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CANARA BANK LTD., BOMBAY v. WARDEN INSURANCE COMPANY LTD., BOMBAY

Chagla C. J.

The same view of the law has been taken by the other High Courts. See *Chheda Lal Jain* v. *Officer Commanding, Meerut*[1] *Mittoor Moideen Hajee, In re*[2] and *Syed Hasan Imam* v. *Brahmdeo Singh*[3]. Therefore, in giving the construction to s. 29 which we are giving we find that we are taking the same view which the other High Courts in India have taken.

The result, therefore, is that we must hold that the appeal is out of time, that s. 5 does not apply, and therefore we have no power to condone the delay on the part of the petitioners. Rule discharged. No order as to costs.

Rule discharged.

M. W. P.

[1] [1941] All. 356. [2] [1923] A. I. R. Mad. 95.
[3] (1930) 9 Pat. 747.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Dixit.

1952
Jan. 24

PRALHAD DALSUKRAI AND OTHERS (ORIGINAL DEFENDANTS NOS. 2, 3, 4 AND 6), APPELLANTS *v.* TEWAR MAGANLAL MULJIBHAI, AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 1, 5, TO 10) RESPONDENTS.*

Hindu Law—Gift by widow—Gift of usufructuary mortgagee's interest in mortgaged property—Whether such interest immoveable or moveable property—Validity of gift—Transfer of Property Act (IV of 1882), s. 58 (a)—General Clauses Act (X of 1897), s. 2 (25).

A Hindu, governed by the Mayukha, died leaving some properties to which his widow succeeded, taking a widow's estate therein. One of the properties was the right of a usufructuary mortgagee in respect of certain lands. The widow made a gift of the amount due under the usufructuary mortgage to her brother. On the question whether this gift was valid as a gift by a Hindu widow of moveable property.

Held, that in view of the definition of mortgage given by s. 58 (*a*) of the Transfer of Property Act, 1882, a mortgagee's interest in immoveable property even in the case of a usufructuary mortgage is itself immoveable and not moveable property and the widow was therefore not competent to make the gift.

Fateh Singh v. *Raghubir Sahai,*[1] followed.

Bai Jadi v. *Purshottam,*[2] not followed.

* First Appeal No. 320 of 1948.

[1] [1938] A. I. R. All. 577. [2] (1922) 24 Bom. L. R. 729.

Ramsumran Prasad v. *Shyam Kumari*,[1] and *Tarvadi Bholanath* v. *Bai Kashi*,[2] referred to.

The interest in immoveable property which the mortgagee acquires cannot be said to be "benefit arising out of land" within the meaning of s. 2, clause (25), of the General Clauses Act, 1897. It is, however, an interest in land itself which is acquired by the mortgagee by reason of the creation of the mortgage in his favour.

First Appeal from the decision of P. P. Vyas, Assistant Sar Nyayadish, Rajpipla.

One Sampatram died on January 24, 1943, leaving him surviving two brothers (plaintiffs) and a widow Rukmini. Sampatram had held a usufructuary mortgage in respect of certain lands under a mortgage-deed, dated July 4, 1932. On June 16, 1942, Rukmini made a gift of a house and the amount due under the aforesaid usufructuary mortgage to her brother Ravishankar (defendant No. 7). On October 10, 1942, Ravishankar executed a deed of trust in favour of certain trustees (defendants Nos. 1 to 7) for establishing "Bai Rukmini Balvikas Trust Fund" and transferred the property which was gifted to him by Rukmini in favour of the trustees, defendants Nos. 1 to 7.

On Rukmini's death, the brothers of Sampatram filed the suit (out of which the present appeal arose) to recover possession of the suit property from the trustees. The plaintiffs claimed that they were joint with Sampatram and that they were entitled to the properties as surviving coparceners, or alternatively as the reversionary heirs of Sampatram. The defendants contended, *inter alia*, that the usufructuary mortgage was moveable property, that Rukmini, though taking a widow's estate therein, was under the Mayukha entitled to dispose of it, that consequently the gift in favour of defendant No. 7 was a valid gift and the plaintiffs were not entitled to the property.

The trial Judge negatived the contentions of the defendants and passed a decree in favour of the plaintiffs.

Defendants Nos. 2, 3, 4 and 6 appealed to the High Court.

K. H. Kaji, with *V. T. Gambhirwala*, for the appellants.

M. B. Mehta, for respondents Nos. 1 and 2.

[1] (1922) 25 Bom. L. R. 634, P. C. [2] (1901) 26 Bom. 305, S. C. 4 Bom. L. R. 18.

