
(1887) 03 CAL CK 0013
In the Calcutta High Court

Lutchmiput Singh Bahadur and on his Death his Son
Chutterput Singh Doogur

APPELLANT

Vs

The Land Mortgage Bank of India, Limited

RESPONDENT

Date of Decision : 18-03-1887

Acts Referred:

Specific Relief Act, 1877 — Section 9

Citation : (1887) ILR (Cal) 464

Hon'ble Judges : Tottenham, J; Ghose, J

Bench : Division Bench

Judgement

1. It was strongly urged upon us by the learned Vakil, who appeared for Lutchmiput Singh, the appellant before us, that; the suit of the Land Mortgage Bank having been dismissed, we should hold that the plaintiff Lutchmiput Singh was entitled to an unconditional decree in this suit, and it was contended that the Land Mortgage Bank having already exhausted their cause of action in the suit brought by them in 1872, no fresh suit would lie to enforce the mortgage lien against any portion of the properties belonging to Sadurrunessa in accordance with the principle laid down in the case of Kendall v. Hamilton L.R. 4 App. Ca. 504 ; and that, therefore, the share of Sadurrunessa must now be taken to be free of the mortgage lien, and that as a result of this, no portion of the debt still due to the Bank could properly be charged against the said share.

2. It was further contended that the lien which existed upon Sadurrunessa's share vanished when the properties were sold ; that the decree of 1872 caused a merger and extinguished the original obligation ; and that, lastly, reckoning from the date upon which the money under the mortgage deed fell due, twelve years had elapsed, and therefore the lien could not be enforced against the properties in question.

3. It appears to us, upon a careful consideration of the matters involved in this appeal, that notwithstanding the result of the other suit decided by the other Division Bench of this Court, it does not follow that the plaintiff in this suit is

entitled to a decree for possession of Sadurrunnessa's share of the properties free of the mortgage lien. The result of that suit is, as we understand it, that the Bank having once brought a suit upon the mortgaged bond, obtained a decree, and sold the properties comprised in it, they are not entitled to maintain a fresh suit upon the same cause of action. But the Bank are the defendants in the present suit; they ask for no relief. The plaintiff is now in the place of one of the representatives of the mortgagor, and what he asks for is that he should be entitled to recover his share of the properties free of the lien imposed upon it by the mortgage-deed. It is one thing to hold that a creditor or a mortgagee is not entitled to enforce his remedy by a suit in Court, but it may be quite a different thing when the question is whether the debtor or the mortgagor is entitled to a specific relief as against the creditor or the mortgagee.

4. The contention on behalf of the Bank is that, notwithstanding the suit of 1872, and the sales which took place in execution of the decree, the lien which existed upon the six annas share of the properties in question has not been extinguished. If this contention be correct the result would be, were we to give effect to the argument of the appellant's vakil, that, although the whole of the money due under the mortgage-deed has not been satisfied, and although there is still a subsisting lien upon the said six annas share, the plaintiff in this case, standing in the shoes of a representative of the mortgagor, is entitled to a decree for the properties freed from that lien.

5. The main question, as it appears to us, upon which the case hinges is whether or no the lien which existed upon the share of the properties which devolved upon Sadurrunnessa has now been extinguished, so that the plaintiff, as the owner of the said six annas share, is entitled to recover the same discharged of the said lien.

6. By the deed of mortgage executed on the 27th August, 1870, a lien was created upon the whole of the properties comprised in the said mortgage. Upon the death of Buzloor Rohim, as already mentioned, a six annas share of the properties devolved upon Sadurrunnessa. The suit that was brought for the enforcement of the mortgage was one in which Sadurrunnessa was not represented, and the decree that was passed in that suit was, as held by a Full Bench of this Court, one which did not affect the share of Sadurrunnessa. The debt contracted by Buzloor Rohim by reason of this decree passed into a judgment-debt, but the lien that was created by the mortgage continued as an incident of the debt. The effect of the decree was not to create any right against the properties mortgaged. The lien or the security, notwithstanding the judgment, would continue, as before, as an incident of the debt itself, and it would continue to exist in the hands of the Bank for the purpose of the satisfaction of the debt. It could not possibly be extinguished by reason of the decree. See the Full Bench decisions in the cases of Syud Emam Momtazuddin Mahomed v. Raj Coomar Dass 23 W.R. 187 Jonmenjoy Mullick v. Dassmoney Dassee 7 C. 714 and Syud Nadir Hossein v. Pearoo Thovildarinee 19 W.R. 254.

