

(1929) 01 AHC CK 0027
In the Allahabad High Court

Naubat Lal and Others

APPELLANT

Vs

B Mahadeo Prasad Singh and Others

RESPONDENT

Date of Decision : 24-01-1929

Acts Referred:

Transfer of Property Act, 1882 — Section 56, 81

Citation : AIR 1929 All 309 : (1929) ILR (All) 606

Judgement

1. This is a defendants" appeal under the following circumstances:

2. The suit was for possession of certain zamindari property or in the alternative for recovery of a sum of Rs. 8,548-0-6 against a number of persons. The plaintiffs alleged that on 11th September 1894 the ancestors of defendants 1 to 9, who are appellants before us mortgaged 3 as.-1.33 pies in the village Chandpur to one Gokul Prasad. Gokul Prasad obtained a decree on foot of this mortgage and an auction sale in execution of that decree took place on 25th June 1919, when Gokul Prasad brought the property mortgaged. The plaintiffs who were purchasers under money decrees and mortgage decrees of 1a.-7.33 pies in the village, deposited the whole of the decretal amount which was Rs. 4519-12-4 on 17th July 1919 under Order 21, Rule 89, Civil P.C., and got the sale of 25th June 1919 set aside. They in the present suit claim possession over the property which is not in their possession and hypothecated in the deed of 11th September 1874 or the amount of money paid therein together with interest at 12 per cent from the date of payment. Defendants 1 to 9 pleaded that the plaintiffs" suit was barred by limitation and that the plaintiffs knew of the prior charge and hence they were liable to pay the same and the defendants were not bound to pay it. They also pleaded that the interest was excessive. The learned Subordinate Judge repelled the contention that the claim was barred by limitation and holding that as defendants 1 to 9 were heirs of the original mortgagors, they could not raise the question of rateable contribution and granted a decree to the plaintiffs for the amount deposited together with interest at 6 per cent, holding that sum was a charge on the property in the hands of the defendants.

3. The defendants have come in appeal in this Court and it is contended by the learned advocate for the appellants that the plaintiffs' claim was barred by Article 61, Lim. Act, and that the property in the hands of the appellants was liable rateably to the claim of the plaintiffs.

4. With regard to the first point, the case for the defendants is that the payment made by the plaintiffs was not a payment made for redemption of any mortgage and that the mortgage subsisted only till the date of the actual sale of the property. The learned advocate contends that under the Transfer of Property Act, Section 89, the right of redemption was barred on the passing of a final decree, but under Order 34, Rule 5 the mortgage subsisted only till the date of the actual sale and that the sale having taken place before the date of payment made by the plaintiffs, such payment could not be treated as a redemption of the mortgage. In support of his argument, reference is made to a passage in the case of *Shah Mehdi Hasan v. Ismail Hasan* [1920] 42 All. 517 at p. 518:

Under the present CPC which repeals Section 89, the mere passing of a final decree does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree.

5. It must be stated that in that case the point raised was different and that as a matter of fact no sale had actually taken place on the material date. In the present case no doubt, the auction sale had been held and the property had been purchased by the decree-holders. A reference to Rule 92, Order 21, shows that a sale cannot become absolute until it is confirmed by the Court and in fact when a deposit is made under Rule 89, the Court makes an order setting aside the sale. It is only when a sale has become absolute that the Court grants a certificate specifying the property sold and that certificate bears the date on which the sale became absolute. We are of opinion that until the sale is confirmed it does not transfer the interest of the judgment-debtor to the auction-purchaser, and where in a case that interest is never transferred by the order of a Court, it cannot be said that the right of redemption had come to an end. In fact the payment made in this case was made by a person who was owner of the property and interested in it as a purchaser of the equity of redemption. Rule 89 had not on the date of this sale been amended by the rule-making powers of this Court to include the judgment-debtor and we cannot accept the contention that the payment made was not made by the mortgagor or his transferee but as a judgment-debtor. We are, therefore, of opinion that the plaintiffs' claim is not barred by limitation and that Article 61, Sch. 2, Lim. Act, does not apply to the facts of the present case.

6. As regards the second point, we are of opinion that the contention of the learned advocate for the appellants must be accepted that the property in the hands of the plaintiffs and the defendant-appellants must contribute rateably to the claim of Gokul Prasad. The learned advocate for the respondents has urged that in view of the provisions of Section 81, T.P. Act, his client being a subsequent mortgagee and purchaser under his decree was entitled to set up the plea that the property in the hands of defendants 1 to 9 was responsible for the

payment of the claim of Gokul Prasad under a prior mortgage. One of the essential points for putting forward the above plea is that the subsequent encumbrancer does not know of the existence of the prior encumbrances and as there are no materials on the record of the case, it is urged that an opportunity should be given to the plaintiffs to produce the original mortgage in his favour and to prove that he had no notice of the prior mortgage. We cannot permit fresh evidence to be adduced at this stage. It was for the plaintiffs to make out the case that is now attempted to be made out by their learned advocate in the plaint that he filed in the case. The plaint is so carelessly drawn up that the learned advocate himself cannot see how the plaintiffs were entitled to the first relief, nor can the defendants clearly set forward in their written statement the plea that the plaintiffs knew of the prior mortgage and unless the original mortgage deed is laid before the Court, no Court can decide what was the contract entered into by the plaintiffs and the appellants when the mortgage in favour of the plaintiffs was executed.

7. Mr. Iqbal Ahmad further contends that under the principles underlying the provisions of Section 56, T.P. Act, he was entitled to plead that the appellants should pay up the whole of the mortgage of Gokul Prasad inasmuch as the plaintiffs were second mortgagees. The provisions of Section 56, T.P. Act, can have no application to a case of an auction-sale and in the absence of facts even the principles of that section cannot be applied to the present case. The property in the hands of the plaintiffs and the defendant-appellants was liable to the extent of Rs. 4,519-12-4. In the case of *Bisheshur Dial v. Ram Sarup* [1900] 22 All. 284, (at p. 289) it has been laid down that:

When several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt: but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprized in the mortgage.... The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to that extent.... If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property.

8. We are therefore of opinion that the plaintiffs were only entitled to a proportionate share of the money that they paid to the prior mortgagee. It is not denied that the proportion in which the parties are in possession of the property mortgaged under the deed of 11th September 1874 is that the plaintiffs are in possession of 19 and defendants in the possession of 17 pies each. The plaintiffs are therefore liable to that extent for the decree of Gokul Prasad and the defendants are liable in proportion. We modify the decree of the Court below and declare that instead of the sum of Rs. 6,005 we substitute Rs. 2,835. Under Order 34, Rule 4, a decree will be prepared for Rs. 2,835 with proportionate

costs and with pendente lite and future interest at 6 per cent per annum against the defendant-appellants.

9. The parties will pay and receive costs in proportion to their success and failure in this Court; and the Court below. The office will fix a date six months from hence for payment.