

(1919) 07 PAT CK 0016
In the Patna High Court

Lala Nathuni Prasad and Others

APPELLANT

Vs

Syed Anwar Karim and Others

RESPONDENT

Date of Decision : 31-07-1919

Acts Referred:

Transfer of Property Act, 1882 — Section 111

Citation : AIR 1919 Patna 390 : 53 Ind. Cas. 16

Hon'ble Judges : Das, J; Coutts, J

Bench : Division Bench

Judgement

Das, J.—This appeal arises out of a suit brought by the plaintiffs to enforce a mortgage-bond executed by one Tabarak Hussain on the 2nd November 1904. Tabarak Hussain is now represented in this litigation by defendants Nos. 1 to 5. Defendants Nos. 6 to 9 are the subsequent purchasers of two annas of the proprietary interest of Tabarak Hussain in the eight annas of Mouzah Pardhana; defendant No. 11 is the mortgagee in respect of a two-annas mokarari interest in the same property.

2. The lower Appellate Court has given a modified decree to the plaintiffs, that is to say, it has given them a decree for sale, declaring that the property mentioned in the mortgage-bond is to be sold in case of failure to pay, but that the two-annas share of defendants Nos. 6 to 9 is not to be deemed to be sold in execution of the decree.

3. The appellants contend that they are entitled, in execution of their mortgage decree, to sell two annas out of the eight-annas share belonging to the mortgagor in village Pardhana free from incumbrance, and that to this extent the decree of the lower Appellate Court should be reversed.

4. The mortgage bond is perfectly clear on this point. The mortgagor mortgaged his two-annas share out of his eight-annas proprietary interest free from mortgage. The defendants Nos. 6 to 9 have purchased two annas out of the eight annas share subsequently to the execution of the mortgage, but Mr. Khurshed

Hussain, on behalf of the subsequent purchasers, argues before this Court that the mortgagees ought not to throw any portion of the burden on them, and that the equities between the parties can be properly adjusted by allowing the plaintiffs to sell two annas out of the six annas of the proprietary interest of the mortgagor, leaving him two annas free from any incumbrance at all. In this connection, we are unable to agree. It seems to us that the right of the mortgagee is to proceed against any two annas he likes out of the eight annas proprietary share which was of the mortgagor. That is his right under the mortgage and that right has not been taken away by anything that has happened subsequently.

5. Defendants Nos. 6 to 9 have purchased the property subsequently to the execution of the mortgage, and they cannot compel the mortgagees to confine themselves to any particular portion of the property. We think, therefore, that this portion of the decree ought to be reversed.

6. Another question that has been argued before us by Mr. Rajendra Prasad on behalf of the appellants is, that, on a proper construction of the mortgage bond, he has got a mortgage security not only on the two annas share of the proprietary interest of the mortgagor but also on the two annas of the mokerari share which the mortgagor inherited just before the mortgage. The point arises in this way. The mortgagor, as the proprietor of the eight annas share of the village, granted a mokerari in 1881 of the entire eight annas in favour of his wife Masammatt Kabiran. Now Musammatt Kabiran died in 1904, and after her death the mortgagor as the husband of Kabiran inherited two annas out of the eight annas mokerari interest which was carved out of the proprietary interest in favour of Kabiran. The mortgage in favour of Mr. Rajendra Prasad's clients was executed subsequently to the date when the mortgagor inherited his two-annas share of the mokerari interest.

7. The first argument advanced by Mr. Rajendra Prasad is that there was a merger of the mokerari interest in the proprietary interest and, therefore, there is no mokerari now subsisting and that by his purchase he is entitled to get direct possession of the property. It seems to us that there cannot be a merger, because the mortgagor was the proprietor in respect of the eight annas share in the village, whereas he inherited merely a two annas share in the mokerari. Section 111, Clause (d), of the Transfer of Property Act provides that a lease of Immovable property determines, in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right. It is obvious that the entire interest of the lessee and the entire interest of the lessor must vest in the same person in the same right before it can be said that a lease of Immovable property has determined.

8. Now, it is not denied by Mr. Rajendra Prasad that the six-annas interest in the mokerari still vests in persons other than the proprietor. Therefore, it seems to us, there cannot be a merger in this case. The case of *Amatco v. Sheik Muksud Ali* 28 Ind. Cas. 314, 19 C. W. N. 435. is an authority for this proposition.

9. In the next place, it is argued by Mr. Rajendra Prasad that, whether there has been a merger or not, the mortgagor undoubtedly, intended to give a mortgage in respect not only of his proprietary interest but also in respect of his mokarari interest, and he relies upon the passage in the mortgage bond, where the mortgagor covenants that his interest is free from incumbrance. Mr. Rajendra Prasad says that mokarari is an incumbrance and, therefore, he has got a mortgage free from the mokarari interest which was in the mortgagor. It seems to us that a mokarari is not an incumbrance at all except for the purposes of Act XI of 1859 (B. C.) and the Bangal Tenancy Act. In our opinion, therefore, this contention on behalf of the appellants must be overruled. The result, therefore, is that this appeal succeeds in so far as the plaintiffs will be entitled to a mortgage decree for the amount claimed by them and will be entitled in execution of that mortgage decree to sell two annas out of the eight-annas proprietary share of the mortgagor in village Pardhana free from incumbrance.

10. We make no order as to costs in this Court.

Courts, J.

11. I agree.