
(1931) 06 AHC CK 0038
In the Allahabad High Court

Moti Chand and Another

APPELLANT

Vs

British India Corporation Ltd. and Others

RESPONDENT

Date of Decision : 30-06-1931

Acts Referred:

Citation : (1931) 06 AHC CK 0038

Hon'ble Judges : Sen, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Sen, J.—This appeal arises out of a suit brought by the British India Corporation Ltd., Cawnpore, against Raja Moti Chand and Lala Gokul Ghand, defendants first party, and Lala Lalta Prasad, Jhabu Lal and Shri Kishen Ghand, defendants second party. The defendants first party will for convenience sake in this judgment be called as Raja Moti Chand and the defendants second party as Lalta Prasad. The plaintiffs prayed that : (1) a decree be passed against the defendant? declaring the proprietary right of the plaintiffs in the plaint properties and declaring that the said properties are not affected by a mortgage executed by Lalta Prasad in favour of Moti Chand on 15th May 1909 and are not saleable in execution of the decree obtained by Raja Moti Chand against Lalta Prasad; (2) it he declared that the sale in favour of Raja. Moti Chand in November 1925 is null and void and ineffectual against the plaintiff; (3) an order of 24th December 1926 passed by the Court of the Subordinate Judge and Deputy Commissioner of Naini Tal be set aside. The Court below has passed a. decree in favour of the plaintiffs against the defendants for the property claimed, on payment of Rs. 8,000. Raja Moti Chand has filed the present appeal against the said decree.

2. It appears that on 15th May 1909" Lalta Prasad executed a simple mortgage in favour of Raja Moti Chand, hypothecating among other properties:

one bungalow with pacca houses and sisam trees, etc., within the enclosure mortgaged,, boundaries given, situate in Mohalla Kathgodam,. District Naini Tal,

purchased under the sale deed, executed and got registered on 22nd October 1885.

3. The exact area of this land is not given in the mortgage deed, but from other documents it appears that the area is. 6? bighas, and it has not been contended before us by any party that the area, was anything else. Raja Moti Chand brought a suit in the Court of the Subordinate Judge of Aligarh upon the basis-of this mortgage and obtained a simple-money decree on 15th April 1915. On 19th July 1915 First Appeal No. 225 of 1915 was filed in the High Court by Raja, Moti Chand in which he claimed that he* should have been given a mortgage decree. On 14th December 1917 the High Court accepted the appeal of Raja Moti Chand and gave him a preliminary mortgage: decree, and the decree was made final on 23rd December 1918. This decree was-transferred to Naini Tal for execution, and on 24th November 1925 the property mentioned above was purchased by Raja Moti Chand. The sale was confirmed on 24th December 1925, and the sale certificate was obtained on 29th May 1926. Raja Moti Chand was evidently obstructed in obtaining delivery of possession by the-British India Corporation, but on 24th December 1926 the Subordinate Judge of. Naini Tal passed an order directing delivery of possession to Raja Moti Chand" against the British India Corporation, and this last order has given the plaintiffs, the cause of action to maintain the present suit. It may be mentioned here that in the mortgage litigation the British India Corporation was not a party and the entire proceedings connected with that litigation were conducted against Lalta Prasad (defendants second party alone) till we come to the time when the British India Corporation offered obstruction to Raja Moti Chand in his attempt to obtain possession.

4. Wo now propose to trace the title to this property, and the earliest that we can go is the year 1885. On 22nd October 1885 one Mrs. Purcell sold this property which was described as:

the house situated on the south of the railway station at Kathgodam, Kumaun District, consisting of four largo rooms, four small rooms, two verandahs and its compound,

5. to the Eight Reverend Bishop and Vicar Apostolic of Patna for a sum of Rs. 6,000. On 30th March 1892 one Frederic Edward George Mathews, acting as the general attorney of the Bishop, sold the same to Lala Lalta Prasad. On 20th June 1917 Lalta Prasad and his two sons, Jhabu Lal and Shri Kishan Chand, sold the same to one Moti Singh, and in this sale deed the property is described as having an area of 6? bighas. It might be mentioned that before this the mortgage in favour of Raja Moti Chand had been effected and Moti Singh obviously purchased this property with the burden of the mortgage in favour of Raja Moti Chand. Moti Singh sold the property on 7th February 1919 to Mr. J.E. da Fonseca, managing proprietor of the Naini Tal Motor Transport Co. Ltd., and in this document also the property is described as having an area of 6? bighas. On 1st March 1920 the Naini Tal Motor Transport Co., obtained a lease from the Secretary of State for India for land measuring 8 bighas odd for 30 years on an annual rental of Rs.

