

(1895) 07 PRI CK 0001

In the Privy Council

Ganga Bahu Debi and Another

APPELLANT

Vs

Kishori Mohun Roy and others

RESPONDENT

Date of Decision : 27-07-1895

Acts Referred:

Citation : (1896) 23 ILRPC 228

Hon'ble Judges : Watson, Morris, R. Couch, JJ.

Judgement

Watson, J. 1. This suit was brought in May 1888, before the First Subordinate Judge of the 24 Pergunnahs, by the leading respondent, Ganga Bahu Debi, hereinafter referred to as "the respondent," for redemption of immoveable estate which she mortgaged with the consent of her husband, in the year 1862, to Kishori Mohun Roy, who is an appellant, along with other members of the joint family to which he belongs. The main questions raised by the appeal is, whether the equity of redemption has been extinguished by certain proceedings in the year 1864, at the instance of the mortgagee, bearing to be in pursuance of the provisions of Section 8 of the Bengal Regulation No. XVII of 1806. The Subordinate Judge held that these proceedings were not in conformity with the terms of the Regulation, and were, therefore, ineffectual; and on appeal to the High Court his decision was affirmed by O'Kinealy and Ameer Ali, JJ. 2. About the year 1844, the respondent obtained from the Board of Revenue a Government grant of 18,600 bighas of waste land in the Sunderbuns upon an improving lease. It was made a condition of the grant that one-eighth of the land should be cleared and fit for cultivation at the end of five years, one-fourth at the end of ten, one-half at the end of twenty, and three-quarters at the end of thirty years : each of these periods being reckoned from the 1st day of May 1844. On the failure of any one of these conditions, the whole interest of the grantee was to be forfeited, and the land was to revert to Government. 3. In 1862, the extent of land already cleared and cultivable appears to have been in excess of what was required by the terms of the lease. On the 16th of May in that year, the respondent borrowed the sum of Rs. 25,000 from the appellant, Kishori Mohun Roy, who was the eldest of three brothers forming an undivided Hindu family;

and on the same day she executed, for the security of the lender, (1) a deed of mortgage or conditional sale of her interest in the said 18,600 bighas, (2) a penal bond for Rs. 50,000, and (3) war-rants-of-attorney to enter up judgment in ejectment on the mortgage, and judgment upon the money bond. The only one of these documents, to which it is necessary to make special reference for the purposes of this appeal, is the deed of mortgage or conditional sale. 4. By the terms of that deed, the land was conveyed subject to the proviso for redemption that if the grantor, or her representatives, should, on the 16th day of May 1865, pay to Kishori Mohun Roy, or his representatives, the principal sum of Rs. 25,000, with interest half-yearly at the rate of 12 per cent, per annum from the date of the deed, and also all revenues, rates and taxes as the same fell due, together with all costs incurred by the mortgagee in respect of the deed and of the bond and warrants to confess judgment, the said Kishori Mohun Roy, or his representatives, should execute a reconveyance of the land to the grantor or her successors. It was further covenanted that, in the event of default being made in the payment of termly interest, or in the fulfilment of the other conditions stipulated, "the whole of the principal monies and interests hereby secured shall immediately become due and payable;" and, in that case, the said Kishori Mohun Roy, and his heirs and successors, were authorised to enter into possession, and, whether in or out of possession, to sell the whole or any part of the, land conveyed, they accounting to the mortgagor and her representatives for any surplus remaining after satisfaction of their debt, and other lawful claims. 5. On the 6th February 1863, the respondent obtained an additional loan of Rs. 17,000 from Kishori Mohun Roy, which was not to bear interest, in order to enable her to proceed with the clearances required by the lease, and so protect the land from forfeiture by the Government. That arrangement was carried into effect by three separate deeds. By the first of them, the respondent charged her interest in the land with the debt of Rs. 17,000 in favour of Kishori Mohun Roy and his representatives, and made an absolute conveyance to them in fee-simple of one moiety of the land which remained uncleared at that date. The terms of the second deed need only be noticed in so far as they provide that the preceding mortgage should be subject to all the powers, remedies and provisos which are contained in the mortgage of the 16th May 1862 for the original loan of Rs. 25,000. The provisions of the third deed have no bearing upon any of the matters of controversy in this appeal. 6. By virtue of his warrants-of-attorney, the appellant, Kishori Mohun Roy, obtained, from the High Court at Calcutta, judgment in ejectment on the 1st March 1863, and also judgment on the penal bond for Rs. 50,000 on the 23rd July 1863. On the 27th January 1864, a writ of possession was issued to the Sheriff, in the ejectment suit, which was duly executed on the 11th February 1864. From that date Kishori Mohun Roy and the other appellants, who are members of the same joint family, remained in possession of the land until the institution of the present suit for redemption. In terms of the transaction embodied in the three deeds of the 6th February 1863, Kishori Mohun Roy retained Rs. 3,000 out of the Rs. 17,000 which he advanced in payment of the interest then due under the mortgage of May 1862. Since that

