

(1910) 03 CAL CK 0044
In the Calcutta High Court

Pancham Lal Chowdhury

APPELLANT

Vs

Kishun Pershad Misser and Others

RESPONDENT

Date of Decision : 11-03-1910

Acts Referred:

Transfer of Property Act, 1882 — Section 99

Citation : 6 Ind. Cas. 47

Hon'ble Judges : Woodroffe, J;Caspersz, J

Bench : Division Bench

Judgement

Woodroffe, J.—This a suit brought for redemption of a mortgage. There was a kabuliat executed by the defendant in favour of the plaintiff's father in respect of the property in suit which the defendant took on lease. That property is 8 annas of mahal Siswa Rasulpur. There was also on the same day, namely, 14th December 1884, a mortgage executed by the father of the plaintiff in favour of the defendant for a sum of Rs. 4,000.

2. The learned Subordinate Judge has found that the lease and the bond, which were executed on the same day formed one transaction and the two taken together constituted a usufructuary mortgage. That finding has not been contested on appeal.

3. On the 16th June 1885, a second mortgage was executed by the defendant and on the 15th June 1889, a roka or hand-note was executed by the plaintiff's father in favour of the defendant. On the 16th January 1890, a suit was brought upon this roka and a decree was obtained for a sum of Rs. 1,200 odd. Then on the 27th May of the same year, a suit was brought on the 2nd mortgage and a decree given for Rs. 4,052. The decree, however, on the roka was a decree which was put into execution and in the course of the execution the plaintiff's father made an application for time which is Ex E. and which is in these terms:

In the above case (No. 190 of 1890) the sale of the properties of your petitioners, the judgment-debtors, is fixed for to-day ; and it is necessary for the

judgment-debtors to pay the decretal money in this case as well as the other dues of the said decree-holder, viz., under Decree No. 50 of 1890 passed by this Court for Rs. 4,052-9 and also the money due under the bond, dated the 14th December 1884, for Rs. 4,000 and it is impossible for your petitioners the judgment-debtors to raise money unless sufficient time is granted to them. Your petitioners, therefore, beg to file this petition and pray that the sale may be stayed to-day and it may be fixed for the 28th August 1890 which is the second sale day in the month of August, without issue of fresh attachment processes and fresh sale proclamations. The attachment processes and the sale proclamations have been duly served. Your petitioners the judgment-debtors shall raise no objection on the ground of non-service of fresh attachment processes and fresh sale proclamations or on the ground of inadequacy of price &c, and in case of sale your petitioners the judgment-debtors shall not raise any objections to the purchase made by the decree-holder. The decree-holder also agrees to the above matter and the signature of the decree-holder's pleader is affixed below.

4. This petition has been relied On for the purpose of showing that there was acquiescence by the respondent in the sale and that, as a matter of fact, the terms of that petition really amounted to a release of the equity of redemption in favour of the appellant.

5. On the 28th August 1890, the property was sold for Rs. 570, it having been put up to sale subject to two prior mortgages. A sale certificate was granted, and possession was granted in the same year. Subsequently an application was made under the Registration Act for registration of the property without objection on behalf of the respondent. Then some 15 years after the purchase, namely, on the 25th September 1905, this suit for redemption was brought within the period allowed by law.

6. The learned Subordinate Judge has held that not with standing the sale on the 28th August 1890, the plaintiff is entitled to redeem and has given him a decree accordingly, holding that the sale was one in contravention of Section 99 of the Transfer of Property Act and was, therefore, an nullity. That decision was passed before the decision of the Full Bench in *Ashutosh Sikdar v. Behari Lal Kirtania* 80 C. 61 : 11 C.W.N. 10 11 : 6 C.L.J. 320, where it was held that a sale in contravention of the terms of that section was not a nullity but an irregular sale liable to be avoided merely on proof that the terms of that section had been contravened.

7. It must be taken, therefore, for the purposes of this appeal that the sale was not a nullity but was an irregular sale.

8. The Full Bench, however, did not deal with the matter which is now before us, namely, whether, assuming the sale to be irregular, the right of redemption is, or is not, affected by such sale. The Full Bench dealt with pro-(sic) for reversal of the sale and was not concerned with a suit for redemption such as that which is

now before us.

