
(1929) 08 CAL CK 0009
In the Calcutta High Court

Mahomed Ismail and Others

APPELLANT

Vs

Sharfutullah and Others

RESPONDENT

Date of Decision : 01-08-1929

Acts Referred:

Citation : AIR 1930 Cal 810

Hon'ble Judges : Mitter, J;Graham, J

Bench : Full Bench

Judgement

Mitter, J.—This is an appeal by the plaintiffs and arises out of a suit for redemption of a mortgage executed by the predecessor of the plaintiffs in favour of the predecessors of defendants 1 to 12, so far back as the year 1852.

2. The three short genealogical trees given below will show who the mortgagees and their successors-in-interest are, as also who the mortgagors and their successors-in-interest are respectively. It is essential that we should have those trees before us in order to understand the questions in controversy in this appeal, more particularly as the heirs of the mortgagees have also succeeded to certain shares in the equity of redemption in the disputed properties.

(1) Kanu = Khatija | |----- Feda Gazi | Asad Ali | |---- Sons Daughter |
| ----- | Plaintiffs. | (2) Paran married Khatija (widow of Kanu)
| Hira Bibi (married) - Hasan Ali | Asmat Ali | |-----| (3) Hasan Ali
Brother | | S |-----|-----|-----|-----| Defendants 1 to 12 3. It is not
necessary to state the earlier history of this somewhat long-drawn litigation,
which commenced in 1919. It is sufficient to state that, by the decree of the
lower appellate Court, which is now under appeal, the plaintiffs have been
allowed to redeem to the extent of only four pies share and the controversy in
the appeal before us has centred round the question as to whether the plaintiffs
should not be allowed to redeem to the extent: (i) of 11 annas four pies share of
the mortgagors, (ii) or, in any event, to the extent of eight annas four pies share
and to have recovery of possession of the mortgaged property to the extent of
the said shares.

4. It is common ground that the mortgaged property belongs to Paran and Kanu, whose relationship to the parties to the litigation is shown in the above genealogical tables.

5. The mortgage was executed in favour of Ahsanullah and Aminullah Sawdagar, predecessor of defendants 1 to 12, by Feda Gazi, Hira Bibi, daughter of Paran, and Manu Bibi, wife of Feda Gazi, in respect of 3 drones 12 kanis of land belonging to taluk, called Paran Kanu, on 10th Falgoon, 1215 M.E., for a consideration of Rs. 188, and it was agreed that the mortgagees were to be put in possession of the mortgaged property and enjoy the same in lieu of interest and that, on payment of the mortgage money, the mortgage property would be released.

6. The claim by the plaintiffs to redeem to the extent of 11 annas four pies share and to recover possession of the same is based on the case that Paran and Kanu were brothers; and plaintiffs, as the heirs of Feda Gazi, would also inherit the share which Feda Gazi inherited from his uncle Paran. It is argued, in this appeal, that, as there is no finding by the lower appellate Court, that Paran and Kanu were not brothers, the case should be remitted to the lower appellate Court for a proper finding on the question. We do not think there is any substance in this ground. The lower appellate Court clearly points out: (i) that it was distinctly stated in the plaint that Paran's heir was his daughter Hira Bibi alone; (ii) that, in the decree of 1859, Ex. 1, Feda Gazi did not claim any share of Paran's property as his heir; (iii) that Feda Gazi was not Paran's heir was recognized in a claim case in 1862; and (iv) that, to an attachment of certain property of Feda Gazi by Azim, Hira Bibi preferred a claim to it as Paran's heir and it was held Hira Bibi was the only heir. These findings of the lower appellate Court are quite destructive of the case of the plaintiffs that Paran was Kanu's brother or Feda Gazi's uncle, for, under the Sunni law of inheritance, by which the parties are governed, if Feda Gazi was Paran's brother's son, he would have certainly inherited a share of Paran's property. The plaintiff's claim to redeem the larger share of 11 annas four pies therefore must fail.

