
(2005) 10 AHC CK 0196
In the Allahabad High Court
Case No : S.A. No. 2335 of 1977

Chandulal Keshwani and Others

APPELLANT

Vs

Balwant Singh and Others

RESPONDENT

Date of Decision : 05-10-2005

Acts Referred:

Transfer of Property Act, 1882 — Section 67, 70, 81, 91, 94

Citation : AIR 2006 All 47 : (2006) 1 AWC 848 : (2006) 1 RD 245

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : K.N. Saxena, for the Appellant; Navin Sinha, S.N. Verma, H.O. Khare, S.M. Dayal, Ashok Kr. Srivastava, D.P. Bahadur, Islam Ahmad, Indra Raj Singh and K.C. Saxena, for the Respondent

Final Decision : Dismissed

Judgement

Sunil Ambwani, J.—Heard Sri K.N. Saxena for appellants. No one appears for the respondents.

2. The Original Suit No. 8 of 1974; Balwant Singh and others s. Chandulal and 7 others for recovery of Rs. 8,160/- against the defendants 1 to 7 and interest pendente lite and future, on the principal mortgage money of Rs. 4,000/- at the rate of 6% per annum was decreed on 4.5.1976. The Civil Appeal No. 101 of 1976 against the Judgment and Decree was dismissed by the District Judge, Jhansi on 30.6.1977. The Second Appeal, was admitted on 13.1.1978. The Court issued notice on ground Nos. 1 to 3 as substantial questions of law.

1. Whether an auction purchaser in a mortgage decree purchases the property free of encumbrance when no encumbrance is shown in sale proclamation or not?

2. Whether the plaintiffs decree holders who did not object to get their encumbrances shown in the sale proclamation are estopped from endorsing their mortgage for recovery of their mortgage money when they were aware of the sale and the suit?

3. Whether plaintiff who pursued their remedy for getting excess amount paid to them and did not object for showing their encumbrances in the sale, proclamation are estopped from enforcing their claim against auction purchaser?

3. The plaintiffs Balwant Singh and others filed a suit with the allegations that the defendant No. 8 Sri H.K. Franklin borrowed Rs. 4,000/- from the plaintiff on 15.10.1962, and executed a simple mortgage in respect of his two houses namely house Nos. 396 B and 397. Premganj, Sipribazar, Jhansi. The defendant No.8 agreed to pay the interest on the mortgaged money. The period of payment of mortgage money was three years. The defendant No. 8 paid Rs. 1300/- towards interest for the periods 15.10.1962 to 30.6.1965. He did not pay interest thereafter. The defendant No. 8 had previously mortgaged the property along with one more house No. 398 situate in same Mohalla to one Sri Ganga Vishnu who filed suit No. 80 of 1965 against the defendant No.8 and obtained a decree for mortgage money from the Court of Additional Civil Judge, Jhansi. In execution of this decree all the three mortgaged houses were sold. House No. 396- B was purchased by Sidh Kumar Rehaney, the husband of defendant No. 1, and the father of defendants 1 to 7; and House No. 397 was purchased by defendant No. 1. The House No. 398 (which was not mortgaged to the plaintiff) was purchased by Chhadamal Lal. The plaintiff had the charge on the disputed house No. 396 B and 397, by way of subsequent mortgage deed. The defendant No. 1 subsequently sold the house Nos. 397 to defendant No. 2, and defendant Nos. 3 to 7, who being the heirs of Sidh Kumar Rehaney were impleaded as parties to the suit. The house was purchased subject to the said charge, hence they are liable to pay mortgaged money to the plaintiffs. The plaintiff No. 2 had taken his share of the mortgaged money from plaintiff No. 1, and that the plaintiff No. 1 alone is entitled to recover the mortgaged money. The interest on mortgage money of Rs. 4,000/- for the period 1.7.1965 to 31.3.1974 @ Rs. 40/- per month comes to Rs. 4160.00, and thus the plaintiff No. 1 is entitled to recovery of Rs. 8160/- from the defendants failing which the houses are liable to be sold.

