(1933) 08 AHC CK 0017

In the Allahabad High Court

Case No : Ex. Second Appeal No. 758 of 1932

Alauddin Khan (and after his death Shabuddin Khan) and Others — APPELLANT

Vs

Shamshuddin and Another — RESPONDENT

Date of Decision : 01-08-1933

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 144
Transfer of Property Act, 1882 — Section 62

Citation : (1933) 08 AHC CK 0017

Hon'ble Judges : Umashanker Bajpai, J

Bench : Single Bench

Advocate : M.A. Aziz, for the Appellant; S.K. Dar and N.A. Sherwani, for the Respondent

Judgement

Umashanker Bajpai, J.—This is a second appeal in an execution matter, more strictly speaking in a Section 144 Code of CPC proceeding. Tie facts are fairly clear and have been given in the judgments of the Courts below. It appears that on the 11th December, 1923, the owners of certain property mortgaged the same usufructuarily to one Shamshuddin for a sum of Rs. 1,200. Later on they sold the property on the 13th of April, 1928, to one Suraj Bhan for Rs. 1,600 leaving in his hand Rs. (sic),200 for payment to Shamshuddin the usufructuary mortgagee. On the 2nd of June, 1928, Suraj Bhan sold the property to Shamshuddin for Rs. 1,700 leaving in his hands Rs. 1,200 for the liquidation of the usufructuary mortgage. On the 13th of June, 1928, Alauddin and others brought a suit for pre-emption. They impleaded Suraj Bhan as well as Shamshuddin. They mentioned both the sale deeds of the 13th of April, 1928, and the 2nd of June, 1928, but they alleged their cause of action to arise on the 13th of April, 1928. They had to impaled Shamshuddin because he had obtained certain rights by the sale deed of the 2nd of June, 1928, but it is clear from a perusal of the plaint that the preemptors were ignoring the sale deed of the 2nd of June, 1928. This pre-emption suit went up to the High Court and the rights of the parties must be deemed to be governed by the decree that was ultimately passed by the High Court on the 11th of June, 1931. That decree contains among others the following provision:

The Plaintiffs shall get constructive possession of the equity of redemption subject to the rights, if any, of the usufructuary mortgagee to retain possession, that is to say, if the usufructuary mortgagee was in possession of the property in question by virtue of his mortgage before the sale deed his actual possession, could not be disturbed without redeeming him.

2. It appears that after the decision of the preemption suit by the court of first instance the preemptors deposited a sum of Rs. 1,600 in court on 1st September, 1928, and claimed to obtain possession of the property. They were given possession either in January 1929 or in May 1929. After the decision by the High Court Shamshuddin applied to the court below that in pursuance of the decree of the High Court he was entitled to possession and u/s 144 CPC he should be restored to possession inasmuch as the decrees of the Subordinate Courts had been varied by the High Court.

3. The Court of first instance dismissed Shamshuddin''s application but on appeal the learned District Judge has ordered that Shamshuddin should be restored to his mortgagee possession of the property in suit. It is contended before me that the lower appellate Court has not put a correct interpretation upon the decree of the High Court. It is argued that the decree of the High Court specially provided that it was only if the mortgagee had any rights then only he could be allowed to retain possession of the property. Stress is laid upon the words "if any" in the decree of the High Court. I am, however, of the opinion that the High Court by its decree elucidated what was really meant by the words "if any" and it distinctly said that if the usufructuary mortgagee, that is, Shamshuddin was in possession of the property in question by virtue of his mortgage before the sale deed his actual possession could not be disturbed without redeeming him. Whether the sale deed referred to above be the sale deed of the 13th of April, 1928, or the 2nd of June, 1928, it is admitted that Shamshuddin was in possession of the property before either of these two dates as a usufructuary mortgagee. What is contended, however, is that by virtue of the sale deed of the 2nd of June, 1928, the usufructuary mortgagee lost all his rights as a mortgagee and became the owner of the property out and out. This argument ignores what is put down in the decree, namely, that the possession that has got to be seen is before the sale-deed, and there can be no question that Shamshuddin before the sale-deed, whether it be the sale-deed of the 13th of April, 1928, or the 2nd of June, 1928, was in possession as a mortgagee.

4. It was next contended that by virtue of the deposit made on the 1st of September, 1928, in pursuance of the orders of competent court''s the mortgage has been redeemed and my attention has been drawn to Section 62 of the Transfer of Property Act. That provision of law defines only the rights of parties and does not mean that as a matter of procedure the mortgage is redeemed

when the deposit is made. Deposits are made in court and tenders are made to the parties out of court and the mortgagees often refuse to accept the money on valid or invalid grounds and the aggrieved party, namely, the depositor has got to file a suit for redemption, and it is only when a decree is obtained that the mortgage is redeemed. It, is, therefore, clear that by the mere deposit of the money redemption was not obtained as was contemplated by the decree of the High Court.

5. I am, therefore, of the opinion that the decision of the court below is correct and I dismiss this appeal with costs. Leave to file an appeal by way of Letters patent is refused.