7. It is conceded that if Paran and Kanu were not brothers then Feda Gazi's share, after his inheritance from Khatija, would be eight annas four pies and that the remaining seven annas eight pies share Of the mortgaged property would be inherited by defendants 1 to 12, who are also the heirs of the mortgagees.

8. Plaintiffs would therefore be entitled to inherit the eight annas four pies share, if Feda Gazi had not parted with any portion of this inheritance, as it is alleged he did, in favour of Basir Mahammad in 1219 M.B., nearly four years after the execution of the mortgage deed.

9. It is argued for the appellants that it is not open to the defendants now to contend that there was the sale in favour of Basir Mahammad, because they are estopped by a previous judgment inter partes in the year 1859: Ex. 3. It appears that, after the execution of the mortgage, the mortgagors did not deliver

possession to the mortgagee and the latter had to institute a suit for possession. To that suit Feda Gazi was a party and so was his vendee Basir Mahammad. Basir Mahammad raised the defence that, as he was a purchaser of the equity of redemption to the extent of eight annas, he should be permitted to redeem piecemeal, on payment of half of the mortgage money. Feda Gazi, in his statement, said that he was the owner of the 12 annas share of the equity of redemption and that he had paid the mortgage-money. He said nothing about the alleged sale to Basir. The Court came to two findings: (i) that the sale to Basir was not proved; (ii) even if the sale was good, he, having alleged to have made the purchase subsequent to the mortgage, cannot get possession of the land until the land is redeemed from the plaintiff's possession, according to the terms of the kabala, and the Principal Sudder Amin decreed the suit for possession with mesne profits against all the defendants to the suit, including Basir Mahammad.

10. It is said for the appellants that this decree operates as *res judicata* and bars the defence that there was a sale of the eight annas share by Feda Gazi to Basir Mahammad.

11. It is said for the respondent, on the other hand, that the finding that the sale to Basir was not proved was not necessary for the decision of the case and the decree could have been sustained even if the finding would have been the other way, viz., that the sale was a good sale and reliance is placed on the decision of the House of Lords in *Juan, Jose De La Trinidad Concha v. Manual Antonio Concha* [1886] 11 A.C. 541.

12. We are of opinion however that the case of *Concha v. Concha* [1886] 11 A.C. 541 has no application to the facts of the present case. In that case, the question arose as to whether the residuary legatee would be bound by a finding in the probate proceedings as to the domicile of the testator. It was held that far as regards all matters, necessarily decided in a suit to which the executors were parties, the residuary legatee was bound by the decision. But with regard to matters upon a point which is immaterial for the purpose of determining the rights in question between the parties, he was held not to be bound by the decision. The question of domicile was not essential to the decision as to whether the plaintiffs were entitled to probate or not and it was held that the decision with regard to the domicile was not conclusive. Lord Herschell said in this case that:

but the real and substantial controversy obviously was between the residuary legatee-under the will and Adalinda Concha. It cannot be questioned that for certain purposes, the executors do represent the legatees and the residuary legatee, and it may perhaps be admitted (at all events for the purposes of this case) that so far as regards all matters necessarily decided in a suit to which the executors are parties the residuary legatee and the other legatees may be bound by the decision. But I think that must be limited to the matters necessarily decided in the litigation to which the executors are parties, and that the

executors choose, as it is said here they have chosen, to obtain a decision of the Court upon a point which is immaterial for the purpose of determining the rights in question between the parties, they cannot by tendering for decision an issue which is unnecessary for the determination of the case bind all parties claiming under the will, legatees of whatever description, because that finding has been obtained in such a suit under such circumstances by the executors. That really is the present case. If the residuary legatee is bound here at all he is bound by a finding of the learned Judge which was quite unnecessary for the determination of what he had to decide and by a finding of the learned Judge which therefore could not be success fully appealed against.

