

(1947) 06 CAL CK 0013
In the Calcutta High Court

Narendra N. Mitra and Another

APPELLANT

Vs

Nripendra B. Roy and Another

RESPONDENT

Date of Decision : 26-06-1947

Acts Referred:

Citation : AIR 1948 Cal 208

Hon'ble Judges : Clough, J

Bench : Division Bench

Judgement

Clough, J.—On 29-6-1928, that is more than 19 years ago, the mortgaged properties of one Nripendra Bhusan Roy were sold by Registrar of this Court pursuant to a mortgage decree. Amongst other lots, nine items comprising a number of properties which it is not necessary to set out but which are mentioned in the Registrar's certificate dated 21-1-1946, annexure "A" to the petition were knocked down to Sm. Sushila Sundari Dassi, her bids amounted to Rs. 1,10,050 and 25% of this amount that is to say Rs. 27,512-8-0, was deposited by her with the Registrar on account of her purchases. She, however, failed to pay the balance of the purchase price and the Registrar's certificate already referred to shows that after deducting his commission a balance amounting to Rs. 24,761-4-0 is still in his hands. This application is made by the sons of Sm. Sushila Sundari Dassi, (she herself having died in June 1938), for an order that the Registrar do pay the amount of the deposit to the petitioners. They aver that the purchase was made by their mother out of her ajoutuk stridban money and there being no unmarried daughters they are her heirs entitled to inherit her ajoutuk stridhan property. The lady's married daughters have given their consent to this petition.

2. The sale was upon usual conditions; they are set out in Appendix J to the Rules of this Court. Condition 3 provided that the highest bidder shall be the purchaser if the bidding is considered sufficient by the Registrar. Condition 5 provided that the purchaser shall at the time of sale pay a deposit of 25% of the purchase money to Registrar. Condition 8 provided for payment by the purchaser

of the balance of the purchase price within a time limited. Conditions 13 and 14 were as follows:

13. Where the purchaser shall not pay his purchase money at the time above specified, or at any other time which may be named in any order for that purpose, and in all other respects perform these conditions an order may be made by a Judge in Chambers for the re-sale of the property and for payment by the purchaser of the amount of the deficiency, if any, in the price which may be obtained upon such re-sale, and of all attorney-and-client's costs and expenses occasioned by such default.

14. Where a re-sale is directed, if for want of a bidder the property cannot be re-sold the purchaser at the former sale shall pay the whole amount of his purchase-money into Court; but where the property be re-sold, and where the price obtained at the re-sale be less than the purchase-money payable by the original purchaser, he shall pay the amount of the deficiency. The costs occasioned by the default of the original purchaser shall also be paid by him. An order containing these directions may also be obtained from a Judge in Chambers.

3. It is now well settled that in the absence of special terms providing otherwise, a deposit is not merely part payment but is an earnest; it is a security for the performance of the purchaser's contract and if the purchaser makes default, it may be retained by the vendor and no express stipulation is necessary to entitle the vendor to the deposit. In *Howe v. Smith* (1884) 27 Ch. D. 89 which was the case of a private sale, the conditions provided that if the purchaser should fail to complete, the vendor would be at liberty to re-sell and to recover any deficiency. The purchaser, in fact, defaulted and the vendor re-sold for the same price. It was held that inasmuch as the deposit was a guarantee for the performance of contract, the purchaser who defaulted was not entitled to a return of deposit.

4. In *Hall v. Burnell* (1911) 2 Ch. 551 which again was a case of private sale it was held that a vendor obtaining rescission owing to default in completion by the purchaser was entitled to the deposit in the absence of express stipulation to contrary, because the deposit was in the nature of an earnest or guarantee for fulfilment of the contract of purchase by paying the purchase money.

5. *Depree v. Bedborough* (1863) 4 Giff 479 was a case of sale by the Court under a decree: the conditions simply provided that in case of default by purchaser there should be a re-sale, and the deficiency, if any, was to be made good by the purchaser. There was no stipulation as to either return or forfeiture of the deposit. The purchaser in that case paid the deposit but afterwards became bankrupt; his assignees elected not to complete; the vendors thereupon contended that the deposit was forfeited. The Vice Chancellor Sir J. Stewart observed as follows:

Where a deposit is exacted by the Court as part of the contract "to be entered into by the purchaser, the purpose for which it is exacted is one for the benefit of the vendor-it is exacted as some security for the performance of the contract;

but where, after the payment of the deposit, and before the completion of the contract of sale and purchase, the incapacity of bankruptcy succeeds and the person who has paid the deposit has no longer any right whatever, but his right has been transferred to another person, who has the right to go on or to abandon the contract, it is quite clear that in such a case there has been a default on the part of the purchaser. Then, how the person who is in default can, upon that default, and in consequence of that default, acquire any right to the money which was parted with as a security that there should be no default, it is difficult to conceive.

