

(1919) 04 AHC CK 0017
In the Allahabad High Court

Babu Jagdip Narain Rai alias Bacha Rai and Others	APPELLANT
Vs	
Ram Sarup Khan and Others	RESPONDENT

Date of Decision : 23-04-1919

Acts Referred:

Evidence Act, 1872 — Section 33

Citation : AIR 1919 All 289 : 51 Ind. Cas. 73

Hon'ble Judges : Piggott, J;P.C. Banerji, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit for redemption of a mortgage by way of conditional sale made on the 19th of January 1861. The mortgagees made an application for foreclosure proceedings under Regulation XVII of 1806 on the 25th May 1882. Notice of those proceedings was issued as required by the provisions of the Regulation and on the 15th of July 1882, the District Judge recorded an order to the effect that the proceedings had taken place. If these proceedings were regularly held and notice was properly served, the title of the mortgagees by way of conditional sale became absolute on the expiry of the year of grace. It is, however, contended on behalf of the respondents that as the mortgagees did not institute a suit for a declaration of their right as absolute proprietors of the mortgaged property, the mortgage must be deemed still to subsist and the mortgagors or some of them are entitled to redeem the mortgage. Reliance is placed on the ruling of their Lordships of the Privy Council in *Forbes v. Ameeroonnissa Begum* 10 M.I.A. 310 ; 5 W.R.P. C. 47 ; 1 Ind. Jur. (N.S.) 117 ; 1 S. P.C.J. 621 ; 2 Sar. P.C.J. 153 ; 19 E.R. 1002. That ruling was considered by this Court in several cases which were referred to in the judgment of the Full Bench in *Ali Abbas v. Kalka Prasad* 14 A. 405 (F.B.) ; A.W.N. (1892) 108 ; 7 Ind. Dec. (N.S.) 627. In that case it was held that the title of a mortgagee became absolute upon the expiry of the year of grace, if the foreclosure proceedings were held in accordance with the provisions of Regulation XVII of 1806. That, no doubt, was a case in which pre-emption was

claimed in respect of a sale which had become absolute after the holding of foreclosure proceedings, but the question as to the date when the title of the mortgagees as absolute owners of the property accrued had to be decided and was decided. This ruling was approved of by their Lordships of the Privy Council in *Batul Begum v. Mansur Ali Khan* 24 A. 17 P.C. ; 5 C.W.N. 888 ; 28 I.A. 248 ; 3 Bom. L.R. 707 ; 8 Sar. P.C.J. 133. In that case their Lordships referring to the year of grace observed as follows:--"The mortgagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession does not affect the question." The matter is, therefore, concluded by the last mentioned decision and we must hold that, although no suit was brought by the mortgagees for a declaration of their right as absolute owners of the property, they acquired such right upon the expiry of the year of grace, provided, of course, that the proceedings upon the application for foreclosure were held in accordance with law. The Court below has decreed the plaintiffs' claim upon the finding that due service of notice of foreclosure had not been proved. It was held by the Privy Council in *Narendra Narain Singh v. Dwarka Lal Mundur* 3 C. 397 (P.C.) ; 1 C.L.R. 369 ; 5 I.A. 18 ; 3 Suth. P.C.J. 480 ; 3 Sar. P.C.J. 771 ; 2 Ind. Jur. 117 ; 1 Ind. Dec. (N.S.) 839 that the functions of the Judge u/s 8, Regulation XVII of 1806, were purely ministerial. In the judgment in that case it was observed as follows:--"Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *esc parte*; and even if the Judge examined the Nazir or the person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *prima facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate."

2. Having regard to these observations of their Lordships, it lay heavily upon the mortgagees in this case to prove that the notice of foreclosure was duly served upon the mortgagors. The proceeding recorded by the District Judge in which he stated that the notice had been duly served would, in view of these remarks, be of very little weight in determining that the notice was duly and properly served. As has been stated above, upon the filing of the petition of the 25th of May 1882, notice was issued to the mortgagors. That notice is printed at page 8 of the appellants' book and at page 9 we find an endorsement made on the notice on behalf of those on whom it purported to have been served. The translation of the endorsement as given at page 9 of the appellants' book is not very accurate. We have referred to the endorsement as made in Hindi and we agree with the

learned Subordinate Judge that the endorsement was to the effect that three notices and a copy of the petition were received by Rupan Khan for himself and for Musammat Lakhpati and Musammat Sobhagi and the remaining three notices were received by Swarath Khan for himself and for Chikhuri Khan and Musammat Gunjasi Kunwar. This endorsement, therefore, shows that notice was not served upon all the mortgagors but only upon two of them. It seems that those who were acting in the interest of the mortgagees felt this difficulty and they accordingly got the serving officer to make a return in the terms mentioned in the report of service dated the 22nd of June 1882 printed at page 10 of the appellants' book. In that return, it was stated that the musammats took the notices intended for them behind the door leaves and the males took them in the presence of the witnesses mentioned in the return. The serving officer was one Durga, who is now dead; his evidence, therefore, could not be recorded in the present case. This report is inconsistent with the endorsement as to receipt of notice as contained on the back of the notice, written out by the Patwari Sheoambar Das. The Patwari Sheoambar Das and the persons who are said to have witnessed the endorsement are all dead. The defendants, however, have examined two witnesses with a view to prove that the notices were actually served upon the three female mortgagors and the three male mortgagors personally. These witnesses are Ram Lakhan Rai and Behari Rai. These two witnesses profess to bear out the report of the serving officer, but their statements are contradicted by the endorsement on the notices to which we have already referred. Furthermore, as pointed out by the learned Subordinate Judge, Ram Lakhan Rai has the same interest as the mortgagees in this case and, therefore, his statement should be looked upon with great caution.

3. There remains the evidence of Behari Rai. The learned Subordinate Judge has given cogent reasons for disbelieving this witness and we agree with him. We are also of opinion that the return of the serving officer and the statements made by the two witnesses are not credible.

4. The learned Counsel for the appellants has asked us to take into consideration the statements contained in two depositions recorded by the District Judge in the course of the foreclosure proceedings. Those are the depositions of Alyar and Bhadesar Rai. These two persons are dead and the depositions are sought to be used as evidence under the provisions of Section 33 of the Evidence Act. No doubt, the mortgagors were parties to the proceedings relating to foreclosure, but it must be shown, in order to make the evidence of these two witnesses admissible, that they had an opportunity of cross-examining the witnesses. If, as it is contended on behalf of the plaintiffs, notice of foreclosure was not duly served on them, these depositions cannot be used as evidence to prove service of notice. We are, therefore, of opinion that these two depositions cannot be used in this case and the learned Subordinate Judge was right in not referring to them in his judgment. The next piece of evidence on which the appellants rely is a proceeding recorded in 1892 by the Revenue Authorities in regard to the entry of names of some of the mortgagees in respect of a portion of the mortgaged

property. The order passed in 1892 appears to have been based on the foreclosure proceedings held in 1882. This order, therefore, can carry very little weight. Reference is made to a mortgage-deed executed in 1894, but we do not think that that document carries us any further. Upon a consideration of the whole of the evidence we are of opinion, in concurrence with the findings of the Court below, that proper service of notice on all the mortgagors has not been established and, therefore, it cannot be held that the mortgage has been foreclosed and the defendants have acquired the absolute ownership of the property. The plaintiffs, who represent some of the mortgagors, are entitled to the decree for redemption granted to them by the Court below. We dismiss the appeal with costs, including in this Court-fees on the higher scale.