

(1930) 08 PAT CK 0006

In the Patna High Court

Janki Saran Singh and Others

APPELLANT

Vs

Mohammad Ismail and Others

RESPONDENT

Date of Decision : 06-08-1930

Acts Referred:

Estates Partition Act, 1897 — Section 99

Transfer of Property Act, 1882 — Section 68, 68(c)

Citation : AIR 1932 Patna 273

Hon'ble Judges : Ross, J;Chatterji, J

Bench : Full Bench

Judgement

Ross, J.—The predecessor-in-interest of the plaintiffs had a usufructuary mortgage over specific lands in a three annas patti in Jahangirpur Mangalpal belonging to one Dharam Lal, the predecessor of defendants 5 to 8. After this usufructuary mortgage which was created in the year 1865 Dharam Lal borrowed money on a simple mortgage of his share from the predecessor of defendants 2 to 4 who brought a suit on that mortgage and in execution of the mortgage decree purchased the share.

2. Thereafter there was a Collectorate partition with the result that the specific lands mortgaged to the plaintiffs, who were no parties to the partition, fell into the share of other maliks who dispossessed the plaintiffs. The claim in the present suit was against defendants 2 to 4 for specific lands equivalent to the lands that were in usufructuary mortgage to the plaintiff's and in the alternative for a decree for Rupees 2,060-14-11 with interest, being the amount of the mortgage debt. The defence was that Section 99, Estates Partition Act, had no application and that the defendants 2 to 4 not being the mortgagors, Section 68, T. P. Act, had no application either. The Subordinate Judge gave 1932 P/35 & 36 effect to this defence and dismissed the suit against defendants 2 to 4 while granting the plaintiffs a decree ex parte against defendants 5 to 8 for the money claimed. This decree was affirmed by the Additional District Judge.

3. The learned advocate for the appellants does not contest the decision with

regard to Section 99, Estates Partition Act, which in terms is plainly inapplicable. His argument is that u/s 68(c), T. P. Act, he is entitled to recover the mortgage money because the mortgagor has failed to secure possession of the property to him without disturbance by any other person and that he is entitled to this remedy against the successors-in-interest of the original mortgagor i. e., defendants 2 to 4.

4. On the side of the respondents it is argued that the true remedy for the plaintiffs was to continue in possession of the land that was mortgaged to them. This is the view that the learned Judge has taken. I express no opinion on this point because it is clear on the authorities that whether the plaintiff's had that remedy or not, they have the remedy u/s 68(c) at all events against the original mortgagor; *Talak Singh v. Jalal Singh* 5 Ind.Cas. 130 is a clear authority on this point. That decision was followed by this Court in *Ramnandan Parbat v. Deni Sahi* AIR 1924 Pat. 91. Both these cases are indistinguishable on the facts from the present case except for the further point that arises here namely, the liability of an assignee of the equity of redemption. In *Talak Singh v. Jalal Singh* 5 Ind.Cas. 130 the contest was between the usufructuary mortgagee and the mortgagor, and in *Ramanandan Parbat v. Deni Sahi* AIR 1924 Pat. 91 the contest was between the mortgagee and the legal representative (in that case the heir) of the mortgagor.

5. The present case contains the additional element that the contest is between the mortgagee and the purchaser of the interest of the mortgagor in execution of a decree on a subsequent mortgage. This, so far as the appellants are concerned, is equivalent to an assignment of the equity of redemption, because as the usufructuary mortgage of the appellants was anterior to the simple mortgage of the respondents all the respondents purchased in their execution was the equity to redeem the appellants. It seems to me that it would be placing much too narrow a construction on Section 68 to limit the word "mortgagor" to the actual mortgagor himself and if the section applies to heirs, as the decision in *Ramnandan Parbat v. Deni Sahi* AIR 1924 Pat. 91 shows, it seems to me that it must be equally applicable to assignees. AIR 1915 Mad 633 was a case u/s 68(b) and it was held that that section applied equally to the heir or assignee of the equity of redemption according to the ordinary rules of construction of Statutes. The learned district Judge has distinguished that case on the ground that it was a case of waste, but that makes absolutely no difference.

