

(1964) 04 AHC CK 0020
In the Allahabad High Court
Case No : Ex. First Appeal No. 264 of 1964

Kastoori Devi and Another

APPELLANT

Vs

Guru Granth Saheb Mauqooa Guru Duwara Shri Guru Singh
Sabha and Others

RESPONDENT

Date of Decision : 13-04-1964

Acts Referred:

Transfer of Property Act, 1882 — Section 70, 70(3)

Citation : AIR 1965 All 193

Hon'ble Judges : M.C. Desai, C.J;R.S. Pathak, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pathak, J.—This is an appeal against an order arising out of execution proceedings.

2. The respondents obtained a mortgage decree against the appellants. The property which of Property Act, 1882, was passed, when the passing, of a mortgage decree did not extinguish either the right to redeem or the security. We are supported In this view by the decision of the Bombay High Court in Shripad Laxman Nakadi Vs. Kashibai Dinkar Jog, . The mere fact that the houses in this case were constructed after the mortgage decree was passed does not, in our opinion, disentitle the respondents from selling them along with the property mentioned In the mortgage decree. Section 70 of the Transfer of Property Act would support such sale. was the subject of mortgage was described in the mortgage deed as a house standing on a plot of land, the boundaries of the plot being set out. It seems that after the final decree was passed, the appellants constructed some other houses on the land and transferred them to third parties. The respondents applied for execution of the decree, and the executing Court directed sale of the property. An objection was filed by the appellants before the executing Court to the effect that only the house and the site under it were the subject of mortgage and not the land surrounding the house. It appears that it

was also urged that in any event the houses constructed after the decree was passed could not be the subject of sale. This objection was dismissed by the executing Court, which found that the property consisting of the house originally standing on the land and the entire land situated within the boundaries mentioned in the mortgage deed were the subject of mortgage, and it held that all this property along with the houses constructed subsequently were liable to be sold in execution of the decree,

3. Learned counsel for the appellants contends that the only property mortgaged was the house mentioned in the mortgage deed and the site on which it stood, and that the land surrounding the house was not mortgaged. We are satisfied that there is no force in this contention. The boundaries of the property mortgaged were clearly mentioned in the deed and these include within them the land which is proposed to be sold.

4. Learned counsel for the appellants then contends that the houses constructed after the decree was passed could not be the subject of sale in execution of the decree as the passing of the decree extinguished the mortgage security. In support of this contention, he relies upon the decision of the Patna High Court in Haradhan Chakerverty Vs. Hargobind Dutta, , where It was held that In execution of a mortgage decree there could be no sale of the brahmottar right in property of which the mukarrari right alone was mortgaged inasmuch as the brahmottar right came into existence subsequent to the mortgage decree. With respect to the learned Judges who decided the case, we are unable to agree. The decision rested upon the view that upon a decree for sale of the mortgaged property, the right of sale is substituted for all the rights under the mortgage. This view proceeded upon the law laid down by the. Privy Council In Het Ram v. Shadi Lal AIR 1918 PC 34 : 45 Ind App 130 ,but in that case the opinion of the Board turned on the provisions of Section 89 of the Transfer of Property Act, which expressly provided that where a decree for sale had been made absolute on the mortgagor's failure to pay the amount due, after the order for sale u/s 88, "the defendant's right to redeem and the security shall both be extinguished".

These provisions have since been repealed, and are not to be found In the corresponding rules of Order 34 of the Code of Civil Procedure, 1908. The effect of this omission was explained by the Privy Council in Sukhl v. Ghulam Safdar 48 Ind App 465 : AIR 1922 PC 11 to be to put the law back to the position obtaining before the Transfer

5. It is then said that as the houses now belong to third parties they cannot be the subject of the sale. This ground has not been taken in the Memorandum of Appeal. In any event, it is noteworthy that it is not the transferees who filed the objection before the executing Court or who have appealed against the impugned order before us.

6. There can be little doubt that the entire property described in the mortgage

decree is liable to be sold, and this will include any constructions standing on the land at the time when the sale is held.

7. We see no force in this appeal which is, accordingly, dismissed summarily.