

(1901) 08 CAL CK 0001

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 2102 of 1899

Hare Krishna Bhowmik and others

APPELLANT

Vs

Robert Watson and Co.

RESPONDENT

Date of Decision : 22-08-1901

Acts Referred:

Citation : (1901) 08 CAL CK 0001

Judgement

Maclean, C.J.—This is a suit to realise a mortgage in favour of the Plaintiffs of certain jotes mortgaged by the Defendants Nos. 1 to 4. The Defendants No. 5 Messrs. Watson and Company were made Defendants, as assignees of the equity of redemption in the mortgaged jotes, and as such entitled to redeem. The Defendants Nos. 1 to 4 did not defend the suit; Messrs. Watson and Company did; and they put in a defence in which they set up that the mortgage was invalid as against them, because they were the landlords of the property, and the mortgaged jotes were not transferable. They are no doubt landlords of a portion of the mortgaged jotes. They were the landlords of part of the mortgaged jotes and assignees of the equity of redemption of the rest. But they did not ask to redeem. Under these circumstances I think the Plaintiffs might have asked to have Messrs. Watson and Company dismissed from the suit, on the ground that they did not ask to redeem, but were setting up a paramount title, and alleging that the mortgage was invalid as against them, an issue which the Plaintiffs did not wish to have tried in the suit which was one merely to realise the mortgage. But the Plaintiffs did not adopt this course : they met Messrs. Watson and Company, on the issue as to the validity of the mortgage and a remand was directed to the Munsif to take evidence on this issue. The Munsif found that the jotes were not transferable, and that view has been confirmed by the lower Appellate Court. Hence the present appeal.

2. A decree, I may point out, has been made in respect of that portion of the mortgaged property in which Watson and Company have no interest as landlords.

3. It is contended, on behalf of the Plaintiffs, the Appellants, that the Court below

ought not to have gone into the question of the transferability of the jotes, and that this was not a fit matter for discussion in a suit merely to realise a mortgage security. But, under the circumstances, I think the Court was right in taking this course. Messrs. Watson and Company set up a paramount title; they did not claim to redeem, but challenged the validity of the mortgage as against themselves, and the Plaintiffs accepted that challenge and failed. If they did not wish that issue tried in this suit, they might have dismissed Watson and Company from the suit, as they stated they did not desire to redeem. The Court had jurisdiction to decide the issue; it was a matter of convenience rather than of law or jurisdiction.

4. In arriving at this conclusion, I do not consider I am in any sense infringing upon the decision of the Privy Council in the case of Nil Kant Banerjee v. Suresh Chunder Mullick I. L. R. 12 Cal. 414 (1885). The decision upon the question of the transferability of the jotes being against the Plaintiffs, they now wish to get out of it and drive Messrs. Watson and Company to another and independent suit upon that question.

5. In respect to the suggestion that the Judge has misconstrued the document of the 8th of January 1887 signed by Mr. Rudduck, as Collector, I think he was quite right. There can be no real ground for saying that that order amounted to a general authority to all the tenants to mortgage their jotes as and whenever they pleased. At the best, the order only applies to the particular raiyats who made the application, and they were not the present Defendants Nos. 1 to 4 : nor is it shown that, at that time, Government were the direct landlords.

6. On these grounds the appeal fails and must be dismissed with costs.

Banerjee, J.

7. I am of the same opinion. Two questions have been raised In this appeal, first, whether the lower Appellate Court was right in entering into the question of the transferability of the holdings mortgaged to the Plaintiffs, and second whether, if the question of transferability was open for inquiry in this case, the Court of Appeal below has correctly construed the permission of the Collector, dated the 1st of August 1887, in holding that it did not authorise the mortgage in favour of the Plaintiffs.

8. Upon the first question it is argued, that in a suit like the present which was brought by the Plaintiffs-Appellants, to enforce their mortgage, the defence by the Defendants that the mortgage was invalid by reason of the holdings mortgaged not being transferable without the consent of the landlords, was a defence foreign to the suit, and ought not to have been entertained, and, in support of this contention Robins On Mortgage, page 1023, and the case of Nil Kant Banerjee v. Suresh Chunder Mullick I. L. R. 12 Cal. 414 (1885) were cited as authorities.

