
(1930) 04 PAT CK 0004
In the Patna High Court

Mt. Azizunnissa

APPELLANT

Vs

Komal Singh and Others

RESPONDENT

Date of Decision : 11-04-1930

Acts Referred:

Bengal Tenancy Act, 1885 — Section 69

Citation : AIR 1930 Patna 579

Hon'ble Judges : Kulwant Sahay, J;Adami, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—These two appeals are directed against the sama decision of the Subordinate Judge of Gaya. Appeal No. 141 is by defendant and appeal No. 13 is by the plaintiffs, and the question raised is as regards the respective rights of the parties under sales held in execution of two decrees on two mortgages.

2. The facts are shortly these: Defendant 2 Jawad Hassain, who appears to be a zamindar having considerable landed properties but who according to the Subordinate Judge was always in a, chronic state of indebtedness, executed several mortgages in respect of his properties in favour of different persons. We are here concerned chiefly with two mortgages, one dated 23rd September 1907 and the other dated 29th July 1908, By the first mortgage of 1907 Jawad Hussain mortgaged three propeties to the plaintiffs, namely (1) seven annas 11 dams odd share of Mauza Mosisnpur Bharthu and Ismailpur Bharthu bearing Tauzi No. 1291 for the sake of convenience I shall call these villages simply Mauza Bharthu; (2) sixteen annas of Mauza Jamuawati Tauzi No. 7705 and (3) sixteen annas of Mauza Jamuawan Tauzi No. 7703. The principal amount advanced under this mortgage was Rs. 11,000 and the interest stipulated was Rs. 1-4-0 par cent, pev mensem with compound interest at the same rate on yearly rests. By the second mortgage of 1903 Jawad Hussaia mortgaged one of these villages, namely Mauza Jamuawan Tauzi No. 770. to Durga Prasad the husband of Mt. Bhawani Kuer defendant 3, the principal sum advanced under this mortgage being Rs. 11,500. In 1915 the plaintiffs instituted Suit No. 64 of that

year to enforce their mortgage of 1907. In this suit the second mortgagee Durga Prasad was not impleaded as a party.

3. A preliminary decree was made in favour of the plaintiffs for a sum of Rs. 33,981-5-3 on 4th August 1915. The final decree for sale was made on 25th March 1916, and in execution of his decree one of the mortgaged properties, namely, Mauza Bharthu, was sold for Rs. 25,000 and was purchased by the plaintiffs decree-holders on 23rd November 1916. The sale was confirmed and the sale certificate was granted to the plaintiffs on 24th August 1917 and possession was delivered to them on 23rd December 1927. For the balance due under the decree execution was again taken out by the plaintiffs in 1921, but previous to this Durga Prasad had instituted a suit in the year 1919 to enforce his mortgage of 1908. In this suit the present plaintiffs were not impleaded as defendants. A preliminary decree was passed in favour of Durga Prasad on 22nd August 1919 and the final decree for sale was made on 10th December 1919. Durga Prasad having died, his widow Bhawani Kuer, defendant 3 executed the decree, and the mortgaged property Mauza Jamuawan Tauzi No. 7708 was sold on. 21st; July 1920 and purchased by, Bhawani Kuer who. obtained delivery of possession through Court on 27th January 1911. Subsequently by a deed ,of sale dated 19th. March 1922, Bhawani Kuer sold Mauza Jamuawain Tauzi No. 7708 to the defendant. Mt, Azizunissa, for Rs. 18,000.

