
(1944) 12 AHC CK 0026
In the Allahabad High Court

Bohra Bhup Singh

APPELLANT

Vs

Sakha Ram and Others and Bohra Ganga

RESPONDENT

Date of Decision : 06-12-1944

Acts Referred:

Citation : AIR 1945 All 158 : (1945) 15 AWR 51

Hon'ble Judges : Yorke, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Yorke, J.—This is a plaintiff's appeal in a mortgage suit. On 3rd March 1928 defendant 1 Sakha Ram as "karta" of the joint family-mortgaged the property in suit, namely, shares amounting to one half of 130 bighas 13 biswas in village Sonapur, 89 bighas odd in village Bistrampur and 95 bighas odd in village Gorau in favour of the plaintiff Bohra Bhup Singh for Rupees 2800, the consideration consisting partly of the prior debts, partly of a cash advance, and partly of the payment of a part of the debt due to one Piarey Lal. It was provided in the mortgage deed that the money would be repaid in five years and that meanwhile the loan would bear compound interest at annas 12 per cent, per mensem with six monthly rests. On 24th September 1929 the mortgagor executed two fresh mortgages in respect of some of these properties. He executed a simple mortgage in respect of the same and other property in village Gorau, the same property in village Bistrampur, the same property in village Sonapur along with property in village Pipri and the equity of redemption in respect of properties in village Dagrana and Azizpur mortgaged usufructually on the same day, for Rs. 3900 and under this mortgage the amount of Rs. 3210 was left with the mortgagee for the discharge of the mortgage debt due upon the plaintiff's mortgage of 3rd March 1928. Secondly, he executed a usufructuary mortgage in respect of zamindari property in village Sonapur, Dagrana and Azizpur for a sum of Rs. 3000, it being provided in this document that the mortgagor could obtain release of the Sonapur property on payment of Rs. 1500 in the month of Jetb, of

Dagrana on payment of Rs. 900 similarly and of Azizpur on payment of Rs. 600 similarly. The Sonapur property was the same half share which had been the subject of the simple mortgage of 1928. At a later date on 5th January 1932 the present plaintiff who had obtained a simple money decree against the defendant Sakha Ram brought the property mortgaged to him to sale in execution of that decree and himself purchased it for Rs. 1200. In the proclamation of sale he showed the property as burdened not only by his own mortgage but by the mortgages of 24th September 1929. He obtained formal possession from the Court on 8th January 1932. The plaintiff was thus in the position that he was the mortgagee in respect of the properties in suit and he had also purchased the equity of redemption, but in the case of village Sonapur the property was in the actual possession of the usufructuary mortgagee. The plaintiff was thus unable to obtain actual possession of the Sonapur property unless he paid to the usufructuary mortgagee the sum of Rs. 1500.

2. It was in these circumstances that on 31st August 1940 the plaintiff instituted a suit for sale on foot of his mortgage of 3rd March 1928, claiming to recover the sum of Rs. 2800 principal plus Rs. 2700 interest, although he alleged that the actual amount of interest due was Rs. 2950. He impleaded as defendants first party the mortgagor Sakha Ram and his* two sons Manni Lal and Babu and as defendant second party the subsequent mortgagee Bohra Ganga Ram. He alleged in the plaint that defendants 2 and 3 had a right to obtain redemption as sons of the principal mortgagor who were minors at the time of the execution of the deed. On behalf of one of these two defendants it was pleaded that there was no legal necessity for the execution of the mortgage bond in suit and that the defendants were agriculturists and entitled to relief under the provisions of the U.P. Agriculturists' Belief Act. On behalf of the defendant Bohra Ganga Ram it was pleaded that the plaintiff had no cause of action for the suit which was not maintainable. Other pleas were taken with which, however, we are not concerned in this appeal. The learned Civil Judge held that legal necessity was proved, but he took the view that the plaintiff's mortgage had been extinguished by his purchase of the equity of redemption since thereby there was a merger of the rights of mortgagor and mortgagee. The position which therefore arose was that the plaintiff was in effect in the capacity of mortgagee suing himself as mortgagor and therefore the suit was not maintainable. Upon this finding he dismissed the suit. In appeal it is contended that the view taken on this pure point of law by the learned Civil Judge is incorrect and the decree should be set aside and the suit remanded for disposal upon the merits. We have listened to a lengthy argument on the point of law raised in this appeal. On the one side stress is laid upon the fact that the plaintiff is in effect suing himself and it is contended that this is not a possible position and it is argued that although Section 101, T.P. Act, provides that:

any mortgagee of, or person having a charge upon, Immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be,

without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property;...

