
(1932) 04 CAL CK 0012
In the Calcutta High Court

Asia Khatun and Others

APPELLANT

Vs

Nurjahan Khatun and Others

RESPONDENT

Date of Decision : 14-04-1932

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89

Citation : AIR 1933 Cal 39

Hon'ble Judges : Mitter, J; Bartley, J

Bench : Full Bench

Judgement

Mitter, J.—This is an appeal by the judgment-debtors from an order of the Subordinate Judge of Backergunj dated 10th October 1931 by which he refused to set aside the sale in execution of a mortgage decree. The questions of law which fall for determination in this appeal depend on facts which have not been seriously disputed before us and which may be briefly stated. It appears that the respondents Nurjahan Khatun and others obtained a mortgage decree against the appellants Asia Khatun and others for a sum of Rs. 10,830-10-6 sometimes in the year 1928 and in execution of the said decree purchased the properties which formed the subject of the mortgage on 19th February 1930. On 19th March 1930 judgment-debtors 2 to 7 made an application to have the sale in execution set aside under Order 21, Rule 89, Civil P.C., and they deposited the decretal money with compensation. On 24th March following notices were issued on the mortgagees decree-holders and judgment-debtor 1 to show cause why the sale should not be set aside. In the meantime on 25th March Narendra Nath Gupta and others who had obtained a rent decree against the mortgagees decree-holders, attached the sum of Rs. 3,410-10-0 out of the money deposited under Order 21, Rule 89 by the mortgagors defendants 2 to 7, and on 26th May 1930 the Subordinate Judge after hearing the objections of the mortgagees decree-holders set aside the mortgage sale. On the next day the mortgagees decree-holders put in a petition before the Subordinate Judge asking the Court to stay the payment of Rs. 3,410-10-0 to Narendra Nath Gupta as they were intending to prefer an appeal against the order of the Subordinate Judge setting

aside the sale to the High Court. They repeated this prayer for stay of payment in their application of 27th June 1930.

2. On 28th June 1930 the mortgagees decree-holders put in a further application in which they distinctly alleged that they did not admit that the amount deposited by the judgment-debtors under Order 21, Rule 89 belonged to them and they prayed that in the circumstances till it was decided by the High Court that the said money belonged to them, the attaching creditors could in no sense be entitled to the money on the footing that the said money belonged to them and they asked for time to bring an order for stay from the High Court. The Subordinate Judge who was dealing with both the rent execution case and the application under Order 21, Rule 89 directed that the sum of Rs. 3,410-10-0 be paid to the attaching creditors on their furnishing security and on 12th July 1930 the security was furnished and payment order was made in favour of the attaching creditors and the rent execution case against the mortgagees decree-holders in the present case was dismissed on full satisfaction. On 21st July 1930 the mortgagees decree-holders preferred an appeal to the High Court against the order of the Subordinate Judge setting aside the mortgage sale. The appeal was heard by the learned Sir George Rankin, C.J. and Pearson, J. Pearson, J., with whom the Chief Justice concurred allowed the appeal and made the following observations:

In my judgment therefore this was not a good deposit under Rule 89 which entitled the judgment-debtor to have the sale set aside and prima facie, the order of the learned Judge cannot stand.

It appears however that on 25th March 1930, a few days after the deposit, an attachment in execution was made of the deposit moneys to the extent of Rs. 8,410-10-0 by creditors holding, a decree against the decree-holders in the present matter. A certificate for payment of that amount was granted to the attaching creditors on 12th July 1930. In the circumstances this matter must go back to the lower Court for consideration of what effect, if any, this fact may have upon the present position and rights of the parties.

