(1898) 12 CAL CK 0009

In the Calcutta High Court

Case No : Appeals from Appellate Decrees Nos. 804 and 805 of 1897

Moti Ram Tewary and Others APPELLANT

Vs

Ram Lakhan Singh and Others RESPONDENT

Date of Decision : 13-12-1898

Acts Referred:

Citation : (1898) 12 CAL CK 0009

Final Decision : Dismissed

Judgement

(In appeal No. 804.)

1. In this case one Kunja Behari Singh, as the managing member of the family of the Defendants, executed a zurpeshgi lease in favor of Basgit Tewari, the ancestor of the Plaintiffs. At the same time Kunja Behari Singh took from Basgit Tewari a katkina lease, so that possession of the property remained with the mortgagor. A decree was obtained for rent on the katkina lease, and in execution of that decree a 2-annas share of mouzah Bemari, that is, a part of the mortgaged property was purchased by the Plaintiffs on the 28th January 1890. The Plaintiffs now sue for possession of the portion of the mortgaged property, claiming it as full owners. Among other defences, there was the defence that under sec. 99 of the Transfer of Property Act a mortgagee was prohibited from selling the mortgaged property, except in a suit brought under sec. 67 of that Act. That defence prevailed in the lower Court, and the suit was dismissed.

2. The chief contention at this bar has been that as the mortgage was a simple usufructuary mortgage a suit to sell could not be brought under the provisions of sec. 67 of the Transfer of Property Act, and consequently sec. 99 did not apply.

3. The mortgage is to be found at page 28 of the paper-book, and the portion necessary for the decision of this case runs as follows:--"The lessee shall also be at liberty to realize the amount covered by the zurpeshgi deed by the sale of 1 anna 9 English pie, the zurpeshgi property, which, forming my proprietary right, is hypothecated for the debt covered by the zurpeshgi deed." We think this a

document containing such a clause as this is not a simple usufructuary mortgage as defined by the Transfer of Property Act, and that therefore the contention must fail.

4. The appeal is dismissed with costs.

(In appeal No. 805)

5. In this case one Kunja Behari Singh executed a mortgage in favour of the predecessor of the Plaintiffs. He nevertheless held on under a katkina lease which was granted on the same day and which covered the mortgaged property. The Plaintiffs brought a suit for rears of rent on the katkina lease, sold a 2-annas share of the mortgaged property, and purchased it themselves. They now sue for possession of the property as auction-purchasers.

6. Among other defences that have been raised in this suit is one that under sec. 99 of the Transfer of Property Act the Plaintiff''s are prohibited from buying the equity of redemption in respect of the property over which they hold a mortgage, and that the remedy, if any, must be the remedy given by that section. This contention has received the approbation of both the lower Courts, where the suit has been dismissed.

7. In second appeal it has been argued that sec. 99 of the Transfer of Property Act is a section of procedure, and the property in this case having been sold by a Court of competent jurisdiction at the instance of the Plaintiffs and bought by them, the sale is not void or voidable; and secondly, it has been contended that as the mortgage in question is a purely usufructuary mortgage, the mortgagees have no right to sell under sec. 67 of the Transfer of Property Act, and consequently it is unreasonable to suppose that the provisions of sec. 99 of the Act apply to such a mortgage.

8. Sec. 99 of the Transfer of Property Act runs as follows:--"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under sec. 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, sec. 43."

9. This section is to be found in Chapter IV of the Act, which, as may be seen from sec. 58, applies to all mortgages, a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage and an English mortgage. There are no words in the section limiting the word mortgagee to a mortgagee holding under a particular form of mortgage, and the ordinary meaning of the language of sec. 99 would be that it prohibits the sale of the property mortgaged in all cases save in a suit brought under sec. 67. Nor does there appear to us to be anything in the argument that sec. 99 does not apply if a suit to sell does not lie under see. 67. The words of the section are general and uncontrolled. To accept the contention would be that we should bo compelled to read into the section the

words " that if under the terms of the mortgage, no suit can be brought under sec. 67, the mortgagee can sell the equity of redemption." There are no such words in the section, and if we were to add them, instead of interpreting the law, we should be legislating. Nor do we think that the section contemplates merely a matter of procedure, and that a sale wrongly made would be merely irregular. The tenor of the decisions of the different High Courts is that the sale is void, and we are of the same opinion. The appeal is dismissed with costs.

