

(1962) 11 PAT CK 0014
In the Patna High Court
Case No : A.F.A.D. No. 748 of 1958

Bhuneshwari Devi and Others		APPELLANT
	Vs	
Sheogovind Lall Missir and Another		RESPONDENT

Date of Decision : 07-11-1962

Acts Referred:

Bengal Land Revenue Sales Act, 1859 — Section 9
Bihar Land Reforms Act, 1950 — Section 14, 3, 3A, 4
Contract Act, 1872 — Section 69
Transfer of Property Act, 1882 — Section 72

Citation : AIR 1963 Patna 185

Hon'ble Judges : Ramratna Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : Sudhir Chandra Ghose, for the Appellant; S.N. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Kanhaiya Singh, J.—In a suit to enforce a simple mortgage dated the 4th January, 1926, the plaintiff-respondents obtained a preliminary decree on the 7th August, 1935, followed by a final decree passed on the 27th October, 1938, which provided payment of the decretal amount in instalments, and it was stipulated that in the event of default of payment of any one instalment, the amount remaining outstanding would fall due and the mortgagee decree-holder will be entitled to realise that amount by sale of the mortgaged property. The final decree had not been satisfied in full even by March, 1954. The property mortgaged constituted an estate. The liability for payment of the revenue and cess for that estate lay on the mortgagors. They defaulted in payment of the revenue and cess. Accordingly, the plaintiff paid revenue and cess for the kist January 1953, March, 1953, June 1953, September, 1953, January 1954 and March 1954, with the result that by March 1934 he had paid in all Rs. 938-14-9 on account of revenue and cess. On the 2nd March, 1956, the plaintiff-respondents commenced the present action for recovery from the appellants-

mortgagors Rs. 938-14-9 paid by them on account of revenue and cess and Rs. 288-8-0 by way of interest, in all Rs. 1227-6-9.

2. The defence of the appellants was two-fold; first, that this payment was gratuitous and voluntary, and it is, therefore, not recoverable from them, and the second that the mortgaged property had vested in the State of Bihar, and, therefore, the present suit was barred u/s 4 of the land Reforms Act.

3. Both the Courts negated the defence, and granted the plaintiff a decree with this modification that the rate of interest was reduced from 12 per cent which the plaintiff had claimed to 9 per cent per annum. Now, the defendants have come up in second appeal.

4. The first contention raised by learned counsel on behalf of the appellants is that the payment made by the plaintiffs was gratuitous and voluntary and does not fall u/s 69 or 70 of the Contract Act, and accordingly the plaintiffs were not entitled to be reimbursed by the appellants. His submission is that when a mortgage decree had already been passed, the plaintiff-mortgagees cannot be said to have an interest in the mortgaged property, and accordingly they were not entitled to make any payment on account of the revenue and cess. In order to appreciate this argument, it will be necessary to state the legal position in this connection. It is true that after the mortgage has matured into a decree, the relationship of the mortgagor and mortgagee ceases to exist and is converted into a relationship of a decree-holder and a judgment-debtor. This is exactly what has been laid down by a Bench of the Madras High Court in the case of Thirukonda Ellarayan Vs. Nakonda Rangaswami Aiyar, :

"The principle involved is that in all suits on mortgage which are successful the mortgage, so far as parties to the suit are concerned, is merged in the decree and the mortgagor's rights are only exercisable under the decree and do not exist any longer outside the decree. The right to redeem, therefore, can be exercised only as provided under the decree and not outside the decree. It follows then, that, after a decree in a mortgage suit whatever the form of that decree whether for foreclosure, sale or redemption, the parties to the mortgage and to the suit and their legal representatives or assignees cannot maintain in future any separate suit or any claim arising out of the mortgage. The ratio of this case is that when a mortgagee has obtained a decree for sale, the mortgage as between himself and his mortgagor and all parties to the suit is merged in the, decree in the suit for sale. The same principle has been laid down by a Bench of the Allahabad High Court in the case of Gauri Sahai v. Ashfak Hussain ILR All 623. This case lays down that there can be in effect only one decree in a suit based upon the mortgage. In the case of Ramratan Gir v. Prag Datt Pande 9 Ind Cas 835 (All) a has been observed by a Bench of the Allahabad High Court :

"It has been repeatedly held, and it is not denied by the learned Vakil for the respondents, that in a suit for sale upon a mortgage there can be but one decree for sale."