202. It has been found by the Court below that these 8 bighas odd include an area of 6½ bighas which is the subject of dispute in the present litigation. We have considered the evidence and are satisfied that this finding is correct. The Naini Tal Motor Transport Co., subsequently went into liquidation, and the Official Liquidator of the Naini Tal Motor Transport Co., sold this property to the British India Corporation on 26th July 1921. On 17th August 1921 the High Court at Fort William, Calcutta, ordered that the sale to the British India Corporation of the moveable and immovable properties as also of the good will of the business of the Naini Tal Motor Transport Co., completed on the 26th day of July 1921 be confirmed. The British India Corporation have now enclosed the entire 8 bighas 11 biswas of land covered by the lease of 1st March 1920, and have made certain additions to the old buildings. The above statements of fact which are practically admitted will indicate the nature of the title advanced by the two contending parties, and we have got to adjudicate upon their rights. The Court below has passed a declaratory decree in favour of the plaintiffs against the defendants with reference to the property claimed subject to a payment of Rs. 8,000 to Raja Moti Chand. The plaintiffs are satisfied with this decree; but Raja Moti Chand in this appeal impugns this decree and contends that he has an indefeasible title to the property under his purchase. In the Court below it was argued on behalf of the Raja that he was entitled to the entire area of 8 bighas odd and to all the buildings that had been subsequently added as accretions to the original security, but in this Court Mr. Pearey Lal Banerji on behalf of the appellants has definitely abandoned this position and his prayer is that he should be given possession over land measuring 6½ bighas and the buildings that stood thereon at the time of the mortgage and the sale and, if some portions of the old constructions have been demolished and new constructions erected instead, then he should get possession over such new constructions, or some other suitable orders passed which might adjust the equities between the parties. We shall decide the present appeal upon the basis of the position that has been taken before us by the learned advocate for the appellants. Issue 3 before the Court below was:

What are the existing boundaries and area of the land mortgaged in 1909?

6. and the finding upon this issue is in the following words:

During the hearing of the suit I made an inspection of the locality; and the result of my inspection is embodied in a note, dated 8th July 1921 (p. 13 of our record). A plan was prepared by an Amin, who proved it in Court. I find that the area which I have shaded blue in the Amin's map (Ex. B) is that which was mortgaged in 1909. The area is 6 bighas 8 biswas and the boundaries are as shown in the said map.

7. This finding has not been attacked by either party and we must take it that the present area of the mortgaged land is 6 bighas 3 biswas and the same has been demarcated by the Court below in the Amin's map referred to above.

8. Issue 4 in the Court below was:

Which or which portions of the existing buildings stand outside the boundaries referred to in issue 3?

9. and the finding thereon was as follows:

The map (Ex. B) also shows the existing buildings which stand outside the limits referred to in the last issue. The big new workshop, the engineering office, and the store are entirely outside the mortgaged area. This finding is based upon evidence and upon the Judge's inspection note and is not seriously challenged by either party.

10. Issue 5 was:

Are any portions of the existing buildings unaffected by the mortgage?

11. and the decision thereon was:

The buildings referred to under issue 4 are in any case unaffected by the mortgage. The extra land which was obtained on lease cannot be regarded as "accruing" to the mortgaged area.

12. In view of the position taken by Mr. Banerji, it is not necessary for us to examine the legality or propriety of this finding and we must accept it as correct. From the evidence of Mr. Vaughan it appears that there were formerly four main rooms and four bathrooms in the main building, a verandah in front and a small verandah behind. In 1915 the front verandah was closed and a room made, and about the same time another room was made closing the back verandah. These alterations were made during the subsistence of the mortgage before it was put in suit, and it is contended that the mortgagee is entitled to these either as accessions or as substituted security unless his right to them is barred by some rule of law. From Moti Singh's evidence it appears that Mr. Fonseca built a room adjoining the bungalow and a long office and a kitchen. This room adjoining the bungalow, the long office and the kitchen were built after 1919, i.e., after the final decree obtained by Raja Moti Ghand; and we shall have to consider whether the Raja can lay claim to these constructions.