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PRALHAD DALSUKRAI v. TEWAR MAGANLAL

Bhagwati J.

Bhagwati J. This is a first appeal from the decision of the Assistant Sar Nyayadhish of the State of Rajpipla decreeing the plaintiff's claim.

Chhotalal Mulji, Maganlal Mulji and Sampatram Mulji were three brothers. Sampatram died on or about January 24, 1943, leaving him surviving his widow Bai Rukmini. During his lifetime Sampatram had acquired a usufructuary mortgage in respect of certain lands under a deed of usufructuary mortgage dated July 4, 1932, executed by Prankda Gumansingh Parbatsing, Hamirsingh Parbatsingh and Gemalsingh Parbatsingh of Prankad. On June 16, 1942, Bai Rukmini made a gift of one house situated at Naibhagol and the amount due under this deed of usufructuary mortgage to her brother Ravishankar Manishankar Pandya. On October 10, 1942, Ravishankar Manishankar Pandya executed a deed of trust in favour of certain trustees including himself for establishing "Bai Rukmini Balvikas Trust Fund" and transferred the property which had been thus gifted to him by Bai Rukmini to the trustees. Bai Rukmini died some time thereafter and Chhotalal Mulji and Maganlal Mulji, the brothers of Sampatram Mulji, claiming as the surviving coparceners of the joint family or in the alternative as the reversionary heirs of Sampatram Mulji, after due notice given to the trustees on November 11, 1942, to hand over possession of the suit lands to them, filed the suit out of which this appeal arises against the trustees who were defendants Nos. 1 to 7 in the suit and the tenants, defendants Nos. 8, 9 and 10, for actual possession of the suit lands, for future mesne profits and for injunction together with costs.

In the plaint which was filed the plaintiffs contended that they were joint with Sampatram and that on the death of Sampatram they became entitled to all the properties belonging to the family as the surviving coparceners of the family, that the mortgage of the suit lands was taken by Sampatram out of the funds of the joint family and that therefore Bai Rukmini had no right, title and interest in the suit lands, much less was she entitled to alienate the same by making a gift as she did in favour of defendant No. 7. They further contended that in any event Bai Rukmini had a life interest in the mortgagees' rights in the suit lands and would not be entitled to alienate the same except for legal necessity, much less was she competent to make a gift of the same to defendant No. 7 as she did. On both these counts, one in the alternative

to the other, they contended that the gift which was made by Bai Rukmini in favour of defendant No. 7 was void as against them and they sought to recover possession of the suit lands from defendants Nos. 1 to 7 and defendants Nos. 8 to 10, defendants Nos. 1 to 7 being the trustees of the deed of settlement executed by defendant No. 7 in favour of himself and defendants Nos. 1 to 6 and defendants Nos. 8 to 10 being the tenants in possession of the suit lands.

The defences which were taken up were that the usufructuary mortgage which Sampatram had taken in respect of the suit lands was movable property, with the result that Bai Rukmini even though she enjoyed a widow's estate therein was under the Mayukha entitled to dispose of the same in any manner she liked and that therefore the gift which she made in favour of defendant No. 7 was a valid gift and the plaintiffs were not entitled to the relief they claimed. There were various other contentions taken up by both the parties in the suit, which, however, we need not advert to for the simple reason that before us the main question agitated has been whether Bai Rukmini was entitled to make a gift of the mortgagees' interest in the suit lands to defendant No. 7.

The trial Court held that the transaction was one of gift and not of sale as it had been contended on behalf of the defendants, and it further held that the mortgage debt due by defendants Nos. 8, 9 and 10, who were the mortgagors as well as the lessees, could not be considered movable property, and if that was so, Bai Rukmini was not entitled to make a gift of the same to defendant No. 7. The trial Court accordingly passed a decree in favour of the plaintiffs for possession of the suit lands and for other reliefs. This appeal has been filed by the original defendants Nos. 2, 3, 4 and 6 against that decision of the trial Court. Defendants Nos. 1, 5 and 7 did not join in this appeal and therefore they along with defendants Nos. 8, 9 and 10 were made party respondents to this appeal along with the original plaintiffs.

The sole question which arises for our determination in this appeal as it has been argued before us is whether the mortgagees' interest in the suit lands which was acquired by Sampatram was moveable property, with the result that the same could be dealt with by Bai Rukmini as she purported to do by making a gift thereof in favour of defendant No. 7. If

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this mortgagees' interest in the suit lands was immoveable property, it is not disputed that Bai Rukmini would not be competent to make a gift of the same. It would only be in the event of this mortgagees' interest in the suit lands being moveable property that she would be competent to make a gift of it in favour of defendant No. 7 under the Mayukha.