What is the position, therefore, in this case? The mortgagees have obtained a decree for sale of the mortgaged property. That decree still subsists and the right of the mortgagee-decree-holders to recover the unsatisfied amount of the decree by sale of the mortgaged property still subsists. It is true that now the mortgage has merged into a decree for sale. This does not, however, obliterate the right which the mortgagee had under the mortgage bond, that is to say, to bring the mortgaged property to sale for realisation of the mortgage money. In fact, it is this very right which has been maintained by the decree itself. The mortgagee-decree-holder now has a right under the decree to realise the decretal amount by sale of the mortgaged property. That being so, the mortgagee-decree-holder has by virtue of the decree an interest in the property in mortgage. If the property vanishes or passes to some other person, the decree which the mortgagee has got cannot be recovered. Therefore, it is, in my opinion, manifest that notwithstanding the fact that the mortgage has ripened into a decree, the mortgagee-decree-holder has still an interest in the hypothecated property. That being so, he is entitled to make payment in order to save the property from destruction, forfeiture or sale. The payment in this case, therefore, comes directly u/s 69 of the Indian Contract Act. This section provides that a person who is interested in the payment of money which another is bound by law, to pay, and who therefore pays it, is entitled to be reimbursed by the other. As I have shown above, the mortgagee-decree-holder is undoubtedly interested in the payment of the money because failure to do so would have resulted in the sale of the property and thereby damaging his interest in the decree. It is futile to discuss cases on this point and I would only refer to the illustration to Section 69 of the Contract Act. From the illustration it will appear that a lease was granted by the Zamindar and the revenue payable by him to the Government being in arrear, the land was advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of the lease. Accordingly, in order to prevent the sale and the consequent annulment of his own lease, the lessee paid to the Government the sum due from the Zamindar. It is stated that in such circumstances the zamindar was bound to make good to the lessee the amount so paid by him. In my opinion, Section 69 is sufficiently plain and this case is covered by Section 69 inasmuch as the mortgagee-decree-holder also had to pay the amount in order to protect the property from being sold under the revenue law. Mr. Ghose, appearing for the appellant, contended further that in the illustration to Section 69 the property had been advertised for sale. In my opinion, this makes no difference to the principle applicable; whether the property was advertised for sale or whether the property was liable to be sold for non-payment of revenue, there is no distinction in principle. What is required by Section 69 of the Contract Act is that the person making the payment must be interested in the payment of money. The interest in making payment does not arise only when the property had been advertised for sale. There is a further consideration. Under the Bengal Land Revenue Sales Act, 1859, which governs the present case, the payment of revenue has to be made before the appointed date and if the payment is not made by the appointed date,

then the estate will be advertised for sale, and after the sale has been advertised, then no payment will be accepted thereafter. If the payment of revenue in arrear cannot be accepted under the Bengal Land Revenue Sales Act after the sale has been advertised, it is incumbent upon the person having interest in the estate to make the payment before the sale is advertised. If the contention of Mr. Ghose were to prevail that Section 69 of the Contract Act will come into operation only when the property is notified for sale, then no payment made under the Bengal Land Revenue Sales Act will be covered by Section 69 of the Contract Act. It is difficult to accept such a wide proposition of law as enunciated by him.