13. The facts in the present case are different. The mortgagee was entitled to possession on execution of the mortgage bond by Feda Gazi and others (mortgagors). Such possession was not delivered to him. He sued for recovery of possession making the mortgagors and Basir Mahammad parties to the suit. Feda Gazi said in his defence to the suit of 1859 that he had 12 annas share in the mortgaged property and that he had paid his proportionate share of the mortgaged debt. Basir Mahammad said, in his defence, that he had purchased eight annas share of the mortgaged property from Feda Gaz and that he was willing to redeem his half-share on payment of Rules 94. The Principal Sudder Amin held that the plea of payment by Feda Gazi was untrue, that Basir Mahammad's purchase was not proved and that even if the purchase was proved, as the purchase of the eight annas share was subsequent to the mortgage, Basir could redeem according to the terms of the mortgage. On these findings the Sudder Amin decreed the suit of the mortgagee against the mortgagor defendants, as well as against Basir Mahammad. The contention for the respondent is that the decision on the question of sale in favour of Basir Mahammad was not material to the suit and was not necessary for the determination of the previous litigation. We do not agree with this contention for it was open to the Court to base its judgment in favour of the defendants on more than one ground. The parties went to trial, evidence was given and the Court at their invitation decided, the points raised by Basir in favour of the plaintiffs (mortgagees), although the decision in favour of the plaintiffs in that suit might have been sufficient to support the decree. This view receives ample support from the decisions of this Court in Peary Mohun Mukerjee v. Ambica Churn Bandopadhyaya [1897] 24 Cal. 900, Rashbehari Sarkar v. Maurendra Nath Ghose [1913] 21 I.C. 979 and Sri Sri Gopal Jew Thakur through Narendra Nath Mondal Vs. Radha Binode Mondal and Others, . This last case was carried in appeal to the Privy Council, but on this question their Lordships of the Judicial Committee expressed no opinion see AIR 1927 128 (Privy Council) .

14. We think therefore the finding, that the sale of Fed a Gazi to Basir had not been proved, was conclusive as against the mortgagees, i.e., predecessor of defendants 1 to 12.

15. Then it is said that the said finding was not conclusive as between

mortgagees and Fedā Gāzi, as no issue was joined between Fedā Gāzi and the mortgagees on the question of sale of the eight annas share. But it appears that Fedā Gāzi claimed to have inherited twelve annas share of the mortgaged property and to have mortgaged the same and as such had paid the twelve annas share of the mortgage debt. This was inconsistent with the case of Basir that eight annas out of the same was sold by Fedā Gāzi. The question was drawn in controversy between the mortgagee and Basir Mahammad, as also between Fedā Gāzi and Basir, and it would be *res judicata* between the mortgagees, the predecessors of defendants 1 to 12 and Basir Mahammad as also between Fedā Gāzi and the mortgagees. Fedā Gāzi said nothing about the sale to Basir, but claimed twelve annas share of the mortgaged property or the equity of redemption a position which is inconsistent with the sale of eight annas to Basir. Whether this is the correct view or not, in any event, this finding negating the sale to Basir Mahammad was a finding which would require to be displaced before defendants can be heard to say that the sale to Fedā Gāzi was a good sale. But this finding has not been displaced by the respondent whose paramount duty was to displace the finding. Can the defendants be heard to say now after the lapse of many years that the sale was a good sale? To such a state of things the following observations of the Judicial Committee in the case of *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy* AIR 1922 P.C. 241, apply with great force:

Their Lordships do not consider that this will found an actual plea of *res judicata*, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform.

16. The mortgagees cannot be permitted to take up two inconsistent positions in Court, more particularly when the one proceeding arises out of the other. The Subordinate Judge finds that, after losing the case of 1860, Basir Muhammad "appears to have washed off his hand." In this view, we think the Subordinate Judge should have held that it was not open to the defendants to say that plaintiffs sold the eight annas share to Basir Muhammad. Plaintiffs' share is annas 4 pies and not 4 pies as has been found by the Subordinate Judge.