that does not" mean that in such a case the mortgagee can institute a suit to enforce his mortgage but only that as between himself and subsequent mortgagees or charge-holders he may use his own mortgage as a shield. We note, however, at the outset that in the section there is no such restriction implied since all that it provides is that the mortgagee may purchase the rights of the mortgagor, that is the equity of redemption, without thereby causing the mortgage to be merged as between himself and any subsequent mortgagee. One of the rights, and in fact the duty, vide O.34, Rule 1, of the mortgagee in a mortgage suit is to implead as defendants subsequent mortgagees whether under a simple or a usufructuary mortgage before he can be held entitled to have the property sold in enforcement of his mortgage. This is both a weapon of attack and a weapon of defence since it enables the plaintiff mortgagee to have the property sold free of any charges upon it and thereby to obtain actual possession, while it also gives the subsequent mortgagees an opportunity to redeem the prior mortgage but allows the prior mortgagee to hold his mortgage as a shield against such later mortgagees. On the other side it is contended for the plaintiff appellant that the mere purchase of the equity of redemption should not put him in a worse position than he was as a mortgagee and deprive him of the right to institute a mortgage suit and get the property sold free, at the risk of the subsequent mortgagees, taking the opportunity of redeeming his mortgage and being able to hold his own mortgage as well as their own against him in his capacity of mortgagor arising from his purchase of the equity of redemption. On behalf of the respondents, and in support of the contention that in a case to which Section 101, T.P. Act, applies the prior mortgagee can use his mortgage only as a shield and not as the basis of his suit, reliance has been placed on some remarks in *Ram Sarup v. Ram Lal* ("22) 9 AIR 1922 All. 394 where it was said:

The shield of a subsequent mortgagee, who acquires the rights of a prior mortgagee, is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation, for, as pointed out in *Laxman Ganesh Rajendra Vs. Mathurabai Narayan Govind*, he cannot be required to sue for the recovery of the money due on his mortgage from his own property. Indeed, being both the mortgagee and the mortgagor, he cannot have any cause of action against himself.

With the greatest respect the learned Judges have not in this case considered the questions which may arise when there are subsequent mortgages in all their

possible aspects. Stress has also been laid in argument upon the fact that there is no reported case in which a prior mortgagee was allowed to bring a suit for sale against himself and a subsequent mortgagee. We have also been referred to the remarks of the Patna High Court in *Kedar Nath Goenka and Another Vs. Bhagwat Prasad Kumar and Others*, quoted by the learned Civil Judge where it was observed that

the words as to keeping alive the mortgage bond are merely an assertion of the same rights that are conferred by reason of Section 101, T.P. Act, and they are intended merely to preserve to the mortgagee a shield against the claims of persons "setting up a subsequent charge upon the same property.

Lastly we were referred to certain remarks in *Arumugasundara Maharajah Pillay v. Narasimha Iyer* ('16) 3 AIR 1916 Mad. 875. In that case it was argued "that in no case could a mortgagee bring a suit on his mortgage after he had acquired the equity of redemption in the mortgaged properties. The purchase of the equity of redemption in that case took place when there were no outstanding incumbrances on the property. On the other hand, it was contended that the mortgage could be extinguished only by payment and that by purchase of the equity of redemption there was merely a combination of two estates, the mortgagor's estate and the first mortgagee's estate, In the course of his judgment *Seshagiri Aiyar J.* remarked with reference to Section 101 as it then stood:

As I read the section it leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the incumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property an intention will be imputed to the mortgagee purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The discussion in the House of Lords in the case already referred to shows that the rule enabling the purchaser to fall back on his mortgage is an infringement of legal rights. Consequently a strict construction should be placed on this provision of law. I am of opinion that a mortgagee purchaser can use his previous mortgage only as a shield if there are mesne incumbrances, and that also only in respect of the properties which are covered by such incumbrances.

Later in his judgment he remarks that

in *Ramu Naicken v. Subbaraya Mudali* ('74) 7 M. H. C.R. 229 it was decided by this Court that the mortgage right can only be used as a shield against puisne incumbrances...

and again:

In my view the mortgage was extinguished when plaintiff 1 acquired the equity of redemption and it is not open to him to sue upon it whatever may be his rights to use the mortgage as a defence against puisne incumbrancers.