I may refer in this connection to a decision of the Calcutta High Court in the case *Moti Chand v. Bajrang Sahai* 16 CriLJ 143. It has been laid down in this case that a suit brought to recover the amount paid by the plaintiff, (a mortgagee from one of the cosharer proprietors) from the entire body of proprietors, on the allegation that under the terms of the mortgage contract he was not liable to pay any share of the Government revenue and that he was compelled, by reason of the default made by one or more of the entire body of proprietors, to satisfy the demand of the Government, is maintainable on the principle recognised in Section 9 of the Bengal Land Revenue Sales Act. Their Lordships further laid down that such a suit is also maintainable u/s 69 of the Indian Contract Act. Referring to Section 69 of the Contract Act, they observed that the reasonable interpretation of this section is that it applies to cases in which the person interested in making payment makes the payment but is himself not liable to make the payment. They further pointed out in that case that the plaintiff mortgagee was not liable to pay any portion of the Government revenue and was interested in the payment of this money because if the money was not paid, his interest as a mortgagee was liable to be extinguished by the sale.

In the case of *Umesh Chandra v. Khulna Loan Co.* ILR Cal 92 the mortgagee of a share of putni taluk, in order to save his interest therein, paid up the putni rent and claimed to recover a proportionate share thereof from the purchaser of the mortgagor's share. Their Lordships held that u/s 69 of the Contract Act the mortgagee was entitled to succeed. These cases afford direct authority on this question and lay down that a mortgagee after payment of land revenue to save the mortgaged property is entitled to recover the amount from the mortgagor u/s 69 of the Contract Act. In principle there is no difference whether the mortgagee as such brings his suit to recover the amount so paid or the mortgagee decree-holder, after the mortgage has matured into a decree, brings a suit to recover the amount paid after the decree. In my considered judgment in a case of such payment there is a clear interest in making the payment by virtue of Section 69 of the Contract Act and the mortgagee is entitled to be reimbursed by the mortgagor.

5. Next, the learned counsel contended that the right which accrues to the mortgagee after payment of the revenue is the right to add that amount to the

mortgage lien, and he is not entitled to bring a separate suit for recovery of that amount, and in this connection reference was made to Section 72 of the Transfer of Property Act and Section 9 of the Bengal Land Revenue Sales Act. This contention also has no merit. The facts of this case do not warrant the application of Section 72 of the Transfer of Property Act or Section 9 of the Bengal Land Revenue Sales Act. Section 72 of the Transfer of Property Act entitles the mortgagee to add to the mortgage money the amount spent by him, inter, alia, for the preservation of the mortgaged property from destruction, forfeiture or sale provided that prior to the payment the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title. As will appear, the provisions of Section 72 are not obligatory. The opening words of this section, namely, "A mortgagee may spend such money as is necessary" is sufficiently indicative that this is a right which is optional for the mortgagee to exercise. In other words, Section 72 gives the mortgagee an additional right, a right over and above what he got under the ordinary provision of law. Where a mortgagee is entitled under the ordinary law to recover the amount spent by him in order to protect the mortgaged property from destruction, forfeiture or sale, that right is not taken away by Section 72. The right conferred upon him by Section 72 is a right in addition to the right which he has got under the general provisions of law. It will appear that when a person is interested in payment of money pays that amount which benefits the other, he is entitled to be reimbursed by him u/s 69 of the Contract Act. Therefore, Section 72 of the Transfer of Property Act does not exclude the personal right of suit which the mortgagee has u/s 69 of the Contract Act. I may refer in this connection to a Bench decision of the Madras High Court in the case of *T. Venkatasami Naicker v. Muthusami Pillai* 45 Ind Cas 949 : AIR 1919 Mad 1102. In that case also an argument was advanced that the mortgagee was not entitled to bring a separate suit for recovery of the money spent by him for preservation of the mortgaged property and all that he was entitled to was to add that money to the principal mortgage money and to insist upon repayment rather than upon payment by a separate suit.

While repelling this contention, their Lordships have laid down as follows :

"The language of Section 72 is against this contention. The words are "the mortgagee may, in the absence of a contract to the contrary, add such money to the principal money". It is a permissive provision and not an obligation imposed upon the mortgagee. As we read the section, it seems to us that the Legislature intended to give larger rights to the mortgagee than he would otherwise have. Every person who spends money for the benefit of another is entitled to sue for that money. The ordinary rules of contract would secure him that right. In the case of a mortgagee, the Legislature apparently intended to put him on a higher footing. He is given the liberty of adding the expended moneys to the amount of the mortgage, thereby securing, to the moneys a charge upon the property. The use of the word "may" shows that it is an additional remedy conferred upon the mortgagee and that it is not the sole-remedy."