date no interest has been paid by the mortgagor. 7. On the 19th April 1864, the appellant, Kishori Mohun Roy, presented a petition to the Judge of Zillah 24-Pergunnahs, in which he set forth that there had been default made in payment of interest under the mortgage of May 1862, and that he had been admitted to possession of the mortgaged land by the High Court on the 27th January 1864; and he prayed that notice might be served upon the mortgagor in terms of Section 8 of Regulation XVII of 1806, and that the sale might be made absolute. In accordance with the prayer of the petition, a notice in terms of Section 8 was duly served upon the respondent, who thereupon lodged a petition objecting that the application for foreclosure was premature. But the respondent having failed to deposit the money for which the mortgage was sought to be foreclosed, within the period allowed by Section 7 of the Regulation, the case was struck off the list of pending causes on the 30th May 1865. 8. Section 8 of Regulation XVII of 1806 provides as follows : Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself, or by one of the authorised vakeels of the Court, to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagee, or his legal representative, to be furnished, as soon as possible, with a copy of it; and shall at the same time notify to him by a perwana under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section, within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive." 9. The function which is committed to the Zillah or City Judge by the clause in question is purely ministerial. Accordingly if the application of the mortgagee is made in due time, after the expiry of what is described as "the stipulated period," and the requisite statutory notice is given to the mortgagor, his equity of redemption is completely barred, unless, within a year from the service of the notice, as required by Section 7, he brings into Court the amount of principal and interest due by him. In the present case, the parties are at issue on one point only : a question of law which arises upon the construction of the Regulation. They differ as to what constitutes the "stipulated period" within the meaning of Section 8. 10. It was maintained by the respondent, whose argument found favour with both Courts below, that "the stipulated period" refers to the date at which the principal sum secured by the mortgage is made repayable, and would have been payable, if all the other conditions of the deed had been duly observed by the mortgagor, that date being in the present case the 16th May 1865. It was, on the other hand, contended by the appellants that the stipulated period preferable to each and every half-yearly term after the date of the deed at which the mortgagor made default in payment of interest, it being expressly conditioned

that in such event the whole principal monies, together with interest accrued, shall immediately become due. According to that construction "the stipulated period" occurred six months after the date of the mortgage of May 1862. The appellants did not dispute that, in the event of its being held that "the stipulated period" did not arrive until the 16th May 1865, the proceedings taken under the Regulation by Kishori Mohun Roy in the year 1864 were premature, and could not affect the right of the respondent to redeem. 11. It is not immaterial to note that, at the time when the Regulation was enacted, the form of security in general use throughout the Presidency of Bengal was simply a conditional sale. The conveyance to the lender was in terms absolute, but it was qualified by a proviso imposing the condition that the borrower should have the right to demand a reconveyance, if he repaid the principal of the loan, with interest, upon a future day specified. Until that day arrived, the conveyance constituted a right in security and nothing more. If it passed without the borrower having made payment; or having taken any judicial proceedings with that view, the conveyance at once became absolute in favour of the lender, without the necessity of his taking any step towards foreclosure. The law of Bengal did not recognize the English rule of "once a mortgage always a mortgage until judicial foreclosure;" and that circumstance of itself appears to their Lordships to make the analogy of English law an unsafe guide in the decision of a case like the present. 12. Since the date of the Regulation, conveyancers in the Presidency of Bengal have borrowed a variety of penal and other clauses from England, and have superinduced these upon the older and simpler form of conditional sale; and the application of Section 8 to the modern and more complex style of deeds has on more than one occasion been considered by the Indian Courts. Their Lordships will accordingly refer to some of these authorities. 13. In *Sarasibala Debi v. Nand Lal Sen* 5 B.L.R. 389 : 13 W.R. 364, which was decided by Mr. Justice Phear and Mr. Justice Mitter in the year 1870, the material facts were these : The conditions, upon the fulfilment of which the mortgagor was to have the right to a reconveyance, were, in the first place, that he should repay the principal sum lent him on the 1st September 1868; and, in the second place, that he should, until that date, regularly make payment every six months, beginning on the 4th March 1863, of a half-year's interest at the rate of ten per cent. The mortgagor having failed to comply with the second of these conditions, the mortgagee applied under Section 8 of the Regulation to the Judge of Chittagong, who admitted the application, and on the 4th December 1866 issued a notification in terms of that section. In April 1868, the mortgagee instituted a suit for confirmation of the foreclosure, and was met by the plea that the notification of December 1866 was premature and invalid, which was sustained by the High Court. 14. In giving judgment, the learned Judges observed: "The "stipulated period" of redemption referred to by the Legislature in this Regulation appears to us to be the whole period prescribed by the mortgage contract for the performance of the conditions, upon the fulfilment of which the mortgagor is to be entitled to a reconveyance. We do not think that in any case it means less than this, or depends upon whether the mortgagor duly fulfils all these conditions