Mr. K. H. Kaji who has appeared for the appellants before us has urged that this was a usufructuary mortgage executed by defendants Nos. 8, 9 and 10 in favour of Sampatram and that the interest of the usufructuary mortgagee is moveable property as was held by our appeal Court in *Bai Jadi* v. *Purshottam.*[1] He has urged upon us that this was a decision of a division bench of this Court and as such is binding on us as being a Court of co-ordinate jurisdiction unless we could distinguish the same or refuse to follow the same on some valid ground. Before we proceed to discuss that decision, it is however necessary to refer to the definition of "mortgage" contained in s. 58 of the Transfer of Property Act. In s. 58 (*a*) a mortgage has been defined as the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage money and the instrument (if any) by which the transfer is effected is called a mortgage-deed. After thus defining a mortgage, the section proceeds to enumerate and define the several kinds of mortgages, the simple mortgage, the mortgage by conditional sale, the usufructuary mortgage, the English mortgage, the mortgage by deposit of title-deeds, and anomalous mortgage. All these are mortgages coming within the definition of mortgage in s. 58 (*a*). The underlying idea of all these mortgages is that they are mortgages coming within the definition thereof contained in s. 58 (*a*) and whatever may be the diversity of modes in which these mortgages are created necessitating their classification in these various categories, they are nonetheless mortgages which are transfers of interest in specific immoveable property. Once you get this underlying idea of transfer of interest in specific immoveable property, prima facie, it would be difficult to get

[1] (1922) 24 Bom. L. R. 729.

away from the position that an interest in specific immoveable property is transferred by reason of the creation of the mortgage and the mortgagees' interest is an interest in specific immoveable property which is thus transferred to him. Could it be then contended that this interest in specific immoveable property, which the mortgagee has thus acquired is moveable property and not immoveable property? It was sought to be argued, and that argument found favour with the learned Judges of the appeal Court in *Bai Jadi* v. *Purshottam*,[1] that all that the usufructuary mortgagee was entitled to was to retain possession of the property as security for the debt until the mortgage was redeemed and that therefore these mortgagee's rights could not be treated in law as immoveable property.

The difficulty, however, in the matter of accepting this argument is that it ignores the definition of a mortgage as given in s. 58 (*a*) of the Act. It ignores that a mortgage is a transfer of an interest in specific immoveable property, and what the mortgagee acquires under the transaction is a mortgagee's interest in specific immoveable property which can only be immoveable property and not moveable property. Whether that interest in immoveable property which the mortgagee acquires can be said to be "benefit arising out of land" within the meaning of s. 2, cl. 25 of the General Clauses Act is an extraneous question. It is not a benefit arising out of land. It is an interest in land itself which is acquired by the mortgagee by reason of the creation of the mortgage in his favour, and an interest in immoveable property can hardly be stated to be moveable property. By reason of the creation of a mortgage the totality of the rights of ownership which is enjoyed by mortgagor is split up into what are called the mortgagee's interest in the property and the equity of redemption which the mortgagor retains in the property. These are two separate interests which are thus carved out by the creation of the mortgage, and it is not necessary to elaborate the matter any further in order to arrive at the conclusion that the mortgagee's interest in property which is thus created is immoveable property and not moveable property. This aspect of the question was not brought to the notice of the learned Judges of our High Court who decided *Bai Jadi* v. *Purshottam*.[1] The facts also in that case were quite different. The widow had inherited the mortgagee's interest in the property under a

[1] (1922) 24 Bom. L. R. 729.

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usufructuary mortgage. She had created a sub-mortgage of that interest and during the subsistence of that submortgage the mortgagor had redeemed the property. When the property was thus redeemed, the only thing which was left was the working out of the result as between the respective parties. The usufructuary mortgage having been redeemed there was no mortgage actually in existence. Whatever property had descended to the widow had been converted into moveable property by process of law as a necessary corollary of the redemption of the mortgage by the original mortgagor. The moneys which represented the value of the redemption did not enjoy the character of immoveable property any more. It became moveable property either in the hands of the sub-mortgagee or the widow who was the heir of the original mortgagee and that was sufficiently determinative of the appeal before the learned Judges. The decision of Mr. Justice Shah against which the Letters Patent Appeal had been filed proceeded on this basis and this ratio found favour with Mr. Justice Coyajee who was a party to that decision along with Macleod C. J. It was really not necessary, with the utmost respect, for Macleod C. J. to make the observations which were relied upon by Mr. K. H. Kaji for the appellants before us. These observations were really *obiter* and the only *ratio decidendi* of the decision was that the usufructuary mortgage no longer remained in existence after it had been redeemed by the original mortgagor. If the widow and the heir of the original mortgagee had got the moneys in her hands after the redemption of the mortgage by the original mortgagor, she would have been entitled to deal with them as she liked by reason of the position as it obtained under the Mayukha, and after the death of the widow her daughter who succeeded to the estate of the mortgagee as the reversionary heir acquired no specific right to the moneys which were thus paid by the original mortgagor for redemption of the mortgage. We are, therefore, of the opinion that this decision in *Bai Jadi* v. *Purshottam* in so far as it lays down that the interest of a usufructuary mortgagee in property is moveable property does not bind us, and we are not therefore bound to follow the same.

