(1934) 01 PAT CK 0020

In the Patna High Court

Bhekdhari Mahton — APPELLANT

Vs

Radhika Koer — RESPONDENT

Date of Decision : 02-01-1934

Acts Referred:
Public Demands Recovery Act — Section 7, 8
Transfer of Property Act, 1882 — Section 100

Citation : AIR 1934 Patna 648

Hon'ble Judges : Mohammad Noor, J;Agarwala, J

Bench : Full Bench

Judgement

Mohammad Noor, J.—The facts leading up to the present appeal are these: By a mortgage deed dated 9th March 1915 one Narayan Prasad mortgaged certain properties to one Rajendra Prasad, one of the properties being mauza Chak Pahar, tauzi No. 7399. Later on one Bhagwan Hajam in execution of his simple, money decree against him purchased the interest of Narayan Prasad in the mortgaged properties and obtained possession of them. Rajendra Prasad brought a suit against Bhagwan Hajam for a declaration that the latter''s purchase was subject to the mortgage in favour of the former. That suit was decreed. Rajendra Prasad then brought a mortgage suit and in due course put the mortgaged properties to sale and purchased them on 25th January 1926. Delivery of possession was formally given to him on the 16th June 1926.

2. Subsequently he sold five out of seven properties, which he had purchased, to the plaintiff by a sale deed dated 2nd August 1926. One of the properties so sold was Chak Pahar the subject matter of the present litigation. In the meantime Bhagwan Hajam who was in possession of the mortgaged properties by virtue of his purchase in execution of the simple money decree, fell into arrears of cesses and notice u/s 7, Public Demands Recovery Act, was served on him on 26th September 1923. Chak Pahar was sold in execution of that certificate and was purchased by one Angnu on 19th March 1924, but later on he transferred it to the present defendant. The plaintiffs not being able to get their names recorded in the Collectorate Register by expunging the name of the defendant who had

already got his name recorded in respect of Chak Pahar, brought the present suit for confirmation of possession or for recovery of possession of the property; in suit, basing their title on the purchase by Rajendra Prasad in execution of the mortgage; decree.

3. On behalf of the defendant it was urged that the effect of the service of notice u/s 7, Public Demands Recovery Act, on Bhagwan Hajam was that a charge was created on his properties in favour of the Secretary of State for the arrears of ceases due to Government. The suit having been instituted in January 1924, some three months after the service of notice the Secretary of State was a necessary party to the mortgage suit, and Angnu who purchased the property which was subject to the charge, was not bound by the mortgage sale and the plaintiffs were not therefore entitled to recover possession from the defendant who had acquired the right, title and interest of Angnu in the village in suit. The first Court decreed the plaintiffs'' suit, but on appeal the learned District Judge has allowed the defendant the option of redeeming all the mortgaged properties by paying up the entire mortgage dues of Rajendra Prasad. The defendant has preferred this second Appeal.

4. The only question involved in the present appeal is the position of the defendant who bases his title upon the certificate of sale for arrears of cesses, notice of which was served upon Bhagwan on 26th September 1923. In other words, the question is whether the mortgage sale was binding upon Angnu and therefore upon the defendant. Section 8, Public Demands Recovery Act, runs thus;

From and after the service of notice of any certificate u/s 7 upon a certificate debtor the amount due from time to time in respect of the certificate shall be a charge upon such property to which every other charge created subsequently to the service of the said notice shall be postponed.

5. It is clear that by the operation of law, on 26th September 1923, a charge was Created on the property in dispute in favour of the Secretary of State in respect of the amount due under the certificate. Section 100, T.P. Act, enacts that:

Where Immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

The effect of Section 8, Public Demands Recovery Act, and Section 100, T.P. Act, is that for all practical purposes the Secretary of State became a simple mortgagee of the properties of Bhagwan Hajam including Chak Pahar. This simple mortgage was of course subject to the simple mortgage in favour of Rajendra created in 1915 and the respective rights of the two purchasers at the two mortgage sales, namely Rajendra and Angnu must be governed by the provision of law which governs the fights of the two mortgagees, the prior and the subsequent.

