

(1934) 04 CAL CK 0005
In the Calcutta High Court

Pranballav Saha and Another

APPELLANT

Vs

Bhagban Chandra Seal and Others

RESPONDENT

Date of Decision : 17-04-1934

Acts Referred:

Transfer of Property Act, 1882 — Section 60

Citation : AIR 1934 Cal 775 : 152 Ind. Cas. 429

Hon'ble Judges : MoNair, J;Mitter, J

Bench : Full Bench

Judgement

Mitter, J.—This appeal has been preferred by the plaintiffs u/s 15 of the Letters Patent from a decision of my learned brother Mukerji, J., and arises in an action commenced by the appellants for enforcing a mortgage security. It is not necessary to restate the facts as they have been stated with sufficient fulness by my learned brother Mukerji, J. The question of law which falls for determination in this appeal is whether defendant 8 who is a purchaser of a portion of the equity of redemption is entitled to redeem his property only when subsequent to his purchase, the plaintiffs without the knowledge, of the said purchase released from the mortgage some other of the mortgaged properties. The contention of the plaintiffs-appellants before us is that it is only when the mortgagee grants a partial release with the knowledge of change of ownership of a part or the whole of the mortgaged properties that a partial redemption is to be allowed and that where he does so without any such knowledge the transferee has no equities in his favour on which he can rely for claiming such partial redemption. The learned Judge points out that he has not been able to discover any authority bearing on the question, and he has come to the conclusion that where the transferee could never have the knowledge of release, as in the present case where a release took place after the transfer, partial redemption can be insisted on. In coming to this conclusion Mukerji, J., has relied on certain equitable grounds and it is best to reproduce what he has said in this connexion:

An innocent transferee of a part of the equity of redemption too has his rights

protected on equitable considerations. In my judgment, such a transferee is entitled to urge on equitable grounds that when he took the transfer there was one indivisible mortgage, and when after he acquired an interest in the equity of redemption, the integrity of the mortgage was broken by the mortgagee and the mortgagor behind his back, he is entitled to claim a partial redemption, the mortgagee himself being no longer competent to rely on the integrity of the mortgage.

2. In considering this question we must first turn to the legislative provision for partial redemption in the transfer of Property Act. This is contained in Section 60 of the Act as it stood before its amendment by the Transfer of Property Amendment Act of 1929, the suit having been commenced in 1928. Section 60 of far as is material ran as follows:

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage except where a mortgagee, or if there are more mortgagees than one all such mortgagees, has or have acquired in whole or in part the share of a mortgagor.

3. This Section would seem to suggest that a part of the mortgaged property is not to be redeemed except on the payment of the mortgage money, the only exception to the rule being the case of the mortgagee having himself acquired part of the mortgaged property. On a strict construction of this section it has been recently held by a Full Bench of the Madras High Court in the case of 1918 Mad. 1030 Peru Mal v. Raman 1918 Mad 1030, in which the judgment was delivered by Sir John Wallis, O. J., as he then was, that a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property. This view is clearly opposed to the view of this Court in the ease of 1 C. L. J. 337 Surjiram Marwari v. Brahamdeo Prasad (1905) 1 CLJ 337. The general rule deducible from the authorities of this Court is stated in Sir Rash Behari Ghose's classic book on the Law of Mortgages in the following words:

The general rule on the subject is that the rights of persons who have acquired an interest in the mortgaged estate since the making of the mortgage, of which the mortgagee has notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If therefore a mortgagee with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser. In other words a mortgagee cannot release a part of the mortgaged land, and then seek to enforce his entire claim upon another portion in which third parties have become to his knowledge interested as assignees of the equity of redemption!" See Ghose's Law of Mortgages, Edn. 5, p. 336.

4. This general rule is supported by the following decisions of the Calcutta High Court: 30 Cal. 755 Hari v. Veliat (1903) 30 Cal 755: 33 Cal. 613 Imam v. Baijnath (1906) .33 Cal 613: 6 C, L. J. 46 Hakimlal v. Ram Lal (1907) 6 CLJ 46 : 6 I. C. 842 Mir Eusuff v. Panchanan (1911) 15 CWN 800 : 17 I. C. 927 Dalip Narayan v. Chait Narain (1912) 17 IC 927. Although it is pointed out by Sir Dinshaw Mulla in his recent commentary on the Transfer of Property Act that the Calcutta decisions regarding the interpretation of Section 60 to the effect that the principle of the sections affects the case of a release by the mortgagee are erroneous we are bound to follow the course of decisions of this Court. The learned commentator in his note u/s 60 under the heading, "Release of a share by the mortgagee" says this:

Even prior to the amendment" it was recognized that the cases, which held that a release by the mortgagee of a share was equivalent to a purchase by the mortgagee of that share, were incorrect for the effect of the release is only to diminish the mortgagee's security and the rest of the property remains subject to the mortgage, for full amount.

