(1929) 02 PAT CK 0025

In the Patna High Court

Bhan Prasad Choudhury and Others — APPELLANT

Vs

Bhirgu Nath Choudhury and Others — RESPONDENT

Date of Decision : 13-02-1929

Acts Referred:

Citation : AIR 1929 Patna 323 : 116 Ind. Cas. 543

Hon'ble Judges : Fazl Ali, J;Das, J

Bench : Division Bench

Judgement

Das, J.—This was a suit by the appellants in substance for redemption of three mortgages executed by one Thakur Choudhury in favour of the respondents; first, on the 29th May, 1911, the second on the 25th August, 1911, and the third on the 29th September, 1911. The plaintiffs are the sons of Thakur Choudhury and they complain that although the mortgages were aware of the fact that they, the plaintiffs, were interested in the mortgage security they did not make them parties with a view to defeat their claim for redemption. They allege various grounds in their plaint to induce the Court to hold that the mortgages were not for legal necessity and that the decrees obtained by the mortgagees were wholly bad. These questions do not arise before us, for the Courts below have held, first, that the mortgages in suit were executed in order to discharge antecedent debts and, secondly, that in all these transactions. Thakur Choudhury acted as the karta of the joint family. It appears that subsequent to the mortgages Thakur Choudhury sold some of the properties to certain other persons and all these persons referred to in the judgment of the lower Appellate Court as kebaladars were parties in the mortgage suits which were instituted by the respondents. The Court below has also found that the mortgage suits were seriously contested not only by Thakur Choudhury but also by the kebaladars. Lastly the Court has found that the plaintiffs were throughout represented in the mortgage actions by Thakur Choudhury. In the result the Court below, agreeing with the Court of first instance, refused to give any relief to the plaintiffs and dismissed their suit.

2. If it were necessary for us to decide the question whether the plaintiffs were

represented by Thakur Choudhury in the mortgage actions, speaking for myself, I would have great hesitation in accepting the conclusion of the Court of first instance. My reasons are these: The mortgages in suit were executed in order to discharge debts which had been antecedently incurred by Thakur Choudhury. It appears from the record, though not from the judgment, that the interest payable on these antecedent debts was Re. I per cent. per month whereas the interest payable on the subsequent mortgages was Re. 1-4-0 per cent. per month, Re. 1-6-0 per cent. per month and Rs. 2 per cent. per month with annual rests. It is obvious that the question whether there was legal necessity to borrow at these high rates of interest was one which was not available to the mortgagor nor to the kebaladars claiming title through the mortgagee; but it was open to the plaintiffs. It follows, therefore, that Thakur Choudhury could not possibly have represented the present plaintiffs in the actions unless it is established that there was legal necessity to borrow money at the high rates of interest as provided in the mortgage bonds.

3. But it seems to me that this appeal must fail on another ground. It is well-established that a suit for redemption does not lie unless the plaintiffs ask for a decree for setting aside the auction sale. There is in fact no right of redemption when sale has taken place and it has been held by the Judicial Committee in Ganpat Lal v. Bindabasini Prashad Narayan Singh 56 Ind. Cas. 274 : 24 C.W.N. 954 : 18 A. L J. 555 : (1920) M.W.N. 382 : 12 L.W. 59 : 39 M.L.J. 108 : 2 U.J.P.L.R. (P.C.) 103 : 28 M.L.T. 330 : 47 C. 924 : 47 I.A. 91 (P.C.) that after the sale has taken place the owner holds as purchaser, and is entitled to raise ail the defences that belong to him as such, and unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in that action, the Court cannot interfere with the possession which has been given to the purchaser. Now if this be so, then it is obvious that this suit is barred by limitation. The sale took place on the 10th June, 1922, and was confirmed on the 8th July, 1922. The suit out of which this appeal arises was instituted on the 14th January, 1921. Article 12 of the Limitation Act prescribes a period of one year for a suit to set aside a sale in execution of a decree of a Civil Court and it also provides that the period of one year runs from the date when the sale is confirmed. It has been held by this Court in Bhola Jha v. Kali Prasad 34 Ind. Cas 288 : 1 P.L.J. 180 : 2 P.L.W. 413 that Article 12 applies to such a suit. The suit should have been dismissed on the ground that it is barred by limitation.

4. I would accordingly dismiss this appeal with costs.

Fazl Ali, J.

5. I agree.