6. It is argued for the respondents that although they may be liable they would only have been liable to the extent of the mortgaged property if it had been in their hands. But it is no longer theirs and they have no personal liability for the mortgage debt. It is true that in the absence of any express covenant the assignee of the equity of redemption would not ordinarily become liable under the personal covenant in the mortgage, but,

on the assignment of the equity of redemption the cases show that though the assignee does not become personally liable to the mortgagee, he is by

implication bound to indemnify the mortgagor: White and Tudor, Edn. 8, Vol. 2. p. 44; see also Dart on Vendors and Purchasers, Edn.8, Vol. 1, P. 502.

7. The principle was stated by Lord Eldon in *Waring v. Ward* [1802] 7 Ves. Jun. 332 thus:

The same principle applies to the purchase of an equity of redemption for the party means to buy the estate subject to that mortgage, in relation to which mortgage the personal contract was entered into, and that was not his. If he enters into no obligation with the party from whom he purchases neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession and has the profits, would independent of contract, raise upon his conscience an obligation to pay the money due upon the vendor's transaction of mortgage, for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage.

8. These words have been frequently quoted and are of recognised authority. The whole matter was fully discussed in *Adair v. Carden* [1892] 29 L.R. Ir. 469 where all the authorities were discussed and it was held that on a conveyance for value of lands subject to a mortgage, and expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of a purchaser to indemnify the vendor against personal liability on foot of the mortgage. The same principle was followed in *Bridgman v. Daw* [1891] 40 W.R. 253. This principle was recognised by the Court of Appeal in *Mills v. United Counties Bank Limited* [1912] 1 Ch. 231 where Fletcher Moulton, L.J., said:

The doctrine of *Waring v. Ward* [1802] 7 Ves. Jun. 332 that there is an implied covenant on the part of a purchaser of an equity of redemption to indemnify the vendor against the mortgage debt is based on good sense. It relates I think to every case where you can reasonably imply that it was the intention of the parties that that should be done but I doubt whether it applies to any other case.

9. Farwell, L.J. said:

He (i. e. the trial Judge) treats the unwritten, obligation which binds the transferee of an equity of redemption to indemnify the transferor against the mortgage debt as if it were a legal covenant. I venture to think that it is and has always been treated as one of those equities, independent of contract, of which there are many instances in the books.

10. Sir Rash Behari Ghosh in his work on mortgages Vol. 1, p. 300 refers to *Waring v. Ward* [1802] 7 Ves. Jun. 332 for the principle which he there states. In the absence of any evidence it must be taken that the predecessor of the defendants 2 to 4 in purchasing this property had allowance made for the existing mortgage; and it is clearly inequitable that they should hold the property free of the obligation. If there had not been any partition it is clear that the lands of defendants 2 to 4 would have been liable, and I do not see any reason why a partition should discharge their liability. It was argued that the words "any other

person" in Section 68(c) mean "any other person having title or claiming under a title" and authorities were quoted: Gopalasami v. Arunachella [1892] 15 Mad. 304 and Nakchedi Ram v. Ram Charitar Rai [1897] 19 All. 191 There is no doubt that this is the correct construction. But this is not a case of dispossession by a trespasser. The plaintiffs were dispossessed by the delivery of possession under the partition decree to certain cosharers to whom these lands had been allotted. These cosharers were in no sense trespassers, but they stood on exactly the same title as the mortgagor himself.

11. In my opinion therefore this appeal should succeed and the decree passed by the courts below should be varied. There should be a decree against defendants 2 to 4 represented by defendant 1 for Rs. 1,933-5-4 principal and Rupees 127-9-7 interest up to the date of suit and this amount will carry interest from the date of the decision of the trial Court at six per cent per annum until realisation. The plaintiffs are entitled to their costs throughout against defendants 2 to 4 represented by defendant 1.

Chatterji, J.

12. I agree.