3. It appears therefore from the observations last quoted that the High Court remanded the case for consideration of the question as to what effect the fact of the attachment of Rs. 3,410-10-0 and of the payment of the same to the attaching creditors of the mortgagees decree-holders may have upon the rights of the parties. When the matter goes back on remand not only this question but also other objections to the sale in execution of the mortgage decree were raised before the Subordinate Judge. The Subordinate Judge rejected the application under Order 21, Rule 89, and the other applications made on 17th August 1931 by which the judgment-debtors 2 to 7 prayed that the mortgage decree may be held to be satisfied and that the sale and, purchase by the mortgagees decree-holders might be set aside. It is against, this order refusing to set aside the sale that the present appeal has been brought. The sale was attacked substantially on four grounds before the learned Subordinate Judge below and the same grounds

have been repeated before us by the learned advocate for the appellants.

4. The first ground taken is that the attaching creditors Narendra Nath Gupta and others were representatives of the mortgagees decree-holders and the withdrawal of money by them precludes the mortgagees decree-holders from contending that the deposit was not a good deposit within the meaning of Order 21, Rule 89, Civil P.C, and reliance is placed on Order 21, Rule 53, Civil P.C, in support of this contention. It is obvious however that Order 21, Rule 53 has no application to the present case seeing that what was attached in the present case was not a decree and Order 21, Rule 53 applies only to attachment of decrees. This ground therefore fails.

5. It is contended in the second place that as the mortgagees decree-holders had enjoyed the benefit of the deposit made by the judgment-debtors 2 to 7 he is precluded from challenging the validity of the deposit or from challenging the order made by the Subordinate Judge in the first instance setting aside the sale. It is pointed out that before filing the appeal on 21st July 1930 against the order of the Subordinate Judge setting aside the sale the decree-holder enjoyed the benefit of the deposit to a certain extent as the rent decree against the mortgagee decree-holders was dismissed on full satisfaction. In support of this contention reliance has been placed on a decision of this Court in the case of *Banku Chandra Bose v. Marium Begum* (1917) 37 IC 804. An examination of that case shows that where a suit which was dismissed for non-prosecution was restored on an application on behalf of the plaintiffs and the Court made certain orders in respect of the payment of defendant's costs incidental to the application and the defendants got their costs taxed and "obtained an allocatur it was held that they having taken advantage of the order were precluded from appealing against it." The learned Sir Lancelot Sanderson, C.J., said that the defendants acted under the order and enjoyed the benefit of it and they could not adopt the order for one purpose and then claim to have it set aside for another purpose. Other cases were also cited to show that where a person accepts a benefit under the order of a Court he is precluded from challenging the order. This rule is only a special phase of the rule that a party cannot either in course of a litigation or in dealing in pais occupy inconsistent positions; upon that rule election is founded. In other words a man shall not be allowed in the language of the Scotch law to approbate and reprobate. Where a man has an election between several inconsistent courses of action he will be confined to that which he first adopts; the election, if made with the knowledge of facts, is in itself binding. The election must be however a voluntary act not forced upon him by circumstances over which he had no control and not with standing his protest. Three petitions of the decree-holders dated 27th May, 27th June and 28th June 1930 respectively make it clear beyond doubt that the mortgagees decree-holders respondents were persistently resisting the application of the deposit money to the satisfaction of the rent decree obtained by Guptas against them. The true rule in cases of this kind is laid down by Dr. Bigelow in his classic work on the Law of Estoppel, Edn. 6 at p. 747. The learned author says this:

Not will the receiving an indirect benefit from a transaction, it seems, if without the party's own procurement, have the effect to preclude him from denying the validity of the transaction.