A similar view has been expressed by a Bench of the Calcutta High Court in the case of ILR Cal 92. In similar circumstances it was held in that case that u/s 69 of the Contract Act the mortgagee was entitled to succeed. Therefore, the contention that Section 72 of the Transfer of Property Act bars a separate suit to recover the amount spent for the preservation of the mortgaged property is not tenable.

6. Similarly, Section 9 of the Bengal Land Revenue Sales Act does not debar the mortgagee from bringing a suit to recover the amount so spent by him Section 9 provides as follows:

"The Collector or other officer as aforesaid shall, at any time before sunset of the latest day of payment determined according to Section 3 of this Act, receive as a deposit from any person not being a proprietor of the estate or share of an estate in arrear, the amount of the arrear of revenue due to be credited in payment of the arrear at sunset as aforesaid, unless before that time the arrear shall have been paid by a defaulting proprietor of the estate.

And in case the person so depositing, whose money shall have been credited in the manner aforesaid, shall be a party in a suit pending before a Court of justice for the possession of the estate or share from which the arrear is due or any part thereof, it shall be competent to the said Court to order the said party to be put into temporary possession of the said estate or share, or part thereof, subject to the rules in force for taking security in the cases of parties in civil suits.

And if the person so depositing, whose money shall have been credited as aforesaid, shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said person, which would have been endangered or damaged by the sale, or which he believed in good faith would have been endangered or damaged by the sale, he shall be entitled to recover the amount of the deposit, with or without interest as the Court may determine, from the defaulting proprietor.

And if the party so depositing, whose money shall have been credited as aforesaid, shall prove before such a Court that the deposit was necessary in order to protect any lien he had on the estate or share or part thereof, the amount so credited shall be added to the amount of the original lien."

It will be observed that under the third clause of Section 9 the person making the deposit of the revenue in order to protect his interest which was likely to be endangered or damaged by the revenue sale, or which he believed in good faith would have been endangered or damaged by the sale will be entitled to recover the amount of the deposit with or without interest as the Court may determine from the defaulting proprietor. I do not see how Section 9 is a bar to the recovery of the amount so deposited by a separate suit. Mr. Ghose referred to the last clause of Section 9 under which the revenue so deposited shall be added to the amount of the original lien. From Clause (4) it does not follow that it was obligatory upon the mortgagee to add the amount of revenue deposited by him

to the principal mortgage money. Several rights have been given by Section 9, and it was for the person, making the deposit or for that matter the mortgagee depositing the revenue money, to decide what right he wanted to exercise. If he chose the right given to him under the third clause, that is, to recover the amount from the defaulting proprietor, there was no bar to his proceeding against him and recovering the amount so deposited by a separate suit. No decision was cited by Mr. Ghose in support of his contention. On the contrary, the decision in the case of *Smith v. Dinonath Mookerjee* ILR Cal 213 is an authority for the proposition that Section 9 of the Bengal Land Revenue Sales Act is not a bar to the recovery of the amount so deposited by a separate suit. In that case a putnidar who had made certain payments on account of Government revenue due by his superior landlords who had defaulted although a separate account had been opened for the payment of such Government revenue brought a suit to recover the amount so paid. It was contended that the payments were merely voluntary and that the plaintiff could not recover them. Their Lordships held that the plaintiff was interested in making the deposits, and was, therefore, entitled to recover u/s 69 of the Contract Act. As regards Section 9 of the Bengal Land Revenue Sales Act, they laid down that the liability of a landlord u/s 9 of the Act to recoup a person paying Government revenue for him does not depend upon the question of whether the money was originally deposited or not, but accrues upon its being credited in payment of arrears. In that case Section 9 was not held to be a bar to such a suit. The same principle was applied in the case of *Kinu Ram Was v. Mozaffer Hossain* ILR Cal 809 (FB). The case of 16 CriLJ 148 is on all fours with the present case. In that case, as stated earlier, the mortgagee was one of the cosharer proprietors who had deposited the Government revenue and brought a suit to recover that amount in that case it was held that the suit was maintainable on the principle recognised in Section 9 of the Bengal Land Revenue Sales Act, and it was also maintainable u/s 69 of the Contract Act. As to the application of Section 9 of the Bengal Land Revenue Sales Act, *Mookerjee*, delivering the judgment of the Bench, observed as follows :

