(1917) 01 AHC CK 0044

In the Allahabad High Court

Ghulam Safdar Khan and Others APPELLANT

Vs

Sukhi and Others RESPONDENT

Date of Decision : 16-01-1917

Acts Referred:

Limitation Act, 1963 — Article 134
Limitation Act, 1963 — Article 134
Limitation Act, 1963 — Article 134

Citation : AIR 1917 All 237 : 38 Ind. Cas. 573

Hon'ble Judges : Tudball, J;Rafique, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This is a defendant''s appeal. The following facts will explain the position of the parties. The plaintiff has brought a suit for sale as against Jag Ram and Net Ram and the present defendants-appellants on the basis of a mortgage-deed executed in her favour by Jag Ram and Net. Ram on the 14th of October 902. Her mortgage covers more than the property which is in'' dispute before us on appeal. Part of the property mortgaged to her is the village Rasulpur. This village originally belonged to Nand Ram and others, who on the 3rd of January 1874 and the 10th of June 1875 made two simple mortgages in favour of Kirpa Ram. The same owners, Nand Ram, etc, on the 15th of June 1883 executed a mortgage in favour of Sundar and Ghulam Safdar Khan; Sundar being however only a benamidar of Ghulam Safdar Khan. In 1886 Kirpa Ram brought a suit on the basis of the mortgage-deeds of 1874 and 1875, but he failed to make Ghulam Safdar Khan a party thereto. He obtained a decree for sale of the property and purchased it himself on the 20th of June 1887. By his Will of the 8th of July 1895 Kirpa Ram gave the whole of his property, including the one purchased by him, to the present plaintiff Musammat Sukhi. After his death, she, the plaintiff, on the 14th of October 1902 executed a deed of gift of the whole of her property in favour of Jag Ram and Net Ram. They in return agreed to pay her an annuity of Rs. 1,200 per annum, and hypothecated as security the village

Rasulpur and other property. In 1910 Ghulam Safdar Khan brought a suit on the basis of his mortgage against Jag Ram and Not Ram as subsequent transferees of the equity of redemption, but he failed to implead Musammat Sukhi, although she was a puisne mortgagee. He got a foreclosure decree from this Court on appeal, but it was made conditional on his paying off the amounts which were due under the old mortgages of 1874 and 1875, which had been paid off by the sale in execution of Kirpa Ram''s decree. Musammat Sukhi has now brought a suit for sale on the basis of her mortgage. The defendants-appellants were impleaded, and at once took up the position that the plaintiff, before she could put to sale the property in village Rasulpur, was bound to pay up to them the amounts that they had paid in satisfaction of the mortgages of 1874 and 1875, and also the amount which had been due to them in their suit for foreclosure. The Court below has given the plaintiff a decree for sale, and has made it a condition that she should pay up to the defendants-appellants the sum of Rs. 2,954, the amount which was paid to satisfy the mortgage-debts of 1874 and 1875. it has, however, declined to make it also a condition that the plaintiff should pay off to the defendants the amount that would be due under the mortgage-deed of the 15th of June 1883. The defendants have appealed in respect to this latter point.

2. They urged that they were entitled to hold up as a shield not only the old mortgages of 1874 and 1875 that they had satisfied, but the mortgage of 1883 as well. The Court below has based its decision upon the fact that the mortgage of 1883 was a mortgage by conditional sale, that when the decree was obtained for foreclosure by Ghulam Safdar Khan, he became the owner of the equity of redemption, and, therefore, he was not entitled to hold up the mortgage of 1883 as a shield. This decision seems to have been based on a misunderstanding of the ruling in Munni Lal v. Munnu Lal 23 Ind. Cas. 559 : 12 A.L.J. 457 : 36 A. 327. The point which was raised in that case was with reference to Article 134 of the Limitation Act. There a mortgage by conditional sale had been foreclosed in favour of the mortgagee as against the mortgagor. The mortgagee after foreclosure sold the property to another person. In the subsequent suit this transferee pleaded limitation urging that under Article 134 of the Limitation Act, the suit was barred and that he was the transferee for valuable consideration from a mortgagee. The Court held that he was not a transferee from a mortgagee and that Article 134 did not apply, that decision has no bearing whatsoever on the facts of the present case. In principle we can see no difference between the case of property which has been transferred by a sale under a simple mortgage and property which has been transferred under a decree for foreclosure. In neither case is the defendant seeking to enforce an old mortgage. He merely holds up as a shield the old mortgages. He is entitled to take up his position either as the owner of the equity of redemption, and as such entitled to redeem the plaintiff, or to stand upon the former mortgages which he has satisfied, that is, to take up the position of a prior mortgagee and to claim redemption. The plaintiff is a puisne mortgagee seeking to enforce her mortgage,

the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit. In our opinion the defendants-appellants are entitled to what they, claim; that is the plaintiff, before she can put to sale the property in Mauza Rasulpur, shall pay off to the defendants-appellants not only the amount allowed by the Court below, but also the amount which would be due to them on the mortgage of the l5th of June 1883. On behalf of the respondents, cross objections have been filed contesting the plaintiff''s right to a payment of Rs. 2,954 due on the old mortgages of 1874 and 1875. What we have said above is sufficient to decide this cross objection. It is further pleaded that the amount due to the defendants appellants on the mortgage of 1883 is not the amount which was decreed to them in the previous litigation which ended in the decree of this Court dated the 29th of July 1913. '' That amount was Rs. 8,619-13-7. This is a point which it is admitted before us was not raised in the Court below. In paragraph 4 of their written statement, the defendants pleaded as follows:--"The debt due to the contesting defendants is proper, valid and lawful and the decree thereof has been passed for a lawful amount to which no objection can be taken." When this case was before the Court below the plaintiff merely contested the defendants'' right to receive payment of what was due on the prior mortgage of 1883. She nowhere put forward the plea that even granted that they had the right, still the amount due to them was not the amount that they claimed, but a different amount. If she had done so an issue no doubt would have been struck, evidence would have been taken, and the Court below would have come to a decision thereon. We must, therefore, take it that in the Court below the plaintiff did not contest the amount which the defendants claimed on the basis of this mortgage. She merely contested his right. We, therefore, decline to accede to the plaintiff''s contention in this respect, and we must hold that the defendants-appellants are entitled to recover the sum of Rs. 8,649-13-7 allowed by the Court below. We, therefore, allow the appeal and modify the decree of the Court below. In paragraph 2 of that decree, after the words, is the date of delivery of actual possession," will be added the following words:--plus the sum of Rs. 8.649-13-7 due on the mortgage of 1883." We alter the period of payment to a period of six months from the date of this Court''s decree. The appellants will have their costs of this appeal and in the Court below; the cross-objections are disallowed.