4. Defendants 1 to 7 contested the suit. They stated in the written statement that the disputed house was never mortgaged by defendant No. 8 to the plaintiff. It is wrong to say that the defendant No 8 executed a simple mortgage in favour of plaintiff for a consideration of Rs. 4,000/-. The mortgage in question is a fictitious and sham deed without any consideration. At the time of auction of the house in execution of the decree in case No. 80 of 1965, no encumbrance or charge was proclaimed. The defendant No. 1, or S.K. Rehaney had no notice of the plaintiffs mortgage. The plaintiffs had full knowledge of the auction in the execution proceedings of the decree in case No. 80 of 1965, and that no objection was raised by him to the auction sale. The suit is thus barred by principles of estoppel and acquiescence. In the alternative it was stated that the plaintiffs were subsequent mortgagees, and since the houses were sold to recover the previous mortgaged money the present suit is not maintainable. The Defendant No. 8 did not contest the Suit.

5. The Trial Court below found that the defendant No. 8 actually borrowed Rs. 4,000/- from the plaintiff, and had executed mortgage deed in their favour. This mortgage deed dated 15.10.1962 (Exh.1) was attested by the attesting witnesses. Rs. 4,000/- was borrowed by Sri H.A. Franklin from the plaintiff on the interest of 1% per mensem payable every month. The entire amount was to be repaid within three years and that if the amount of interest remained for a period of three months, the amount was to be added in the principal amount and interest was to be charged thereon. Sri Ganga Vishnu was the mesne mortgagee and the plaintiffs were the puisne mortgagee. The plaintiffs were not impleaded in Original Suit No. 80 of 1965. The rights of mesne mortgagee are given u/s 94 of the Transfer of Property Act, 1882. He has same rights against puisne mortgagee as he has against mortgagor. u/s 92 of the Transfer of Property Act, they have a right of subrogation. Puisne Mortgagee can redeem the property from the mesne mortgagee. A subsequent mortgagee can redeem a prior mortgagee on a right of subrogation to the position of a prior mortgagee. The equity of redemption was with original mortgagor. The houses were sold in execution of the decree. Sri Chandulal, the defendant No. 1 and S.K. Rehaney, predecessor in interest of defendants 3 to 7, were auction purchasers of the mortgaged property. Sri Chandulal, mortgaged the property to Sri Satrughan Pujari, defendant No. 2. The auction purchasers of mortgaged property in execution of a decree, purchased the rights of the mortgagee as well as that of mortgagor. Where both the rights merged in a person, he becomes absolute owner of the property.

6. The Trial Court also held that where a property has been mortgaged to secure subsequent or successive debts and sold in execution of a decree passed in an auction by a mesne mortgagee against the mortgagor without impleading puisne mortgagor, then the puisne mortgagee is not bound to redeem the mortgage of the mesne mortgagee. He can very well enforce his mortgage against the auction purchaser who has stepped in shoes of the mortgagor by purchasing the property in an auction, in execution of a decree standing in favour of the mesne mortgagee. The Trial Court relied upon *Ram Sanahi Lal and Another Vs. Janki Prasad and Others*, in which it was held that the purchaser in execution of a mortgage decree acquires the rights of the mortgagor. If the subsequent mortgagee has not been made a party to the prior mortgage suit the auction purchaser acquires no right as against subsequent mortgagee. The same view has been taken in Patna High Court in the case of *Abdul Gafoor Vs. Sagun Choudhary and Others*, . In *Nanhoomal v. Ram Chander* AIR 1931 All 772, it was held that if any accession was made by an auction purchaser the puisne mortgagee can take benefit to the accession as well u/s 70 of the Transfer of Property Act. The auction purchaser having acquired all the mortgagor's right, title and interest in the property must be treated as mortgagor. It was thus held that the plaintiffs are entitled to recover the amount claimed, from the defendants 1 to 7 who are auction purchaser, but not against the defendant No. 8.

7. On issue No. 4, regarding the limitation it was held that since three years from the date when mortgage money became due had passed, a suit for personal decree against the defendant No. 8 was barred by time. The plaintiff No. 8 has realized his share and thus the decree could only be passed against the defendants 1 to 7.

