

(1957) 03 AHC CK 0024
In the Allahabad High Court
Case No : Civil Revision No. 1369 of 1952

Hakim Mohammad Illayas Khan	Vs	APPELLANT
Sahab Collector Bahadur (Aligarh)		RESPONDENT

Date of Decision : 14-03-1957

Acts Referred:

Transfer of Property Act, 1882 — Section 52

Citation : AIR 1958 All 24

Hon'ble Judges : Srivastava, J; Mukerji, J

Bench : Division Bench

Advocate : Gopi Nath Kunjru and Mirza Hamid Ullah Beg, for the Appellant; M.A. Kazmi, for the Respondent

Final Decision : Dismissed

Judgement

Srivastava, J.—This case was filed as a First Appeal from order, but as the Bench before which it was put up for admission was of the view that it could be entertained only as an application in revision it has been converted into a Civil Revision.

2. One Zafar Husain was the owner of the Properties in dispute. On 9th June 1926 he made a simple mortgage in respect of the properties in favour of Nawab Muzammiluallah Khan for a consideration of Rs. 26,000. On 20th April, 1928 he made a second simple mortgage of the properties in favour of one Kishan Lal. Zafar Husain died after making these mortgages and was succeeded by his mother Smt. Meharun-nissa his widow Srimati Faruqi Begam and a sister Smt. Batul Fatma. The applicant before us is the husband of Smt. Batul Fatma. On 11th January, 1932 the applicant purchased the mortgage rights in respect of the second simple mortgage of Zafar Husain from the mortgagee Kishan Lal.

A suit (Suit No. 136 of 1932) was then filed on behalf of the first mortgagee for the recovery of the mortgage debt by the sale of the mortgaged properties. The applicant who was a subsequent mortgagee of the properties at the time of the

suit was, however, not impleaded in that suit as a party. A preliminary decree was passed in the suit on 27th May, 1933 and was made final on 4th August 1934. On the coming into force of the Agriculturists Relief Act, an application was made by the judgment-debtors under Sections 4 and 5 of the Act for the amendment of the decree and the decree was amended on 3rd February 1937. The decree was made payable by instalments.

The applicant who was the second mortgage filed a suit on the basis of his own mortgage on 19th April, 1940 and sought to realise the amount due to him by the sale of the mortgaged properties. This suit was registered as Suit No. 26 of 1940. He too did not implead the prior mortgagee in his suit as a party. The suit was decreed. He got the decree executed and himself purchased the mortgaged properties in execution of the decree on 6th November 1943 and succeeded in getting possession of the property as auction-purchaser. A default having been made in the payment of instalments of the decree of the prior mortgagee it was put in execution on the 31st of May 1948. In this application for execution the prior mortgagee impleaded the applicant also as a party on the ground that he was a transferee pendens lite.

The applicant filed an objection in the executing Court in which besides questioning the correctness of the amount claimed he raised two other contentions. He urged in the first place that the application was time-barred. His second contention was that the execution could not proceed against him as he was no party to the decree which was being sought to be executed. If the prior mortgagee wanted to enforce his claim against him he ought to have impleaded him in his suit. The mortgage of the prior mortgagee could be enforced against him only by a regular suit.

3. Both these objections were rejected by the executing Court but it held that the decree-holder was entitled to Rs. 26,751-6-0 only the sale of the properties (sic). It, therefore, declared the amount due as Rs. 26,751-6-0, but dismissed the rest of the applicant's objection.

4. The applicant has come up in revision. His learned counsel has pressed three contentions on his behalf:

"(1) That the applicant was no party to the decree sought to be executed against him. The decree had been amended and made payable in instalments in his absence. He was therefore, not bound by the amendment. But for the amendment, the decree which had been originally passed on 4th August 1934 was barred on account of the expiry of twelve years. The application for execution which was filed on 21st May 1948 was, therefore, barred by time.

(2) He was a second mortgagee of the properties and had a right to redeem the first mortgage. The first mortgagee was, therefore, bound to implead him as a party in his own suit. He had omitted to do so. The decree obtained by him could not, therefore, be enforced against the applicant and the applicant could not be deprived of his right to redeem. It was not open to the decree-holder to implead

the applicant in execution proceedings of the decree and to enforce the decree against him by doing so.

(3) The applicant being a second mortgagee could file a suit to enforce "is own mortgage without imploding the prior mortgagee. The decree which he had obtained on the basis of the second mortgage was therefore a valid decree and when he had purchased the properties in execution of the decree, the purchase was & valid one. The claim of the prior mortgagee could be enforced against him only if it was within time. On the date on which the prior mortgagee had impleaded the applicant in his execution application the period of limitation for the suit on the basis of the prior mortgage had expired. It was therefore not open to the prior mortgagee to enforce his mortgage against the defendant or the properties in his possession."

