
(1922) 07 CAL CK 0030
In the Calcutta High Court

Kamala Kanta and Others

APPELLANT

Vs

Annanda Chandra Chakraborty and Others

RESPONDENT

Date of Decision : 25-07-1922

Acts Referred:

Transfer of Property Act, 1882 — Section 72

Citation : 71 Ind. Cas. 1030

Hon'ble Judges : Walmsley, J; B.B. Ghose, J

Bench : Division Bench

Judgement

1. This appeal is by the plaintiffs and it arises out of a suit for redemption of a mortgage by conditional sale dated the 4th Jaisiha 1304 B.S. Both the Courts below have dismissed the suit on the ground that the document which purported to be a deed of mortgage was really a deed of sale and upon that it was held that the plaintiffs had no right to redeem the mortgage. The Subordinate Judge on appeal, although he held that oral evidence was not admissible for the purpose of showing that the deed was really a deed of sale, though in the form of a mortgage, was of opinion that evidence of the acts and conduct of parties was admissible to show that the document was really not what it purported to be, that is, that it was not a mortgage but really a sale. That such evidence is not admissible between parties to the document has been definitely laid down by the Judicial Committee in the case of *Maung Kyin v. Ma Shwe La* 42 Ind. Cas. 642 : 44 I.A. 236 : 22 C.W.N. 257 : 15 A.L.J. 825 : 33 M.L.J. 648 : 3 P.L.W. 185 : 6 L.W. 777 : 23 M.L.T. 36 : 27 C.L.J. 175 : 20 Bom L.R. 278 : (1918) M.W.N. 300 : 45 C. 320 : 9 L.B.R. 114 : 1 Bur. L.T. 21 (P.C.). The learned Subordinate Judge refers to this case in his judgment as reported in 22 Calcutta Weekly Notes 257 *Maung Kyin v. Ma Shwe La* 42 Ind. Cas. 642 : 44 I.A. 236 : 22 C.W.N. 257 : 15 A.L.J. 825 : 33 M.L.J. 648 : 3 P.L.W. 185 : 6 L.W. 777 : 23 M.L.T. 36 : 27 C.L.J. 175 : 20 Bom L.R. 278 : (1918) M.W.N. 300 : 45 C. 320 : 9 L.B.R. 114 : 1 Bur. L.T. 21 (P.C.) but he has overlooked the fact that their lordships of the Privy Council observed in that case that the cases which rejected evidence of acts and conduct rightly followed the decision of the Privy Council in *Balkishen Dvs v. W.F.*

Legge 22 A. 249 : 4 C.W.M. 5 : 2 B M.L.R. 523 : 27(sic) A. 58 : 7 Sar. P.C.J. 601 : 9 Ind. Dec. 1130 (P.C). There is no doubt, therefore, that that evidence is not admissible under the law. So, the deed must be taken as a mortgage and the rights of the parties should be regulated upon that basis. The learned Vakil for the respondents, however, seeks to support the judgment of the Subordinate Judge mainly upon the ground that the landlord had taken possession of the holding and remained in possession for two years and the mortgagees took a fresh settlement from the landlord, the result being that the right of the mortgagors has been extinguished and the mortgagees have acquired a new title which the plaintiffs are not entitled to redeem. The short answer to their contention seems to be that the mortgagees were in possession, and the dispossession of the mortgagees by the landlord, even assuming that it was done against their will, cannot by itself operate as adverse possession as against the mortgagors during the continuance of the mortgage. Besides, the mortgagees cannot by suffering dispossession and having taken a new title from the landlord affect the right of the mortgagors in the property of which they were put into possession under the mortgage. The plaintiffs, therefore, have a subsisting right to the property which they are entitled to redeem under the mortgage-deed.

2. It is, however, urged by the mortgagees-respondents that, under the terms of the deed, the mortgagors were bound to pay rent to the landlord but they had omitted to make the payment and that they, the mortgagees, had paid the rent, although they were not bound to do so under the terms of the contract contained in the mortgage bond. If that be so, the mortgagees are entitled to add such amount to the mortgage-money and also to interest under the terms of Section 72 of the Transfer of Property Act.

3. The appeal, therefore, must be allowed, the judgment and the decree of the Court of Appeal below set aside and the case sent back to the Trial Court for making a redemption decree under the law after finding out the sum or sums which the mortgagees are entitled to recover from the mortgagors in addition to the amount payable under the mortgage deed, which the mortgagees had to pay for the purpose of preservation or management of the property in excess of what they were bound to pay under the terms of the deed. The plaintiffs-appellants are entitled to their costs in this Court and in the lower Appellate Court. The costs of the Trial Court will depend upon the sum which is found to be payable by the mortgagors for the purpose of redeeming the property, and the mortgagees will be entitled to such costs which will depend upon the sum so found.

4. August 10, 1922. - The learned Vakils on both sides pray that our order as regards the costs of the Court of first instance may be varied by directing that each party do bear its own costs, in that Court. As both sides agree to this, we modify our order accordingly and direct that the parties do bear their own costs in the Trial Court.