13. The first contention that has been advanced on behalf of the appellants is that the plaintiffs being purchasers pendente lite could not set up their title by purchase as against the claim of the appellant mortgagee under the decree. It is quite clear that, apart from certain complications, which we shall notice later on, Moti Singh, who is in a certain sense the predecessor of the present plaintiffs, purchased the property on 20th June 1917, during the pendency of the mortgage suit initiated by the appellants. It may be noted here that the Court below is in error when it says:

After he (Moti Singh) purchased the property, an appeal was preferred to the High Court and the decree was given against the property.

14. It is conceded that the appeal in the mortgage suit was filed on 19th July 1915, and Moti Singh's purchase was made on 20th June 1917 during the pendency of the appeal in the High Court which was decided on 14th December 1917. The provision of law which has been relied upon by the appellants is contained in Section 52, T.P. Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate Court are merely continuation of those in the suit: see the case of *Gobind Ghunder Roy v. Guru Churn Kurmoker* [1888] 15 Cal 94. Further in a mortgage suit the lis does not terminate with the preliminary decree, but must be deemed to continue at least till the passing of the final decree : vide *Parsotam Narain v. Chheda Lal* [1906] 29 All. 76, at p. 80 and *Sahib Chandra v. Laxmi Narain* AIR 1929 P.C. 243. It is obvious therefore that at least up till 23rd November 1918, when the final decree in the mortgage suit was passed, the property could not be transferred or otherwise dealt with by any party to the suit or his representative so as to affect the rights of any other party thereto under any decree or order which might be made therein. The sale by Lalta Prasad to Moti Singh on 20th June 1917 could not in any way affect the rights which Raja Moti Chand obtained under his decree.

15. The question that immediately arises is: What are the rights which Raja Moti Chand obtained under the decree and the auction sale, and to what extent are the plaintiffs affected by them? On 24th November 1925, Raja Moti Chand purchased one bungalow with pukka houses and sisam trees, etc, within the enclosure mortgaged (boundaries given) situate in Kathgodam, District Naini Tal, acquired under sale deed, dated and registered on 22nd October 1885. It may be mentioned that neither the British India Corporation nor the Secretary of State for India, nor the Naini Tal Motor Transport Company, nor Moti Singh, were parties either to the mortgage suit of Raja Moti Chand or to the execution proceedings connected with the mortgage suit. We shall for the time being exclude out of our consideration the Secretary of State for India, but from what we have said above it is clear that every one of these persons is bound by the final decree obtained by Raja Moti Chand on 23rd November 1918, so far as they are the successors-in-interest of Lalta Prasad. This follows from the text of Section 52, T.P. Act, 1882 before its amendment. The amending Act 1929, has not introduced a new rule of law in the following explanation appended to Section 52:

For the purposes of this section the pendency of a suit or proceeding shall be deemed to continue until...the suit or proceedings has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained

16. but has put the impress of legislature upon certain judicial pronouncements in which it has been held that in a mortgage suit the lis discontinued even after the final decree and subsisted during the pendency of proceedings in execution; see the case of *Surjiram Manvari v. Barhamdeo Persad* [1905] 2 C.L.J. 288. In

the case of Bhawani Koer v. Matkura Prasad [1908] 7 C.L.J. 1, at p. 30 Mookerjee, J. observes as follows:

It is quite clear, in the first place, that the mere fact that a judgment has been obtained on a mortgage does not extinguish the debt, and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Statute of Limitations. This view is supported by the decisions of Lord Ellenborough in *Drake v. Mitchel* [1803] 3 East 251, namely, that a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party. This principle has been recognized in the cases of the highest authority which will be found reviewed in the judgment of this Court in *Surjiram Marwari v. Barhtmddeo Pershad* [1905] 2 C.L.J. 202, (at p. 214). It follows consequently, that the fact that the defendant obtained a decree on his mortgage did not extinguish his security.

