

month to month) the outgoings were deducted in the following order of priority : A

1. Payment of taxes.
2. Payment of interest on the amount of expenditure on maintenance and repairs.
3. Payment of the expenditure on maintenance and repairs. B
4. Interest on the amount of principal of the mortgage bond.
5. Amount of principal under dispute.

The learned counsel for the appellant, Mr. S. T. Desai, says that item 4 above should be item 3, and to substantiate this has submitted three propositions before us : C

(1) Section 76(h) does not lay down any order of priority inconsistent with the order of priority mentioned in s. 76(d) and does not reverse that order. Both the provisions must be read together and in a harmonious manner;

(2) The liability for repairs under s. 76(d) is very limited in its scope. This liability arises only if there is a surplus left after deducting from the rents and profits of the property two items, *viz.*; D

(i) expenses mentioned in clause (c), and

(ii) interest on the principal money; E

(3) If the mortgagee expends more for repairs than the surplus left after the last mentioned deductions, that expense would not be in pursuance of any liability of his under s. 76(d) but would be claimed under the right conferred by s. 63A(2) and s. 72(b). Such expenses would be treated as additions to the principal money.

Sections 76 (c), (d), (h), 63A and 72(b) read as follows: F

"76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

* * * * *

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold; G

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after H

A deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;

* * * * *

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgager;.....

63A. (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

72. A mortgagee may spend such money as is necessary—

* * * * *

(b) for the preservation of the mortgaged property from destruction, forfeiture or sale;

* * * * *

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent per annum; Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary

unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.....". A

It seems to us clear that the object of s. 76(d) is not to fix any priorities but to make it obligatory on the mortgagee, in the absence of a contract to the contrary, to carry out necessary repairs to the property but the amount he can spend is limited to the difference between rents and profits and payments mentioned in cl. (c) and the interest on the principal money. When we come to cl. (h), it directs the mortgagee to apply the receipts from the mortgaged property in a certain manner. The order of application is (1) the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses *mentioned* in cls. (c) and (d), (2) interest thereon, (3) the surplus, if any, has to be utilised towards reduction of interest on principal money, and (4) the principal money itself. In our view, there is no contradiction between s. 76(d) and s. 76(h). It is true, as stated in proposition No. 2 of the learned counsel, that the liability for repairs is limited in its scope and arises only if there is a surplus left after deducting from the rents and profits of the property the expenses mentioned in cl. (c), and the interest on the principal money, but the fact that the liability is limited in scope does not bear on the question whether it lays down any order of priorities inconsistent with the priorities mentioned in cl. (h). This is so because, as we have stated above, s. 76(d) is not concerned with the question of priorities but with limiting the amount which can be spent by the mortgagee in possession for carrying out necessary repairs. B C D E

Coming now to the third proposition, it is not necessary to deal with the question of the relationship between s. 63A, s. 72(b) and s. 76, because the plaintiff has neither alleged nor proved that any expenses were incurred by which improvement was effected and the improvement was necessary to preserve the property from destruction or deterioration within s. 63A(2). Similarly, he never alleged or proved that he spent money which was necessary for the preservation of the mortgaged property from destruction, forfeiture or sale within s. 72(b). There is no allegation or evidence that the mortgagor had been called upon and failed to take proper and timely steps to preserve the property. F

We may mention that the only allegation to which our attention was drawn is contained in para 11 of the written statement, which reads as follows : G

"11. The transaction dated 4-8-28 is not one of security or mortgage. The defendant has never received rent for the suit property more than Rs. 65 per month. The defendant has incurred expenses from time to time for taxes, expenses, maintenance, repairs, (and) constructions. The defendant made constructions and H

A repairs and spent more than Rs. 10,000 (ten thousand) therefor because it was his own property. I shall produce an extract in that behalf. For many years the property under dispute was unoccupied."

This hardly covers the point now sought to be made.

B For the aforesaid reasons the appeal fails and is dismissed with costs.

G.C. *Appeal dismissed.*