17. It becomes, therefore, unnecessary to determine the other question raised at the Bar, viz., that, even if the share of the plaintiffs be 4-pies, they can redeem in respect of the 8-annas share, which is alleged to have been sold by Fedā Gāzi to Basir Muhammad. But, as the question has been fully debated before us, we propose to give our decision on the same. In this case the equity of redemption in a portion of the disputed property has vested by inheritance in the heirs of the mortgagee, i.e., defendants 1 to 12 and, in such circumstances, the plaintiffs were entitled to redeem their share, but could not compel the mortgagee to redeem the share of Basir Muhammad also. The general rule is that a person

who has any right at all to redeem has a right to redeem the whole of the mortgaged property and cannot be compelled to redeem only the part in which he may be interested. An exception, however, has been engrafted on the general rule by the case of *Azimut Ali Khan v. Jowahir Singh* [1870] 13 M.I.A. 404. That exception is that where the mortgagors are the owners of distinct parcels or either joint tenants or tenants-in-common, they can redeem only to the extent of their shares, if the mortgagee has become the owner of a portion of the equity of redemption. In the case before the Judicial Committee, the person seeking to redeem was the owner of a specific village comprised in the mortgage and it is said, for the appellant, that that case is distinguishable from the present case, where a person seeking to redeem has only got an undivided share in the equity of redemption, and, to show the soundness of this distinction, reliance is placed on certain decisions of the Bombay High Court, viz., *Bhikaji Daji v. Lakshman Balal* [1888] 15 Bom. 27 and *Narayan v. Ganpat* [1896] 21 Bom. 619.

18. But Sir Rash Behary Ghose, in his classic work on the Law of Mortgage, maintains that the distinction taken by the Bombay High Court is not a sound one. See his book on the Law of Mortgage (5th Edn.), p. 266 et seq. His view is that the mortgagee having acquired a portion of the equity of redemption is entitled to redeem the share of other-coparceners, for such a right is inherent in all the holders of the equity of redemption. The Allahabad and the Madras High Courts take no such distinction as is taken by the Bombay High Court see *Brij Kishore v. Madho Singh* [1905] 28 All. 279; *Rathna Mudali v. Perumal Reddy* [1915] 38 Mad.310; *Dina Nath v. Lachmi Narain* [1903] 25 All. 446 and *Shib Lal v. Bhawani Shankar* [1906] 26 All. 72. We prefer to follow the view taken by the Allahabad and Madras Courts; which is in accordance with the opinion of the learned author on the law of mortgage. We do not think that it would be right to limit the operation of the broad principle laid down by the Privy Council in *Azimut's* case [1870] 13 M.I.A. 404 to cases where the mortgagors are owners of distinct parcels comprised in the mortgage and not sharers in the whole of such property.

19. It should be noted, however, that the English law is different, for in England, the recognized rule compels the mortgagor to redeem the whole unless there is a special bargain: see *Hall v. Howard* [1886] 32 Ch. D. 430 and *Charter v. Watson* [1899] 1 Ch. 175. In England, a person only having a partial interest in the equity of redemption is entitled to redeem the whole property leaving open the rights of other co-owners to be determined afterwards *Pearce v. Morris* [1869] 5 Ch. 227. We think, therefore, that the contention of the appellant on this point must fail.

20. As the appellant succeeds on the first point, the decree of the lower appellate Court will be varied by allowing them (appellants) to redeem the 8-annas 4-pies share, instead of only 4-pies share on payment of the proportionate part of the mortgaged debt. Our decree consequently will be in the following terms:

21. It is declared that the mortgager stands redeemed in respect of plaintiffs' 8-

annas 4-pies share and the plaintiffs, shall get possession of the same jointly with the defendants, as circumstances; require with the heirs and assignees of the mortgagee and his heirs where the tenants where the lands are tenanted, except in case of defendant 41, against whom the suit stands dismissed. Defendants 1 to 12 and their transferees are directed to retransfer their 8-annas 4-pies share of the land to them and take out 8 annas 4-pies share of the money deposited by the plaintiffs, and the plaintiffs may take back 7-annas 8-pies share of the money deposited.

22. The appellants are entitled to costs of this appeal.

Graham, J.

23. I agree.