"That section deals with deposit by persons not proprietors. The Legislature has provided that if the arrears of revenue due have been paid by a person who is not a proprietor, he may have a three-fold remedy. If he is a party to a suit pending before a Court of Justice for pos-session of the estate, it is competent to the Court to put him temporarily in possession. In the second place, he is entitled to have a personal decree against the defaulting proprietors for the amount paid by him to save the estate from danger. In the third place, he is entitled also to have a lien on the estate for the amount paid. It was pointed out by their Lordships of the Judicial Committee in the case of *Nugender Chunder Ghose v. Kaminee Dossee* 11 Moo Ind App 241 that It is open to a person who has made such a payment, to obtain a personal decree against the defaulting proprietor, and it was pointed out by this Court in the cases of *Upendra Chandra Mitter v. Tara Prosanna Mukherjee* ILR Cal 794 and *Rakhohari Chat-taraj v. Bipra Das* ILR Cal 975 that a person in this position is entitled to add the sum so

deposited, to his mortgage security."

In the instant case the plaintiff seeks a personal remedy against the defaulting mortgagors, and it is clear that u/s 9 of the Bengal Land Revenue Sales Act the plaintiff is entitled to succeed. Referring to Section 69 of the Contract Act, his Lordship made the following significant observations :

"We may add that the plaintiff is also entitled to succeed u/s 69 of the Indian Contract Act. That section provides that a person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by the other. The reasonable interpretation of this section is that it applies only to cases in which the person who makes the payment is himself not liable to make the payment. In the case before us, as already explained, the plaintiff was not bound to pay any portion of the Government revenue; the defendants, on the other hand, were so liable. The plaintiff was also interested in the payment of this money, because if the money was not paid, his interest as mortgagee was liable to be extinguished by the sale. He has accordingly made the payment. He is, therefore, entitled to be reimbursed by the others, that is, by the whole body of proprietors who were bound by law to pay the entire sum of the Government revenue."

On the strength of this authority it must be held that from whatever point of view the present case is considered whether falling u/s 9 of the Bengal Land Revenue Sales Act or u/s 69 of the Contract Act, the plaintiff is entitled to a decree as against the defaulting proprietors.

7. It will be seen, therefore, that far from being a bar to the suit, Section 9 of the Bengal Land Revenue Sales Act clearly enables the mortgagee to recover the amount of revenue deposited by him from the defaulting proprietors either by a recourse to Section 9 of the Bengal Land Revenue Sales Act or to Section 69 of the Contract Act, and the contention of Mr. Ghose on this point must be overruled.

8. Next, it was contended that the estate has vested in the State of Bihar under the Bihar Land Reforms Act, 1950, and accordingly the plaintiff is not entitled to maintain the suit for recovery of the amount. It was pointed out that the remedy of the plaintiff was limited to what has been provided in the Bihar Land Reforms Act and reference in this connection was made to Section 14 of the Act. The submission of the learned Counsel is that the proper course for the plaintiff to adopt was to go before the Claims Officer as provided in Section 14 of the said Act. In bar of the suit the provisions of Section 4(d) were invoked". Clause (d) of Section 4 provides that :

"No suit shall lie in any Civil Court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of, or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped."

In order to attract the provisions of Section 4(d) of the Bihar Land Reforms Act, it is necessary that the money which is sought to be recovered must be secured by a mortgage of, or is a charge on, the estate or tenure which has vested in the State, u/s 3 or 3A of the said Act. The question is whether the amount sought to be recovered in the present case was secured by a mortgage of, or by a charge on the estate which has now admittedly vested in the State of Bihar.