17. u/s 89, T.P. Act (4 of 1882), when an order absolute under that section for sale of the mortgaged property was obtained, the security was extinguished, and therefore there are cases including decisions of the Privy Council which lay down that after an order absolute, if the property should not be redeemed, "that matter passes from the domain of contract to that of judgment :"*Sunder Koer v. Rai Sham Krishen* [1907] 34 Cal. 150, (at p. 161), *Bet Ram v. Shadi Ram* AIR 1918 P.C. 34 and *Malru Mai v. Durga Kunwar* AIR 1920 P.C. 79. These cases are no longer law in view of the repeal of Section 89, T.P. Act, and the enactment of Order 34, Civil P.C., 1908, This matter has been clearly brought out in the decision of *Mt. Sukhi v. Ghulam Safdar Khan* AIR 1922 P.C. 11, and therefore we think that the principle of law enunciated by Mookerjee, J., in *Bhawani Koer's* [1908] 7 C.L.J. 1 case is sound. The result is that the British India Corporation, so far as they are the representatives of Lalta Prasad are bound by the auction sale of 24th November 1925. Two consequences follow from this: (a) the British India Corporation have lost their right to redeem *Moti Chand's* mortgage, and (b) *Raja Moti Chand* has acquired an indefeasible title as against them. Indeed the British India Corporation has never offered to redeem, and we are inclined to hold that they are aware that they have no right to redeem. The auction sale is clearly binding upon the British India Corporation in so far as they are the successors-in-interest of Lalta Prasad.

18. *Raja Moti Chand's* purchase included the building and such rights in the land as Lalta Prasad possessed. We have now to see what rights Lalta Prasad possessed in the land which has now been found to have an area of 6 bighas 3 bas as was marked in the *amin's* map by the Court below. *Mrs. Purcell* sold to the Bishop of Patna and the Bishop of Patna sold to Lalta Prasad and Lalta Prasad mortgaged to *Moti Chand*. There is no suggestion that the right in the land which was dealt with by these transactions was anything but proprietary right. It is true that *Moti Singh* says that he used to pay Rs. 3 yearly rent to the Tahsil, but we have no other material on the record from which we could come to the conclusion that *Mrs. Purcell*, the Bishop of Patna or Lalta Prasad had not

permanent rights is the land, but only limited rights terminable at the option of a superior proprietor. It has been argued by Dr. Katju who appeared on behalf of the respondent that on 1st March 1920 the Naini Tal Motor Transport Co. obtained a 30 years" lease renewable again after the lapse of 30 years from the Secretary of State for India, and these rights could in no event be sold, for he says that, as these lessee rights were acquired after the final decree, there is no equity in favour either of the mortgagee or of the purchaser at the Court auction to have such acquisitions taken away from the person who paid for them and attached to the property covered by the decree, and he relies upon the cases of Haradhan Chakerverty Vs. Hargobind Dutta, and Sivananjiah v. K. Sithey Goundar AIR 1921 Mad. 627.

19. Even if we were to agree that there can be no accession to the mortgage security after the passing of the final decree, we are of the opinion that the action of the Naini Tal Motor Transport Co., in obtaining a lease from the Secretary of State for India, does not enlarge their proprietary interest, acquired by them under the sale deed dated 7th February 1919. As we said before, there is no material on the record from which we can gather that Lalta Prasad had limited rights in the land and, if therefore the Naini Tal Motor Transport Co., in a spirit of caution or under the stress of certain unexplained circumstances took certain proceedings to ensure the continuance of their possession this did not enlarge their title acquired under the purchase dated 7th February 1919 or confer upon them an independent title. It may be mentioned here that the Naini Tal Motor Transport Co., paid no premium to the Secretary of State for India, but only agreed to pay a yearly rent of Rs. 202, and executed a building lease upon certain terms. The buildings which they have constructed outside the mortgaged area, will, as has been conceded by the learned advocate for the appellants, belong to the British India Corporation. There is thus no hardship cast upon them.