4. As I have stated the plaintiffs took out execution for the balance of, their decree in the year 1921 and the two villages Jamuawan bearing Tauzi Nos. 7705 and 7708 were sold on 8th February: 1921 and purchased by the present plaintiffs, decree-holders. The sale was confirmed on 9th December 1921. The plaintiffs then made an. application for delivery of possession over these, two villages and defendant 1 objected to such delivery of possession, in so far as Mauza: Jamuawan Tauzi No. 7708 was, concerned, on the basis of the sale in execution of Durga Prasad's decree. The objection of defendant 1 was allowed on 30th May 1923, and although possession was delivered to the plaintiffs over Mauza Jamuawan Tauzi No. 7705, they failed to obtain possession in so far as Mauza Jatnuawan Tauzi No. 7708 was concerned. They thereupon instituted the present suit for a declaration of their title in respect of Mauza Jamuawan Tauzi No. 7708 by virtue of their purchase in execution of the mortgage decree and for possession thereof. They asked for an alternative relief allowing the defendants an opportunity to redeem Mauza Jamuawan Tauzi No. 7708 on payment of such sum as the Court may determine as the proportionate amount payable in respect of the said village within a time to be fixed by the Court, and in the event of the sum so fixed not being deposited within the time fixed by the Court possession of the said mauza be delivered to the plaintiffs. It may be noted that in the plaint the plaintiffs had alleged that the purchase of 19th March 1922 was really made by defendant 2 Jawad Hussain and that, defendant 1 was merely a benamidar. for defendant 2.

5. The defence of defendant 1, with which we are concerned in the present

appeals, was that she was not the benamidar for defendant 2 and that she was entitled to redeem not only Mauza Jamuawan Tauzi No. 7708 on payment of the proportionate amount of the mortgage money, but that she was entitled to redeem the entire mortgage in respect of all the three villages. The learned Subordinate Judge has held that it has; not been established that defendant 1 was a benamidar for defendant 2. He has however disallowed the claim of defendant 1 to redeem the entire mortgage and he has held that defendant 1 was entitled to redeem only Mauza. Jamuawan Tauzi No. 7708 which was mortgaged in the bond of Durga Prasad and which was sold in execution of the decree upon that mortgage. The, learned Subordinate Judge has further found that in order to redeem, defendant 1 was entitled to pay the amount proportionate to the value of mauzi Jainua wan, Tauzi No. 7708 but, that, the, mortgage money should be deemed to be the amount found due on the date of the plain tiff's decree in their mortgage suit and that upon that amount interest will run at the stipulated rate mentioned in the mortgage bond till the date fixed for payment in the plaintiff's mortgage decree and that after that data interest shall be calculated at 6 per cent per annum until six months after the date of the decree in the present suit. The appeal of defendant 1 is directed against the portion of the decision of the Subordinate Judge where he held that defendant 1 was entitled to redeem Mauza Jamuawan Tauzi No. 7708, her contention being that she is entitled to redeem all the three villages covered by the mortgage of the plaintiffs. The next contention of defendant 1 is as regards the proportionate amount of the mortgage money chargeable on Jamuawan Tauzi No. 7708. The appeal of the plaintiffs is directed against the finding of the Subordinate Judge that defendant 1 was not the benamidar of defendant 2 and to the amount payable by defendant 1 for redeeming Jamuawan Tauzi No. 7708.

6. It may be stated at the outset that the learned advocate of the plaintiffs did not press his appeal on the question of benami and it must be accepted for the purpose of the present appeal that defendant 1 was not a benamidar for defendant 2. The principal question for decision in the appeal of defendant 1 is whether she is entitled to redeem the entire mortgage or only the mortgage in respect of mauza Jamuawan Tauzi No. 7708.

7. The general principle of law is that the mortgage contract is indivisible and it is the right equally of the mortgagor and the mortgagee to keep it indivisible. Where, however, there has been a severance of the security and the integrity of the mortgage has been broken it is the right of the mortgagee as well as of the mortgagor or the person having equity of redemption to insist on an apportionment of the mortgage debt upon the several mortgaged properties and on partial redemption. The purchaser of the mortgaged properties in execution of a mortgage decree acquires not only the interest of the mortgagee but also the equity of redemption of the mortgagor, and he is entitled to redeem other mortgages on the same property created by the mortgagor. Defendant 1 as a purchaser of one of the mortgaged properties has acquired the equity of redemption of Jawad Hussain and can claim a right to redeem the entire

mortgage of the plaintiffs inasmuch as She is not bound by the decree obtained by the plaintiffs in the suit on their mortgage as her predecessor-in-title was not made a party thereto. Upon such redemption by defendant 1 the plaintiffs in their turn as purchasers of the equity of redemption of Jawad Hussain Can similarly claim the right to redeem defendant 1.