8. The Appellate Court confirmed the findings and dismissed the appeal. It relied upon AIR 1940 11 (Privy Council) , in which it was observed by Sir George Rankin, that while the purchaser at an execution sale under a mere money decree gets no more than the right, title and interest of the judgment debtor at the date of the sale, the purchaser under the mortgage decree gets, the right, title and interest in the mortgaged subjects which the mortgagor had on the date of the mortgage and charged thereby. Buying the mortgaged property free from encumbrances, he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption. He is not a mere successor in interest of the owner of the equity of redemption at the date of the sale.

9. Sri K.N. Saxena learned Counsel for the appellants, submits that the auction purchaser of a mortgaged decree purchased, the property free from encumbrances. No encumbrances were shown in the sale proclamation. The plaintiffs-decree holders did not get their encumbrances shown in the sale proclamation and thus they are estopped from enforcing their claim against the auction purchasers. Sri Saxena has relied upon the same Privy Council decision in AIR 1940 11 (Privy Council) . He submits that the opinion of the Privy Council was wrongly construed by the Appellate Court. In the matter before the Privy Council, three English mortgages were executed in 1923 and 1924 by one Bhuban Mohan Mullick. The mortgage deeds were executed in respect of 1/8th share in certain immovable property. The mortgagor died instate leaving behind him, a widow, a minor son and an unmarried daughter. The High Court held that the maintenance of the widow and unmarried daughter is a charge upon the interest of the mortgagee under the mortgages. The appellants had brought a suit upon their mortgages in the High Court impleading the minor son. They obtained a preliminary decree and a final decree for sale and purchase of mortgaged property at the execution sale and obtained a sale certificate. A partition suit was filed after about seven months of the final decree and five months before the execution of sale giving rise to the proceedings upto Privy Council. The mortgagor Bhuban Mohan Mullick had 1/8th share in the number of properties which had belonged to his grand father and by the mortgages. He had encumbered his share in some of the properties. In the partition suit the auction purchasers were not impleaded as parties. In the preliminary decree for partition it was declared that the share of Biswanath defendant No. 6 was one-eighth and which was subject to charge and other expenses of his mother and marriage expenses and maintenance of his unmarried sister. Before the execution of sale, the appellants applied to be made parties to the partition suit. Their request was rejected on the ground that it was not necessary at that stage to make them parties. A direction was, however, made to the Commissioner of partition to hear

the appellants submission.

10. The High Court set aside this direction and consequently the subordinate Judge allowed separate allotment of their share for maintenance. The Commissioner of partition rejected the allotment of certain properties to the appellants but subject to charge, as a security for payment of maintenance and other expenses. The Trial Court held that the partition suit continues to be pending even after preliminary decree, and that the rights of the parties have to be adjusted at the time of final decree. He ordered the properties allotted to Viswanath should stand charged for maintenance of his mother and sisters and not the properties allotted to the appellants and a final decree was accordingly passed. The High Court confirmed the decree and held that the preliminary decree in the suit for partition will not be altered or modified in any way in the proceedings for partition. The Privy Council held as follows:

The learned Judges of the High Court were right therefore in directing that the appellants should be made parties. But observed at the end of their judgment that "it goes without saying" that all proceedings taken before 10th April, 1930 would be binding upon the appellants just as much as they would be binding upon "their predecessor-in-interest" is not easy to interpret or accept. It may have been directed only to this-that there was no need to invalidate what had already been done in the suit merely because the appellants had not been parties at the time; that partition could proceed under the preliminary decree. The appellants' rights being adjusted there under. Sale J., on a question of the costs of partition had harmlessly referred (in the case already cited) to the original mortgagor as predecessor-in-title of a purchaser at a mortgage sale meaning no more than that he was the person who had previous to the sale represented the share in question before the Court. He had held that the purchaser could not take advantage of the partition and at the same time repudiate all liability for costs of partition incurred before his purchase. After referring to this passage in the judgment of Sale J., the learned Judges in the present case may have had similar matters in mind when they employed the same language, and the phrase "it goes without saying" suggests some such interpretation rather than a decision upon an important matter which had not been argued. But two Courts in India have interpreted the order made as a decision to the effect that because the preliminary decree of 1st October, 1929 rightly held the mother and sister of Biswanath to have a charge for maintenance upon what he inherited, the appellants-as one time mortgagees from his father and not purchasers of the whole original interest of his father-were liable to maintain his mother and sister out of the property and that partition should be made accordingly. This interpretation runs some risk of doing an injustice to the learned Judges, but if their Lordships may assume against the appellants that the order of the High Court involved an erroneous opinion to the effect that the preliminary decree of 1st October, 1929 bound the mortgagees, it still remains that appellants had since the passing of that decree become purchasers of the whole interest in the share and that no decision as to their rights as purchasers

had at any time been given in the suit. Their Lordships are not prepared to hold that the order of 14th July, 1930 must needs be construed, contrary to the rights of the parties, as holding that after the execution sale the ladies had the same rights against the purchasers as they had against Biswanath's interest in the equity of redemption.

