(1908) 02 CAL CK 0019

In the Calcutta High Court

Case No : Appeal from Original Decree No. 366 of 1906

Mutty Lal Pal — APPELLANT

Vs

Nandu Lal Neogi and others — RESPONDENT

Date of Decision : 21-02-1908

Acts Referred:

Citation : (1908) 02 CAL CK 0019

Judgement

Maclean, C.J.—This is a suit to enforce a mortgage. The original mortgagor was one Fulkumari Dasi who is dead, leaving three sons who became equally entitled to the equity of redemption. One of the sons sold his 1/3rd share in the equity of redemption to the Plaintiff, the mortgagee. The Plaintiff now brings this suit to realise his mortgage and he offers to allow 1/3rd of the mortgage debt, as being the share of that debt which he is liable to pay as the purchaser of a 1/3rd share of the equity of redemption. Prima facie that would seem to be right. The mortgagors, however, the owners of the other 2/3rd of the equity of redemption claim to deduct from the mortgage debt the full value of the share purchased by the mortgagee. The lower Court has accepted this view, and dismissed the suit; the Plaintiff has appealed. The contention of the Defendants cannot prevail. If there had been no sale the mortgagor of the one-third share would have been liable only for one-third of the mortgage debt. There is no question here of proportionate value: the shares were equal undivided thirds. Apart from authority I should have thought that the mortgagee standing in the shoes of the mortgagor to the extent of the 1/2rd share purchased by him, was only bound to give credit for that which his vendor would have been liable to pay, namely, one-third of the mortgage debt. The point, however, is concluded by authority. The case of Mahtab Singh v. Misrulal 2 N.-W. P. H. C. Rep. (Agra) 88 (1867) decided some forty years ago and reported in N.-W. P. High Court Reports, Vol. II, page 88, supports the principle I have referred to. That has been followed in several other cases. A Full Bench of the Allahabad High Court in Bishehur Dial v. Ram Sarup I. L. R. 22 All. 284 (1900) held that, where A mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. The judgment in that Full Bench case was delivered by Mr. Justice Banerjee, who in a previous case, Chunna Lal v. Anandi Lal I, L. R. 19 All. 196 (1896), had taken a different view. This Full Bench case in the Allahabad High Court followed a Full Bench ruling of the Bombay High Court in the case of Lakhmidas v. Jamnadas I. L. R. 22 Bom. 304 (1896), where the same principle was acted upon: and, in a subsequent case, Fakiraya v. Gadigya I. L. R. 26 Bom. 88 (1901), the same view was taken. There is therefore a current of decisions extending over a period of forty years, which supports the view for which the present Appellant contends. I do not think that any distinction can be drawn between a purchase at an auction sale and a purchase by private treaty. No reason has been suggested for any such distinction.

2. It is suggested that the kobala in this case has not been produced. But the Plaintiff alleged, in para. 4 of his plaint, the effect of that kobala and that has not been challenged. On the contrary, in para. 5 of the written statement, the Defendants admit that the Plaintiff purchased one-third share of the mortgaged property, though they say that the present suit is not maintainable. If anything had turned on the terms of the kobala, and it had really been challenged, its productions could and would have been directed. The Plaintiff is entitled to the decree he asked for, giving credit for one-third of the mortgage debt; and, consequently the judgment appealed against must be reversed and the Respondents must pay the costs of this appeal and also the costs that have been thrown away in the first Court; and there will be the usual mortgage decree giving the Respondents six months'' time from the date hereof to redeem the mortgage.

Doss, J.

I agree.