3. On behalf of the appellant it is pointed out that the view taken in 29 M.L.J.

583 has been dissented from in subsequent decisions of the High Court of Madras. We have been referred to three cases. The first of these is Polayya Dora v. Anantha Patro ("36) 23 AIR 1936 Mad. 61. In that case Ramesam J. at p. 50 remarked with reference to the Madras Law Journal case that the remarks of Seshagiri J. were purely obiter for the earlier case as the actual decision in that case was that Section 101 was not applicable to it because there was no intermediate incumbrance. He expressed disagreement with the remarks in the earlier case. With respect we would note "that in this very case it might be said that the point was not really arguable. The position which arose was that out of five branches of the family of the defendants three branches were in possession of a part of the property as mortgagors not bound by the sale of the equity of redemption to the plaintiff mortgagee. Hence, prima facie, so far as those defendants were concerned the question of merger did not arise and the plaintiff was in the position of a mortgagee suing his own mortgagors and not of a mortgagee who had purchased the equity of redemption suing himself. In the same year in Arumuga Bathan, lately a minor but since declared major and guardian and Others Vs. Semba Goundan (dead) and Others, reliance was placed on this decision. In that case the mother of the plaintiffs purchased certain property subject to a simple mortgage without notice of a subsequent usufructuary mortgage. She discharged the prior mortgage and thereby she became the assignee in law of the mortgagee. After her death her heirs, the plaintiffs, sued puisne usufructuary mortgagee and the mortgagor to enforce the simple mortgage. The learned Judges in this case really held that Section 101 had no application and that the plaintiff's mother by discharge of the simple mortgage became subrogated to the position of the mortgagee and could therefore sue upon the mortgage. In effect they held that the case was covered by Section 92 and not by Section 101, T.P. Act. The question came up again in Venkatalingama Nayanam Bahadur v. Partbasarathy Rayanimgar ("42) 29 AIR 1942 Mad. 558 where the learned Judges remarked:

Then there is nothing in Section 101, T.P. Act, that the mortgagee purchaser can use his previous mortgage only as a shield and cannot use his previous mortgage which has not been extinguished u/s 101 as a spear or by way of an attack. In coming to that decision the learned Judge (of the Court below) referred to an old decision of this Court in Ramu Naicken v. Subbaraya Mudali ("74) 7 M. H. C.R. 229 (quoted above) where it was held that the mortgage right could only be used as a shield against puisne incumbrances. We find nothing in Section 101 which would entitle a person who has acquired an absolute title to the property or happens to become a charge or incumbrance holder of the property of which he was the owner to plead the charge or incumbrance only by way of defence and not to enforce the same against the puisne or the mesne incumbrancers as a plaintiff. See in this connexion the eases reported in 59 Mad. 446 and 59 Mad. 1042 (quoted above).

4. The same view has been taken by the Chief Court of AIR 1943 407 (Oudh) That was a case where the mortgagor executed a perpetual lease in favour of a

third person after he had mortgaged the property to the plaintiff. The Chief Court permitted the plaintiff mortgagee who had purchased the property to sue upon his own mortgage and to get decrees for foreclosure and sale in order to get rid of the perpetual lessee who had paid part of the decretal amount in respect of two other prior mortgages. In the course of the judgment it was remarked:

There is nothing to prevent a mortgagee from suing upon the basis of a mortgage any person who has subsequently taken a transfer of interest in the encumbered property from the mortgagor if such a suit is not beyond limitation. We regret we are unable to accept the view expressed in *Arumugasundara Maharajah Pillay v. Narasimha Iyer* ("16) 3 AIR 1916 Mad. 875. In fact that view has not been followed in the Madras High Court itself in subsequent decisions.

The learned Judges went on to refer to the three cases to which we have referred above. The same view has been taken by the Calcutta High Court in *Mangtula Bagaria Vs. Upendra Mohan Pal Chaudhuri*, . In that case also it was contended that the plaintiff who was the first mortgagee had purchased the equity of redemption with notice of the lease in favour of one Rajdeo and hence that lease was binding upon him and he could not seek to enforce his own mortgage as against Rajdeo or his representatives as the mortgage had become extinguished, the two interests having been united in the same person. The learned Judges observed that the doctrine in *Toulmin v. Steere* (1816) 3 Mer. 210 to which reference had been made in this case was not applicable to Indian transactions except as the law of justice, equity and good conscience. They went on to say:

It is not therefore a sound proposition that because the mortgagee purchased the equity of redemption, it may be by what amounts to a private treaty, it necessarily causes a merger of the mortgagee's interest. The plaintiff as a mortgagee therefore is entitled to assert his right as such mortgagee against the defendant and may claim that his mortgage interest has been kept alive notwithstanding his purchase of the equity of redemption, as this was for his benefit: see Section 101, T.P. Act.

5. It appears to us that in the light of the cases quoted and in the absence of any provisions in Section 101, T.P. Act, restricting the right of the mortgagee to use his mortgage for purposes other than those of defence, we must necessarily hold in the present case that there is no such limitation in law. It follows that the plaintiff's suit is maintainable and it must be decided upon the merits. We accordingly allow this appeal, set aside the decree of the lower Court dismissing the suit and remand the suit to the Court below for disposal on the merits. Costs of this appeal will be costs in the cause.