Now, if the lien is not extinguished by reason of the debt having been turned into a judgment debt, can it be said that, by reason of the proceedings in the sale or sales which took place in execution of their decree, the said lien came to an end so far as the six annas share of Sadurrunnessa was concerned? No doubt, if the whole sixteen annas share of the properties in question had been validly sold, the benefit of the lien which existed in the hands of the Bank would be transferred to the purchasers, and in that way the lien would be extinguished. It is indeed true that the Bank purported to sell the whole sixteen annas share of the properties. But whatever they might have purported to have sold, the fact is, as was held by the Full Bench in *Assamathemnessa v. Roy Lutchmiput Singh* 4 C. 142 that the whole sixteen annas did not pass under the sale. All that was really sold was the ten annas share, and a six annas share remained, notwithstanding the sales, with Sadurrunnessa. The six annas share, therefore, not having been sold, the result must be, as we understand it, that the lien imposed upon it by the original deed of mortgage remained intact and continued in the hands of the Bank, and nothing has since happened which has the effect of removing or extinguishing the lien. We are not called upon in this case to determine the respective rights and remedies of the Bank and those parties who have, in execution of the decree obtained by the Bank, purchased some of the properties. The question in this case is one entirely between the plaintiff, as one of the representatives of the mortgagors entitled to his six annas share, and the Land Mortgage Bank, the mortgagees. What we have to determine is whether the plaintiff's six annas share has now been freed from the mortgage lien ; and we are of opinion that it is not. Nor do we think it necessary to determine whether, as contended by the learned Counsel for the Bank, a suit would lie at the instance of the Land Mortgage Bank to enforce their mortgage lien against the six annas share belonging to Sadurrunnessa. A Division Bench of this Court has, no doubt, held that it does not lie. But, whether that decision is correct or not, the question yet remains whether the effect of that judgment is to free the six annas share from the mortgage lien so as to entitle the plaintiff in this suit to an unconditional decree for the recovery of the six annas share of the properties now in the possession of the Bank. If the reasoning that we have adopted above be correct, then it follows that, notwithstanding the result of the other suit, the lien yet subsists upon the six annas share of Sadurrunnessa. The Land Mortgage Bank may not be in a position, by reason of the previous suit of 1872, to enforce that lien by another suit, but it does not necessarily follow from this that the lien imposed upon it has been discharged or extinguished. We then find, as already mentioned, that the deed of mortgage provided that, in case of default, the mortgagee would be entitled to enter into possession of the mortgage premises. The possession which the Land Mortgage Bank obtained in this case was, no doubt, a possession under the sale which took place in execution of their own decree. But that sale was no sale so far as regards the six annas share of the properties in question, and therefore it may be taken that the Bank in one sense unlawfully entered into possession; and it is possible that Sadurrunnessa might have recovered a decree for possession u/s 9 of the Specific Relief Article, if she

had brought a suit within six months from the date of such unlawful possession, notwithstanding the above covenant in the mortgage deed. But no such suit was brought; and this being a suit where all questions of right between the two parties must be tried, we are bound to see whether the said covenant can now be relied upon by the Bank, It seems to us that the Bank are entitled to insist upon their right to be in possession as mortgagees until the proportion of the debt which may legitimately be imposed upon the said six annas share of the properties is paid, and the lien thus discharged.

7. It was pressed upon us by the learned Vakil for the appellant that such a power, as was reserved under the mortgage deed, was unknown in the mofussil, and he relied upon the decision in the case of *Bhuwani Churn Mitter v. Joykishen Mitter* S.D.A. (1847) 354.

8. The question before us was not identically the same that was considered in that case. There the mortgage deed gave a power of sale of the mortgaged properties in case of default in the repayment of the money. The mortgagee sold under the power without the intervention of the Court; and the purchaser brought a suit against the mortgagor to obtain possession under the sale made to him. The Court refused to recognise the validity of such power, and it was of opinion that such a power was opposed to the principles of the Regulations in regard to the transfer of Immovable properties, and particularly in satisfaction of mortgage debts.

