

(1926) 05 AHC CK 0039
In the Allahabad High Court

Bans Bahadur Rai and Others

APPELLANT

Vs

Chaitra Kut Rai and Others

RESPONDENT

Date of Decision : 17-05-1926

Acts Referred:

Citation : (1926) 05 AHC CK 0039

Final Decision : Allowed

Judgement

1. This second appeal arises out of a suit for redemption of a mortgage by conditional sale executed on the 15th of April 1866. The plaintiffs and certain pro forma defendants are the heirs of the mortgagors, and the contesting Defendants Nos. 1-13, who are the appellants in this Court, are the heirs of the mortgagee. The defendants contended that the mortgage was foreclosed under Regulation XVII of 1806, and that the right of redemption was absolutely extinguished by a decree of the Munsif's Court, dated the 19th of February 1876. Adverse possession for more than 12 years was also pleaded as a defence. We are not concerned with the other pleas raised by the defendants. The trial Court found that the right of redemption had been extinguished and dismissed the suit.

2. The lower appellate Court held that it was necessary for the defendants to prove that the foreclosure procedure laid down in Regulation XVII of 1806 had been strictly followed, and that the right of redemption survived failing proof that all the formalities prescribed by the Regulation had been observed. Finding that the notice issued in the foreclosure proceedings was defective, and that there was no proof of a prior demand for payment, the lower appellate Court held that the right of redemption was not extinguished, and decreed the plaintiff's claim for redemption.

3. In our opinion, the learned District Judge was wrong in thinking that, in the present case, it was necessary for the defendants to prove that every step in the procedure prescribed by Regulation XVII of 1806 had been followed. He relies upon the rulings in *Badal Ram v. Taj Ali* (1907) 4 ALJ 717 and *Ram Baran Rai and*

Another Vs. Har Sewak Dube and Others, In these rulings it was held that in a case of a mortgage to which Regulation XVII of 1806 applies, before it can be held that the right of redemption is barred, it must be proved that the requirements of the regulation have been strictly complied with. For instance, it must be proved that there was a previous demand by the mortgagee from the mortgagor of payment of the mortgage-debt. These rulings, however, do not apply to the present case. In the present case the mortgagee did not only adopt the foreclosure procedure prescribed by Regulation XVII of 1806, but after he had obtained a rubkar, dated 15th July 1875, ordering foreclosure, he then proceeded to institute a suit for proprietary possession of the mortgaged property. The suit was instituted in the Munsif's Court on a valuation of Rs. 601, which was the consideration mentioned in the mortgage-deed. The mortgagors put in a written statement admitting the claim. They stated that

as a matter of fact the claim is proper and the document in favour of the plaintiffs is genuine and payable. The amount was borrowed and the mortgage-deed by conditional sale was executed by these defendants. The foreclosure proceedings were taken within the knowledge of these defendants. The plaintiff should be awarded possession as prayed for in the plaint; these defendants and their heirs shall have no objection to it.

4. In accordance with the admission of the mortgagors, the Munsif passed a decree for proprietary possession of the mortgaged property in favour of the mortgagee on the 19th February 1876.

5. The learned District Judge has failed to note the significance of this decree for proprietary possession. Those cases upon which the lower appellate Court relies, to which we may add the case of Babu Jagdip Narain Rai alias Bacha Rai and Others Vs. Ram Sarup Khan and Others, in which it was held that the right of redemption is not absolutely barred by reason of foreclosure proceedings under Regulation XVII of 1806 unless it is proved that the procedure prescribed by that Regulation has been strictly followed are all cases in which the mortgages after taking proceedings under the Regulation had failed to institute a suit for proprietary possession or for a declaration of his absolute title. In our opinion, the fact that in the present case the mortgagee instituted a suit for proprietary possession in addition to adopting the foreclosure procedure under Regulation XVII of 1806 is of vital importance.

6. It was pointed out by their Lordships of the Privy Council in Forbes v- Ameeroonnissa Begum (1863-66) 10 MIA 340 that the mortgagee after having done all that Regulation XVII of 1806 requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale or the regularity of the proceedings taken under the Regulation in order to make it absolute,

7. In the present case the mortgagee did bring a regular suit to recover possession. It was no doubt open to the mortgagors in that suit to contest the regularity of the proceedings taken under the Regulation. They might have urged that no previous demand had been made or that the form of notice was invalid. They had the opportunity of raising any objection they thought fit but as a matter of fact, they raised no objection and admitted the plaintiffs' claim which was accordingly decreed by the Munsif. It is impossible to go behind this decree which has long ago become final. It is quite unnecessary for the defendants to prove strict compliance with all the formalities laid down for foreclosure proceedings under the Regulation, since their title does not rest only upon these proceedings, but primarily upon the decree in the regular suit for possession. In the case of *Maula Bahhsh v. Tajammal Husain* (1892) AWN 51, where the mortgagees, after obtaining an order for foreclosure under Regulation XVII of 1806, subsequently got an ex-parte decree declaring their right to proprietary possession, it was held by a Judge of this Court that he was not entitled to go behind that decree for the purpose of looking into the validity or otherwise of the foreclosure proceedings which preceded it and the decree must be taken as conclusive of the proprietary title of the defendant to the land in suit. The argument applies with even greater force in the present case since the decree of the 19th February 1876 was not merely an ex parte decree, but was passed on the mortgagors' own admission. In our opinion that decree is final and conclusive as extinguishing the plaintiffs' right to redeem the mortgage.

8. The question of *res judicata* strictly speaking, does not arise, since the present suit is cognizable only by the Subordinate Judge and not by the Munsif. The plaintiffs' claim is not; barred by the principle of *res judicata*, but by the fact that their right of redemption has been extinguished by the decree of 1876.

9. The plaintiffs had tried to attack the validity of that decree on the ground that the Munsif had no jurisdiction to entertain the suit. This objection has no force. There is no reliable evidence to show that the value of the property in dispute in 1876 was more than Rupees 1,000. Moreover the suit was valued at Rs. 601, the amount of consideration mentioned in the document. No objection was raised to the Munsif's lack of jurisdiction and it is too late to raise that plea about 50 years afterwards.

10. We therefore allow the appeal and restore the decree of the trial Court, The appeal is allowed with costs including fees on the higher scale.