8. The question in the present case is: How are the equities between the parties to be worked out? In my opinion the view taken by the learned Subordinate Judge is correct and defendant 1 can be allowed to redeem only Mauza Jamuawan Tauzi No. 7708. This view was taken by this Court in *Mt. Dhanwanti Chaudharin Vs. Hargobind Prasad and Others*, and the reasons" given by me in that case apply to the facts of the present case.

9. Reliance has been placed on behalf of defendant 1 upon the decision of the Privy Council in *Yadali Beg v. Tuka Ram* AIR 1921 P.C. 125. The facts of that case were these: In 1893 one Laxmansa Bal-krishnasa executed a mortgage in favour of Yadali in respect of 16, fields in five villages authorizing the mortgagee to take possession of the mortgaged premises if the mortgage money was not paid by a certain date. It also authorized the mortgagee to sell the mortgaged property for realization of the mortgage money. The mortgagor Subsequently in the year 1896 sold one of the fields to the respondent Tukaram. In 1899 the mortgagee Yadali sued on the mortgage to recover the principal amount with interest due under it. In this suit the subsequent purchaser of one of the fields, Tukaram, was not made a party. The suit was decreed by consent of the mortgagor whereby it was agreed that unless the mortgagor paid a certain sum of money within a year nine of the fields including the one purchased by Tukaram should be foreclosed and the plaintiff mortgagee should be put in possession thereof. No payment was made and the final decree for foreclosure in respect of the nine fields was passed in favour of Yadali on 17th December 1900, and he was put in possession of the fields including the one purchased by Tukaram in January 1901. Tukaram then brought his suit which went to the Privy Council claiming to be entitled to redeem all the nine fields. The Subordinate Judge held that he was entitled to redeem only the field purchased by him on payment of the proportionate amount of the mortgage money. On appeal the Judicial Commissioner held that the plaintiff Tukaram was entitled to redeem the entire mortgage, but as he had confined his suit to the nine fields covered by the consent decree, a decree was made for redemption of those nine fields on payment of the entire mortgage debt. The Privy Council upheld the decision of the Judicial Commissioner. In doing so Viscount Haldane observed as follows:

According to English law the respondents would have been entitled to redeem the mortgage in its entirety subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption, a point which has not arisen so far in the present case. The respondents, being transferees of part of the security, by English law, if it applied, would on the one hand be entitled to redeem the entire mortgage on the properties generally, and co-relatively could

not compel the mortgagee to allow them to redeem their part by itself. This would be so as the result of principle unless something had happened which extinguished the mortgage in whole or in part, such as an exercise of a power of sale originally conferred on the mortgagee by his security, or such conduct on the part of the transferees as would estop them from asserting what normally would have been right. Nothing of this kind is alleged in the case before their Lordships.

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The Judge in the original Court thought that the decisions of the Courts in India had established that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object. Subject to proper safeguarding of the rights to redeem, which these owners may possess, their Lordships are of opinion that this is not so in India any more than in England.

10. It will appear from this decision of their Lordships that they were proceeding on the general principle that a mortgage is indivisible unless something had happened which would operate as a severance of the security. In observing that the respondents in the case before their Lordships were entitled to redeem the mortgage in its entirety, subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption, their Lordships clearly recognized the right of a partial redemption, but the question of partial redemption did not arise in that case and their Lordships clearly state that that point had not arisen in the case. They however clearly indicated that the right of other owners of the equity of redemption has to be safeguarded and the question in the case now before us is whether any other person has a right of redemption which must be safeguarded. In my opinion the plaintiffs are such persons and they have got the right of redemption which must be safeguarded. The case of *Yadali* AIR 1921 P.C. 125 therefore is not an authority for holding that defendant 1 is entitled to redeem the entire mortgage and not only the village purchased by her.