9. This view of the law was not, however, adopted by a Division Bench of this Court in the case of *Sonatun Bysak v. Kunjo Behari Bysak*. The case is unreported, but will be found in the Tagore LAW Lectures for 1876, Appendix 1. And in a more recent case before another Division Bench of this Court *Bhanoomutty Chowdhraïn v. Premchand Neogee* 15 B.I.R. 28. the Judges said they felt considerable difficulty in deciding the question; but disposed of the case upon another ground. The same question came before the Bombay High Court for consideration on two different occasions ; and they seem to have held that such a power of sale, when reserved in the mortgage deed, could lawfully be exercised-*Keshavrav Krishna Joshi v. Bhavanjibin Babjain* 8 B.H.C. 142 and *Petamber Narayan Dass v. Vanmali Shamji* 2 B. 1. Upon the authorities as they stand at present, the question does not seem to be a settled one. The question, however, that we have to determine is somewhat different. It is whether, when a power of entry into possession in the case of default is reserved in a mortgage deed, the mortgagee can insist upon such a power. The question seems to have come up before a Division Bench of this Court for consideration in the case of *Khelat Chunder Ghose v. Tara Chum Koondoo* 6 W.R. 269. The immediate question then before the Court was one of limitation whether the suit, which was one for the recovery of possession of the mortgaged properties, after foreclosure, was barred by limitation, it not having been brought within twelve years from the date of default, in which event the mortgagee was, under the terms of the mortgage deed, entitled to enter into possession. Sir Barnes

Peacock, in delivering the judgment of the Court, observed as follows: "In this case there was a stipulation that, until default should be made in the payment of the mortgage money (which was Rs. 22,000 and interest), the mortgagee should not be at liberty to turn the mortgagor out of possession ; but that, if default should be made on the 4th April 1848, the mortgagee was to be entitled to possession, and then he would be entitled to the usufruct of the estate. He would receive the usufruct subject to the first mortgagor's right to redeem the estate if he came in and paid the mortgage money and interest before the mortgagee should foreclose the estate; but he would be entitled to possession, and to receive the usufruct of the estate, the mortgagor being entitled to redeem and the mortgagee being entitled to foreclose." And later on he adds : "it is clear that, as soon as the default was made, the mortgagee might have sued the mortgagor and Guru Churn Sen, and recovered possession of the estate in dispute (assuming that it was included in the mortgage); and I am of opinion that, from that date, the statute of limitation began to run as against the mortgagee in respect of a suit for possession." The case then went upon appeal to the Privy Council (*Brojonath Koondoo Chowdhry v. Khelat Chunder Ghose*) 14 M.I.A. 144 : 8 B.L.R. 104 : 16 W.R. (P.C.) 33. Their Lordships of the Judicial Committee accepted the view of the question taken by Sir Barnes Peacock in respect of limitation, and observed as follows : "The right under the mortgage deed was to obtain possession of the land, and the cause of action accrued when default was made." And later on, after adverting to the question raised upon the judgment of this Court whether the bar of limitation applied even to the case of the original mortgagor himself if he continued in possession and paid interest to the mortgagee, and then remarking that the said question did not arise in the case, observed as follows: " But it is impossible to hold that the defendant, the purchaser, was holding or supposed that he was holding by the permission of the mortgagee ; and when both things occur-possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old it is impossible to say that such a possession is not protected by the law of limitation."

10. It seems to us, upon the observation of Sir Barnes Peacock and their Lordships of the Judicial Committee just referred to, that, when an express right of entry is covenanted for, the mortgagee would be entitled to enter into possession, although it might be that such right of entry ought to be enforced through the intervention of the Court. The mortgagee when he enters into possession would be in possession as mortgagee, subject to the right of redemption in the mortgagor ; and there is, as far as we are aware, nothing in the law of this country to prohibit such a covenant being enforced. And if we are entitled to look into the intention of the parties at the time when the covenant was entered into, there can be no doubt,, considering that the mortgage deed was drawn up in the English form, was executed in the town of Calcutta, where portions of the mortgage properties were situate, and the mortgagees were an English Banking firm, and the deed was drawn up by an European attorney, that

it was the intention of the parties that the contract should be governed by the English rule of law which obtains in such matters, under which law such a covenant as we have to deal with in the present case is a perfectly valid one see *Bhola Nath Coondoo v. Unoda Pershad Roy* 1 Boul. 97; *Petamber Narayen Dass v. Vanmali Shamji* 2 B. 1.

