

(1916) 07 CAL CK 0023
In the Calcutta High Court

Afsar Shaik and Another

APPELLANT

Vs

Saurava Sundari Dasi

RESPONDENT

Date of Decision : 12-07-1916

Acts Referred:

Evidence Act, 1872 — Section 92
Transfer of Property Act, 1882 — Section 76

Citation : 40 Ind. Cas. 371

Hon'ble Judges : Cuming, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by two of the defendants in a foreclosure suit. On the 2nd December 1908, the first defendant executed in favour of the plaintiff an instrument which was a mortgage by conditional sale within the meaning of Clause (c) of Section 58 of the Transfer of Property Act. The mortgagor ostensibly sold the mortgaged property on condition that on default of payment of the mortgage-money on the 14th May 1909, the sale would become absolute. The principal amount was Rs. 41 and carried interest at the rate of 37 1/4 per cent, per annum. The document further recited that the mortgagor retained possession of the property. The case for the plaintiff is that the mortgage-money was not re-paid on the due date, with the result that from the 15th May 1909, she entered into possession of the mortgaged property with the consent of the mortgagor. She continued in peaceful occupation till she was dispossessed by force on the 1st April 1912, by the third defendant who had meanwhile succeeded to the interest of the mortgagor. On the 12th April 1912, she instituted the present suit for foreclosure. She claimed to recover Rs. 41 as principal and Rs. 51-4-0 as interest therein from the date of the mortgage to the date of the institution of the suit, and prayed that the usual foreclosure decree might be made as provided in Order XXXIV of the Civil Procedure Code. The defendants pleaded that the claim was entirely unfounded as the mortgage-debt had been fully satisfied by means of the profits received by the mortgagee during the period of her occupation of the mortgaged premises. The Court of first

instance made a preliminary decree in the terms prescribed by the Code and directed the usual accounts to be taken. When accounts were taken, it transpired that the mortgage-debt, principal and interest, had been satisfied in full by the profits received by the plaintiff during her possession of the mortgaged properties. The result was that the Trial Court ultimately dismissed the suit. Upon appeal that decree has been reversed by the District Judge, on the ground that Section 92 of the Indian Evidence Act precluded proof that the terms of the original mortgage were modified so as to change it into a usufructuary mortgage. The defendants have appealed to this Court and have argued that this conclusion is based upon a complete misapprehension of the relative rights of the mortgagor and mortgagee. In our opinion this contention is well-founded.

2. The plaintiff alleges in her plaint that she took possession of the mortgaged property, with the consent of the mortgagor, when the latter failed to pay the mortgage money on the due date. It is a mistake to suppose that this altered the nature of the contract between the parties and transformed the conditional mortgage into a usufructuary mortgage; what happened in essence was that the parties adopted a mode of satisfaction of the mortgage *Kamla Sahai v. Babu Nandan Mian* 2 Ind. Cas. 18 : 11 C.L.J. 39; *Lala Himmat Sahai Singh v. Llewellyn* 11 C. 486 : 5 Ind. Dec. (N.S.) 1083 consequently no question arises as to the effect of Section 92 of the Indian Evidence Act. The real point in controversy is, whether the sums received by the mortgagee during her possession of the mortgaged premises must be applied by her in reduction of the mortgage-debt. The answer must be in the affirmation in view of the provisions of Section 76 of the Transfer of Property Act. Clause (h) of that section provides that where, during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, his receipts from the mortgaged property shall, after deducting the expenses mentioned in clauses (c) and (d) [that is, revenue, public charges, rent, and cost of repairs, 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 on the mortgage-money, and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money. It is perfectly plain that the plaintiff took possession during the continuance of the mortgage, for the default of the mortgagor to pay the mortgage-money on the due date, did not extinguish the equity of redemption and transform the title of the mortgagee into full ownership, The plaintiff cannot but be deemed to have taken possession as mortgagee without any reasonable ground for belief that he was entitled to hold in a different capacity *Parkinson v. Hanbury* (1867) 2 H.L. 1 : 36 L.J.Ch. 292 : 16 L.T. 243 : 15 W.R. 642; *Gaskell v. Gosling* (1896) 1 Q.B. 669 on appeal (1897) A.C. 570 : 66 L.J.Q.B. 848 : 77 L.T. 314. The case does not fall within the class of decisions, where the mortgagee has been led into an honest belief that upon non-payment by the mortgagor of the money at the time fixed, he became the absolute owner of the property; *Smyth v. Simpson* (1850) 7 Moore P.C. 205 : 13 E.R. 859; *Anandrav v. Ravji* 2 B.H.C.R. 214; *Ramshet Bachashet v. Pandhatinath* 8 B.H.C.R.A.C.J. 236. There was a valid mortgage in

existence and in full operation when the mortgagee took possession; this, indeed, has been the common case of both the parties. The title of the mortgagors could not be extinguished till a decree absolute had been made in a foreclosure suit properly framed for the purpose. On the other hand, as the mortgagee, in the present litigation, claims interest for the full period between the execution of the mortgage and the institution of the suit, such claim can be sustained only on the theory that she has throughout this period retained the character of mortgagee. She is consequently bound to appropriate the profits, as mortgagee in possession in reduction of the mortgage -debt, on the principle recognised by the Judicial Committee in *Sri Raja Papamma Rao v. Sri Vira Pratapa* 19 M. 249 : 23 I.A. 32 : 6 M.L.J. 53 : 7 Sar. P.C.J. 10 : 6 Ind. Dec. (N.S.) 879 and by this Court in *Ramawatar v. Tulsi Prasad Singh* 11 Ind. Cas. 713 : 14 C.L.J. 507 : 16 C.W.N. 137; *Robertson v. Norris* (1858) 1 Giff 421 : 65 E.R. 983 : 114 R.R. 486. The true position is that the rents and profits are, in the view of a Court of Equity, incidents de jure to the ownership of the equity of redemption, and the mortgagee in possession is bound to apply whatever profits he actually receives towards the satisfaction of the mortgage debt.

3. If the contrary view were adopted, the result would be that the mortgagee would be allowed interest in addition to the profits retained by her, a position which cannot be justified on any conceivable ground of justice, equity and good conscience. We are clearly of opinion that the decree made by the Trial Court could not be successfully impeached; nothing was due to the plaintiff at the date of the institution of the suit, for the report of the Commissioner who took the accounts has ever been challenged.

4. The result is that this appeal is allowed and the decree of the Court of first instance restored. The suit will thus stand dismissed with costs in all the Courts.