11. Reliance has also been placed on behalf of defendant 1 upon *Promotha Nath Mitter and Others Vs. Ram Kishan Singh*, . There also the question arose whether the purchaser of a portion of the mortgaged property was entitled to redeem the entire mortgage. The facts of that case, however, were these: In 1913, three brothers, Sarat, Hem and Gouri Prasad had executed a mortgage, in respect of 3 annas 2 pies 8 karant share in a certain mahal to defendant 1. Subsequently in 1915 two of the brothers, Sarat and Hem, sold 2 annas out of their 2 annas 1 pie 12 karant share to the plaintiffs and the pro forma defendants, the plaintiffs' share in the purchase being 5 pies only. In 1919 the mortgagee instituted a suit to enforce his mortgage against the mortgagors and the purchasers were not made parties. An ex parte decree was made and the entire share was sold in execution thereof and purchased by defendants 2 and 3 to whom possession was subsequently delivered. In July 1921 defendants 2 and 3 sold the entire" share

purchased by them to defendants 4 and 5. Thereupon the suit giving rise to the appeal which came up to this Court was instituted by the plaintiffs who were the purchasers in respect of the 5 pies share for redemption of the entire mortgage and the question raised was whether they were entitled to redeem the entire mortgage or only the five pies share, the contention of defendants 4 and 5 being that the plaintiffs could redeem only five pies share. It was held by this Court that the plaintiffs were entitled to redeem the entire mortgage. There was, however, a direction to the effect that on the deposit of the mortgage money being made by the plaintiffs a final decree for redemption will be passed in their favour, but possession will not be delivered to the plaintiffs until after the expiry of one week from the date of such decree and that if defendants 4 and 5, namely the purchasers in execution of the mortgage decree, consent within that week that their proportion of the total mortgage money due in respect of their one anna odd share be repaid, and also pay up the costs of the suit and appeals decreed against them and their proportion of any other costs which would be a charge u/s 95, or consent that the same be paid to plaintiffs out of the total mortgage money, possession of the share of those defendants will not be delivered to plaintiffs. The effect of this direction in the decree of this Court virtually amounts to a partial redemption. It was held that the plaintiffs were entitled to redeem the entire mortgage, but that they were not entitled to possession of the entire mortgaged properties if defendants 4 and 5 consented to pay up the proportionate amount of the mortgage money in respect of the share other than that purchased by the plaintiffs. In the judgment the question as regards the right of defendants 4 and 5 to redeem was not expressly dealt with and it appears that an application for review of this judgment was made, and in dealing with that question on the application for review the learned Judges observed as follows:

As to the right of defendants 4 and 5 to redeem during the hearing of the case it was generally admitted that these two defendants had a right. Such a right was never really controverted. In our judgment, we took it for granted that defendants 4 and 5 had a right to redeem and the judgment clearly shows that in my opinion they had such a right. It is unnecessary to make any change in our judgment.

12. This order on the review application clearly indicates what was really decided in the case, namely that the plaintiffs in that case were entitled only to a partial redemption. I am therefore of the opinion that the view taken by the learned Subordinate Judge is correct and the plaintiff in the present case is entitled to redeem only Jamuawan Tauzi No. 7708.

13. The next question is as regards the proportionate amount on payment of which defendant 1 should be allowed to redeem. In order to apportion the mortgage money it is necessary to find out the value of the three mortgaged properties on the date of the mortgage. As regards two of the properties, namely the two Jamuawans, the learned advocate for defendant 1 accepts the finding of

the learned Subordinate Judge. He however attacks the finding of the Subordinate Judge as regards the value of Mauza Bharthu. The learned Subordinate Judge has found that the value of this mauza is Rs. 42,000. It has been contended on behalf of the defendant-appellant that the value of this mouza is about a lakh of rupees and reference has been made to certain documents used as evidence in this case. The learned Subordinate Judge has refused to rely upon these documents, firstly, on the ground that they relate to a period much later than the date of the mortgage bond; and secondly, on the ground that they show the income of the mouza in dispute in a particular year which is not a safe criterion for fixing the average income for the purpose of ascertaining the value thereof. The documents referred to are judgments and decrees in cases u/s 69, Ben. Ten. Act, and in rent suits. In my opinion the learned Subordinate Judge was right in the view taken by him. It is contended on behalf of the defendant-appellant that the plaintiffs had refused to produce the collection papers in respect of Mauza Bharthu when called upon to do so. The same objection applies to these collection papers. In the first place they related to a period much later than the date of the mortgage. In the second place defendant 1 ought to have called for the collection papers from Jawad Hussain at the time of the mortgage, and the collection papers of the period after the plaintiffs had taken possession after their purchase could be no guide to fix the value of the property in 1907. We have however got a document of the time of the mortgage.