11. We further observe that in the case of *Jatha Naik v. Venktapa* 5 B. 14. where the mortgagee entered into possession under a sale in execution of a decree made upon the mortgage, but which decree and sale were held not to be binding as against the plaintiff, who was the heir of the original mortgagor, a Division Bench of the Bombay High Court was of opinion that the defendant, the purchaser at the sale, was at least a mortgagee in possession, and that the plaintiff could not be permitted to recover the property without redeeming the mortgage.

12. Upon these considerations, therefore, we hold that the defendants, the Land Mortgage Bank, as mortgagees, are now entitled, notwithstanding the decree and sale, to insist upon the covenant of entry into possession stipulated in the mortgage deeds. They might have enforced such a covenant by suit in Court. But it does not follow that because such a suit was not brought, and the Bank entered into possession under a sale which has now fallen through, the plaintiff, the mortgagor, is entitled to obtain an unconditional decree for possession without redeeming the properties.

13. The observations already made, we think, dispose of all the grounds raised before us by the learned Vakil for the plaintiff-appellant, with the exception, perhaps, of only one, that is, limitation. But it is obvious that the right of the Land Mortgage Bank cannot in any sense be said to be extinguished by efflux of time, although twelve years have run out from the date of default, if they are rightfully now in possession as mortgagees under the covenant. They do not seek to enforce their lien as against any portion of the properties ; they have no necessity to do so. It is the plaintiff, the mortgagor, who seeks to destroy the lien upon the ground that it has come to an end.

14. That being our view of the questions raised in the appeal, it follows that the plaintiff is not entitled to have in this case an unconditional decree as prayed for in the plaint, and that he can only have a decree if he pays the amount of money legitimately chargeable upon the six annas share of the properties now in the hands of the Land Mortgage Bank. And this brings us to the question, what is the amount which the plaintiff is bound to pay before he can redeem the said six annas share. We have already noticed what the decree of the lower Court was in the suit brought by the Land Mortgage Bank, which, among other matters, was that the sum of Rs. 1,63,232-2-1 plus other sums of money, which the Court held justly payable by the defendants in that suit, should be realized by a sale in the first instance of the six annas share of the properties which were in the possession of the Bank, and if the proceeds of such sale be insufficient, then by the sale of the six annas share of the properties in the hands of Roy Lutchmiput

Singh and his donees. In this case the decree that was pronounced by the Subordinate Judge was but the result of accounts taken in the other suit, but it runs thus: "That the plaintiff do, on payment of Rs. 1,63,232-2-1 due to the defendant, or on payment of that money in any other way than the sale of the mortgaged property in suit, recover possession of a six annas share of the properties mentioned in the schedule and in possession of the defendant, and it is further ordered that each party do pay his own costs."

15. It is obvious that this decree as drawn up cannot be affirmed, for the sum of Rs. 1,63,232-2-1 was chargeable not only upon the six annas share now in the hands of the Land Mortgage Bank but also upon the like share of the properties in the hands of Lutchmiput Singh and his donees. In the view taken of the matter by the Subordinate Judge himself, this sum of money should have been rate ably distributed amongst all the several properties in the possession of both the parties, and it should have been provided that, upon payment of that portion of it, which legitimately falls upon and is chargeable against the nine properties (one out of the ten properties in suit being not identified or traced) now in the hands of the defendants, and in respect of which the present suit is brought, the plaintiff be entitled to recover possession. The enquiry which the lower Court will have to make will, therefore, be as to the respective values of the several properties now in the hands of the Bank and of the plaintiff and his donees with a view to the apportionment of the money now due to the Bank, and the Court will direct that, upon payment of the sum thus found due as chargeable against the six annas share of the properties in the possession of the Bank, the plaintiff should be entitled to redeem.

16. We therefore remit the case to the Court below with the direction that the Court do complete the necessary enquiries and make the final decree in the cause.

17. Under the circumstances, each party will bear his own costs in both this Court and the lower Court.