(1938) 02 PAT CK 0019

In the Patna High Court

Fateh Bahadur Singh APPELLANT

Vs

Mt. Subhago Kuer and Others RESPONDENT

Date of Decision : 10-02-1938

Acts Referred:

Citation : AIR 1938 Patna 265

Hon'ble Judges : Wort, J

Bench : Division Bench

Judgement

Wort, J.—This is a case in which the mortgagor after a transfer of the mortgage has paid off (so he alleged) the mortgage debt. The transfer to the plaintiff was on 30th June 1930 and the payment by the mortgagor is supposed to have been made on 11th October 1930 to the original mortgagee.

2. It is clear that there was no express notice by either the mortgagee or the assignee to the mortgagor and therefore the ordinary principle laid down by Cozens-Hardy J. in Dixon v. Winch (1900) 1 Ch. 736would apply. No reference was made at the Bar to this decision but it is a well-known decision on this point. The principle was stated thus:

It is well settled that payments of interest or payments on account of principal made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee.

3. The main principle is stated in these words:

It is well settled that where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer;

and Cozens-Hardy J. also relying on the case, In re Lord Southampton''s Estate, Allen v. Southampton (Lord) Banfather''s claim (1881) 16 Ch. D. 178 stated that the principle applied to the case where the mortgagor paid off the whole of the mortgage debt in the absence of notice.

4. At first when I came to consider this case it looked as if the decision of the learned Judge in the Court below was insufficient so far as the question of notice was concerned. I have stated and I repeat that there was no express notice. But the Judge in supporting the judgment of the trial Court came to the conclusion that the mortgagor had notice of the transfer but his judgment with regard to that was very brief, although not necessarily to be questioned on that ground, but it seemed at first that the statement of the Judge was unjustified. Had I been still of that opinion, I should not have hesitated in sending the case back to the Judge for the determination of the question whether the mortgagor had notice of the transfer or not. But there is one other finding which makes it unnecessary in the circumstances of the case. The question of notice will only arise if payment in fact had been made. But the Judge in the Court below is quite clear in his conclusion that the payment supposed to have been made by the mortgagor was nothing more than a show of payment; in other words, the payment had not been made. The question of notice therefore did not arise.

5. Apart from those most important questions, the main argument of Mr. Mitter on behalf of his client was that the transfer to the plaintiff was inoperative. By that I understand him to mean that it was nothing more than a fictitious transaction.

6. From one point of view I suppose the mortgagor was entitled to question the plaintiff''s right to sue as assignee, although it is perhaps somewhat difficult to see how the mortgagor could question the transaction as between the mortgagee and his transferee on the footing that no consideration had passed. But the Judge in the Court below has held that it was the intention of the parties in those circumstances that the transaction was to be effective, in other words the right conveyed by the deed of assignment did pass to the plaintiff. The mere fact that the Rs. 162 odd had not been paid to the mortgagee does not necessarily conclude the matter. There is abundant authority for that proposition and therefore it is impossible for me to come to the conclusion that the learned Judge in the Court below was wrong in law in coming to the conclusion that the transaction was a valid one and that the interest conveyed had passed to the plaintiff.

7. The only line of attack as I have already stated was that as the consideration had not been paid the right did not pass. That is not necessarily conclusive and, to repeat myself, it does not entitle this Court to come to the conclusion that the Judge in the Court below was wrong in holding in the absence of the passing of consideration that the right had passed to the plaintiff.

8. I think the finding in this case is sufficiently clear that the money was not paid and in my judgment that concludes the matter.

9. The appeal fails and must be dismissed with costs.