5. On behalf of the opposite parties decree-holders it is not disputed that when the suit to enforce the prior mortgage was filed, the second mortgagee should have a right to redeem. It is also conceded that in his own suit the second mortgages (the applicant) was not bound to implead the prior mortgagee. The decree on the basis of the second mortgage and the sale in execution of the decree must, however, be held to have been made subject to the claims of this prior mortgagee. The simple answer, it is urged, to all the three contentions put forward on behalf of the applicant is that he is a purchaser pendente lite, and the doctrine of lis pendens is enough to negative all the three of his contentions.

He had purchased the properties in execution of his own decree on 6th November 1943 during the pendency of the us in respect of the prior mortgage. He cannot therefore escape being bound by the decree obtained in that suit. As a purchaser of the properties he is the representative of the mortgagor and as the mortgagor was a party to the suit on the basis of the prior mortgage the applicant too must be deemed to have been a party to the suit. The decree is therefore enforceable against him and the properties in his possession in the same way in which it would have been enforceable against the mortgagor. If the execution application is within time against the mortgagor, it is not open to the applicant to say that it is not within time against him on the ground that he is not bound by the amendment of the decree.

As a second mortgagee, the applicant had certainly a right to redeem the first mortgage. The second mortgage of the applicant, however, came to an end when the decree he had obtained on its basis got satisfied by the sale held in execution of it. After that sale the applicant remained only the purchaser of the mortgaged property and his position was no better than that of the mortgagor. The mortgagor lost his right to redeem the first mortgage as soon as the final decree on the basis of that mortgage was passed. The applicant cannot therefore claim to have retained that right.

6. It cannot be disputed that the lis in a mortgage suit begins from the date on which the suit is instituted and continued till the decree is satisfied. The suit on

the basis of the prior mortgage in the present case was instituted in 1932 and the decree has not yet been satisfied. When the applicant purchased the mortgaged properties on 6th November 1943, therefore, he must be held to have purchased them during the continuance of the lis of the prior mortgagee's suit.

7. It is true that Section 52 of the Transfer of Property Act does not apply in terms to sales held in execution of a decree and the applicant has purchased the properties in execution of his own decree. But it is well settled that the principle of lis pendens applies to such Court sales also. In the case of *Ram Sanahi Lal and Another Vs. Janki Prasad and Others* one of the questions referred to the full Bench was: Where the sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage, whether the sale in the subsequent mortgagee's suit is affected by the rule of lis pendens so as to make the purchaser's right subject to the result of the prior mortgagee's suit.

The answer which the Full Bench gave to the question was in the affirmative. The Full Bench consisted of five learned Judges of this Hon'ble Court and the view they took is binding on us and must be followed with respect. The sale in favour of the applicant having been made during the pendency of the prior mortgagee's suit must therefore be held to be affected by the doctrine of lis pendens.

8. The applicant must therefore be held to have purchased the properties subject to the decree obtained by the prior mortgagee in the suit filed to enforce his own mortgage and the applicant being a transferee pendente lite the prior mortgagee could enforce his decree against him in the same way in which as he could enforce it against the mortgagor who was a party to the suit. It is, therefore, not open to the applicant to say that the decree obtained on the basis of the prior mortgage cannot be enforced against him in execution and the properties in his possession cannot be sold in execution of that decree. He purchased the property after the decree had been amended in 1937.

The amendment is therefore binding upon him even though he was no party to it and if the application for execution is in time keeping the terms of the amended decree in view, the applicant cannot contend that it is time barred and that limitation should be counted after ignoring the amendment.

9. It also does not appear to be open to the applicant to contend that the prior mortgagee should file a fresh suit against him and that he could enforce his claim against him only if it was in time on the date on which he ought to implead the applicant in the execution of the decree. The basis of the doctrine of lis pendens as explained in the leading case of *Bellamy v. Sabine*. (1857) 1 De G & J 566 (B), in the words of Turner. LJ is.

"It is as I think a doctrine common to courts both of law and equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if the alienations pendente lite were permitted to prevail. The plaintiff would be liable in every

case to be defeated by the defendant's alienating before a judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."

In view of this, therefore, the applicant having purchased the property pendens lite cannot require the decree-holder to recommence his proceedings against him and cannot say that the decree can be enforced against him only if the claim is within time on the date on which he is sought to be impleaded.

10. As a second mortgagee the applicant had certainly a right to redeem the prior mortgage. But his second mortgage is no longer subsisting: . It has come to an end because the decree obtained on its basis stands fully satisfied. The applicant cannot, therefore, claim a subsisting right to redeem the prior mortgage on the ground of his being a second mortgagee, and on that account complain that he has been deprived of his right to redeem. He cannot claim a right to redeem on the basis of his purchase because that right came to an end when a final decree was passed in the prior mortgage suit against the original mortgagor.

11. It therefore, appears to us that the doctrine of lis pendens constitutes an effective answer to all the three contentions put forward on behalf of the applicant, and none of the contentions can therefore be accepted. The view taken by the executing court in respect of the applicant's objection thus appears to be correct, and the application in revision must therefore fail.

12. It is accordingly dismissed with costs.