

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.39 of 1976

Against the Judgment and Decree dated 18.09.1975 passed by Ist Addl. Subordinate Judge, Barh in Title Suit No.46 of 1969/ 9 of 1975.

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Chandraprabha Devi & Ors.

.....Defendants -appellants

Versus

Ram Chandra Prasad Singh & Ors.

.....Plaintiffs - Respondents

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With

First Appeal No.771 of 1976

Against the Judgment and final Decree dated 23.08.1976 passed in the Title Suit No.46 of 1969.

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Chandraprabha Devi & Ors.

.....Defendants -appellants

Versus

Ram Chandra Prasad Singh & Ors.

.....Plaintiffs - Respondents

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Appearance :

Appearance :

For the Appellant/s
(both the F..A.)

:- Mr. Vikas Kumar Sharma, Advocate
Mr. Murli Narain Chaudhary, Advocate
Mr. Bijay Kumar, Advocate
Mr. Mohit Srivastava, Advocate

For the Respondent

:- Mr. Ram Sumiran Singh, Advocate who
appeared in person also as respondent No.3.

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Dated : 5th day of January, 2016

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T



1. The defendants have filed both these First Appeals against the Judgment and preliminary Decree dated 18.09.1975 passed by the learned Addl. Subordinate Judge, Barh in Title Suit No.46 of 1969/ 9 of 1975 and against final decree dated 23.08.1976 whereby the Court below decreed the plaintiff respondent's suit.

2. The plaintiff respondents filed the aforesaid suit that is Title Suit No.46 of 1969 for a mortgage decree of Rs.93,016/- with respect to 5 mortgage bonds executed by the defendants in favour of the plaintiffs and for interest and prayed that a decree may also be passed directing the defendant to pay the amount within three months and if it is not paid, final mortgage decree be passed and the amount may be realized by sell of the mortgaged lands.

3. The plaintiffs-respondents claimed the aforesaid relief alleging that the defendant No.1 is the *karta* of the defendant's family. The defendants were in need of money for marriage and for repayment of previous debts and other necessity and approached the plaintiff No.1 for advancement of loan on usufructuary mortgage and demanded Rs.1,43,998/- . Since the plaintiff No.1 was in good term with defendant No.1, loan was advanced and five mortgage bonds were executed from 25.09.1963 in favour of each of the plaintiff No.1 to 5 and the sixth mortgage bond was executed in the name of Ram



Lakhan Prasad Singh, son of plaintiff No.1. The mortgage deeds were registered on 26.09.1963 and 30.09.1963. It is further pleaded that the mortgage deed in favour of plaintiff No.12 was for Rs.24,998/- out of which Rs.6000/- was paid to Kulo Singh who was previous mortgagee of defendant No.1. That mortgage deed was executed on 19.09.1958. Rs.6000/- was paid before the execution of the mortgage bond. Accordingly, total Rs.12,000/- was paid.

4. The second mortgage was in favour of plaintiff No.2 for Rs.22,998/- and out of which Rs.400/- was repaid regarding the mortgage bond dated 01.11.1955 which was in favour of Jago Singh and before the execution of mortgage deed, Rs.5,000/- was paid. Thus, total amount of Rs.5400/- was paid.

5. The third mortgage bond was in favour of plaintiff No.3 for Rs.24,998/-. Out of the same, Rs.2000/- was paid to the earlier mortgagee, Hari Singh regarding mortgage bond dated 01.11.1955. Before the execution of the mortgage deed, Rs.6000/- was paid. Thus, total amount paid was Rs.8000/-.

