(1969) 02 PAT CK 0007

In the Patna High Court

Case No : A.F.A.D. No. 111 of 1967

Baleshwar Mandal and Others APPELLANT

Vs

Uchit Lal Jha and Others RESPONDENT

Date of Decision : 13-02-1969

Acts Referred:
Trusts Act, 1882 — Section 90

Citation : AIR 1970 Patna 131

Hon'ble Judges : H. Mahapatra, J

Bench : Single Bench

Advocate : Ramakant Verma and A.B.S. Sinha, for the Appellant; Shivanandan Ray, Nawal Kishore Sinha and Md. Noor Akhtar, for the Respondent

Final Decision : Dismissed

Judgement

H. Mahapatra, J.—The defendants second party in a suit for redemption of a usufructuary mortgage executed by plaintiff No. 1 in favour of the grandfather of defendant No. 1 are the appellants. The mortgage was executed on the 2nd February, 1933, with a condition that the mortgagee was liable to pay the rent to the landlord amounting to Rs. 13/- and odd a year. On account of default in payment of rent, the entire holding including the mortgaged security was brought to sale in execution of a rent decree and purchased by the father of defendants 1 and 2 in 1939. Thereafter, the auction purchaser sold the property to the father of defendant No. 5. The plaintiffs claimed that they were entitled to redeem that mortgage in spite of the auction purchase in the rent sale. The Courts below have relied upon the principle of equity in Section 90 of the Trusts Act to decree the suit in favour of the plaintiffs.

2. The defence on behalf of the defendants second party was that there was no liability on the mortgagee to pay the rent, and, therefore, the sale of the mortgaged security and other properties for default of payment of rent cannot be attributed to any contributory default on the part of the mortgagee. The mortgagee auction purchaser in the rent sale derived independent title and by

purchasing the same from him the defendants second party also acquired a good title.

3. The suit having been decreed by both the courts below, the transferees-defendants second party have come up in appeal.

4. Two points were raised on behalf of the appellants. Learned Counsel urged that in the present case, according to the findings, the liability to pay rent was on the mortgagee, not in full but in part, the other part of the rent being payable by the mortgagor. On account of the default committed by both, the rent sale took place. In a case where there is a joint default by the mortgagor and the mortgagee, the principles envisaged in Section 90 of the Trusts Act cannot be invoked against the mortgagee, and the equity of redemption will be deemed to have been extinguished by the purchase by the mortgagee of the mortgaged security in the rent sale.

In support of this proposition, learned Counsel referred to the case of Mt. Barti Kuer and Another Vs. Brahmchari Singh and Others, . This decision no doubt goes a long way to help the appellants. But, in the case of Basmati Devi Vs. Chamroo Sao and Others, , their Lordships of the Supreme Court have held otherwise. I may quote a portion from that Judgment:

"The question for consideration is whether in circumstances like the present where the decree and the sale in execution of it are brought about by the default of both the mortgagor and the mortgagee, the mortgagee can be said to have taken advantage of his position by purchasing the property at the sale. The High Court appears to think that unless the sale was brought about by the default of the mortgagee alone the mortgagee cannot be said to have taken advantage of his position in making the purchases. What seems to have weighed with the learned Judges is that even if the mortgagee had done his duty by paying the rent he was liable to pay, the sale would still have taken place as the mortgagor did not pay that portion of the rent which he was liable to pay. So, they thought that the mortgagees, though they took advantage of the fact that the property had been brought to sale, could not be said to have taken advantage of their position as mortgagees.

"With this view, we are unable to agree. In our opinion, the fact that the mortgagor had made a default, does not alter the position that the mortgagee had also defaulted in paying the rent he was liable to pay. -By his default he has contributed to the position that a suit had to be brought for arrears of rent and ultimately to the position that the property was put to sale in execution of the decree obtained in the suit. This contribution to the bringing about of the sale was a direct result of his position as a mortgagee. When therefore, he purchased the property himself at the sale in execution of the rent decree he clearly gained an advantage by availing himself of his position as a mortgagee,

"This, in our opinion, is the position in law even if the mortgagee''s liability was to pay less than the major portion of the rent of the holdings".

In view of the above observations, I do not think that the appellants can take advantage of the decision in the case of Mt. Barti Kuer and Another Vs. Brahmchari Singh and Others, .

I may here refer to another decision of this Court in the case of Subedar Rai Vs. Bachai Pandey, , where in circumstances similar to those in the instant case, the principle involved in Section 90 of the Trusts Act was applied against the mortgagee.

5. Learned Counsel referred to Exts. L and J, the sale proclamation in the rent execution case and the suit register in regard to that rent suit, and, he pointed out that the suit register indicates that the judgment debtors included persons other than the mortgagor. It also appears, as he contended, that the property brought to sale was more than the mortgaged security and the rent for which the rent suit was laid was more than the rent payable for the mortgaged security. No doubt the mortgaged security was involved in the rent execution case along with other properties. The sole purpose of referring to these two exhibits by learned Counsel was to contend that in a case where the rent sale in which the mortgagee is the auction-purchaser is for immovable property more than the mortgaged security, Section 90 of the Trusts Act should not be invoked. If the equitable principle involved in that section can be attracted in a case where the mortgagee''s liability to pay rent is only in part, the other part of the rent being payable by the mortgagor, I do not see what justification there should be in holding otherwise for the mere reason that the property brought about to be sold in rent execution case was more than the mortgaged security,

6. For the reasons given above, the view taken by the Courts below cannot be said to be wrong. This appeal is dismissed with costs.