9. The question is one not altogether free from difficulty. Independently of the provisions of the Transfer of Property Act, it is a well-established principle that a purchase by the mortgagee of the equity of redemption constitutes him a trustee for the mortgagor and that he does not on such a purchase require an irredeemable title. That is, of course, assuming that there has been no release of the equity of redemption or other circumstances which in law would bar this right to redeem. I do not think that in the present case the petition (Exhibit E), to which I have referred, constitutes such a release. I think that the meaning of that petition was that the defendant agreed not to object as to any matters of procedure or irregularities in the procedure connected with the sale and it was not in his mind nor did he express himself as releasing thereby his equity of redemption. As regards this, their Lordships of the Privy Council observe in *Khierajmal v. Dain* 32 C. 296, : 2 A.L.J. 71 : 1 C.L.J. 584 : 9 Bom. L.R. 1 : 6 C.W.N. 201 that "neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."

10. It has, however, been contended on behalf of the appellant that the plaintiff is not entitled to redeem. The way in which the argument has been put is this: it has been contended that as the Full Bench has held that a sale in contravention of Section 99 is not a nullity but an irregularity, then the sale must be taken to exist with all its consequences until it is in fact set aside and that the consequence of such sale was that the equity of redemption was purchased by the appellant and, therefore, no longer existed in the respondents so as to form the foundation of his present suit. It is contended that until the sale has been set aside the plaintiff has no right to sue and that the sale cannot be set aside as the suit is barred by the law of limitation.

11. The point, as I have said, is one which appears to me to be open to arguments; but I am not satisfied that the effect of the Full Bench decision to which we have referred is to narrow the previously existing rights of the mortgagor or to affect the hitherto established proposition of law, that the purchase of the equity of redemption constitutes the mortgagee a trustee for the mortgagor. We have been referred upon this point to the decisions in *Kamini Debi v. Ram Lochun Sircar* 5 B.L.R. 450 at p. 459, *Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Ltd.* 23 M. 377 : 10 M.L.J. 91 and *Martand Balkrishna Bhat v. Dhondo Damodar Kulkarni* 22 B. 624 .

12. I do not think that it is necessary that the plaintiff should, in order to obtain the relief which he claims, have the sale set aside. He is for the purposes of this suit, content to leave the property where it is, namely, vested in the defendant by the sale which is still subsisting. But as so vested and against it as property in the defendant's possession, he seeks to exercise another, and a distinct, right

which is consistent with the defendant's right of possession, namely, his the mortgagor's right to redeem. I refer to what was said in *Mayan Pathuti v. Pakuran* 22 M. 347 : 9 M.L.J. 98, where the learned Judges held that "notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale." I am of opinion, therefore, that the plaintiff has a subsisting right to redeem.

13. Then the learned pleader for the appellant contends, and I think rightly, that if the defendant is to be taken to be, since his purchase, a trustee for the plaintiff, then he is entitled to be reimbursed and to add to the mortgage-debt the amount which he has expended in the protection and preservation of the property. It appears that the defendant has been engaged amongst other things, in certain litigation in respect of which he claims to be reimbursed. It is quite clear, and indeed it has not been contested, that the appellant is entitled to recover whatever he has properly spent for the preservation and protection of the property though, of course, it is a question of fact to be determined what particular sum was properly spent for this purpose.

14. In so far, however, as the accounts are determined by the decree, both parties are desirous that they should be accepted and should not be re-opened. We order accordingly and direct that inquiry be made to ascertain what sums the mortgagee has, properly and as a prudent man, expended since the date of his purchase for the preservation and protection of the property in suit, either by litigation or in any other manner, excluding, however, the sums of money which he has spent as costs of partitioning the 8 annas share of the property purchased by him. The sums which on inquiry shall be found to be thus properly spent, the mortgagee is entitled to recover. These sums must be credited to him and added to the mortgage-debt.

15. Subject to the above order, the appeal is dismissed.

A.O.D. No. 41 of 1908.

16. This is a cross-appeal by the plaintiff. He complains of the finding of the learned Subordinate Judge as regards issue No. 10. The appeal has not been pressed. It is, therefore, dismissed.

17. Having regard to all the circumstances we direct that each party do bear his own costs of both these appeals.

Caspersz, J.

18. I concur.