6. The fourth mortgage bond was for Rs.22,998/- in favour of plaintiff No.4. Out of the same Rs.2000/- was paid to earlier mortgagee, Hari Singh, under mortgage bond dated 01.11.1955 and before execution of the bond, Rs.6000/- was paid and thus total

amount paid is Rs.8000/-

7. The fifth mortgage was for Rs.22,998/- in favour of plaintiff No.5. Rs.2,000/- was paid to the earlier mortgagee, Jago Singh and Rs.6,000/- was paid before the execution of the present mortgage deed. Thus total amount paid is Rs.8,000/-. So far sixth mortgage deed executed in favour of Ram Lakhan Pd. Singh is concerned, no amount was paid. After registration of the mortgage bonds, Rs.19,000/- was paid as part consideration. Thereafter, the plaintiff No.1 requested defendant No.1 to receive the balance of the mortgage money and to make exchange of equivalents but the defendants refused. Then the defendants cancelled the above usufructuary mortgage bond by registered cancellation deed dated 05.10.1964 making false recital therein. Thereafter, the plaintiff contacted defendant No.1 and requested to refund the amount paid to him but in vain. In spite of repeated request, the possession of the mortgage property was also not given to the plaintiff. Therefore, the plaintiffs are entitled to realize Rs.64,000/- with interest at the rate of 9% per annum from the date of mortgage bond till realization. The plaintiffs are not professional money lenders. The aforesaid loan was advanced because of good relationship between the parties and the defendant No.1 was in urgent necessity.



8. The defendant filed contesting written statement. One written statement was filed by defendant No.1 and the other written statement was filed by defendant No.2 to 6. Mainly their defence is that the suit is barred by law of limitation, the plaintiffs are professional money lenders but have got no license. The defendant had no necessity of taking loan. There was no marriage of the daughter of defendant No.1 in the year of the execution of mortgage bond. The plaintiff in order to advance his business, he proposed advancing loan of Rs.1,50,000/- to the defendant. No amount was paid to the mortgagee, Kulo Singh, Jago Singh and Hari Singh nor any amount was paid to the defendants either before or after execution of the mortgage bonds. The defendant requested the plaintiff several times to pay the amount and exchange the equivalent but plaintiff No.1 postponed the matter, therefore, the defendant No.1 withdrew the original mortgage bonds from the Registration office on 28.03.1964 further the defendant No.1 had given notice on 31.03.1964 by registered post to exchanged the equivalent within sixteen days but the plaintiff No.1 neither paid nor exchange the equivalent. Subsequently, the defendant cancelled the mortgage bonds on 5.10.1964. There was no contract for payment of interest. The plaintiff never paid any amount to the defendant, therefore, also there is no question of payment of interest.

9. The other defendants No.2 to 6 in their written statement alleged that the defendant No.1 is not the *karta*, they have separated by decree in Title Suit No.34 of 1975. The defendant No.2 and 3 are minor and defendant No.6 is lady, therefore, there is no question of approach by them arises and they are not bound to pay the debt if any which was entered between the plaintiff and defendant No.1.

10. On these pleadings of the parties, the learned Court below framed the following issues :-

- (i) Is the suit as framed, maintainable?
- (ii) Have the plaintiffs any cause of action or brining the suit?
- (iii) Is the suit barred by limitation?
- (iv) Whether there was any legal necessity for contracting the above loan for the defendants?
- (v) Are the defendants amounts totaling Rs.60,400/- advanced to defendant not on occasions as alleged by the plaintiffs?
- (vi) Did the plaintiffs pay the rehan money to prior mortgagees and redeemed the mortgage as alleged in the plaint before the suit was brought?
- (vii) Did the plaintiffs fail to effect exchange of equivalent in respect of the suit bounds?

(viii) Are defendants, other than defendant No.1 liable for any bound by the loan in suit?

(ix) Are the plaintiffs entitled to mortgage decree for the sum claimed?

11. The Court below on the basis of the evidences recorded a finding that the suit is maintainable as mortgage suit and the plaintiff are entitled to a decree of Rs.60,400/- with interest @ 6% per annum since 23.9.1969. Further, the Court below directed the defendants to pay the amount within three months from the date of judgment failing which the decree will be made final and money will be realised by sale of mortgaged property and accordingly, decreed the plaintiff's suit.

12. Subsequently, final decree was also passed and the money was realized by selling the mortgaged property. The plaintiffs themselves had purchased the mortgage property. Against which the other First Appeal has been filed. So far this preliminary decree is concerned, the learned counsel Mr. Vikas Kumar Sharma, submitted that no amount was ever paid by the plaintiffs as pleaded in the plaint. No doubt there are recitals in the mortgage bonds regarding payment but those are in correct recital. However, the case of the plaintiff that subsequently, Rs.19,000/- was paid after execution and registration

has not been proved by adducing cogent and reliable evidence. But the learned Court below wrongly relied on mere oral statement of the witnesses. There is no document in support of the fact of payment of Rs.19,000/-.