It is manifest that the ladies interest in the equity of redemption equally with Biswanath's must be regarded as having passed to the appellants, if it is not regarded as having come to end. At no time was it correct to treat that appellants as mere assignees of Biswanath's interest. Before the sale their interest was as mortgagees and was not represented in the suit. After the sale when they were made parties their interest as complete owners was before the Court- an interest which at no time had belonged to Biswanath. At no time was it correct or sufficient to regard Biswanath as "their predecessor-in-title;" upon any question as claiming to be interested in the equity of his interest had no bearing upon the rights of the appellants before the execution sale or afterwards.

Their Lordships fully agree with the observation made by the learned Subordinate Judge who passed the final decree in his order of 8th May, 1934, whereby he allowed the objections of the appellants to the Commissioner's report on the ground that a partition suit which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree.

In this view it becomes unnecessary to consider whether, if the High Court's order of 14th July, 1930, was binding upon the Division Bench who heard the appeal from the final decree, it necessarily follows that it could not be disturbed on appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court dated 28th January, 1937, set aside, and the final decree of the learned Subordinate Judge restored. The respondents 9,15 and 17 who appealed to the High Court must pay the costs of the present appellants incurred in the High Court and of this appeal.

11. In Variavan Saraswathi and Another Vs. Eachampi Thevi and Others, , the Supreme Court dealing with the rights of the co-mortgagee in case of redemption by mortgage property held in paras 6 and 7 as follows :

6. Since the transfer in a mortgage is, only, of interest and not of entire right and title, as takes place in sale, the mortgagor and the mortgagee can transfer or assign their interest. A mortgagor may assign or transfer, the equity of redemption or may even create second mortgage. Similarly a mortgagee may assign his interest or create another mortgage. What happens when a mortgagee assigns his interest in favour of another person? Since an assignor can pass on interest that he has, the assignee becomes holder of the same interest that a mortgagee has. In other words, he steps into the shoes of the mortgagee, Can the same be said where a co-mortgagor or anyone on behalf of mortgagor

authorized under law, pays the amount and brings to an end the interest the mortgagee had? Can the same be said where a co-mortgagor or anyone on behalf of mortgagor authorized under law, pays the amount and brings to an end the interest the mortgagee had? Mortgage is creation of an interest in the property for payment of debt. Once the mortgage debt is discharged by a person beneficially interested in equity of redemption the mortgage comes to an end by operation of law. Consequently the relationship of mortgagor and mortgagee cannot subsist. What then is the status of a person paying off debt to secure the property either with consent of others or on own volition? In law he becomes the owner, entitled to hold and possess the property. But in equity the right is to hold the property till he is reimbursed. In other words, he may hold the property in surety or he may bring the claim for contribution. In *Ganeshi Lal v. Joti Pershad* it was held:

...Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognized that where there are several joint debtors, the person making the payment is a principal debtor as regards the part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtors....

Similarly the co-mortgagor whose share has been got redeemed is entitled in equity, to get possession over his share of property on payment of the amount of his share. In *Valliamma Champaka Pillai v. Sivathanu Pillai*, the principle was explained thus: (SCC p.439 Para 31).

From what has been said above it is clear that where the Transfer of Property Act, is not in force and a mortgage with possession made by two persons, one of whom only redeems discharging the whole of the common mortgage debt, he will, in equity, have two distinct rights. Firstly, to be subrogated to the rights of the mortgagee discharged *visa-viz* the non-redeeming, co-mortgagor, including the right to get into possession of the latter's portion or share of the hypotheca. Secondly, to recover contribution towards the excess paid by him on the security of that portion or share of the hypotheca which belonged not to him but to the other co-mortgagor. It follows that where one co-mortgagor gets the right to contribution against the other co-mortgagor by paying off the entire mortgage debt, a correlated right also accrues to the latter to redeem his share of property and get its possession on payment of his share of the liability to the former/This corresponding right of the "non-redeeming" co-mortgagor, to pay his share of the liability and get possession of his property from the redeeming co-mortgagor, subsists as long as the latter's right to contribution subsists....

