
(1942) 07 CAL CK 0013
In the Calcutta High Court

Pashupati Nath Pal and Others

APPELLANT

Vs

Durjodhan Roy Chaudhury and Others

RESPONDENT

Date of Decision : 10-07-1942

Acts Referred:

Transfer of Property Act, 1882 — Section 76(b)

Citation : AIR 1943 Cal 160

Hon'ble Judges : Nasim Ali, J; Blank, J

Bench : Full Bench

Judgement

Nasim Ali, J.—This appeal arises out of a suit to recover arrears of rent in respect of a darpatni. The facts which are not in dispute in this appeal are these : Biswanath Tewari and Dharmadas Tewari were zemindars of lot Kankora in the district of Burdwan. They granted a putni of this lot to one Chandravati. The latter granted a darpatni of the said lot to one Taraprasanna Chongdar in 1876. The zemindars of 8 annas share of lot Eankora mortgaged their entire share in the zemindary to one Hazarimull in the year 1913. The zemindars of the remaining 8 annas share in the zemindary mortgaged their share to the same person in the year 1917. Hazarimull brought two mortgage suits to enforce these two mortgages in the year 1920. During the pendency of these two suits, Taraprasanna sold his darpatni right to defendants 1 to 6 on 10th May 1923. The final decrees in both the mortgage suits instituted by Hazarimull were made in the year 1925. Eight annas share of the zemindary was purchased by the mortgagee Hazarimull in the mortgage decree obtained on the basis of the first mortgage on 17th September 1926. Proceedings for setting aside the sale were started by the mortgagors. During the pendency of these proceedings and during the pendency of the proceedings in execution of the mortgage decree obtained by Hazarimull on the basis of the second mortgage, Hazarimull obtained two orders from the Court, which passed these decrees as well as which was executing these decrees, under Order 39, Rule 9, Civil P.C., putting him in possession of the 16 annas share of the zemindary as a mortgagee.

2. On 15th January 1927, Hazarimull got his name registered as a mortgagee in possession s under the provisions of Land Eegistration Act. On llth July 1927, Hazarimull instituted a suit to recover arrears of patni rent from Baisakh 1333 to Jaistha 1834 B. Section On 7th November 1927, the plaintiffs purchased the patni under this lot in execution of a money decree against the patnidar. The rent suit instituted by Hazarimull was decreed on 10th November 1927, and a lady named Bishnupriya purchased this patni on 10th April 1928. This sale was confirmed on 15th May 1928. The plaintiffs" purchase in execution of the money decree against the patnidar was confirmed on 16th May 1928, and they obtained possession of the patni on 15th October 1928. Bishnupriya took possessioa on 28th February 1929. On 18th April 1933, the plaintiffs brought the present suit for recovery of arrears of rent in respect of the darpatni purchased by defendants 1 to 8 from Taraprasanna for the years 1336 to 1339 B. Section on the basis of their purchase of the patni at the auction sale held on 7th Novem. ber 1927.

3. The defence of the darpatnidar defendants is that the plaintiffs have acquired no title to this patni on the basis of their purchase and that Bishnupriya had acquired title to the patni by her purchase on 10th April, 1928. Bishnupriya was not originally impleaded as a party in this suit. She was, however, subsequently added as a defendant in this suit by an order of this Court. Her defence in the suit is the same as that of defendants 1 to 8. The Courts below have accepted the defence of the defendants and have agreed in dismissing the suit. Hence this second appeal by the plaintiffs. Prom the facts stated above, it is clear that the plaintiffs" purchase of the patni was prior to that of Bishnupriya. The Courts below, however, have come to the conclusion that the plaintiffs have acquired no title to the patni on the basis of their purchase as Bishnupriya purchased the patni in execution of a rent decree and the plaintiffs purchased the patni in execution of a money decree. If the decree in execution of which Bishnupriya purchased the patni was a rent decree, then her title must prevail. The contention of Mr. Mukherjee on behalf of the appellant is that the decree in execution of which Bishnupriya purchased the patni was not a renf decree inasmuch as (1) Hazarimull, the de-cree-holder, was not the landlord of the patni at the time when the rent suit was instituted, and the decree in the rent suit wag passed and also at the time when the patn : was sold in execution of this decree: (2) that the claim in this rent suit included arrears due for a period during which Hazarimul was not the landlord of the patni; (8) that the plaintiffs who purchased the patni befor the decree were not impleaded as defendant in the rent suit brought by Hazarimull Hazarimull entered into possession of the 16 annas share of the zemindary on the basil of two orders made under Order 39, Rule 9, Civil P.C. This rule is in these terms:

Where land paying revenue to Government, or 1 tenure liable to sale, is the subject-matter of a suit if the party in possession of such land or tenure, neglects to pay the Government revenue, or the rendue to the proprietor of the tenure, as the case ma; be, and such land or tenure is consequently order to be sold, any other party to the suit claiming t have an interest in such land, or tenure may,

upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure; and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit" or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