or not." And they add: "From the very object of the Regulation, it is obvious that the framers of it had expressly in view the case of a mortgagor who fails to perform the conditions necessary to give him the contract right to redeem; and if they thought of the "stipulated period" as a period terminating on the first default of the mortgagor, they surely would have used some other expression than this to convey their meaning." 15. Counsel for the appellants endeavoured to distinguish that case from the present, by pointing out that there the mortgage did not, as it does here, contain a stipulation to the effect that, upon default in payment of interest, the principal sum is to become due. The distinction thus suggested appears to their Lordships to be without any solid foundation. The stipulation accelerating the period at which the principal was to become due is not made a condition of the proviso for redemption; and there is no term assigned for its payment in the event of such acceleration. It was obviously introduced into the mortgage of 1862, not for the purpose of qualifying the proviso, but with the view of facilitating the mortgagee's exercise of the power of sale given him by that deed, and also his use of the remedies afforded by the two collateral deeds of the same date, for recovery of the principal sum lent. 16. The observations made in the year 1874 by the Chief Justice of the High Court in *Wooma Churn Chowdhry v. Beharee Lall Mookerjee* 21 W.R. 274, concurred in by Mr. Justice GLOVER, point to the same construction of the Regulation of 1806. The Chief Justice referred to the decision in *Sarasibala Debt v. Nand Lal Sen* 5 B.L.R. 389 : 13 W.R. 364, which has just been quoted, as supporting the view that, in construing Section 8, "the stipulated period" must be held to refer to the time which, according to the contract of the parties, is stipulated for the payment of the principal sum. No authority was cited by the appellants in support of the proposition that an acceleration of the time when the capital of the loan became due, without any term being assigned for its payment, ought to be regarded as fixing "the stipulated period" within the meaning of Section 8 of the Regulation of 1806. The learned Judges who decided this case in the High Court state that the appellants' Counsel admitted that they knew of no authority which could bear out that contention, and no such authority was produced at their Lordships' bar. 17. Their Lordships have, in the circumstances of this case, come to the conclusion (1) that the period described in Section 8 as "the stipulated period" must be ascertained by referring to the date fixed in the proviso for redemption, as the date at which the mortgagor may redeem the subject of the security, by repaying the capital of the loan, and (2) that the period so ascertained will not be altered or affected by the failure of the mortgagor to make due and regular payment of termly interest before that period arrives. In their opinion, a separate stipulation which, for other purposes, accelerates the time at which the principal is to become due, and makes no provision for the mortgagor making payment in order to avoid forfeiture, cannot legitimately be taken into account in considering what ought to be regarded as the stipulated period." Upon the assumption that the opinion of this Board upon the question of foreclosure might be unfavourable to them, the appellants maintained that the decree of the High Court was erroneous, in so far as it

disallowed (1) compound interest upon the sums spent by them in order to protect the subject of their security, and (2) interest upon the money expended by them on its improvement. Their Lordships are of opinion that in both of these particulars the decree of the High Court is right, and they are satisfied with the reasons assigned by the learned Judges. 18. Their Lordships will accordingly humbly advise Her Majesty to affirm the judgment of the High Court. The appellants must pay to the respondents their costs of this appeal.