Mr. K. H. Kaji then drew our attention to a passage from the observations of their Lordships of the Privy Council in *Ramsumran Prasad* v. *Shyam Kumari*[1]. In that case a

[1] (1922) 25 Bom. L. R. 634, P. C.

widow had in her hands moneys which were secured by a mortgage of immoveable property. She had bid at the auction sale and had been declared the highest bidder of the immoveable property which was the subject of the mortgage. The sale had, however, not been confirmed in her favour and their Lordships of the Privy Council observed that (p. 639):

"...In the hands of the deceased and in the hands of the widow till the sale it was money secured by a mortgage on immoveable property. For a very brief period it might be said that the widow had converted the property by her purchase at the sale; but even this can hardly be said. The sale had not been confirmed and the compromise was upon the very point whether it should be confirmed, that is whether the property should be converted."

Here also it may be observed that after the sale of the immoveable property what remained in the hands of the widow would be the moneys due at the foot of the mortgage and it would only be on the confirmation of the sale in her favour, she having been the auction purchaser, that she would acquire an interest in the immoveable property. Before the confirmation of the sale therefore the only interest which she had was an interest in moveable property, viz. the moneys which were realised at the auction sale of the immoveable property and therefore there was no question of her having retained any interest in the immoveable property after the auction sale had taken place at her instance.

Mr. K. H. Kaji then drew our attention to a decision reported in *Tarvadi Bholanath* v. *Bai Kashi*[1] where a division bench of our High Court held that a mortgage debt was moveable property within the meaning of s. 268 of the Civil Procedure Code and its sale in execution by public auction carried with it the right to proceed against the mortgaged property even though there might have been no attachment and sale under s. 274 of the Code. Mr. Justice Chandavarkar who was a party to this decision along with Jenkins C. J. observed as under (p. 311):

"...A simple mortgage creates a right to recover the debt due on it from land; a mortgage with a right of foreclosure creates a right to recover the land itself. Therefore, a debt due on a simple mortgage is a debt, though it is secured on land, and the security is merely collateral, the right accruing from it is merely accessory."

The decision, however, turned really upon the construction of s. 268 of the Code and the learned Judge there considered the definition of "immoveable property" contained in the

[1] (1901) 26 Bom. 305.

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General Clauses Act and observed that that definition according to s. 2 of the Act could not apply to any Act where there was something repugnant to it in the subject or context. On a consideration of s. 268 of the Code the learned Judges came to the conclusion that that section was repugnant to the definition of "immoveable property" in the General Clauses Act and, therefore, excluded it. This was really the ratio of the decision and the decision therefore turned on the construction of the provisions of s. 268 of the Code and cannot afford a guidance to us when we have got to consider the provisions of s. 58 of the Transfer of Property Act.

On the other hand, we have before us a decision of the Allahabad High Court reported in *Fateh Singh* v. *Raghubir Sahai*[1] where it was held that (p. 584):

> "...the rights of a usufructuary mortgagee taken as a whole form a very large and important part of the bundle of rights which constitute ownership. It is not a wholly correct description of such rights to say that what a usufructuary mortgagee is entitled to is to retain possession of the property as security for the debt until he is redeemed. He is entitled in fact to the fullest enjoyment of the property and has the right to exclude all others including the owner from its possession and enjoyment. He may not be the absolute owner of the property, but for all practical purposes, he may well be deemed to be the owner thereof while he is in possession...The fact that the property in his possession is open to redemption by the owner is to my mind quite irrelevant for the purposes of determining the nature of the property....If the mortgagor transfers what in the eye of the law is included within the meaning of immoveable property the subject of the transfer must retain its character even in the hands of the mortgagee."

The learned Judges there considered the decision of our appeal Court in *Bai Jadi* v. *Purshottam* and differed from the same. We are substantially in accord with the opinion expressed by the learned Judges of the Allahabad High Court. We are of the opinion that on a plain reading of s. 58 (*a*) of the Transfer of Property Act there is no getting away from the conclusion that a mortgagee's interest in immoveable property even in the case of a usufructuary mortgage is immoveable property and not moveable property as contended for by the defendants.