9. The passage from Robins On Mortgage, p. 1023, runs thus :--"The Court will

not permit the mortgagor's title to be investigated under the proceedings for foreclosure. The Court can only bar the equity of redemption and leave the mortgagee to pursue his legal means to establish his right." That only goes to show that it is not open to the mortgagee to ask the Court to enter into an investigation as to the right of the mortgagor in the property mortgaged. And as for the case of *Nil Kant Banerjee v. Suresh Chunder Mullick* I. L. R. 12 Cal. 414 (1885), that case only goes to show that if a Defendant in a mortgage suit sets up a paramount title and does not accept his position as a person who has either to redeem or to foreclose, it may be inconvenient to try such a defence in a suit of that description. But neither the case which is referred to, nor the passage from *Robins On Mortgage*, p. 1023, or the corresponding passage from *Fisher, On Mortgage*, 5 Ed., p. 471, para. 988, can be said to lay down any hard and fast rule that in no case and under no circumstances can a Defendant in a mortgage suit be allowed to go into matters that have the effect of impugning the validity of the mortgage itself. Although, no doubt, the general rule is, that the question of the mortgagor's title is not to be gone into in a suit for the enforcement of a mortgage, as an enquiry into such a question may lead to unnecessary harassment and delay to the mortgagee, the rule must be taken subject to exception and the case before us is, in my opinion, one of an exceptional kind to which it would not be right to apply the rule.

10. The Defendants No. 5, who have raised the question as to the validity of the mortgage, have been made Defendants as purchasers of some of the mortgaged holdings in execution of decrees for rent obtained by them. They thus fill two characters, one as persons deriving title to the holdings in question in one sense from the Plaintiffs, mortgagors, and another, as landlords of those holdings, and the question is, whether it is open to them in their character as landlords, to deny the validity of the mortgage on the ground of the holding not being transferable without their consent.

11. We are asked by the learned vakil for the Appellants to answer this question in the negative, and to hold that the Defendants No. 5 are parties to the suit only in their character as assignees of the mortgagor's interest. But the argument overlooks the fact that these Defendants have become assignees of the mortgagor's interest, because they have by implication consented to the transfer in their favour. If the transfer had been made to a stranger without their consent, such a transfer, if the defence of the Defendants No. 5 be well-founded, could not have been valid. Therefore even as assignees of the mortgagor's interest, the Defendants No. 5 did not appear in their sole character as persons deriving title from the mortgagors. But their other character (sic) is necessarily mixed up (sic) character as assignees to make (sic) in their favour valid. It is (sic) therefore, to split up the legal character of these Defendants in the way we have been asked to do ; and it would be an anomalous thing for us, now that it has been found after trial, that the holdings in question are not transferable without the consent of the landlord, to say, notwithstanding that fact, that the question ought not to have been gone into and should be treated as not having been gone into, and

that the holdings should be put up for sale in execution of the mortgage decree inviting the public to buy them at the risk of being, afterwards, in a future suit, at the instance of Defendants No. 5 defeated and told that they had bought nothing. The only ground upon which it could possibly be said that enquiries into questions of title like those here raised should not be gone into in a mortgage suit, namely, the ground of inconvenience, could hardly be any reason at all; in a case like this, for giving effect to the Appellants' contention, seeing that the inconvenience, if any, has already been undergone and a trial held which has resulted in a finding adverse to the Appellants. To give effect to their contention now would result in something very much worse than inconvenience, it might result in positive hardship and injustice to purchasers who might unwarily be led to purchase the mortgaged property, if a decree for the sale of it, such as we have been asked to grant, were to be granted. I am, therefore, clearly of opinion that, the first contention of the Appellant's must fail. As to the second contention, I have (sic) to what has been said in (sic) of the learned Chief Justice. An order like the one relied upon granting permission to alienate could not be held to have the effect of a general license to all the tenants to alienate their holdings instead of being limited to the particular tenants who applied for and obtained that permission.