

(1932) 02 CAL CK 0024
In the Calcutta High Court

Mahammad Mehar Talukdar and Others	APPELLANT
Vs	
Rash Behari Majumdar and Others	RESPONDENT

Date of Decision : 23-02-1932

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167

Citation : AIR 1932 Cal 561

Hon'ble Judges : Pearson, J; Mallik, J

Bench : Full Bench

Judgement

Mallik, J.—This appeal arises out of a suit for possession of some lands after giving the defendant a right to redeem if he chooses. What happened in the case was this. Defendant 7 mortgaged a jama of Rs. 7-3-0 to the plaintiff's predecessor on 23rd February 1909. The jama was held under several landlords. There was a partition among these landlords with the result that a part of the jama with a rental of Rs. 5-3 0, fell to the share of some of the landlords while the rest with a rental of Rs. 2 fell to the share of the others. The landlords, to whose share had fallen the part of the jama with the rental of Rs. 5-3-0 brought a suit for rent against defendant 7, obtained a decree, and when in execution of that decree the jama of Rs. 5-3-0 was put up to sale, it was purchased by the contesting defendant. This was on 22nd May 1919. On 5th September 1921, the plaintiff applied under Order 21, Rule 90, Civil P. C., to have this sale set aside. The sale was set aside by the first Court on 29th April 1921, but the Court of appeal reversed the first Court's decision and the sale was confirmed on 5th September 1922. In the meantime, viz. on 21st December 1921, the plaintiff instituted a suit on the mortgage bond of 23rd February 1909. He obtained a preliminary decree on 7th August 1922, and a final decree on 12th September 1922, and himself purchased the mortgaged property in execution of the decree on 26th September 1924. Symbolical possession was obtained on 9th March 1925; but when he failed in his attempt to get actual possession, he instituted the present suit on 7th November 1927--a suit for possession subject to defendant's right of redemption. It is to be observed here that in his suit on the

mortgage bond instituted on 21st December 1921, the plaintiff had not made the defendant--the purchaser at the rent sale on 22nd May 1919--a party to the suit. The Court of first instance gave a decree to the plaintiff. This decision was reversed by the Court of appeal below and the Court of appeal below dismissed the plaintiff's suit. The plaintiff has appealed to this Court.

2. The principal question for consideration in this appeal is whether a mortgagee who purchases the mortgaged property in execution of his mortgage decree is entitled to recover possession of it from a transferee of the equity of redemption subsequent to the mortgage who was not a party to the mortgage suit subject to the right of the latter to redeem the mortgage. There have been a number of decisions on this point which are by no means consistent. In support of the contention that such a suit would lie the learned advocate for the appellant cited before us among others the cases of Jagdeo Singh v. Habibulla [1907] 6 C.L.J. 62 Ganga Das v. Jogendra Nath [1907] 11 C.W.N. 403 and Har Per-shad Lal v. Dalmardan Singh [1905] 32 Cal. 891 while the learned advocate for the respondent relied among others on the cases Habibulla v. Jagdeo Singh [1907] 6 C.L.J. 609 and Aghor Nath v. Debnarayan [1907] 11 C.W.N. 314 in support of his contention that the mortgagee plaintiff could not sue for recovery of possession. These conflicting decisions were reviewed by Suhrawardy, J., in his decision in Kristopada Roy and Others Vs. Chaitanya Charan Mondal and Others, where it has been laid down that a mortgagee must not be allowed to sue for recovery of possession from the holder of an equity of redemption, if at the time he brings his mortgage suit, he had notice of transfer of the right of redemption and in spite of that notice did not choose to implead the transferee in his suit on the mortgage bond. In the present case the mortgagor filed an application under Order 21, Rule 90, Civil P. C, to have the rent sale set aside indicating thereby beyond any doubt that he was aware of the transfer of the equity of redemption before he brought his mortgage suit and presumably he had the further knowledge that there had been no annulment of the mortgage-encumbrance u/s 167, Ben. Ten-Act. This was an element that was wanting in all the cases cited in support of the contention on behalf of the appellant. In view of this special feature in the present case I would follow the decision of Suhrawardy, J., in Kristopada Roy and Others Vs. Chaitanya Charan Mondal and Others, and hold that the plaintiff's suit for possession, subject to the defendant's right to redeem, was a suit that was not maintainable. Mr. Nasim Ali for the appellant lastly drew our attention to the provisions of Order 34, Rule 1, Civil P. C., which while laying down that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage do not lay down what the effect of non-joinder of any of such persons would be and contended that in the absence of any statutory provisions as regards the penalty for such omissions the Court should proceed on equities, and equities in the present case could be adjusted by a suit of the present nature. But the aid of equity could not in my opinion be allowed to be reasonably invoked by a party, the plaintiff in the present case, who knowingly

omitted to do something which the law had enjoined him to do.

3. In view of the aforesaid observations I would not interfere with the decision of the lower appellate Court and would accordingly dismiss the appeal with costs,

Pearson, J.

4. I agree.