13. The learned counsel next submitted that this mortgage suit is not maintainable by the mortgagee because of bar created under Section 68 of the Transfer of Property Act. Admittedly, the mortgage was usufructuary mortgage, therefore, the plaintiffs are not entitled to get a decree for sale of the property. Moreover, According to the plaintiff themselves, Rs.1,43,998/- was the consideration amount but admittedly they never paid the amount in spite of repeated demand made by the defendant-appellants and they even did not come on possession of the suit property. They had not advanced the amount as claimed by them and now they have filed the suit for realization of the alleged amount which is only a simple suit for money decree because the mortgage bond was executed between the parties was never acted upon. Therefore, the plaintiff's suit is not maintainable as mortgage suit and in fact it is a suit for money decree.

14. Since the suit is a money suit, it should have been filed within three years but the suit has been filed in the year 1969 much after the right to sue accrue. Therefore, also the plaintiff's suit is

barred by law of limitation but the learned Court below wrongly interpreted Section 68 of the Transfer of Property Act and held that the suit is maintainable as mortgage suit.

15. The learned counsel, Mr. Sharma, further submitted that the Court below has mis-appreciated the evidences available on record and mis-interpreted Section 68 of the Transfer of Property Act, as such the judgment is liable to be set aside. According to the learned counsel, although there is no evidence at least regarding payment of Rs.19,000/- after registration, the Court below should not have recorded finding that the said amount was also paid by the plaintiff. That part of the finding is therefore, liable to be set aside.

16. So far the final decree is concerned, the learned counsel submitted that the plaintiff prayed for a decree for realization of Rs.93,016/- but the Court below granted decree of Rs.60,400/- only. However, at the time of calculation in the final decree, the Court below has added the cost payable on the total amount claimed by the plaintiff but did not calculate the cost proportionately to the decree as only plaintiff's suit was decreed in part. Further the Court below added the interest from 18.09.1975 to 14.08.1976 i.e., the date of preparation of decree. Although this interest was not granted in the preliminary decree. Therefore, the final decree itself is contrary to the

preliminary decree which could not have been executed by the Court below but the Court below executed the same and more than 100 biggha of land have been sold in favour of the plaintiffs. On this ground also, the learned counsel submitted that the final decree is liable to be set aside.

17. On the other hand, the learned counsel, Mr. Ram Sumiran Singh, who appeared on behalf of the other respondents and appeared in person for himself as respondent No.3 submitted that the learned Court below has considered the evidences produced by the plaintiff very minutely and recorded the finding that the plaintiffs had paid to the defendants to the extent of Rs.29,000/- at the time of execution of mortgage deed. The learned Court below on the basis of the evidence of P.W.22 who is plaintiff himself, P.W.11, P.W.13, P.W.14 who all have supported the fact of payment of Rs.19,000/- has rightly held that the same amount was also paid by the plaintiffs to the defendant No.1. According to the learned counsel, in fact the amount was paid and there is no reason as to why the plaintiff will state a false fact and if at all the plaintiff was claiming falsely payment of Rs.19000/-, the plaintiff would have claimed more than the said amount because it is a meager amount. The plaintiff cannot be said to be claiming falsely and moreover witnesses have been examined in support of the case of

payment of Rs.19000/-.

