
(1939) 08 AHC CK 0009
In the Allahabad High Court

Bhagwati Prasad	Vs	APPELLANT
Dullan Singh and Another		RESPONDENT

Date of Decision : 16-08-1939

Acts Referred:

Citation : AIR 1939 All 719 : (1939) 9 AWR 718

Hon'ble Judges : Thom, C.J

Bench : Division Bench

Judgement

Thom, C.J.—This is a defendant's appeal in a suit for possession of certain zamindari property. The property in suit was mortgaged by one Manohar Singh in the year 1905. The mortgage was a usufructuary mortgage in favour of Jwala Singh. The plaintiff Dullan Singh claims the property as a reversioner. The contesting defendant Bhagwati Prasad, vakil, is a sub-mortgagee of Jwala Singh's mortgagee rights. In the year 1921, the mortgagee Jwala Singh instituted a suit for sale against Manohar Singh. During the pendency of the suit Manohar Singh died and his minor son Ajab Singh was brought upon the record. The dispute between the parties was eventually compromised and decree was passed in terms of the compromise. The decree was one under Order 34, Rule 5, and the decretal amount was Rs. 450. The defendant Bhagwati Prasad took a mortgage of Jwala Singh's mortgagee rights as already observed and also over other property of Jwala Singh in the year 1913. He brought a suit upon his mortgage against Jwala Singh and Mt. Bhagwani Kunwar, the widow of the said Ajab Singh, in the year 1926. This suit was decreed ex parte. In execution of the decree the property mortgaged by Manohar Singh was auctioned and purchased by Bhagwati Prasad in the year 1929. In this year, the plaintiff Dullan Singh filed a suit against Bhagwani Kunwar and Jwala Singh praying for possession of Manohar Singh's property including the property mortgaged. He averred that after the death of Antu Singh, the grandson of Manohar Singh, he was entitled to possession as reversioner. The suit was contested by Mt. Bhagwani Kunwar alone. The defence however failed and decree for possession was granted to the plaintiff. Dullan Singh thereafter applied for mutation and discovered that the

name of the contesting defendant in the present suit, Bhagwati Prasad, had already been recorded in the respect of the property. He has in these circumstances prayed in the present suit for possession. The contesting defendant has pleaded that the plaintiff is not entitled to decree except upon the payment of the total amount due upon the sub-mortgage in his favour. The learned Civil Judge in the lower Appellate Court granted a decree in favour of the plaintiff conditional on payment by the plaintiff of the sum of Rs. 450, the amount of the decree in the suit by Jwala Singh on his mortgage.

2. In appeal it was contended for the defendant that the decree in Jwala Singh's suit was not binding upon the defendant. Counsel maintained that despite the final decree in Jwala Singh's suit which was passed on 28th October 1922 the security still subsisted and the defendant, i.e. Sub-mortgagee, was entitled to the benefit of that security. In support of his contention that the security still subsisted despite the passing of a final decree in a mortgage suit learned Counsel for the appellant referred to the case in *Mt. Sukhi v. Ghulam Safdar Khan* AIR (1922) P.C. 11. In that case it was decided by the Privy Council, that

when a prior mortgagee brings the property to sale in execution of a decree on his mortgage without impleading the puisne mortgagee to the suit, the rights of the puisne mortgagee are not affected by the sale. But if the puisne mortgagee brings a suit on his mortgage, the auction-purchaser in execution of the prior mortgage decree, can use the prior mortgage right as a shield, and claim payment of the amount due under the prior mortgage decree, where the puisne mortgagee seeks a decree for sale in his favour.

3. The dispute in that case did not concern the rights of a sub-mortgagee but those of a purchaser at an auction in execution of a decree on a prior mortgage. In determining the rights of a sub-mortgagee different considerations apply. Furthermore, in our judgment, it does not follow that because the security subsisted despite the passing of a final decree the defendant is entitled to claim the total amount due upon his sub-mortgage. The security no doubt subsists for certain purposes after the passing of a decree but it subsists only in respect of the decretal amount. The finding of the lower Appellate Court in the present case is that the mortgagor had no notice of the sub-mortgage. The suit of 1921 was compromised in ignorance so far as the mortgagor was concerned of the sub-mortgagee's rights. The lower Appellate Court has further found that there was no fraud or collusion on the part of the mortgagor and the mortgagee. In these circumstances in our judgment the plaintiff is entitled to take his stand upon the decree.

4. The suit which was filed by Jwala Singh was in our judgment incompetent. Jwala Singh was a usufructuary mortgagee. He was not entitled to maintain a suit for sale of the mortgage property. Nevertheless he filed such a suit and in that suit he obtained a decree under Order 34, Rule 5 for the sum of Rs. 450. This sum was not paid by the mortgagor. Jwala Singh allowed the decree in his favour to become a dead letter and remained in possession of the mortgage

property. In these circumstances we are satisfied that in equity the plaintiff who has succeeded to the property is entitled to recover possession of the property on payment of the sum of Rs. 450. If this suit had been directed against Jwala Singh he could have had no answer to the plaintiff's claim. In equity no doubt he could have claimed to retain possession until the sum of Rs. 450 was paid to him despite the fact that he had allowed his decree to become time-barred. The sub-mortgagee stands in a no higher position than Jwala Singh, the mortgagee. He is bound by what has been referred to in a number of cases as the "state of account" between the mortgagor and the mortgagee. In this connexion we would refer to Gour on the Law of Transfer of Property, Edn. 6, p. 889. In para. 1418 the learned author observes:

The original mortgagor is entitled to sue the sub-mortgagee for redemption, and conversely the sub-mortgagee may sue the mortgagor for recovery of his money from the mortgaged property. The sub-mortgage is extinguished by the payment of the mortgage debt by the mortgagor, if he has no notice or knowledge of the sub-mortgage, and acts in good faith; similarly payments made under these circumstances towards the mortgage-debt to the mortgagee will reduce the same *protanto* so far as the sub-mortgagee is concerned; but no payment made with notice or knowledge of the sub-mortgagee will discharge wholly or partially the mortgage-debt due to the sub-mortgagee. Following these principles, a sub-mortgagee of property is entitled to retain its possession against the original mortgagor until the amount due on the sub-mortgage is paid off, and he is not bound to seek his remedy against the original mortgagee. The sub-mortgagee cannot get anything more than the amount due to the original mortgagee at the time when the mortgagor learns of the sub-mortgage.

5. In *Papala Chakrapani Chetti v. Lachimi Achi* AIR (1919) Mad. 1082 it was held that:

Where a mortgagor in ignorance of the existence of a sub-mortgagee executes in substitution of the original mortgage, two mortgages covering two distinct portions of the property, whereby the original mortgage is discharged the sub-mortgagee's rights under his sub-mortgage are not affected by the two mortgages executed in substitution of the original mortgage.

6. Learned Counsel relied upon this decision. We are not called upon in deciding this appeal to consider whether this decision is sound or not, the circumstances of the present case being quite different. It is to be noted however that in the course of their judgment Wallis C.J. and Napier J. observed that:

In *Matthews v. Wallwyn* (1798) 4 Ves Jur 118 it was held that the only lights of a mortgagor without notice of the assignment are that the assignee holds subject to the account between him and the original mortgagee. This latter proposition was re-affirmed in *Chambers v. Goldwin* (1804) 9 Ves Jur 254. This principle applies both to payments made prior to the assignment and to those subsequent to it : vide Halsbury's Laws of England, Vol. 21, page 179 and *Dixon v. Winch*

(1900) 1 Ch. 736 here the limits of the doctrine were considered.

7. In this connexion we would refer further to the case in *De Lisle v. Union Bank of Scotland* (1914) 1 Ch. 22. In that case which was decided in the Court of Appeal in England Phillimore L.J. in the course of his judgment observes:

The transferee of a mortgage takes it on the footing that the amount said to have been advanced on the security has been advanced, but with the knowledge that since the creation of the mortgage the debt may have been reduced. He is not bound by the true state of the account between mortgagor and mortgagee at the date of the mortgage, because the statement as to the original loan cannot be falsified; but as to all transactions subsequent to the creation of the security he must take the accounts as they in fact stand unless and until he protects himself by giving notice to the mortgagor.

8. It is further remarked in the same judgment that the assignee of the mortgagee rights must allow any repayment or any discharge made at any time after the execution of the sub-mortgage until he protects himself by giving notice to the mortgagor. Now, in the present instance, the state of the accounts shows that the sum due by the mortgagor under his mortgage is Rs. 450. Learned Counsel for the appellant conceded that if this sum had in fact been paid by the mortgagor to the mortgagee then his defence must fail. He has maintained however that the learned Civil Judge in the lower Appellate Court having reached the conclusion that no payment was made under Jwala Singh's decree the security subsisted in respect of the full amount due under the sub-mortgage. In our judgment this argument is unsound. The sub-mortgagee is bound by the state of the account. It cannot be disputed that the decree of 28th October 1922 fixed the state of the account between the mortgagor and the mortgagee. The decree fixing the state of the account is no doubt a compromise decree but it is nonetheless binding upon the parties. It creates equitable rights both for the mortgagor and the mortgagee and it is not permissible at this stage in the absence of any allegations of fraud or collusion to go behind the decree and to examine the considerations which induced the parties to conclude the compromise. After the passing of the decree in 1922 there can be no doubt that the plaintiff would have been entitled to recover from the mortgagee the mortgage property upon the payment of the decretal amount and in our view the fact that the property is now in the possession of the sub-mortgagee does not alter the legal position. The amount due under the mortgage having been reduced by payment or by decree the sub-mortgage security is pro tanto restricted, the sub-mortgagee having failed to give notice of the mortgage to the mortgagor. The learned Civil Judge has granted a decree of possession of the property in suit conditional upon the payment of Rs. 450 to the appellant. In our judgment this decision is sound.

9. We would observe in conclusion that in the sub-mortgage of 1913 Jwala Singh not only mortgaged his mortgagee rights under Manohar Singh's mortgage but other property also. This property has been auctioned by the appellant in

execution of his decree in the year 1929. We have no information before us as to the amount realized by the sale of this property and accordingly whether more than the sum of Rs. 450 is due under the sub-mortgage. In the result the appeal fails. The appeal is dismissed with costs.