4. The contention of Mr. Mukherjee is that the orders under this rule putting Hazarimu in possession of the mortgaged property were without jurisdiction, inasmuch as an order under this rule could be made after the final decrees in the two mortgage suits. This property mortgaged was the subject-matter of a suit within the meaning of this rule. A suit to enforce a simple mortgage is for realisation of the mortgage money by the sale of the mortgaged property. It does not terminate with the final decree as the final decree only directs the mortgaged property to be sold. Until and unless the security has been realised for satisfaction of the judgment-debt, it cannot be said that the suit has] come to an end : vide *Bepin Krishna Ray and Others Vs. Jogeshwar Ray and Others*, . The contention of Mr. Mukherjee, however, is that the words "the Court in its decree may award against the defaulter.in J E. 9 imply that in case of mortgage suits the power of the Court under Rule 9 of Order 39 is restricted up to the stage of the final decree and not beyond that stage.

5. I am unable to accept this contention. The object of the rule is to prevent the sale of the subject-matter of the suit for neglect of a party to the suit to pay revenue or rent during the pendency of the suit. If the contention of Mr. Mukherjee be accepted, the very object of the rule would be defeated because after the passing of the final mortgage decree the mortgagor by his neglect to pay the revenue or rent can get the mortgaged property sold. In suits relating to immovable property other than mortgage suits, the person who has been adjudicated for the final decree as the owner of the property is liable to pay the revenue or rent. If such owner does not pay the revenue or rent which he is liable to pay the question of preventing any mischief does not arise, but in suits for sale of the mortgaged property the liability of the mortgagor to pay the revenue or rent continues even after the final mortgage decree. Mr. Mukherjee also contended that even if an order under Order 39, Rule 9 can be made at a stage after the final decree it cannot be made after the sale. In other words, Mr. Mukherjee's contention is that it is the sale of the mortgaged property and not the confirmation of the sale which terminates the mortgage suit. The mortgage sale can be set aside even after the sale either under Rules 89 or 90 of Order 21, Civil P.C. By the sale, the security is no doubt tentatively realised but this realisation does not become effective till the sale has been confirmed. A mortgage suit, therefore, does not come to an end till the sale has been confirmed. I am, therefore, of opinion that the orders under Order 39, Rule 9, Civil P.C., were not without jurisdiction.

6. Again, if Mr. Mukherjee's contention that the security was realised and extinguished by the sale of the mortgaged property be correct then at the time when Hazarimull instituted the rent suit he was the zemindar of the eight annas share of the zemindary and was the mortgagee in possession of the remaining eight annas share. It cannot be disputed that as zemindar he was the landlord of the eight annas share of the property. Mr. Mukherjee's contention, however, was that although Hazarimull took, possession of the mortgaged properties on the basis of the orders under Order 39, Rule 9, he was not a landlord within the meaning of the Bengal Tenancy Act. A mortgagee in possession is entitled to collect the rents and profits of the mortgaged property : see Section 76 (b), T.P. Act. A party to the suit who is put in possession of the property which is the subject-matter of a suit under Order 89, Rule 9 is, by virtue of his right to possess the property also entitled to collect the rents and profits of the property in suit. If the tenant does not pay the rent amicably, it necessarily follows that he has got the right to realise rent by suit. When the mortgagee takes possession of the mortgaged property, either on the basis of any contract or under the order of a Court, the tenants of the mortgaged property are bound to pay rent to him alone and not to the mortgagor. The liability of the tenant to pay rent, therefore, is only to that person. He is, therefore, the tenant of that person. The person who becomes entitled to possess the mortgaged property either by contract or by operation of law becomes the landlord of the tenants of the mortgaged property. Hazarimull was, therefore, the landlord of the patni at the time when the rent suit was brought. It is not disputed in this case that if he was the landlord at the date of the suit he was also the landlord at the date of the decree and also at the date of the sale. I, therefore, overrule the first ground.

7. As regards the second ground, Hazarimull having taken possession of the mortgaged property, was entitled to recover also the arrears of rent which were payable to the mortgagors before he took possession of the mortgaged property and the darpatnidar was liable to pay these arrears to him. The second ground, therefore, also fails. As regards the third ground, it is an admitted fact in this case that although the plaintiffs purchased the patni only four days before the rent decree the sale was not confirmed till after the purchase of the patni by Bishnupriya. Rent was the first charge on the patni. Non-joinder of the plaintiffs, therefore, in the rent suit does not affect the character of the decree passed in the rent suit as a rent decree. For the reasons given above, I am of opinion that the decree in execution of which Bishnupriya purchased the patni was a rent decree and that the plaintiffs acquired no title to the patni on the basis of their purchase on 7th November 1927. The Courts below were, therefore, right in dismissing the suit. The appeal accordingly fails and is dismissed with costs. The cross-objections are not pressed and are therefore dismissed without costs.

Blank, J.

8. I agree.