6. The decree-holders were no free agents in the matter of attachment of Rupees 3,410-10-0 and in these circumstances I can see no reason on principle and I can see nothing in authority to guide me to the conclusion that the respondents are precluded from challenging the validity of the deposit. At the same time I feel that no order for confirmation of sale can be made until the mortgagees decree-holders can bring into Court the sum of Rs. 3,410-10-0 and place it to the credit of the judgment-debtors, defendants 2 to 7. The next ground taken is that under the provisions of Order 34, Rule 5, as it stood; before its amendment by Act 21 of 1929 the judgment-debtors are entitled to redeem before the confirmation of sale. It is argued that the right of the mortgagors to redeem is not extinguished, by the sale, that the security remains alive till the date of confirmation of the sale and reliance has been placed in support of this contention on a Full Bench of this Court in the case of Bibijan Bibi v. Sachi Bewah (1904) 31 Cal 863. An examination of that case will however show what was there laid down is that a mortgagor judgment-debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage decree by payment of the debt before the sale actually takes place and the sale proceeds are distributed. It is argued that the use of the words and the sale proceeds are distributed in the said Full Bench judgment goes to show that the mortgage could be redeemed before confirmation of sale. We cannot agree with this contention. In our opinion the right of redemption is extinguished with reference to persons who are concluded by the decree for sale by the sale actually taking place. It is then said that this might have been the position when the Transfer of Property Act of 1882 (Section 89) was in force, where on payment of the mortgage debt the defendants' right to redeem and the security was held to be extinguished. It is said that the words:

and thereupon the defendants' right to redeem and the security shall both be extinguished

which occurred at the end of Section 89 having been omitted from Order 34, Rule 5, Civil P.C, the effect is that the right of redemption of the mortgagor is not extinguished by the sale. In support of this contention reliance has been placed on the following observations of their Lordships of the Judicial Committee of the Privy Council in the case of Sukhi v. Gholam Safdar AIR 1922 PC 11. Dealing with Hetram v. Shadi Ram AIR 1918 PC 34 Lord Dunedin said this:

But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so soon as the decree of sale was obtained; and that was based on the express words of Section 89, T.P. Act, 1882, which ends after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." Now the group of Sections 85 to 90 inclusive of the Transfer of Property Act, 1832 were repealed by the Civil Procedure Code, 1908 and were replaced by the rules under Order 34. In these

rules the words above quoted are omitted in the rule which corresponds to Section 89. They do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of Order 84 which are limited to providing for the extinction of the debt....Now the words being gone their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, namely that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded to set up the first mortgage as a shield.

7. This case in our opinion is no authority for the proposition that when a mortgagee has obtained a decree for sale the mortgage as between himself and his mortgagor and all parties to the suit is not extinguished by the sale. As I read the decision of their Lordships it merely lays down that by the decree and the sale the security is not extinguished so far as to prevent the agitation of the rights under it which were not decided by the decree. Their Lordships were not dealing with the question of re-agitating rights already concluded by the decree and the sale. In Sukhi's case AIR 1922 PC 11 the prior mortgagee had obtained a decree for sale without joining a puisne mortgagee and in the suit by the latter the puisne mortgagee contended that the prior mortgagee could not use his mortgage as a shield because the mortgage was merged in the decree for sale and was therefore extinguished. The Judicial Committee held the mortgage was not extinguished and could be held up as a shield. On the other hand their Lordships held that the purchaser of the mortgage sale was in the rights of the first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage and this shows that the right of the mortgagor in the mortgaged property was gone. This view receives support from a decision of Wallace, in the case of Y. Ellarayan v. N. Nagaswami Ayyar AIR 1926 Mad 816. There is some authority for the view that the security might not be extinguished by the decree for sale for as has been pointed out by Sir Rash Behary Ghose in his Law of Mortgage, p. 503, Edn. 5:

A judgment being a security of the highest character known to the law, there seems to be an idea, a mistaken idea, I think, that when a judgment is recovered on a debt secured by a mortgage, the security is extinguished. It is said that there cannot be two debts, one leviable by execution and the other continuing to be a charge on the property. The original debt is gone, transit in rem judicatam; and a fresh debt is created with different consequences. This notion however is based on a misapprehension of the observations of Lord Bramwell: In re European Central Railway Co. (1876) 4 Ch D 33 which can only lend support to it, if they are detached from the context. A careful examination of the judgment will show that the remarks of the learned Judge are applicable only to a personal action of the covenant against the mortgagor and not to an action to realize the security,

but there can in our opinion be no doubt that the security was extinguished by the sale which took place before Act 21 of 1929 came into force. By the omission of the words "the security shall be extinguished" (from Order 34, Rule 5) the inference follows that the law under Order 34, Rule 5 before amendment remained as it certainly was before the Transfer of Property Act 1882 as expounded and applied in *Sunder Koer v. Shamkrishen* (1907) 34 Cal 150 where Lord Davey observed as follows:

After the expiration of the period of grace if the property should not be redeemed, the matter would pass from the domain of the contract to that of judgment and the rights of the mortgagee would thenceforth depend not on the contents of his bond but in the directions in the decree

8. Reliance has next been placed on a recent decision of this Court in the case of *Kalipada Mukerji Vs. Basanta Kumar Dutta and Others*, . In that case my learned brother Mukerji, J., made the following remark on which reliance has been placed by the appellant as supporting the contention that the right of redemption existed even up to the date of the confirmation of the sale:

In any case there is no foundation for the view that under the sale in the present case treating the auction-purchaser Basanta as a stranger the right of redemption remained in the appellant after the sale or in any event after the confirmation thereof.

9. In making these observations Mukerji, J., was referring in this passage to the facts of the particular case where the payment was made after the confirmation of the sale. On the other hand it seems to me that Mukerji, J., was clearly of opinion that in a sale held under an order absolute under Order 34, Rule 5 the purchaser acquires the right of the mortgagee as also of the mortgagor, that is to say the latter's right of redemption; see p. 886, top of the right hand column. The only decision which supports the contention of the appellant that the right of redemption remained in the mortgagor after the sale and for long afterwards is the decision of Dass, J., in the case of *Maulavi Muhammad Musa Vs. Babu Aidal Singh and Others*, For the reasons we have given above we are unable to agree with Dass, J. It is argued for the appellant that it is somewhat anomalous that the security will be held not to be extinguished with reference to persons who are not parties to the decree for sale and will be held to be extinguished with reference to persons who are parties to the decree for sale. We do not consider that, there is any such anomaly for we cannot overlook the effect of the decree for sale against the mortgagor which merges the debt into the decree for sale and prevents the mortgagor who is concluded by the decree for sale from re-agitating his rights of redemption after the sale actually takes place. We are therefore of opinion that this ground must also fail.

10. The next and the last ground taken is that Act 21 of 1929 must be held to have retrospective operation and that it is therefore permissible to the judgment-debtors to redeem even before confirmation of sale, for" under Order 34, Rule 5

as amended payment could be made at any time before the confirmation of a sale made in pursuance of a decree passed under Sub-section 3 of the rule. There is no force in this contention as the Act expressly states in Section 15, Clause (c) that nothing in the Act will affect rights already acquired. The rights acquired by the mortgagee at the sale in question was a substantive right and even if there was no such saving clause under the ordinary rules of interpretation no retrospective operation could be given to the Act for it affects substantive rights. It is sought to be argued that the question of redemption on payment of the mortgage decretal amount before confirmation of sale is merely a matter of procedure and retrospective operation could be given to the recent enactment and reliance is placed on a decision of the Full Bench in the case of Jagadanandan Sing v. Amritlal Sircar (1895) 22 Cal 767 (F B). This Full Bench decision is not applicable to the present case as it related to a very different state of facts.

11. We are therefore of opinion that the order refusing to set aside the sale is right. We think however that the sale should not be confirmed until the mortgagees decree-holders bring into Court the sum of Rs. 3,410-10-0 and put it to the credit of defendants-appellants 2 to 7. This money must be brought into Court within a month from the date of the arrival of the record in the Court below. On the failure of the respondents to bring the money into the Court within the time fixed the sale will be set aside and the appellants will be allowed to redeem on payment of the amount due on the mortgage, with interest and costs. In all the circumstances we think that each party should bear their own costs of these proceedings throughout.

Bartley, J.

12. I agree.