7. But these rights in equity, either in favour of the person who discharges the debt or the person whose debt has been discharged, do not result in resumption of relationship of mortgagor and mortgagee. Even under subrogation, a legal concept, meaning substitution, applied, on English Law principle, even earlier, inserted now as Section 92 in Transfer of Property Act since 1929, the rights that are created in favour of a co-mortgagor as a result of discharge of debt are "so

far as regards redemption, for closure or sale of such property, the same rights as the mortgagee whose mortgagee redeems." What is the meaning of the expression "right as mortgagee"? Does a person who in equity, gets subrogation becomes mortgagee? Or his rights are confined to foreclosure or sale? A plain reading of the section does not warrant a construction that the substitute becomes a mortgagee. The expression is, "right as the mortgagee" and not right of mortgagee. The legislative purpose was statutory recognition of the equitable right to hold the property till the mortgagor was reimbursed. And not to create relationship of mortgagor and mortgagee. The section confers certain rights on co-mortgagor and provides for the manner of its exercise as well. The rights are of redemption, foreclosure and sale. And the manner of exercise is as mortgagee. The word "as" according to Blacks' Law Dictionary means "in the manner prescribed". Thus a co-mortgagor in possession, of excess share redeemed by him, can enforce his claim against non-redeeming mortgagor by exercising rights of foreclosure or sale as is exercised by mortgagee u/s 67 of the Transfer of Property Act. But that does not make him mortgagee. Therefore, a co-mortgagor or a junior member of the Tarwad who continued in possession over the excess share, got redeemed by him could not be deemed to be mortgagee so as to acquire right u/s 4-A(1)(a) of the Kerala Land Reforms Act.

12. Ram Sanahi Lal and Another Vs. Janki Prasad and Others our High Court held that the purchaser at the first auction sale, whether it be held under the prior mortgage or under the subsequent mortgages acquires the interest of mortgagor. Same view was taken by Patna High Court in Mt. Naurozi Vs. Nafaf Ali Sah and Others, .

13. Shri K.N. Saxena has wrongly placed reliance upon Section 81 of the Transfer of Property Act, which provides for marshalling of securities, and for satisfaction of prior debts by the subsequent mortgagee. No such situation arises on the facts of the present case.

14. A puisne mortgagee is a person who has an interest in the right to redeem the mortgaged property under the prior mortgage. He may institute a suit for redemption of the prior mortgage. Where a prior mortgagee obtains a decree without impleading the puisne mortgagee he becomes entitled to sue for redemption of earlier mortgage. If the property is sold in execution of the decree, the rights of Puisne mortgagee are not affected, so long as there is no other prohibition in law. A puisne mortgagee is the assignee of the equity of redemption but he has to bring a suit to enforce his rights. Section 91 of the Transfer of Property Act, gives such a right to the subsequent mortgagee. He will fall within the entitlement of the person in Sub-clause (a) of, Section 91, as a person who has an interest in or charge upon the mortgaged property, or in or upon the right to redeem the same.

15. It is thus held that the auction purchaser of the mortgaged property stepped into the shoes of the mortgagor and where the subsequent mortgagee is not a party to his suit for foreclosure, such a puisne mortgagee-inferior in rank, acquires

a right of redemption, and can sue for his interest in the mortgaged property. In a decree of redemption of mortgaged property the right of the auction purchaser is subject to the rights of the puisne mortgagee. There was no pleading nor any issue was framed or evidence led between the parties of the plaintiff having knowledge of auction sale and thus the question of the plaintiff nor objecting to the encumbrances at the time of auction sale cannot detain or be raised as a plea in equity to resist the decree of the interest in the mortgaged property. The substantial question of law are accordingly answered against the appellants.

16. The Second Appeal is accordingly dismissed with no order as to costs.