18. The learned counsel further submitted that there was good relation between the parties as has been stated by P.W.10, 11, 13, 14, 15, 18, thus, there is no question of giving false evidence arises. The learned counsel, with regard to money lending business is concerned, submitted that the plaintiffs are not money lenders. In fact because of good relation, the plaintiffs advanced the loan. In such circumstances, the suit is not barred under any provision of Money Lenders Act. Further, since the amount was advanced as consideration of mortgages, the plaintiffs has to file the mortgage suit for realizing the mortgage money as provided under Section 68 of the Transfer of Property Act. The Court below considering the provision has rightly held that the suit is maintainable under Section 68 (d) of the Transfer of Property Act. The learned counsel further submitted that in view of Section 67 of the Transfer of Property Act, the plaintiffs are entitled to recover the amount advanced by sale of the property mortgaged and the Court below has rightly passed the final decree. No doubt, there are some mistakes in the calculation in the final decree but those are clerical mistake and can be rectified but for that purpose, the final decree cannot be set aside. The arithmetical and clerical errors are curable errors and that can be cured in exercise of jurisdiction under Section 151 and 152 CPC. Accordingly, the learned counsel

submitted that the final decree also cannot be set aside.

19. So far limitation is concerned, the learned counsel submitted that the Court below has rightly held that the suit is not barred by law of limitation in view of Article 120 of the old Limitation Act, 1908 and Article 113 of the new Limitation Act, 1963 read with Section 30 of the new Act. On these ground, the learned counsel submitted that both the Appeals are liable to be dismissed.

20. In view of the rival contentions of the parties, the following points arises for consideration in this First Appeal :-

- (i) Whether the plaintiff has paid Rs.29,000/- at the time of execution of the mortgages ext.H series and Rs.19,000/- after execution of the same?
- (ii) Whether the plaintiff's suit is maintainable as title suit for recovery of mortgage amount and mortgage decree could have been passed or the suit should have been treated as money suit?
- (iii) Whether the plaintiff's suit was barred by law of limitation or not?
- (iv) Whether the Court below has rightly passed the mortgage final decree and whether the same was in accordance with preliminary decree or not and whether the Court below has rightly sold the suit property in auction sale in execution of the mortgage final decree.

21. **Point No.(i)** :- According to the plaintiff's case, six mortgage deeds were executed in favour of the defendants on 25.09.1963 which are all registered mortgage deeds. The plaintiff and defendants both have filed the same. The original deed have been



produced by the defendants. Ext.2/5= ext. "H" is a mortgage deed in favour of plaintiff No.1 for Rs.24,998/-. Likewise ext.2/6=ext. H/4 is mortgage bond and the mortgagee is plaintiff No.2 for Rs.22,998/-. Ext.2/7 = H/2 wherein mortgagee is plaintiff No.3 for Rs.24,998/-. Ext.2/8= H/3 in which plaintiff No.4 is the mortgagee and the amount is Rs.22,998/-. Ext.2/9= ext.H/1 wherein plaintiff No.5 is the mortgagee for Rs.22,998/-. Ext.2/10 wherein son of plaintiff No.1 is the mortgagee for Rs.24,998/-. All these mortgagees are family members either wife, son or minor son or grand son of plaintiff No.1. In the body of these exhibits, it is clearly recited that the earlier debt in favour of various persons mentioned in the deed were paid by the plaintiff. For example, Rs.6000/- was paid to Kulo Singh against mortgage dated 19.09.1998 and in addition to that Rs.6000/- was paid at the time of execution. Likewise in exhibit 2/6, Rs.4000/- was paid to Jago Singh against mortgage ext.2/2 dated 1.11.1955. Rs.2000/- was paid to Hari against mortgage debt dt. 1.11.1965, ext.2/3. Again Rs.2000/- was paid to Hari Singh against ext.2/4 against mortgage debt dt.1.11.1955 and again Rs.2000/- was paid to Jago Singh against mortgage debt dt.1.11.1955 ext.2. Admittedly, these are the recitals made in the registered document. These registered document had been produced by the defendants. Prior to filing the written statement, the defendants never sought for any relief to the effect that the recital



are wrong and no payment was made. There is a presumption in favour of the genuineness of the registered document. So far these recitals are concerned, for the first time in the written statement the defendants challenged that payment were not made. The documents were executed on 25.9.1963 and were registered on various dates, i.e., ext.'H, H/3, H/1, ext.2/10 were registered on 26.9.1963 whereas ext.'H/4, H/2 were registered on 30.09.1963. After expiry of three year that become final. It is not the case of the defendants that the recital are wrong, therefore, now after expiry of three years when the said statements become final, the oral evidence produced by the defendants denying the payment cannot be relied upon. The witnesses examined by the plaintiff, P.W.8, who is son of Kulo Singh and P.W.21 who is scribe of the endorsement made in ext.2/1 have stated that the payment was made to Kulo Singh amounting to Rs.6000/-. Likewise P.W.16, P.W.23 have supported the payment of Rs.4000/- in ext.H/4 and Rs.2000/- each in exhibit H/2, H/3 and H/1.