5. Under the recent amendment in 1929 it is to be noticed that the insertion of the word "only" after the word "except" in the last paragraph of the section makes it clear that there can be proportionate abatement only where the mortgagee has acquired an interest in the equity of redemption. But the amendment does not govern the present case. The question however whether notice of the transfer of the equity of redemption is essential, has never been directly raised in this country though such notice is necessary both in the English as well as in the American law. In the case of 21 Ch. D. 685 Kettlewell v. Watson (1884) 21 Ch D 685, Fry, J., formulates the legal position thus:

The argument put forward was this, that there had been a release of the plaintiff's lien by their giving it up in certain cases. I can conceive that if a person who was entitled to a lien upon properties, which he knew to belong to A, B, C and D released the lien to A, he could not afterwards insist upon it as against B, C and D because he would without their privity and consent be increasing the burden on them. But it appears to me that in order to raise such an equity you must show that he knew that the estate which had originally been in one person, had got into the hands of various persons. No such evidence has been adduced in the present case:" 21 Ch. D. 685 Kettlewell v. Watson (1884) 21 Ch D 685. On appeal 26 C. H. D. 501.

6. Fisher in his law on Mortgages in para. 1522 states the law as indicated in the decision of Fry, L. J., in the following words:

If part of an estate be released from a lien, the release will prevent the lien from being enforced against any part of the property which at the time of the release had got into the hands of other persons, with the knowledge of the , owner of the lien.

7. The American law is stated in Jones on Mortgage, para. 723 as follows: The

mortgagee who has actual or constructive notice of the equity of such purchaser must regard it and therefore if he releases a part of the mortgaged debt he must abate a proportionate part of the mortgage debt as against such purchaser. The principle on which this rule is based is explained in one of the American cases: in 66 ASR. 87 *Brooks v. Benham* 66 ASR 87, cited in the decision of A. T. Mukerjee, J., in 5 C. W. N. 800 *Mir Eusuff v. Panchanan* (1911) 15 CWN 800 in the following words:

While the whole of the debt is secured by the "whole of the land each parcel of the land as between the different properties is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land; and if its owner should be compelled to redeem the mortgage he can resort to the others for a rateable contribution and for that purpose is entitled to the benefit of subrogation to the mortgage-title. To release any particular parcel from the mortgage incumbrance is to make, as respects that, any such subrogation impossible. The mortgagee therefore releases at his peril if he had notice of the conveyance out of which the equities in question arise: and if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the residue of that share in favour of the owners of the remaining parcels.

8. We are therefore of opinion that in the absence of any authority directly covering the question in issue we should be prepared to follow the English and American authorities on the point, and with great respect we differ in view of these authorities from the conclusion arrived at by our learned brother Mukerji, J., in this behalf. It remains to notice two cases to which reference was made by the learned advocate for the respondent. In the case of 30 Cal. 755 *Hari v. Veliat* (1903) 30 Cal 755 it was no doubt held that where the mortgagee released one of the mortgaged properties the mortgage should be treated as having been split up and the release should be held to have the same effect as if the mortgagee had himself bought the property released and the mortgaged debt should be apportioned between that property and the mortgaged property. In this case suit upon the mortgage was brought without making the purchaser of one of the mortgaged properties from the mortgagor which had been released by the mortgagee, a party to the suit; it was held" that the suit could not be dismissed on that ground as the property cannot strictly speaking be considered property comprised in the mortgage. The precise question now raised before us did not arise in that case. The next case is that of 1927 Cal. 195 *Muktakeshi v. Bamani*, 1927 Cal 195 decided on, 2nd February 1928 by B. B. Ghose and Panton, JJ. In this case the mortgagee after relinquishing his claim on a portion of the mortgaged property was held not entitled to throw the whole burden of the mortgaged debt on the remainder of the properties. What happened in this case was that the mortgagee did not desire to proceed against certain portion of the mortgaged properties which were purchased by her husband and her husband's brother at sales by which only the equity of redemption passed to them. The learned Judges followed the decision in 1 C. L. J. 337 *Surjiram Marwari v.*

Brahamdeo Prasad (1905) 1 CLJ 337 and refused to follow the Full Bench of the Madras High Court in 1918 Mad. 1030 Peru Mal v. Raman 1918 Mad 1030. In these two cases the precise question now before us did not arise for determination.

9. The result is that the judgment of my learned brother Mukherjee as well as of the Courts below must be set aside and the following decree will be made. There will be a preliminary decree for sale of all the mortgaged, properties except the property released. A decree is passed for the sum claimed which represents the principal amount of the mortgage with interest up to the date of the suit and interest at the bond rate on the principal amount from the date of the suit till the date fixed by the decree of the first Court as the period of grace, and thereafter at the rate of six per cent, per annum till the date of payment. If this sum is not paid within 3 months from this date the mortgaged properties as in the amended plaint would be sold. The plaintiff is entitled to his costs in all the Courts against defendant 8 and the costs of the First Court against the other defendants. The costs are to be added to the mortgage money.

MoNair, J.

10. I agree.