Before I consider this point, I think it is necessary to state that in the instant case, as will appear from the above, the final mortgage decree was passed on the 27th October, 1938, with the result that "the relationship of mortgagor and mortgagee was converted into a relationship of decree-holder and judgment-debtor. Further, the payment of revenue and cess in this case was made in 1953 and 1954. It is admitted that the vesting of the estate in question occurred much later. In other words, the final decree was passed and these payments were made prior to the vesting of the estate in question in the State. Therefore, the payment of this amount cannot be said to be secured by a mortgage of the disputed estate. The mortgage had already disappeared and had merged into a decree of the Court. At the time of the payment of this amount, therefore, there was no mortgage in existence. The contention of Mr. Ghose was that it became a part of the mortgage security because u/s 72 of the Transfer of Property Act, this amount was to be added to the principal mortgage money. I have pointed out that the right conferred upon the mortgagee u/s 72 of the Transfer of Property Act is a right in addition to the right under the general law. Apart from this, there was no question of adding this amount to the principal mortgage money because the mortgage debts had merged into the decree of the Court. It cannot be reasonably urged that this amount could have been added to the decree passed by the court. There is no such provision for making alteration to the decree by adding any sum subsequent to the passing of the decree. Therefore, Section 72 has no application, and by recourse to Section 72 it cannot be said that the payment of this amount was secured by the mortgage in question. The same consideration applies to Section 9 of the Bengal Land Revenue Sales Act under the last clause of Section 9 the amount of revenue deposited is to be added to the amount of the mortgage lien. No mortgage lien was subsisting, and, therefore, the question of addition of that amount to the mortgage lien does not apply. Mr. Ghose contended that the payment of the Government revenue creates a lien upon the estate by virtue of Section 9 of the Bengal Land Revenue Sales Act. There is no foundation for this contention. The fourth clause of Section 9 of the said Act does not say that it would create a lien upon the mortgaged estate. All that it lays down is that it will be added to the amount of the original lien. It does not, therefore, create a new lien. It provides for addition to the original lien. Accordingly, if there was no original lien, or the original lien for any reason had disappeared, the question of addition of this amount to the original lien hardly arises. As stated above, the mortgage lien merged into the decree of the Court and the question of addition of the amount subsequently paid to the mortgage decree does not arise at all. If there is no independent lien or any

statutory lien, as called by Mr. Ghose, by virtue of the operation of Section 9 of the Bengal Land Revenue Sales Act it cannot be regarded as a charge upon the estate. If there was no charge, as pointed out above, either by virtue of Section 72 of the Transfer of Property Act or Section 9 of the Bengal Land Revenue Sales Act, Section 4(d) of the Bihar Land Reforms Act, 1950, does not come into operation and does not create a bar to the present suit. I would, therefore, overrule this contention also.

9. If the Bihar Land Reforms Act has no application, as held above, the question of recoupment from the amount of compensation u/s 4(c) (as then in force) or of laying a claim u/s 14 of the Act does not at all arise and it is unnecessary to pursue this matter further.

10. Lastly, it was contended that the plaintiff is not entitled to interest for the amount claimed in the suit. The plaintiff claimed interest at the rate of 12 per cent per annum. The Courts below refuted it to 9 per cent per annum. It is true that there was no contract for payment of interest, but as will appear from the third clause of Section 9 of the Bengal Land Revenue Sales Act, the depositor is "entitled to recover the amount of the deposit, with or without interest as the Court may determine, from the defaulting proprietor". Therefore, the statute entitles the plaintiff to recover interest as the Court may determine. It is, therefore, for the Court to decide whether the plaintiff was or was not entitled to interest. In this case the Courts below have exercised discretion in favour of the plaintiff and have accordingly granted a decree for interest also at a reduced rate, and I do not think the Courts were wrong. There is, therefore, no good ground for disallowing, interest altogether.

11. In the result, this appeal is dismissed with costs.

Ramratna Singh, J.

12. I agree.