22. The plaintiffs also examined witnesses in support of payment of cash at the time of execution of the six mortgage deeds. P.W.10, 11 and 12 have stated payment of Rs.6000/- against ext.'H', Rs.5000/, against ext.H/4, Rs.6000/- each, against ext.H/2, H/3 and H/1.



23. The learned counsel for the appellant submitted that there are much contradictions in the evidences of these witnesses regarding payment in cash. So far this submission is concerned, it may be reiterated here that these payments are mentioned in the registered document. Therefore, on the basis of discrepancies of the witnesses examined by the plaintiff what is recited in the registered document cannot be disbelieved. Moreover so far the witnesses examined by the defendants are concerned, they are only negative evidences and the witnesses have stated that no payments were made. Since the plaintiff is praying for the relief for recovery of the amount, the burden is on the plaintiff to prove the fact of payment of the amount claimed by him. Therefore, in support of his case, the plaintiffs adduced evidences. I have already discussed the oral evidences and also the registered mortgage deeds ext. 'H' series. Now, therefore, in view of the recitals made in the registered documents which is supported by the witnesses examined by the plaintiffs, it appears that the plaintiffs have paid Rs.12,400/- towards the previous mortgage bonds and Rs.29,000/- at the time of execution of the mortgage deed ext. 'H' series total being Rs.12400+29000=41,400/-.

24. So far payment of Rs.19,000/- is concerned, it is the case of the plaintiff that Rs.19,000/- was paid after registration of the mortgage deeds in favour of the plaintiffs. In support of this case, the



plaintiff had produced P.W.11, P.W.13 and P.W.14. These witnesses examined by the plaintiff in the month of Kartik 1963. Except this oral statement of the plaintiff witness nothing had been brought on record about the date of payment of Rs.19000/-. It is simply pleaded that after registration, this amount was paid and the witnesses have supported pleading. Admitted fact is that huge area of landed property were mortgaged by the mortgage deeds for Rs.1,43,998/-. According to the recitals, only 41,400/- were paid. When every payment has been stated in the registered document, there is no reason as to why no document was obtained nor any receipt was obtained by the plaintiff in support of payment of Rs.19,000/-. The learned counsel for the plaintiff respondent submitted that there was very good relation between both the parties, therefore, in good faith, the amount was paid without receipt or document in support of the payment. So far this submission is concerned, it will not be out of place to mention here that there was good relation between the parties but then why mortgage deeds were executed, why every payment are noted in the registered document. If such good relation was there, then without mortgage deed, plaintiff could have advanced the loan because according to the plaintiffs, the defendants were in dire need of money in relation to marriage of the daughter of defendant No.1. Further, here the plaintiff admitted that the total amount of



Rs.1,43,998/- was not paid rather at the time execution, only Rs.41,400/- was paid and for that documents were executed. When Rs.19000/- was paid, no document was executed because this payment of Rs.19000/- is not a meager amount but is about half amount of the total paid amount, i.e., Rs.41,400/-. Only because some of the witnesses who are either related to the plaintiffs in support of the plaintiffs have deposed before the Court, the statement of the witnesses cannot be accepted blindly, particularly when here the huge amount is involved and huge landed property is involved and also the conduct of the party shows that everything were being done in writing. Further, in the plaint, the plaintiff has not pleaded about the date or month of payment of the said amount and in whose presence, it was paid. Therefore, the evidences or the statements of the witnesses produced by the plaintiff are not reliable and not supported by the pleading. It is not the case of the plaintiff that this amount was paid in presence of these persons on particular month or particular date. In view of the above, I find that the Court below has wrongly relied upon the case of the plaintiff that Rs.19000/-was paid after registration of the mortgage deeds. Ultimately, I therefore, come to the conclusion that the plaintiffs had only paid Rs.41,400/- in part consideration of Rs.1,43,998/-. The findings of the trial Court contrary to the above finding is hereby thus reversed. **The Point**

No.(i) is answered in favour of the defendants appellants.

