
(1886) 06 AHC CK 0005
In the Allahabad High Court

Lalta Prasad

APPELLANT

Vs

Sitla Bakhsh minor by his Guardian Punno Kuar and Another

RESPONDENT

Date of Decision : 08-06-1886

Acts Referred:

Citation : (1886) ILR (All) 388

Hon'ble Judges : Straight, O.C.J.; Tyrrell, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Straight, Offg. C.J.

1. This is an appeal from a decision of the Subordinate Judge of Cawnpore, passed upon the 15th January 1885. There were several defendants to the suit, but we are only concerned in the appeal to this Court with one Sitla Bakhsh, a minor, who is represented by his mother, Musammat Panno Kuar, as his guardian ad litem, who is the sole appellant. The suit was brought by the plaintiff-respondent, as the proprietor of eight annas in a certain property, to obtain possession of that property, on the basis of a document of the 13th December 1864, which, the plaintiff contends, amounted the conditional sale-deed, and certain foreclosure proceedings taken thereon. It is, in fact, upon the strength of a statutory title, which he says that he obtained by that operation of Regulation XVII of 1806, that he claims to be entitled to possession of the property to which he lays claim. Now the relief which is asked in the plaint is that a decree for proprietary possession of eight annas zamindari share out of the entire sixteen annas zamindari in mauza Bharauli, pargana Bindki, tahsil Kaliyanpur, in the Fatehpur district, with all the rights appertaining to the aforesaid zamindari, may be passed in the plaintiff's favour against all the defendants by actual dispossession of Pahlwan Singh, Sitla Bakhsh, Musammat Chhogar Kuar, and Lala Prasad, defendant, and declaring the want of title of talmukand, pro forma defendant." It is therefore quite clear from the mode in which this suit was presented in the Court below, that it was a suit bas id upon the statutory title

which the plaintiff alleged he obtained under the Regulation I have already mentioned, and it was for the possession of the property upon the strength of that statutory title. Hence it follows that unless it is clearly and satisfactorily established that the provisions of the 8th clause of Regulation XVII of 1806 were satisfied, the plaintiff cannot succeed in the present suit. The case has taken considerable time in argument, but has not been unnecessarily protracted, because the points that have been raised by the learned Counsel for the appellant were well worthy of attention. The first contention was, that the father of Sitla Bakhsh, the appellant, having purchased at an auction-sale held in execution of a decree obtained upon a bond of 1859, which was prior in date to the mortgage or conditional sale-deed upon which the plaintiff claims, he therefore had a prior lien to the plaintiff, and was entitled to remain in possession of the property as being the owner of a prior charge. I have already indicated that in regard to that contention of the learned Counsel for the appellant, it appears to me to turn upon a question of fact, namely, whether the purchase by the father of Sitla Bakhsh was made at a sale in execution of a decree passed upon an instrument which created a prior charge to that of the plaintiff. Now, as a matter of fact, it seems to me that the Subordinate Judge was right in the conclusions at which he arrived, and has correctly held that, regarding all the circumstances, the sale at which the appellant's father purchased the share in this very village was a sale in execution of the simple money-decree, which had been obtained by one Har Dayal and some one else against Gulab Rai and Kishen Dayal. I therefore, as regards this contention, was against the learned Counsel for the appellant, and did not require to be addressed on this point by the learned Pandit who appears for the respondent. The next objection taken was that, upon a true construction of this deed of the 13th December 1864, the instrument was not in the nature of a conditional sale, and that it was nothing more nor less than a simple mortgage, which, under certain circumstances, could and would become a usufructuary mortgage. Of course, if this construction is a well-founded one, it is obvious that this suit, which is a suit for possession of the property under a title created by the foreclosure proceedings of 1882, cannot succeed, and that we have no power to decree possession to the plaintiff as a usufructuary mortgagee. I think, however, it will be best for me, assuming for the purpose that the document constituted a conditional sale, to deal with the case in reference to the third contention of the appellant's learned Counsel, which is based upon the informality or rather invalidity of the foreclosure proceedings taken by the plaintiff. I adopt this course in order to avoid the possibility of conflict between two Division Benches of this Court as to the construction to be placed upon the instrument of the 13th December 1864, for though I do not wish to commit myself definitively to the opinion, I confess I entertain grave doubts as to whether it was correctly - held on a former occasion that that document did amount to a conditional sale. I will, however, not dispose of the case upon that ground, because even assuming it to be the instrument contended for by the plaintiff, I think the suit fails by reason of the conditions precedent of the Regulation XVII of 1806 not having been

satisfied. It may be taken as undoubted law, which their Lordships of the Privy Council have laid down in the most explicit terms in *Norender Narain Singh v. Dwarka Lal Mundur* ILR Cal. 397 : 5 Ind. App. 18 and *Madho Pershad v. Gajadhar* ILR Cal. 111 : 11 Ind. App. 186 that the provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but that strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right; and it is clear, not only by these decisions of their Lordships, but by a long course of decisions of this and other Courts in India, that the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and upon the basis of the observance of the requirements of that section to assert an absolute title to the property of the mortgagor. In this case there is no evidence that the requirements of the 8th clause of the Regulation have been complied with. First, there is nothing to show, except a recital in the application itself, that any "demand" was ever made upon the mortgagors for payment of the mortgage-debt. As to the necessity of this preliminary demand, there are rulings of this Court to be found in *Behari Lal v. Beni Lal* ILR All. 408 and *Karan Singh v. Mohan Lal* ILR 5 All. 9 and an unreported ruling of the late Chief Justice and Mr. Justice Duthoit in First Appeal No. 50 of 1884. Next, there is no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish. Further, there is nothing to show that the notice which was issued was signed by the Judge to whom the application was made. Indeed, it would seem not to have been, nor is it proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. Without referring in detail or dealing at length with the reasons given by their Lordships in the two rulings of the Lords of the Privy Counsel to which I have referred, it seems to me that, applying the principles of these rulings to the facts before us, we have no alternative but to hold that the provisions of the Regulation have not been satisfied, and that the plaintiff has not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. These observations are sufficient for the purpose of dealing with this appeal.

3. Before leaving the matter, however, I must refer to the suggestion made by the learned Pandit for the respondent that we should treat this suit as one instituted under the Transfer of Property Act, and that we should allow his client to obtain such relief as he would be entitled to by that Act.

4. I cannot adopt this suggestion. To do so would be to countenance an entire change in the nature and character of the suit from the shape in which it was originally instituted, and this I do not think is a course sanctioned by law.

5. The appeal must be, and is, decreed. The plaintiff's suit will stand dismissed with reference to the interests of *Sitla Bakhsh* and *Musammat Sonidha Kuar* with costs in proportion in this Court and in the lower Court.

Tyrrell, J.

6. I entirely concur.