(1925) 04 PAT CK 0004

In the Patna High Court

Lekhraj Mahton APPELLANT

Vs

Jang Bahadur Singh and Others RESPONDENT

Date of Decision : 08-04-1925

Acts Referred:

Citation : AIR 1926 Patna 23

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

Bench : Full Bench

Judgement

Das, J.—The question in this appeal is one of priority. To appreciate the point involved in this case, it is necessary to remember the following transactions:

2. On 30th Baisak 1305 the principal defendants executed a mortgage in favour of Ghena Singh as a security for a loan of Rs. 3,700 advanced by Ghena Singh to the mortgagors.

3. On 1st Sawan 1305 they executed another mortgage in favour of Ghena Singh as a security for an advance of Rs. 500.

4. In Kartik 1307 corresponding with 12th November 1899, they executed a zerpeshgi patta in favour of Sant Prasad and Ram Lagan. Defendants 7-9 represent the interest of Sant Prasad, and Ram Lagan has been cited as defendant 15 in this suit, Sant Prasad Ram Lagan paid Rs. 600 to the mortgagors and held Rs. 4,400 in their hands for the purpose of paying off the mortgages of Ghena Singh, the sum agreed to be advanced by Sant Prasad Ram Lagan being Rs. 5,000 in all. It appears that Ram Lagan did not pay his share of the mortgage money, but Sant Prasad discharged the mortgage bond of 1st Sawan 1305 by paying Rupees 738-12-3 to Ghena Singh. He also paid Rs. 2,104-3-0 to Ghena Singh in part satisfaction of the mortgage of 30th Baisak 1305.

5. Ghena Singh instituted a suit to enforce his mortgage of 30th Baisak 1305. He obtained a decree and proceeded to sell the property in due course. In order to save the properties from sale, the mortgagor-defendants borrowed Rs. 6,000 from the plaintiff and on 5th December 1908, executed a mortgage in favour of

the plaintiffs. It is the mortgage of 5th December 1908, which is sought to be enforced in this suit and the question is whether defendants 7-9 as representing the interest of Sant Prasad are entitled to priority in respect of the sums of moneys paid by them and which form part of the consideration of their mortgage of 12th November 1899. The learned Subordinate Judge has decided this question in favour of defendants 7-9 and the plaintiffs appeal to this Court.

6. In my opinion the decision of the learned Subordinate Judge is erroneous. It is quite true that Sant Prasad paid off the mortgage bond of 1st Sowan 1305; but by so paying he acquired the rights and powers of Ghena Singh as a second mortgagee, for it is to be noted that the mortgage of 30th Baisak 1305 was still outstanding. Now Ghena Singh enforced the mortgage of 30th Baisak 1305. He obtained a decree in due course and put up the mortgaged properties for sale. It was the duty of Sant Prasad under his contract with the mortgagor-defendants to satisfy the mortgage of 30th Baisak 1305; but he paid Ghena Singh the sum of Rs. 2,104-3.0 in part satisfaction of his claim and failed to pay the balance to him. In these circumstances the mortgagor-defendants approached the plaintiffs and took a loan from them to enable them to discharge the mortgage of 30th Baisak 1305 "keeping intact the encumbrances under the bond dated 30th Baisak 1305 and the decree in Suit 231 of 1907" which was the suit instituted by Ghena Singh to enforce the mortgage of 30th Baisak 1305.

7. I have no doubt whatever that the plaintiff is entitled to priority by virtue of his express agreement with the mortgagor-defendants. It has been pointed out more than once that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. In this case the mortgaged properties were about to be sold. Sant Prasad refused to save the properties although under his contract with the mortgagor defendants it was obligatory on him to satisfy the mortgage of 30th Baisak 1305. The plaintiffs thereupon lent money to the mortgagor-defendants in order to save the mortgaged properties and there was an express agreement between them that the plaintiffs should receive and hold an assignment of the debt as security.

8. But it was pointed out that Sant Prasad not only paid off the mortgage-bond dated 1st Sawan but also partly satisfied the mortgage of 30th Baisak 1305. As I have said, by paying off the mortgage-bond of 1st Sawan Sant Prasad stepped into the position of a second mortgagee. Now in regard to the payment by him of Rs. 2,104-3-0 the position of Sant Prasad is a perfectly hopeless one. It is well established that subrogation is by redemption and unless there is redemption subrogation cannot take place. As was pointed out by Mukerji, J., in Gurdeo Singh v. Chandrikah Singh (1909) 36 Cal 193, "before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely

satisfied, so that he shall be relieved from all further trouble, risk and expense." In this case the demand of Ghena Singh was not entirely satisfied and, in my opinion, it is impossible to hold that the defendants 7-9 are entitled to be subrogated to the securities held by Ghena Singh to the extent of Rs. 2,104-3-0 paid by them to Ghena Singh.

9. I would accordingly very the decree by discharging the direction of the Court below in regard to "the lien of defendants 7-9 for Rs. 738-3-12 plus the amount that would be left out of Rs. 2,104-3-0 after deducting there from the interest on Rs. 1,850 at 14 per cent, per annum from 25th Kartik 1307 to 9th Baisak 1309. The result is that the plaintiff is entitled to the usual mortgage decree with costs both in this Court and in the Court below. We give the defendants six months to redeem. The cross appeal is not pressed and is dismissed.

Adami, J.

10. I agree.