The Vice Chancellor held that the assignees were not entitled to recover the deposit money any more than the purchaser himself would be. Then at page 484 he observed as follows:

The proper course to follow now will be, not to determine more than that the assignees in bankruptcy have no right to the deposit; and, even if upon a re-sale of the property it should fetch ten times the amount which Mr. Boucicault bid for it, I do not see that any right can be set up by the assignees to this deposit.

This case is therefore an authority for the proposition that in the absence of special circumstances a purchaser who defaults forfeits his right to the deposit which he has paid.

6. In *Gowal Das Sidany Vs. Luchmi Chand Jhawar*, Lord Williams J. held that when, in the case of sale by Registrar on conditions in Appendix J pursuant to a decree obtained by plaintiff in a suit for recovery of the sum due under a deed of charge, the purchaser who had deposited 25% had failed to pay the balance of the purchase money, the vendor had an option: he could either choose to treat the contract as rescinded in which case the deposit was forfeited and he would be entitled to retain the deposit but had no further right against the first purchaser, or he would insist on his rights under the contract as to resale in which case he would be entitled to recover from the first purchaser the deficiency if any. But in calculating the deficiency he must in that event give credit for the amount of the deposit: but nothing in this decision suggests that a defaulting purchaser is entitled to get back the deposit or any part of it. The deposit in the second circumstances which he visualises simply is credited to the first purchaser for the purpose of arriving at the deficiency if any. If there is no deficiency but a surplus, the purchaser at the first sale is not entitled to the surplus. This is illustrated by *Howe v. Smith* (1884) 27 Ch. D. 89 where as I have already mentioned, the price realised on re-sale was the same as that offered by the first purchaser: even so he was not entitled to a return of deposit. In the absence of special circumstances the purchaser upon default loses his right to recover the deposit money. It is not in question that in this case there was a default by the purchaser *Sm. Sushila Sundari Dassi* and the sale went off on that account. Upon her default, her right to recover the deposit, was in my opinion, lost.

7. To be of any assistance to the petitioners any special circumstances which

they rely upon must be such as amount to an agreement binding on the mortgagee to forego his right with regard to the deposit; that is to say something which amounts to an agreement by the mortgagee to return the deposit which has already been made and which he has become entitled to either as a sum which he may forfeit or as an amount which though it will be taken into consideration in calculating any deficit upon a re-sale, will not otherwise be repayable to the person who made the deposit.

8. With regard to two of the sales in respect of which the deposit was made that is to say those in respect of which deposit of sums amounting to Rs. 11,750 and Rs. 8575 were made, orders were passed on 27th March 1929 and 23rd April 1929 respectively that the sales in favour of Sm. Sushila Sundari Dassi be set aside and the properties comprising in the lots concerned be sold by Registrar at an early date; and it was further ordered that the sums deposited by Sm. Sushila Sundari Dasi be not paid out to her without notice to the applicants. No corresponding order was made in respect of the other properties for which the lady had bid. The properties were of course not re-sold at an early date?they have not been re-sold at all. This circumstance does not, I think, help the applicants before me. The fact that the properties were not re-sold at an early date or within a reasonable time, may disentitle the mortgagees. to recover from the lady?in this case her representatives?the deficiency that may arise, if and when the properties are eventually re-sold. But the fact that there has not been a resale cannot, in my opinion, operate so as to give the lady or her representatives the applicants before me a title to the deposit which was lost by her when she defaulted.

9. There is no doubt that a very large sum is still due to the mortgagees: exactly what it amounts to is not clear but it amounts to several lacs of rupees. The question whether the mortgagees can still execute their mortgage decree and can at all now sell the properties has been disputed. It does not seem to me to matter at all whether they can or whether they cannot. Again whether the mortgagees are bound to give credit to the mortgagors for the amount of the deposit does not seem to me to affect the question at issue in this application in any way. The question is whether there were any facts which gave to Sm. Sushila Sundari Dassi and which give to her representatives a new right to the deposit which she lost when she defaulted in carrying out her contract. In my opinion, there are no such facts. A number of circumstances have been mentioned by counsel opposing: this application. It has been alleged that the lady was a benamidar for her husband who was the mortgagor. It has been urged that the applicants before me are not entitled to an order in any event in view of the fact that they have not obtained the succession certificate. It has been urged that the applicants' rights if any, are barred by limitation. It has been further contended in this application that a Chamber Summons is not the correct procedure, and that the application, if they have any rights, must file a suit. Having regard to the opinion which I have formed on the merits of the case it is not necessary to discuss these several matters. In my opinion, the application must be dismissed

with costs. Certified for counsel.