25. Point No.(ii) :- The plaintiffs have claimed for mortgage decree of Rs.93,016/- with respect to the five mortgage bonds, ext. “H” series. The appellants’ objection is that the suit for mortgage decree is not maintainable because the plaintiffs are praying for recovery of the loan amount advanced to the plaintiff. The suit is neither maintainable under Section 67 nor maintainable under Section 68 of the Transfer of Property Act. The suit would have been filed for a money decree only, that too within three years from the right to sue accrue. So far the mortgage deeds are concerned, the plaintiffs never complied the terms and conditions and never paid the balance consideration amount, therefore, the deeds were admittedly not acted upon. The Court below had wrongly held that the suit is maintainable under Section 68 of the Transfer of Property Act.

26. Admittedly, in this case, the plaintiffs never paid the entire consideration amount of Rs.1,43,998/-. I have found that only Rs.41,400/- was paid. It is also admitted that delivery of possession of the mortgage property more than hundred acres of land was not given to the plaintiffs. The registration receipt were not given to the plaintiffs rather it was kept by the defendants themselves and the original registered mortgage deeds, ext. ‘H’ series, have been produced

by the appellants. Now, let us examine the case as to whether the mortgagee, i.e., the plaintiffs have got right to file mortgage suit and pray for sale of the mortgage property.

27. From bare perusal of the ext. 'H' series, it becomes clear that the mortgage is an usufructuary mortgage. Neither the appellant nor the respondent disputed this position. The usufructuary mortgage is defined as follows :-

“Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.”

28. In view of the above definition, the ingredients of usufructuary mortgage are (i) There is delivery of possession to the mortgagee. (ii) the mortgagee is to retain possession until the money is repaid and is entitled to appropriate income thereof. (iii) if the loan is repaid or discharged then the property is redeemed and (iv) in this usufructuary mortgage, there is no personal liability and there is no remedy available either by sell or for closure. No doubt, in the present case, there is undertaking to delivery of possession but the plaintiff themselves did not pay the entire consideration amount of

Rs.1,43,998/-. Therefore, the plaintiffs are at fault.

29. In the Transfer of Property Act, the mortgagees have two rights. One against the person of the mortgagor and the other against the mortgaged property. So far the rights against the persons of the mortgageor is concerned, it is dealt with in Section 68 of the Transfer of Property Act whereas the right against mortgaged property is concerned, it is dealt with in Section 67, 69 and 69A. The Court below in the present case has held that the suit is maintainable under Section 68 of the Transfer of Property Act. The plaintiffs also filed the suit for availing the rights against the person of the mortgagor.

30. Section 68 of the Transfer of Property Act reads as follows :-

68. Right to sue for mortgage-money -

(1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely,

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of

the mortgagor;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor

(2) Where a suit is brought under clause (a) or clause (b) 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, re-transfers the mortgaged property.

31. In view of this provision the contract referred to in Clause (a) always exist in a simple mortgage, English mortgage or mortgage by deposit of title deeds and it may also exist if expressly provided for in an anomalous mortgage. Admittedly, here the mortgage is usufructuary mortgage. Clause(b) deals with cases when the whole or part of the property is destroyed by an act of God, therefore, this is not applicable. Clause (c) and (d) are the examples of cases where there is breach of covenant for title referred to in Section 65. So far clause (d) is concerned, the mortgagor is responsible only when the mortgagees possession is disturbed by the mortgagor and not by trespasser. This clause (d) applied to usefucutuary mortgagees. However, it will be applicable only when mortgagee is entitled to possession of the mortgage property and the mortgagor fails to deliver



