

A S. RAJAGOPALASWAMI NAIDU

v.

BANK OF KARAUKUDI LTD.

September 22, 1970

[J. C. SHAH AND A. N. GROVER, JJ.]

B *Transfer of Property Act 4 of 1882, s. 67A, Applicability of—Usurious Loans Act 1918—Rate of interest when penal.*

C The appellant mortgaged his property bearing No. 162A West Masi Street Madurai Town for a sum of Rs. 45,000 with the respondent Bank on October 14, 1950. In January 1952 the appellant and his wife borrowed Rs. 25,000 and jointly executed a pronote. The wife deposited her title deeds relating to premises No. 162 West Masi Street. On June 25, 1952 the appellant and his wife created a mortgage of their respective properties Nos. 162A and 162 West Masi Street to secure repayment of a sum of Rs. 8,850. All the three mortgages were in favour of the respondent Bank. In 1953 the Bank instituted a suit on the foot of the last two mortgages and obtained a decree against the appellant and his wife. This decree was satisfied. In April 1958 the Bank filed a suit on the foot of the mortgage dated October 14, 1950. The main defence of the appellant, who was the sole mortgagor, was that the suit was not maintainable in view of the provisions of s. 67A of the Transfer of Property Act and that the stipulation of interest was penal and in contravention of the provisions of the Usurious Loans Act, 1918. The trial court decreed the suit and the High Court dismissed the appeal. By special leave appeal was filed in this Court.

D **E** **F** **G** **H** **HELD:** If a mortgagor has made two or more mortgages of the same property or of different properties to the same mortgagee the mortgagor may redeem each separately but the mortgagee must enforce all or none. To attract the applicability of s. 67A it is essential that the mortgagor must be the same and he should have executed two or more mortgages in respect of each of which he has a right to obtain the same kind of decree under s. 67. In the present case it was not possible to hold that the mortgagor in the suit on the foot of the mortgage dated October 14, 1950 was the same as the mortgagor in the previous suit which was filed on the foot of the mortgages in favour of the appellant and his wife. In the other two mortgages there were two mortgagors, one the appellant and the other, his wife. There is no statutory provision or rule or principle by which the wife and the husband could be treated as one entity for the purpose of the mortgage. Each was owner of a separate and distinct property and both joined in mortgaging their respective properties. The bar of s. 67A therefore could not possibly come in the way of the institution of the present suit. [429 B-F)]

Moro Raghunath v. Balaji, I.L.R. 13 Bom. 45, approved & applied.

(ii) In the light of the provisions of the mortgage deed and all the circumstances the interest rate of 12% was unfair and penal. [Rate suitably reduced.] [429 G]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1672 of 1966.

H Appeal from the judgment and order dated 16th March 1965 of the Madras High Court in Appeal Suit No. 139 of 1961.

P. Balagopal A. V. Rangam and Lily Thomas, Advocates for the appellant.

M. Natesan, R. Ramamurthi Iyer and R. Gopalakrishnan, for the Respondent. A

The Judgment of the Court was delivered by

Grover, J. This is an appeal by certificate from a decree of the Madras High Court.

The appellant mortgaged his property bearing No. 162A West Masi Street, Madurai town for a sum of Rs. 45,000/- with the respondent Bank on October 14, 1950. He agreed to repay Rs. 5,000/- within a specified date and the balance was payable within two years from the date of the deed together with interest at 10½%. It was further agreed that if the mortgagor failed to pay the interest periodically and regularly he would be liable to pay interest at the rate of 12% per annum from the date of such default and further if he failed to pay the entire amount stipulated within two years he would have to pay the whole amount together with interest at 3½% per annum. The sum of Rs. 5,000/- was paid within the time specified but the balance remained unpaid. In January 1952 the appellant and his wife borrowed Rs. 25,000/- and jointly executed a pronote. The wife deposited her title deeds relating to premises No. 162 West Masi Street. On June 25, 1952 the appellant and his wife created a mortgage of their respective properties Nos. 162A and 162 West Masi Street to secure repayment of a sum of Rs. 8850/-. All the three mortgages were in favour of the respondent Bank. B C D

In 1953 the Bank instituted a suit on the foot of the last two mortgages and obtained a decree against the appellant and his wife. This decree appears to have been satisfied. In April 1958 the suit out of which the present appeal has arisen was filed by the Bank on the foot of the mortgage dated October 14, 1950. The main defence of the appellant, who was the sole mortgagor, was that the suit was not maintainable in view of the provisions of s. 67A of the Transfer of Property Act and that the stipulation of interest was penal and in contravention of the provisions of the Usurious Loans Act 1918. A number of other issues were framed but it is altogether unnecessary to mention them. The trial court granted a preliminary decree for the recovery of principal amount of Rs. 40,000/- which remained unpaid with interest at 12% per annum from August 1, 1952 till the date of the decree and thereafter at 6% per annum till realisation. An appeal was taken to the High Court where two points were agitated. The first was based on the provisions of s. 67A of the Transfer of Property Act and the second related to the rate of interest. The High Court did not accede to any of the contentions and dismissed the appeal. E F G

Section 67A of the Transfer of Property Act provides that a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under s. 67 and who sues to obtain such decree H

- A on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all mortgages in respect of which the mortgage-money has become due. This section was inserted by the Amending Act 20 of 1929 in view of certain conflict among the High Courts in this country, with regard to the right of the mortgagee to sue at different times on different mortgages although
- B the mortgagor was the same. As pointed out in Mulla's Transfer of Property Act, 5th Edn. at page 481 ss. 61 and 67A of this Act lay down the simple rule that if a mortgagor has made two or more mortgages of the same property or of different properties to the same mortgagee the mortgagor may redeem each separately but that the mortgagee must enforce all or none. To attract the applicability of s. 67A it is essential that the mortgagor must be the same and he should have executed two or more mortgages in respect of each of which he has a right to obtain the same kind of decree under s. 67A. In the present case it is not possible to hold that the mortgagor in the suit on the foot of the mortgage dated October 14, 1950 is the same as the mortgagor in the previous
- D suit which was filed on the foot of the mortgages in favour of the appellant and his wife. In the other two mortgages there were two mortgagors, one the appellant and the other his wife. There is no statutory provision or rule or principle by which the wife and the husband could be treated as one entity for the purpose of the mortgages. Each was owner of a separate and distinct property and both joined in mortgaging their respective properties. In
- E *Moro Raghunath v. Balaji*⁽¹⁾ the first mortgage was by two brothers and the second mortgage of part of the same property was by one brother. The Bombay High Court held that the suit to enforce the first mortgage did not bar a suit to enforce the second mortgage. This was before the insertion of s. 67A but the principle embodied in that section is clearly illustrated by that case.
- F The bar of s. 67A, therefore, could not possibly come in the way of the institution of the present suit.

On the question of interest we are of the view in the light of the provisions of the mortgage deed and all the circumstances that the rate of 12% is unfair and penal. We are inclined, therefore, to give this relief that the interest should be calculated at the rate of 10½% (which was the original contractual rate) from the date of the mortgage to the date of the preliminary decree. Thereafter the interest shall be payable as directed by the trial court at the rate of 6% per annum till realisation. With this modification the appeal is dismissed but in view of the entire circumstances the parties are left to bear their own costs in this Court.

H G.C.

Appeal dismissed.

(1) I.L.R. 13 Bom. 45.