IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-2119-2010 (O&M)
Date of decision: 31.10.2018

RAJ DEV MEHTA THR LRS ... Appellants

Versus

JAGIR CHAND AND ORS. ... Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present : Mr. Lakhwinder S. Maan, Advocate
for the appellant.

Mr. Inderjit Sharma, Advocate
for the respondents.

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REKHA MITTAL, J. (Oral)

The present appeal directs challenge against concurrent findings recorded by the Courts whereby suit for recovery of Rs.3,55,200/- on the basis of mortgage was partly decreed by the trial Court and the respondents/plaintiffs have been held entitle to recover Rs.1,60,000/- with interest @ 6% per annum from the date of execution of mortgage deed Ex.P1 till realization whereas counter claim filed by the appellant/defendant was dismissed.

The judgment and decree passed by the trial Court gave rise to two separate appeals preferred by respondents/plaintiffs as well as defendant/appellant and the same were decided vide common judgment and decree dated 24.12.2009 passed by the Additional District Judge (Fast

Track Court), Bathinda. The judgment and decree passed by the trial Court were modified to the effect that respondents/plaintiffs are entitle for recovery of the entire amount along with contractual rate of interest as per Order 34 Rule 11 of the Code of Civil Procedure (in short 'the Code') but findings of the trial Court dismissing counter claim were affirmed.

Counsel for the appellant has assailed the judgments and decrees primarily on two counts. The first submission made by counsel is that as the respondents/plaintiffs filed suit for recovery under Order 34 of the Code, the trial Court was obligated to pass a preliminary decree as provided under Order 34 Rule 4 of the Code. The second submission made by counsel is that as the trial Court has not allowed the relief for sale of alleged mortgaged property by passing a preliminary decree, the Appellate Court has wrongly allowed claim of the respondents/plaintiffs for recovery of Rs.3,55,200/- with contractual rate of interest i.e. 24% per annum. In the alternate, it is argued that if aforesaid contentions are not accepted, judgment and decree passed by Court in appeal may be modified and principal sum of Rs.1,60,000/- with pendente lite and future interest @ 6% per annum may be allowed.

Counsel representing the respondents/plaintiffs, on the contrary, would urge that as the Courts have passed simpliciter decree for recovery without allowing the relief for realisation of decretal amount by sale of mortgaged property, no useful purpose would have been served by passing the preliminary decree at first instance and thereafter confirming the same as it is. However, he is not in a position to support findings of the Appellate Court allowing recovery of entire amount with contractual rate of interest in the circumstances that neither the trial Court nor the Court in appeal has passed a preliminary decree under Order 34 Rule 4. He would fairly concede that decree passed by the Court in appeal may be modified by allowing reasonable rate of interest on the principal sum of Rs.1,60,000/- from the date of loan till realisation.

I have heard counsel for the parties, perused the paper book particularly the judgments impugned.

The respondents/plaintiffs filed suit for recovery of Rs.3,55,200/- i.e. Rs.1,60,000/- principal amount and Rs.1,95,200/- towards interest upto date of filing of the suit by foreclosure i.e. sale of mortgaged property namely house constructed on land measuring 103 sq. yards detailed in para 1 of the judgment of trial Court. However, the trial Court passed a simple money decree for recovery of principal amount with interest. The Appellate Court did not accept plea of the respondents/plaintiffs to realize the decretal amount by way of sale of mortgaged property.

Rule 4 of Order 34 of the Code deals with preliminary decree in suit for sale. A relevant extract from Sub Rule 1 of Rule 4 of Order 34 of the Code, germane to the present controversy, reads as follows:-

> "(1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein

> mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.”

As has been rightly argued by counsel for the respondents/plaintiffs that in a suit for sale, the Court shall pass a preliminary decree to the effect mentioned in Clauses (a), (b) and (c)(i) of Sub Rule 1 of Rule 2 and further direct that in default of defendant paying as therein mentioned, the plaintiff shall be entitle to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold for realisation of the amount which the decree holder has been held entitle to recover but in case the decree holder is not held entitle to recover the amount by sale of mortgaged property, there is no occasion with the Court to pass a preliminary decree for recovery and then to affirm the same in an application for final decree. In this view of the matter, contention of the appellant in this regard is not tenable.

This brings the Court to decree passed by the Appellate Court by invoking Rule 11 of Order 34 of the Code. As in the case at hand, the trial Court did not pass a decree allowing realisation of the decretal amount by sale of mortgaged property, provisions of Rule 11 of Order 34 of the Code cannot be attracted.

Taking into consideration the concession recorded by counsel for the respondents/plaintiffs coupled with principles of justice, equity and good conscience, it would be in the fitness of things that decree passed by the Appellate Court is modified to the effect that respondents/plaintiffs shall be entitle for recovery of principal amount i.e. Rs.1,60,000/- with interest @ 9% per annum from the date of execution of mortgage deed till the date of decree and interest @ 6% per annum on the principal amount from the date of decree till realisation.

For the foregoing reasons, the appeal is partly allowed in the aforesaid terms, leaving the parties to bear their own costs.

(REKHA MITTAL)
JUDGE

31.10.2018
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Whether speaking/reasoned: Yes / No
Whether reportable: Yes / No