This being the position, we are of the opinion that the conclusion which was reached by the Court below was correct and this appeal must fail and stand dismissed. In so far as there was some justification for the stand taken up by the appellants, having regard to the observations in *Bai Jadi* v. *Pursho-*

[1] [1938] A. I. R. All. 577.

ttam we feel that the fairest order in the circumstances of the case would be that each party should bear and pay its own costs throughout. The decree of the lower Court will, therefore, be confirmed except with this variation as regards costs.

Dixit J. I agree, and have very little to add.

Mr. Kaji for the appellants has contended that the transfer of the mortgagee's right in favour of defendant No. 7 was a transfer of moveable property. I must confess I felt extremely puzzled by the argument presented by Mr. Kaji, because if reference is made to ss. 58 (*a*) and 58 (*b*) of the Transfer of Property Act, it is apparent that the mortgage is a transfer of interest in specific immoveable property and that when the mortgagor delivers possession of the property to the mortgagee authorising him to retain possession until payment of the mortgage money, the transaction is one of usufructuary mortgage. What happens in the case of a usufructuary mortgage is that what is transferred is a right of possession and enjoyment of usufruct. In this case the mortgage in dispute is a usufructuary mortgage. It is not in dispute that by the terms of the transaction Sampatram was allowed to enjoy the property in lieu of the debt. It was this right of Sampatram which became the subject of transfer by Rukminibai in favour of defendant No. 7.

Now, in the case of a mortgage, unlike the case of a sale, the totality of the rights of the owner are not transferred. While in the case of a sale there is a transfer of the totality of the rights, in the case of a mortgage what is mortgaged is some of the rights, the mortgagor retaining the other rights. Now, if the mortgagors were to transfer his interest after having created a usufructuary mortgage, it is not suggested and it cannot be suggested that the transfer is in relation to immoveable property, but it is said that if the mortgagee transfers his right in favour of another, then the transfer is a transfer in respect of moveable property. I find it difficult to accept this argument. By its very nature a transaction called a mortgage is a transfer of an interest in the specific immoveable property. What is secured by the transaction is a debt which the property secures, and the transfer is a transfer of an interest in specific immoveable property and what the transferee did in this case was to transfer her own interest in favour of defendant No. 7. If, therefore, as between the mortgagor and the mortgagee it was a transfer of an interest

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in specific immoveable property, I find it difficult to understand why when a transferee transfers his interest in specific immoveable property that should not amount to a transfer of an interest in specific immoveable property. Strength to the argument was accorded by the decision in *Bai Jadi* v. *Purshottam*,[1] but for reasons which have been already given by my learned brother I am, with respect, unable to accept the principle underlying that case. If the true position is that by reason of the transaction evidenced by the transfer the transferee gets a right to be in possession and a right of enjoyment of the usufruct of the mortgage, I find it difficult to understand the contention that it should not amount to a transfer of an interest in specific immoveable property. For these reasons I think the view taken by the lower Court was correct and I agree with the order proposed by my learned brother.

Decree confirmed.

K. B. S.

[1] (1922) 24 Bom. L. R. 729.

APPELLATE CRIMINAL

Before Mr. M. C. Chagla, Chief Justice.

1952
Feb. 8

MADHAV RAOJI SHELKE (ORIGINAL ACCUSED), APPLICANT *v.* STATE.*

Motor Vehicles Act (IV of 1939), ss. 89, 112, 116, 131—Criminal Procedure Code (Act V of 1898), s. 246—Accused prosecuted for offence under s. 89—Magistrate, on evidence before him, convicting accused under s. 116—Whether conviction according to law in view of s. 246 of the Criminal Procedure Code.

The accused was prosecuted under s. 89 read with s. 112 of the Motor Vehicles Act, 1939. A summons for the offence under those sections was served on him within 28 days of the commission of the offence. The trying Magistrate held that the offence disclosed on the evidence led before him was an offence under s. 116 and convicted the accused under s. 116 of the Act. The conviction was challenged on the ground that it was not proper in view of s. 131 of the Act.

Held, that as none of the conditions laid down by s. 131 for a conviction under s. 116 of the Act was satisfied, the Magistrate was in error in convicting the accused under s. 116 of the Act.

The powers of the Court under s. 246 of the Criminal Procedure Code, 1898, are not so wide that it can convict an accused in respect of an

* Criminal Revision Application No. 1130 of 1951.