(1940) 03 PAT CK 0002

In the Patna High Court

Rameshwar Nath — APPELLANT

Vs

Naramdeshwar Prasad Narain Singh and Another — RESPONDENT

Date of Decision : 08-03-1940

Acts Referred:
Transfer of Property Act, 1882 — Section 76, 76(a)

Citation : AIR 1940 Patna 627

Hon'ble Judges : Wort, J;Manohar Lall, J

Bench : Full Bench

Judgement

Wort, J.—This is an appeal by the mortgagee defendant in an action for redemption. The only question that arises, there being no doubt as to the right of the plaintiffs to the return of the zarpeshgi deed, is that of accounting. The zarpeshgi dates back to the year 1872 and was for a sum of Rs. 8325. The rental of the property was estimated to be about 682. The mortgagee was to pay, according to the terms of the zarpeshgi Government revenue amounting to Rs. 120, and was to appropriate the balance Rs. 562, "besides the entire produce which he may have in excess of the profit in lieu of interest on the said peshgi money and remuneration for the thika;" I am quoting from the document itself (Ex. H).

2. Therefore until the mortgagor was prepared to pay the principal, subject to any question of account, the zarpeshgidar was entitled to remain in possession.

Now, in taking the account the learned Judge in the Court below has come to the conclusion that the narpeshgidar had settled certain bakasht lands and had realized a premium of Rs. 1299 for such settlement, but that he should have received an additional Rs. 1911 that is to say, instead of obtaining the Rs. 1299 he should have obtained Rs. 3210, and in taking the account of the monies due by the plaintiff to the defendant. The Judge has made this allowance of Rs. 3210. Incidentally I might state here that the learned Judge has allowed the sum of Rs. 1299 twice over. That of course will have to be eliminated from the account.

3. In addition to that the learned Judge has come to the conclusion that as regards the rent of these bakasht lands settled by the mortgagee in possession another Rs. 11 on the total area settled should have been obtained. The case of the mortgagor plaintiff was that the mortgagee should have obtained as rent something much in excess of this amount. The learned Judge has in the result come to the conclusion that the difference between the rental at which he ought to have settled the lands and that which he in fact has settled them at, is Rs. 11. Capitalized that by twenty the Judge has allowed Rs. 220 in the account; and in addition to that he has allowed Rs. 125 to the mortgagor for cess, which the mortgagor himself has paid between the years 1932 to 1935.

4. I propose to deal with the sum of Rs. 220 in the first instance. I should have thought that the maxim de minimis non curat lex applies to the case although the learned advocate appearing on behalf of the respondent contends that he can support the judgment by showing that the evidence would substantiate the claim he made. That argument, in my judgment, cannot be accepted. It merely amounts to this that the decision of the learned Judge in the Court below was wrong, and how a judgment can be supported by contending that it is wrong I fail to see. In my judgment, this amount is so small, that it should not have been allowed in the account. It will, therefore, be struck out accordingly. As regards Rupees 1299, the question depends upon the construction of the document itself. The pas-sage is:

appropriate year after year the balance amounting to Rs. 562 besides the entire produce which he may have in excess as profit in lieu of interest.

In my judgment the argument of Dr. Mitter, that the premium which he obtained by the settlement of these bakasht lands was the produce of the land, cannot be supported. It is quite clear that the meaning of the word ''produce'' in the deed itself is that which would ordinarily be placed upon it, that is, the produce of cultivation. It is therefore quite clear that the mortgagor would be entitled to have Rs. 1299 set off in the account against him.

6. The Rs. 1911 is somewhat more difficult. The argument put forward by Dr. Mitter was that the settlement by him (the mortgagee) would enure only until such a time as he went out of possession. As I understood the argument, the mortgagor when he came into possession would be entitled to eject the persons that the mortgagee had settled upon the lands. To put the argument in another form, the mortgagor should minimise his damage that is, if he could turn these tenants out (although the rents and the premium obtained for the settlement were both low), he did not in fact and need not suffer any damage, because ejecting the tenants he could re-settle the lands with other tenants. That argument was met by the deoision of Adami and Kulwant Sahay JJ. in Bhairo Nath v. Shanke Pahan AIR (1926) Pat 605 There, Kulwant Sahay J., in delivering the judgment of the Court distinguished bakasht land by saying that such land is nothing more than raiyati land which had as a result of surrender or abandonment come into the possession of the landlord; and then came to the

following conclusion:

Unless there is a provision in a zarpeshgi lease, restricting the power of the zarpeshgidar as regards the settlement of raiyati lands, the latter is, in the ordinary course of management, entitled to settle raiyati lands with tenants, and such settlement will be binding on the proprietor.

7. I think it may be pointed out, as has been pointed out on many occasions, that the right of the tenant cannot be determined by a contract between the mortgagor and the mortgagee, but is to be determined by the rule of law. If as in this case, (although there is no decision on the point) these tenants are occupancy raiyats, their right to remain on the land will continue in spite of the mortgagor going into possession, and it must be held in my judgment that the tenants'' possession or right to possession did not come to an end at the time the mortgagor came back into possession.

8. In my judgment, therefore, the point as regards Rs. 1911 apart from the merits of the case, which has not been argued, is unsustainable, and the mortgagor was entitled, to have the Rs. 1911 taken into account as between himself and the defendant. The question that remains is the question of cess. That in my judgment is determined by the provision of Section 76, T.P. Act:

If the mortgagee fail to perform any of the duties imposed upon him by this Section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss (if any) occasioned by such failure.

The first Clause (a) of Section 76 provides:

He must manage the property as a person of ordinary prudence would manage it if it were his own.

9. The principle of law there laid down by Section 76 applies in my judgment both to the case of Rs. 1911 and to the question of cess, and as regards the question of cess the matter is concluded by the decision in Abid Husain Khan v. Kaniz Fatima AIR (1924) PC 102. In that case (as in this case) there was a usufructuary mortgage of May 1869, prior to the passing of the Transfer of Property Act in 1882, and their Lordships of the Judicial Committee of the Privy Council held that

as the mortgages did not provide otherwise the mortgagee was bound to pay the enhanced revenue and cesses as part of his duty to manage the property with prudence, and was not entitled to recover the payments upon redemption.

Clause (c) of Section 76, T.P. Act, reads:

He must in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof.

10. Although Section 76 does not apply in terms to the mortgage in this case nor

did it apply in terms to that in Abid Husain Khan v. Kaniz Fatima AIR (1924) PC 102 yet their Lordships applied the principle there laid down and made this observation:

In British India a mortgagee in possession of immovable property under a mortgage made before the Transfer of Property Act of 1882 came into force was under the ordinary law then in force bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property.

Their Lordships held, that cess was one of these charges of public nature payable by the mortgagee.

11. In the result the mortgagor will be entitled, in the taking of the account, to set-off Rs. 1299, Rs. 1911, Rs. 125 and Rs. 66 for cutting down trees with regard to which I have heard no argument. The decree is modified to the extent of striking out Rs. 220 and Rs. 1299 which have been charged twice over. The appellant is entitled to proportionate costs of this appeal. In working out this proportion Rs. 1299 must not be taken into account because this amount could have been corrected by an application to the Judge in the Court below.

Manohar Lall, J.

12. I agree.