6. It is obvious that the purchaser at the certificate sale is entitled to all the rights of the puisne mortgagee at whose instance the property which to purchased was sold, namely, a right to an opportunity to redeem. Now under the law, viz., Order 34, Rule 1, Civil P. C, it was incumbent upon Rajendra to implead in the mortgage suit the Secretary of State who held a subsequent mortgage of the property in question, the mortgage having been created by the operation of law prior to the institution of the mortgage suit. This not being done the Secretary of State and Angnu who purchased the property in enforcement of that mortgage are not bound by the proceedings which took place in the suit instituted by Rajendra. Nor is the sale of the property in any Way binding upon them and their right of redemption remains absolutely intact. This is the view which has been taken by this Court in a fairly large number of cases. Among them I may mention the following: Sheo Narain Sahu v. Ram Nirekhan Ojha 1919 Pat 399, Amirchand v. Moti Pande 1981 Pat 434, Azizunnissa v. Komal Singh 1930 Pat 579 and Raghunath Prasad v. Sadhu Saran 1925 Pat 31.

7. Now the learned District Judge has allowed the defendant the right of redemption but he has done so in respect of the entire mortgaged property by paying up the entire mortgage-debt. Presumably he relied upon the doctrine of indivisibility of the mortgage-debt. No doubt under ordinary circumstances a mortgage is indivisible but this indivisibility is for the protection of the mortgagee and the mortgagee by his own act can create a situation under, which the integrity of the mortgage debt must be held to have broken up. One well Known circumstance under which a mortgage debt is split up is when the mortgagee himself acquires the equity of redemption in respect of a portion of the mortgaged properties.

8. In that case the persons interested in the remaining portion can insist upon redemption of that portion only by paying up the proportionate mortgage-debt. The cases referred to above clearly show that if the mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings about the property to sell and purchases it himself, he is bound to allow the redemption of the portion concerned on payment of the proportionate amount. In this particular case the mortgagee, Rajendra, omitted to implead the Secretary of State who, as I have said was a puisne mortgagee in respect of the certificate debt and purchased the mortgaged property himself. Now at the time when the purchaser in execution of the certificate sale claims redemption it is found that the equity of redemption in respect of the remaining property is vested in the mortgagee himself the defendant therefore can in equity claim to be allowed to redeem that portion of the property only in which he is interested The plaintiffs are the representatives of Rajendra, and the defendant of Angnu.

9. In my opinion the decree of the learned District Judgement be varied by allowing the defendant to redeem the property in suit by paying up the proportionate amount due in respect of the property in suit as was ordered in the

case of Balli Singh v. Bindeshwari Tewari 1916 Pat 282. I would therefore allow the appeal and order the trial Court to take an account of the amount due under the mortgage of March 1915, up to 16th June 1926, We date oh which Rajendra Prasad, the mortgagee auction-purchaser, was formally given possession of the property. Then the value of the several mortgaged properties on the date of the mortgage should be ascertained and the mortgage debt found due as above should be distributed on them proportionately and the amount due from the village in suit should thus be ascertained.

10. Thereafter the defendant will be given three months time to redeem the property by paying up to the plaintiffs the amount so found due in respect of the property in suit. In that event the plaintiff''s suit for possession will be dismissed. If he fails to do so within the time aforesaid, the property in suit will be put up for sale. Out of the sale proceeds the mortgage debt due upon the property will be satisfied first and the amount will be paid to the plaintiffs as the representatives of the mortgagee and the balance, if any, will go towards the satisfaction of the mortgage decree if it still remains unsatisfied; otherwise it will be paid to the defendant.

11. The plaintiffs are not entitled to a decree for possession as on the date of the present suit they were not entitled to possession as the sale at which they purchased was not binding upon the defendant. The only right they had was a right on failure of redemption to bring the property to sell. We understand that since the order passed by the learned District Judge the plaintiffs are in possession of the property in suit and are enjoying the usufruct thereof. We have therefore not directed the taking of the account of the mortgage debt for the period after 16th June 1926. Under the circumstances it is directed that the parties will bear their own costs throughout.

Agarwala, J.

12. I agree.