the same. In the present case, it is the mortgagee who failed to comply the terms and conditions of the mortgage bond and never paid the consideration amount and never tried to obtain delivery of possession. Therefore, also Clause (d) is no helpful to the plaintiff. Under this clause (d), the plaintiff can file suit for obtaining delivery of possession. But here the plaintiff is praying for recovery of the part payment because he fails to perform his part of the agreement. As has been quoted above, Section 68 provides that the mortgagee has the only rights to sue for mortgage money as mentioned in the said Section and not in any other case. Here, I have discussed the above clauses of Section 68 and none of these clauses is applicable in the present case, therefore, the suit filed by the plaintiff for recovery of money as mortgage decree was not maintainable. The plaintiff could have filed the suit for money decree only that too within three years but the suit had been filed in the year 1969 whereas the amount was advanced in the year 1963. In my opinion, therefore, the Court below had wrongly held that this plaintiff's suit is maintainable for mortgage money decree under Section 68. Therefore, the findings of the Court below is hereby reversed on this point.

32. Point No.(iii) :- As stated above, the plaintiff's suit for mortgage money decree itself was not maintainable, therefore, there is no question of limitation arises. Moreover, even if it is held that the

suit can be treated as suit for money decree then also it is barred by law of limitation because payment was made in 1963 and the suit has been filed much after three years and the limitation for recovery of money is only three years from the date of payment. Accordingly, this point is also decided in favour of the appellant.

33. Point No.(iv) :- From perusal of the Judgment, it appears that the Court below while decreeing the plaintiff's suit for Rs.60,400/- only directed to pay interest at the rate of Rs.6% per annum since 23.9.1969 and directed the appellant to pay the same within three months from the date of judgment. From perusal of the final decree, it appears that the amount of interest after decree has also been added although in the preliminary decree, the Court below has not granted the interest till the realization of the amount.

34. Section 34 of the Code of Civil Procedure provides that the Court may order to pay interest firstly from the date of the suit to the date of the decree. Secondly, at such rate not exceeding 6 per cent per annum from the date of the decree to the date of the payment. Here, the Court below had granted the interest pendent lite only, i.e., from the date of suit to the date of the decree. In the final decree, the interest from the date of decree till preparation of final decree is also added. Thereby, the amount was increased which is contrary to the

preliminary decree.

35. Further, the plaintiffs prayed for decree of Rs.93,016/- but the Court below decreed the suit in part. But from perusal of the final decree, it appears that the cost have not been proportionally calculated rather the cost on the entire claimed amount had been calculated. Thus, on this ground also, the decree is incorrect.

36. I have recorded finding above that the plaintiffs failed to prove Rs.19,000/- and also I have found that the plaintiff had paid only Rs.41,400/-, therefore, the final decree prepared, consequently, is liable to be set aside.

37. In the present case, it appears that the property have been sold in execution of the final decree. Since the final decree prepared is contrary to the preliminary decree and prepared for excess amount, it is liable to be set aside consequently, the sale affected in execution of the final decree is also to be set aside. Thus, it is set aside.

38. The Hon'ble Supreme Court in the case of *Sital Parshad Vs. Kishori Lal AIR 1967 SC 1236* has held that 'if in appeal, the preliminary decree is reversed, the final decree must fall to the ground for there is no preliminary decree. It is not necessary in such a case for the defendant to go to the Court passing the final decree and ask it to set aside the final decree. Even if the

defendant does not make an application to the Court for setting aside the final decree within three years because the preliminary decree has been reversed, the decree-holder cannot get the right to execute the final decree which has no preliminary decree in support of it.' In the present case I have already held above that the plaintiff's suit itself was not maintainable under Section 68 of Transfer of Property Act and the plaintiff failed to prove payment of Rs.19,000/-, therefore, even if the plaintiff's suit is decreed considering it to be the mortgage decree then also the preliminary decree is only with respect to Rs.41,400/- and not more than that.

39. In view of above discussions, I find that the preliminary decree and final decree are liable to be set aside and consequently, the auction sale, if any, is also liable to be set aside as the same has been made pursuant to the final decree.

40. In the result, both the First Appeals are hereby allowed and the impugned Judgment and preliminary decree as well as final decree are set aside. In the facts and circumstances of the case, the parties shall bear their own cost.

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(Mungeshwar Sahoo, J)