
(1869) 05 CAL CK 0008
In the Calcutta High Court
Case No : Special Appeal No. 2687 of 1868

Bani Madhab Ghose

APPELLANT

Vs

Ganga Gobind Mandal

RESPONDENT

Date of Decision : 29-05-1869

Acts Referred:

Citation : (1869) 05 CAL CK 0008

Judgement

Markby, J.—This is a suit for possession of land brought against Lakinarayan, the son of Sarbeswar, Haris Chandra Mookerjee, and Ganga Gobind Mundai. It has been found as a fact that Sarbeswar, who is now represented by his son, on the 11th of Baisakh 1259 (1853) executed a deed which was in form an absolute sale of 33 bigas 11 kathas of land at Raghunathpore in the zilla of Hooghly, and of 4 bigas 19 kathas of land at Kidderpore in the 24-Pergunnas, in favour of the defendant Haris Chandra for the consideration of rupees 1,000. It is not however asserted by the plaintiff, who claims through this conveyance, that this was in reality an absolute sale; it is admitted to have been only a mortgage, and it has been found as a fact that Haris Chandra gave to Sarbeswar a notice of foreclosure, the period for redemption under which expired on the 30th March 1854. Haris Chandra took no steps to recover possession of the property, and on the 5th Magh 1269 (1863) he sold the property to the plaintiff.

2. The defendant Ganga Gobind Mandal has established that a few months after the mortgage to Haris Chandra, Sarbeswar sold to him that part of the mortgaged property which was situate at Kidderpore, and " since that time he has been, and is now in possession, but the precise date when he got into possession is not shown. No notice of foreclosure was served on Ganga Gobind, but it is admitted that the mortgagee was not aware of his purchase. Ganga Gobind defends the suit in respect of the land at Kidderpore only; the other defendants make no defence. The question now before us is, whether the mortgagee was bound to give notice of foreclosure to Ganga Gobind, and whether without such notice the plaintiff can recover possession of the land at Kidderpore.

3. The question turns entirely on the construction to be given to the words "legal representative" in Regulation XVII of 1806. In the first place, it is contended broadly, that those words do not mean the legal representative of the mortgagor in respect of the particular property mortgaged, but the universal legal representative, such as an heir, and there is no doubt some color for this contention. These words are sometimes used in the latter sense as for instance in section 210 of the Code of Civil Procedure, and this is the idea which these words would at first sight rather suggest to my mind. But it appears to me to have been settled by long practice and authority that they were not used in this Regulation in that sense. The late Sudder Court held that the purchaser at a sale in execution of civil process is entitled to notice, and that doctrine has I believe ever since been acquiesced in. Now this completely negatives the construction contended for. An auction purchaser, as he is called, is not the universal legal representative of the mortgagor; he is only the assignee of a portion of his property.

4. It also appears to me to have been decided by a great preponderance of authority in this Court, although I admit that the decisions are not altogether reconcilable, that a purchaser out and out of the mortgagor's interest, whether by public or private sale, and whether he be in possession or not, must be served with notice except where any alienation of the mortgage's interests has been prohibited by contract between the mortgagor and mortgagee. It is not necessary to go through the cases which are all collected in Macpherson on Mortgages, 5th Edition, 179.

5. Nor do I think that there is any ground for putting upon these decisions the restrictions which have been now contended for, namely, that they do not apply to cases where the whole of the property comprised in the mortgage has not been sold by the mortgagor; or to cases where the mortgagee has no notice of the subsequent sale, both which peculiarities are said to be found in the case now under consideration. I do not see that a purchaser out and out of a distinct and definite portion of the property is in a different position from a purchaser of the whole, and as to the question of consent, I see no ground whatever for introducing that consideration. If, as is now decided, the words "legal representative" include an assignee of the mortgaged property, it appears to me that they must include all such assignees; and that to make a distinction between assignments to which the mortgagee has or has not consented, would be an unwarrantable addition to the provisions of the Legislature. I therefore think that the defendant Ganga Gobind, who holds an absolute assignment of a portion of the mortgaged property, was entitled to notice.

6. It was said that this would be a great hardship on mortgagees who might not be aware or able to discover what assignments the mortgagor had made, but I do not think so. If, as he ought to do, the mortgagee on the expiration of the year of grace at once sues for possession, that would probably bring to light any assignee whom he had not hitherto discovered, and this assignee, if he is not

prepared to redeem, can be speedily foreclosed. Moreover though it is not necessary to decide that now, in all probability the same principles would be applied when a mortgagee has made diligent inquiry for, and failed to find the assignee as have been applied where he searches for and fails to find the mortgagor. I do not think that under the view of the law here taken there is any risk for a mortgagee who is diligent and honest, beyond the possibility of his proceedings for foreclosure taking a little longer time; and I do not consider that any great hardship.

7. It is unnecessary therefore to express any opinion upon the other point raised by Mr. Allan, namely, whether the Court below was right in admitting secondary evidence of the mortgage. Upon the ground above stated, the decree in favor of the plaintiff must be set aside, and the suit dismissed. The applicant will be entitled to his costs in this and both the lower Courts.

Jackson, J.

I concur.