(1940) 08 PAT CK 0003

In the Patna High Court

Mahabir Prasad APPELLANT

Vs

Jugal Kishore Prasad and Others RESPONDENT

Date of Decision : 15-08-1940

Acts Referred:

Citation : AIR 1941 Patna 447

Hon'ble Judges : Harries, C.J;Fazl Ali, J

Bench : Full Bench

Judgement

Harries, C.J.—This is a judgment-debtor''s appeal from an order of the learned Subordinate Judge of Gaya dismissing his application for setting aside a sale. The appellant judgment-debtor was defendant 8 in a mortgage suit which was based on two mortgages, dated 9th June 1928 and 24th August 1929.

2. In the mortgage of 9th June 1928, the mortgagor had mortgaged in favour of the mortgagees two annas share in a village called Daulatia and in the mortgage of 24th August 1929, the mortgagor had mortgaged to the same mortgagee the same two annas share in village Daulatia and a 2 annas 18 dams share of certain property in village Ganowa. Defendant 8, the present appellant, was a subsequent mortgagee of this 2 as. 18 dams share in village Ganowa. The decree-holder brought a suit on these two mortgages and obtained a preliminary decree in his favour. In that decree it is recited that the amount due on the mortgage of 9th June 1928 was Rupees 3360-11-9 and on the mortgage of 24th August 1929, Rs. 1815-0-7. Eventually this decree was made final. In the sale proclamation it was declared that the properties would be sold in satisfaction of the sum of Rupees 5524- 4-4, being the total of the amount due on both these mortgages together with interest and costs up to date.

3. It had been directed that the properties comprised in the mortgage of 9th June 1928, should first be sold and that the properties comprised in the second mortgage should only be sold if the amount obtained for the two annas share in Daulatia was insufficient to satisfy the whole amount due. Bids for the property comprised in the mortgage of 9th June 1928, namely two annas share in village

Daulatia only amounted to Rs. 3000, whereas the actual amount due under this mortgage at the date of sale is said to have been Rupees 8587-0-9. The share in village Ganowa was then put up for sale and that realized a sum of Rs. 2524-4-4. The purchaser in each case was the decree-holder, and he obtained the two properties for precisely the amount which was due upon both mortgages, namely Rs. 5524-4-4. Application was made to the learned Subordinate Judge to set aside this sale on a number of grounds; but it is unnecessary to consider any of those grounds, because the ground now relied upon by counsel for the decree-holder is an entirely new ground which was never raised in the Court below.

4. It, however, seems to us to be a ground of some substance, and in our view the Court below must have an opportunity of reconsidering this application to set aside the sale in the light of the considerations which have been brought to our notice.

5. It is clearly stated in the preliminary decree that a certain sum was due on the mortgage of 9th June 1928, and another sum due on the mortgage of 24th August 1929. The sums are kept apart. It was, however, recited that the property comprised in the mortgage of 9fch June 1928, should be sold first and in the event of that property not producing the total amount due to the decree-holder, the property comprised in the mortgage of 24th August 1929, should be sold to satisfy the decree. Counsel for the respondent has urged that the decree allows the two properties to be sold to satisfy the total amount due on both the mortgages.

6. According to him, if the property comprised in the mortgage of 9th June 1928, did not fetch the amount due on that mortgage, it was open to the decree-holder to sell village Ganowa to satisfy the remainder of the sum due on both the mortgages. He has urged that in this particular case though village Ganowa realized more than what was due on the mortgage of 24th August 1929, yet the decree-holder was entitled to retain that sum as the share of Daulatia had not realized the amount due on the earlier mortgage.

7. In my view the preliminary decree and the final decree based upon it must be construed as a whole. In the preliminary decree and in the final decree the amounts due under the two mortgages are referred to, and it appears to me that it was never the intention of the Court in drawing up this decree that the properties comprised in either of the mortgages could be sold to satisfy more than what was due on the mortgage relating to such properties. What the preliminary decree means is that Daulatia is to be sold first, and it must be remembered that Daulatia had been mortgaged in both the mortgages.

8. If the price realized for the share of Daulatia was sufficient to satisfy both the mortgages, then Ganowa was not to be sold. However, it is provided that if the amount obtained by Daulatia did not satisfy both the mortgages then Ganowa had to be sold to satisfy the decree; but the "decree" there must mean the decree imposing a liability on Ganowa not for the balance due on the mortgage

after the sale of the share in Daulatia but rather the amount due on the mortgage of 24th August 1929, which was the only mortgage affecting Ganowa. In my judgment, there is great force in the argument that under this decree Ganowa could never be made to bear a greater burden than the amount due on the mortgage of the 24th August 1929.

9. As I have stated, though only about Rs. 1815-0-7 was due on the mortgage of 24th August 1929, at the date of the sale, yet Ganowa, which was one of the properties mortgaged by that mortgage, was sold for Rs. 2524-4-4. That sum was considerably more than the sum due under the mortgage of Ganowa. As Daulatia has realised less than was due on the mortgage of 9th June 1928, the decree-holder retained this surplus; but it has been urged before us that he was bound by law to deposit in Court the difference between the purchase price of Ganowa and the sum actually due under the mortgage whereby Ganowa was mortgaged.

10. It appears to me that such deposit had to be made unless it could be shown that the decree in terms permitted the decree-holder to retain this surplus and apply it towards the discharge of the other mortgage relating to Daulatia. There being a surplus on the sale of Ganowa, it is urged that this should have been deposited in Court and that the failure to deposit this sum gave the Court no alternative but to resell the property: see Order 21, Rule 86, Civil P.C. There appears to be considerable substance in this argument; but we have not the materials before us to decide the question. As I have stated, this point has been taken for the first time in this Court and the necessary materials have not been incorporated in the paper book. Further, in my view it would not be right to decide this case without giving the lower Court an opportunity of considering this new point and coming to a conclusion upon it.

11. A preliminary point was taken in this ''Court by the respondent that this was really an application under Order 21, Rule 90, Civil P.C., and that as the judgment-debtor had not paid the necessary deposit he could not possibly proceed with his application. In our view the application based on this new ground cannot possibly be regarded as an application under Order 21, Rule 90; but it will be open to the lower Court to consider whether the application is well founded on any other ground.

12. In my judgment, the justice of the case demands that the order of the Court below should be set aside and the case remanded to that Court to be heard and determined in the light of the observations which I have made. It will be for the Court below to consider whether there was or was not a surplus after the sale of Ganowa and whether such surplus should have been deposited in Court and not applied towards the satisfaction of the mortgage on Daulatia. It appears to me that if the Court comes to the conclusion that this surplus should have been deposited it will then consider whether the sale can possibly stand. The costs of this appeal and of the proceedings in the Court below will abide the event.

Fazl Ali J.

I agree.

