

(1940) 07 BOM CK 0026
In the Bombay High Court
Case No : First Appeal No. 27 of 1939

Mahalingappa Chanmallappa Gotkindi	APPELLANT
Vs	
Shankarayya Gurushantayya Hiremath	RESPONDENT

Date of Decision : 11-07-1940

Acts Referred:

Land Improvement Loans Act, 1883 — Section 7, 7(1)(c)

Citation : AIR 1941 Bom 300 : (1941) 43 BOMLR 600

Hon'ble Judges : Divatia, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Divatia, J.—This appeal is preferred by the plaintiff in a suit to recover Rs.16,000 with interest due on a simple mortgage for Rs.8,000 passed by defendant No. 1 in favour of the deceased father of the plaintiff on August 29, 1919. The mortgaged property comprised eight survey numbers one of which was revision survey No. 94. On February 1, 1921, defendant No. 1 took a tagai loan from the Government for improving his field, survey No. 94, and for that purpose he mortgaged to the Government another land of his, namely, revision survey No. 11/1. He failed to repay that tagai loan, and as a result Government sold survey No. 94 in 1932 when it was purchased by defendant No. 4 for Rs. 1,525 and he passed a kabulayat to the Government for that number. Thereafter the appellant brought this suit on January 3, 1936, to recover the amount due on the mortgage. The main issue was whether the plaintiff could hold survey No. 94 in suit liable for the suit debt in view of the fact that the land was forfeited and sold by the Government for arrears of tagai. The learned Judge held that the plaintiff cannot hold that land liable for the suit debt, and he, therefore, passed a decree against the defendants to the effect that the plaintiff was entitled to recover his money by sale of the mortgaged property except survey No. 94.

2. The plaintiff has now preferred this appeal against that part of the decree by which his claim against survey No. 94 was dismissed, and his contention before

us is that the lower Court was wrong in holding that that survey number was not liable for the suit debt. The provision of law under which this land was sold for the non-payment of the tagai dues is in Section 7 of the Land Improvement Loans Act, XIX of 1883. The relevant part of that section is:--

(1) Subject to such rules as may be made u/s 10, all loans granted under this Act, all interest (if any) chargeable thereon, and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely:--

* * * * *

(c) out of the land for the benefit of which the loan has been granted-as if they were arrears of land-revenue due in respect of that land;

Then the proviso to that section is as follows:-

Provided that no proceeding in respect of any land under clause (c) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower, and of mortgagees of, or persons having charges on, that interest...

3. It is contended before us on behalf of the appellant that the plaintiff's right as mortgagee before defendant No. 1 took the tagai loan could not be extinguished under the proviso which is sought to be construed as not affecting any right of a prior mortgagee of the land. In our opinion, however, there is no warrant for that construction. The proviso clearly states that it would not affect any interest which existed before the order granting the loan other than the interest of the borrower and other than the interest of the mortgagee of that interest. It is clear that by the words "of mortgagees of that interest" the Legislature meant to include the mortgagee of the land before the loan was taken. The appellant's contention is that the words "mortgagees of that interest" mean the mortgagees of the interest of the borrower at the date of the loan, and that interest was only the ownership of the equity of redemption. This argument implies that there must be two mortgages before that date, first of all, the mortgage created over the property, and, secondly, a mortgage of the equity of redemption remaining with the mortgagor after the first mortgage was created. But that assumes that the purpose of the proviso was to protect the prior mortgagee of the land for which there is no warrant whatever. The clear meaning of the words of the proviso is that the interests of third parties are protected, but that the interest of the borrower and the interest of the mortgagee or charge-holder from the mortgagor with regard to the property sold would be extinguished.

4. This construction of the section is supported by the decision in Sankaran Nambudripad v. Ramaswami Ayyar (1918) ILR 41 Mad. 691. There the learned Judges had to construe this particular proviso and they have construed it as meaning that a sale u/s 7(1)(c) of the Land Improvement Loans Act to recover the loan was free of prior incumbrances. It is stated that the proviso releases

rights other than those of the borrower and of the mortgagees, e.g., the rights of an occupancy tenant.

5. We think that that construction of the proviso is correct and that the Legislature meant to protect the rights of third parties only and not of those who claim under the borrower himself even though the transaction was created before the date of the loan.

6. We think, therefore, that the decision of the lower Court is correct, and the appeal is dismissed with costs.