13. It is a thika patta dated 28th June 1906, and is marked Ex. 4. By this document several properties were given in lease by Jawad Hussain and one of those properties was Mauza Bharthu and the rent reserved of this mauza was Rs. 2,730. On deducting the Government revenue. of Rs. 450-4-0 and the road cess Rs. 223-8-0. the balance recoverable by Jawad Hussain was Rs.: 2,056-4-0 and twenty times this amount comes to Rs. 41,000 odd. This is the only document on the record showing the income of Mauza Bharthu about the time of the mortgage and it supports the finding of the Subordinate Judge. The Subordinate Judge has further referred to a document marked as Ex. 14. It appears that after the sale, of Mouza Bharthu in execution of the plaintiffs' decree Jawad Hussain made an application for setting aside the sale on the ground of irregularity and inadequacy of price. In the course of that proceeding one Rudra Deva Narain Singh filed an application (Ex. 14) on 8th March 1919 in which he stated that in case the sale be set aside he was prepared to purchase that mauza for a consideration of Rs. 42,000. The learned Subordinate Judge has accepted this figure as the value of Mauza Bharthu. Although this document is also of a period much later than the mortgage of 1907. yet it supports the valuation arrived at on a consideration of the thika patta, Ex. 4, and in my opinion the learned Subordinate Judge was right in finding the value of Mauza Bharthu to be Rs. 42,000.

14. The next question is as regards the form of the decree. The learned Subordinate Judge has taken the amount of the mortgage money to be the amount calculated in the decree of the plaintiffs. In this he is clearly wrong. As

was pointed out in *Jageswar Mandal and Another Vs. Sridhar Lal Aditya Deb and Others*, the purchaser who brings the suit for redemption and recovery of possession cannot redeem upon payment of the amount decreed in the mortgage suit; he must pay the amount to be found due under the original mortgage bond giving deduction for the profits made by the mortgagee auction-purchaser from the date of his taking possession of the property. To quote the language of the Privy Council in *Umes Chunder Sircar v. Zahur Fatima* [1889] 18 Cal. 164 defendant in the present case seeks to take away from the plaintiffs the benefit of the decree and it would be unjust if she could use the decree to cut down the plaintiffs' interest while she deprives them of the whole advantage of it. The case of defendant 1 is that so far as she is concerned the plaintiffs are still but mortgagees and if that be so then the plaintiffs should be allowed such benefit as their mortgage gives them. If the plaintiffs had not got a decree and defendant 1 had come to redeem their mortgage she must have paid whatever interest the plaintiffs' contract entitled them to and the Court would have no jurisdiction to cut it down and that is the position in which the parties are placed by the decree in this suit. The plaintiffs are therefore entitled to the amount which may be found due upon their mortgage on taking an account calculating interest at the rate stipulated for in the mortgage bond. The amount so found due will be apportioned amongst the three villages according to their respective valuation as fixed by the learned Subordinate Judge. The interest should be calculated at the bond rate up to 23rd December 1917 on which date the plaintiffs were given possession over Mauza Bharthu. After that date the usufruct will be set off against the interest and no further interest will be allowed to the plaintiffs. The amount found payable on account of Mauza Jamuawan Tauzi No. 7708 should be paid by defendant 1 within six months from date of the decree of this Court. Defendant 1 must also pay the costs awarded to the plaintiffs by the decree of the Subordinate Judge and also the costs of this Court in Appeal No. 141 of 1926 which appeal is hereby dismissed.

15. In the event of the failure on the part of defendant 1 to pay the amount on account of principal and interest and costs within six months from this date she will be debarred from her right of redemption which will be extinguished and the plaintiffs will thereafter be put in possession of Mauza Jamuawan Tauzi No. 7708. Appeal No. 13 of 1927 is allowed in part but there will be no order for costs.

Adami, J.

I agree.