20. The Secretary of State for India was no party either to the mortgage suit or to the execution proceedings, and is not the successor-in-interest of Lalta Prasad, and is of course not bound in any way by the decision of the suit.

21. Our conclusion therefore is that Raja Moti Chand is entitled, unless barred in some other way, to the land marked in the Amin's map by the Court below. We have now to see what rights he has in the buildings. By parity of reasoning and in view of our findings it follows that Raja Moti Chand is entitled to obtain possession over the residential bungalow exclusive of the room adjoining the bungalow and long office and a kitchen, unless some other principle of law stands in his way.

22. It was finally argued before us on behalf of the respondents that we should not interfere with the decree of the Court below by reason of the fact that Section 51, T.P. Act, is applicable to the facts of the case, and that provision of law gives an option to the British India Corporation, and the Court below has given effect to that option correctly. On the other hand, it was argued on behalf of the appellants that Section 51 cannot be taken advantage of by a person to

whom Section 52 applies. This contention is founded upon the principle enunciated by a Division Bench of this Court in Md. Shafiqullah Khan Vs. Md. Samiullah Khan by which we are bound. But we are of the opinion that the plaintiff-respondent is not entitled to the benefit of Section 51, and in our view Section 51 works out in a way different from the way in which the Court below has worked it out. It runs as follows:

When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted there from by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

23. It is obvious that the British India Corporation are the transferees of immovable property and the persons subsequently evicted there from, and Raja Moti Chand is the person having a better title within the meaning of the section. The consequence therefore is that the British India Corporation have a right to require Raja Moti Chand either to have the value of the improvement estimated and paid to them or to ask Raja Moti Chand to sell his interest in the property to the British India Corporation at the then market value thereof irrespective of the value of such improvement. Upon this treading of the law it is clear that the British India Corporation can put Raja Moti Chand upon election, and it is for Raja Moti Chand to decide whether he will pay up the British India Corporation or whether he will sell his own interest to the British India Corporation. The Court below however without putting Raja Moti Chand upon an election, as compelled him to sell his interest to the British India Corporation, and therein we think it has fallen into an error but we think that there is no occasion for Section 51 to come into play at all.

24. So far as the "improvements" are concerned there has been no improvement in the land according to our view and so far as the buildings are concerned, we have already held that Raja Moti Chand will not be entitled to the new room adjoining the bungalow, the long office and the kitchen built by Mr. Fonseca after 1919. Moreover? it is not made out by the evidence on the record that the - British India Corporation believed in good faith that they were absolutely entitled to the immovable property in question. Nobody on their behalf has entered into the witness box to state that they made any inquiries and that the result of those inquiries was that the Corporation was lulled into a sense of security. Neither the recitals contained in" the sale deed of 26th July 1921 nor the bald statement of Moti Singh Bhat, that he had no information of any in-eumbrance, can be of any avail to the plaintiff-respondent. Moreover we are not impressed by the statement of Moti Singh. Section 51, T.P. Act, is therefore inapplicable. Our conclusion finally is that there is nothing in law which would stand in the way of Raja Moti Chand"s claiming possession over the land marked in the Amin"s map

and over the residential bungalow. Here his right ceases. He has no right to the lands outside this area and to the room adjoining the main building, the long office and the kitchen built after 1919.

25. The result is that we allow this appeal, set aside the decree of the Court below and substitute therefore a decree declaring the proprietary right of the plaintiffs over : (1) the property mentioned in Section A, (excluding therefrom the land marked blue in the Amin's map and the residential bungalow); and (2) the end-room adjoining the main building, the long office and the kitchen which were built after 1919. It is also declared that the properties that have been secured to the plaintiffs by our decree are not affected by the mortgage and sale in favour of Raja Moti Chand. The order of 24th December 1926, passed by the Court of the Subordinate Judge and Deputy Commissioner of Naini Tal so far as it affects the properties decreed to the plaintiffs, is set aside.

26. The plaintiffs have succeeded to some extent, but have lost to a greater extent; and we think that the proper order to make on the question of costs is that the plaintiffs will get one-third of the taxable costs from the defendants first party and the defendants first party will get two-thirds of their taxable costs from the plaintiffs in both Courts. Defendants second party will bear their own costs which they have incurred.