(1936) 02 PAT CK 0018

In the Patna High Court

Kesho Ram — APPELLANT

Vs

Ram Lal Sahu — RESPONDENT

Date of Decision : 05-02-1936

Acts Referred:
Transfer of Property Act, 1882 — Section 76

Citation : AIR 1936 Patna 312

Hon'ble Judges : Wort, J

Bench : Division Bench

Judgement

Wort, J.—This is an appeal from the decision of the District Judge in an action for redemption. The only question which arises is whether the mortgagee is entitled to set off certain sums in the mortgage account. The Judge in the Court below has held that on the state of affairs as it existed the mortgagee should have given up possession of the property which was a house on 9th August 1930. It is unnecessary to state the very complicated facts relating to the matter, and I content myself with referring to the fact that the mortgagee who is the appellant before this Court was a second mortgagee, there having been a previous mortgage of the property by the proprietor to one Sukni Kuer. Sukni Kuer''s mortgage was paid off, it would appear, by the mortgagor respondent borrowing from the present mortgagee appellant. In those circumstances the mortgagee in the Court below contended that he was entitled to a set off in the mortgage account in respect of three items amongst others and with these three items I am concerned in this case.

2. Sukni appears to have sued the mortgagee for rent. I should have stated that one of the terms of the mortgage bond in this action was that as regards the principal and interest the rent of Rs. 45 per month should be set off by the mortgagee. The rent approximately was something in excess of Rs. 500 a year, that is, Rs. 45 a month and the interest on Rs. 2,000 borrowed amounted to Rs. 240. We therefore see that there was a balance after the interest had been liquidated and this balance was to be set off as against the principal. The three

items mentioned are first, costs of the mortgagee who was ultimately successful in a certain litigation as regards rent; secondly, the sum of money which was advanced by the mortgagee to Ramlal who claimed to be entitled to this property under the will of Radhika Debi, his wife. This sum of money was advanced for the purpose of enabling Ramlal to take out Letters of Administration with the will annexed.

3. The third was an item of Rs. 73 odd paid by the mortgagee in possession for municipal taxes. I will deal with the items in the order reverse to that I have mentioned them. As regards Rs. 73 odd paid for municipal taxes there is no question that the mortgagee is entitled to set this off. The only question is whether he is entitled to set off in the account which will eventually be taken in an application for mesne profits by the mortgagor or whether he should set it off in the mortgage account; by that I mean whether he was entitled to remain in possession for a period longer than that decided by the learned District Judge in the case.

4. The contention of Mr. Sarju Prasad is this: that if he (the mortgagee) is entitled to set off in the mortgage account as he set off the rent, he would be entitled to remain in possession longer, exactly what period I need not at this moment state. I cannot quite see how it is possible in the circumstances to decide that he is entitled to set this off having regard to the admitted provisions of the mortgage bond where it is only provided that the rent of Rs. 45 is to be set off as against principal and interest. On first impression I came to the conclusion that the mortgagee was not entitled to set off as I have stated; but when the argument is examined it is difficult to meet; Section 76, T.P. Act, is relied upon in this connexion. Sub-clause (c), part 1, Section 76, provides:

When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold.

5. I come to the conclusion on the whole that the mortgagee was entitled to set off this Rs. 73 odd in the account, that is to say, that he is entitled to remain in possession until that sum was liquidated. Exactly what period that may be will be decided by the Court taking the account. As regards the other items I am quite clearly of the opinion that if the mortgagee likes to advance money to the mortgagor he may do so, and there is an implied contract therefore by the mortgagor to repay, but the mortgagee was in no sense obliged to advance the money and therefore whatever the object of the advance was, it cannot possibly be taken into account in the mortgage account. As regards the costs of the rent action I am of the same opinion. If the mortgagee was entitled to set off these costs he will also be entitled to set off the costs of any action which any person who had nothing whatever to do with the property might have brought against

him for rent. It is quite clear that, so far as the rent up to 10th May 1924 was concerned, that was the date of the deposit when Sukni Kuer was the landlord, and she was entitled to rent prima facie as against the mortgagee who was her tenant. The litigation in the case before the Court of appeal ended in the mortgagee''s favour, and, as I understand, partly on the ground that the rent had been paid for the period during which Sukni Kuer was liable, and, as regards the remainder, for that period Sukni Kuer had no title In my judgment the learned Judge in the Court below was right as regards these matters, and his judgment will be affirmed subject to the modification that as regards Rs. 73 odd paid for municipal taxes the mortgagee will be entitled to remain in possession for a period in proportion to the amount which will carry interest. In the circumstances I think there should be no order as to costs of the appeal.