(1923) 04 PAT CK 0010

In the Patna High Court

Sarjug Prasad Missir and Others		APPELLANT
	Vs	
Harischandra Chaudhuri and Others		RESPONDENT

Date of Decision : 18-04-1923

Acts Referred:

Citation : AIR 1924 Patna 530

Hon'ble Judges : Kulwant Sahay, J;Das, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—This is an appeal by the plaintiffs against the decree of the District Judge of Darbhanga, dated the 28th February 1921, whereby he declared that the plaintiffs were entitled to redeem the mortgage of the defendant first party on payment of the full amount of the decree passed in their favour on the basis of the mortgage of the 15th August 1884. The facts giving rise to the present litigation are as follows: One Sadiq Ali Khan had 5 annas 17 garidas 2 kawries share in Mauza Athar, Parganna Ahilwar, Tauzi No. 335. On the 26th of July 1877 Sadiq Ali Khan executed a mortgage in favour of one Balbhadar Prashad Sahu and Matuk Lal Sahu for a sum of Rs, 49,970 mortgaging 4 annas share of the said Mauza Athar and other properties. A suit was brought on the basis of the said mortgage and an ex parte decree was passed on the 19th of September 1883. In execution of this decree it appears that Sir Lachhmeshar Singh, the Maharaja of Darbhanga, purchased the 4 annas of Mauza Athar. The exact date of this purchase does not appear from any document on the record.

2. On the 15th of August 1884 Sadiq Ali Khan executed another mortgage in favour of Awadh Narayan Chaudhuri, father of the defendants Nos. 1 and 2, for a sum of Rs. 2.000 and amongst other properties he mortgaged his entire share of 5 annas 17 gandas 2 kawries of Mouza Athar.

3. On the 21st March 1885 Sadiq Ali Khan executed a third mortgage in favour of Lalji Lal Sahu for a sum of Rs. 90,000 whereby he mortgaged 1 anna 17 gandas 2 kawries of Mauza Athar and a large number of other properties. On the 14th December 1885 a suit was brought to enforce this third mortgage and a decree

was passed thereon on the 15th of February 1886 for a sum of Rs. 1,04,250.

4. On the 12th September 1898 the defendants Nos. 1 and 2, the sons of Awadh Narayan Chaudhuri, who was the mortgagee under the bond of the 15th of August 1884 brought Suit No. 77 of 1898 to enforce the above mortgage. In this suit Lalji Lal was not made a party, but the Maharaja of Darbhanga was made a party on the ground of his purchase of 4 annas share of Mauza Athar in execution of the decree of the first mortgagee. The defendants Nos. 1 and 2, that is, the plaintiffs to the Suit No. 77 of 1898, released the 4 annas share of Mauza Athar on the objection of the Maharaja of Darbhanga and they obtained an err parte decree for the sale of 1 anna 17 gandas 2 kawries of Athar. This decree was pissed on the 10th of May 1899 but it was subsequently set aside. A fresh decree for sale of 1 anna 17 gandas 2 kawries of Athar was passed in favour of the defendants Nos. 1 and 2 on the 2nd August 1.905. There was an appeal to the Calcutta High Court against this decree, but the appeal was dismissed on the 1st of April 1908.

5. Lalji Lal took out several executions of his decree of the 15th February 1886. On the 16th of May 1892 a petition was filed on behalf of the defendants Nos. 1 and in ona of the execution cases of Lalji Lal which is Exhibit 7 in this case. The defendants Nos. 1 and 2 in this petition stated that amongst other properties. 1 anna 17 gandas 10 kawries share in Mauza Athar had been put up for sale in the execution case of Lalji Lal v. Sadiq Ali Khan,, judgment-debtor. They submitted that the said share was first mortgaged to Lalji Lal and thereafter to them under a bond dated the 15th August 1884 without thoir having any knowledge of the mortgage of Lalji Lal. The defendants Nos. 1 and 2 therefore, prayed that at first other properties might be advertised for sale and that if the sale proceeds thereof proved insufficient to pay off the decretal amount, then the I anna 17 gandas 10 kawries of Athar might be sold. Along with this petition, they produced their own bond of 1884. Now, in this petition the defendants Nos. 1 and 2 wrongly stated that the mortgage of Lalji Lal was prior to their own mortgage. As a matter oc fact, their mortgage was dated the 15th of August 18S4 and Lalji Lal''s mortgage was dated the 2 st of March 1885. They filed this petition in the execution case of Lilji Lal and if they had taken the trouble to look into the records of that execution case, they would at once have come to know that the mortgage of Lalji Lal was subsequent IO their own mortgage. However, it appears that at the time this petition of the 16th of May 1892 was filed, there was no execution case of Lilji Lal pending, it having been struck off on a prior date, and the order made by the Court upon this petition was: "The case referred to in this petition has already been struck off. Ordered: file this petition with the record and return the bond."

6. The present plaintiff''s and one Babu Ram Prashad had a money decree dated the 21st of February 1895 against Lilji Lal and in execution of this decree the plaintiffs and Ram Prashad attached the decree of Lalji Lal against Sadiq Ali Khan dated the 15th February 1886 and on the 21st of April 1904 they purchased the

said decree in execution of there own decree. On the 2nd April 1904 the plaintiffs and Ram Prashad, as purchasers of the decree of the 15th of February 1886 applied for execution of that decree and for sale of 1 anna 17 gandas 7 kawries of Athar and other properties. The sale was held on the 15th February 1907 and the plaintiff became the purchasers of toe said I anna 17 gandas 2 kawries of Athar. By a private partition between the plaintiffs and Run Prashad, the whole of this shape has been allotted to the plaintiffs.

7. The defendant No. 1 and 2 took out execution of their decree of the 2nd of August 1905 and attempted to sell the 1 anna 17 gandas 2 kawries of Athai which had been purchased by the plaintiffs and t is led to the institution of the present suit, wherein the plaintiffs prayed for a declaration that they were not bound by the bond of the 15th of August 1884 and the decree of 2nd August 1905 obtained by the defendants Nos. 1 and 2; and that the said bond and decree were null and void as against them. They prayer in the alternative that if the Court found the plaintiffs to be liable under the bond of the 15th August 1884 it might be feeld that the plaintiffs were entitled to redeem the said mortgage as against the defendants and they prayed that, having regard to the fact that the defendants Nos. 1 and 2 had released 4 annas share of Mauza Athar from their mortgage lien in favour of the Maharaja of Darbhanga, the plaintiffs were entitled to redeem the 1 anna 17 gandas 2 kawries share of the village on payment of the proportionate amount of the mortgage-money.

8. The defendants Nos. 1 and 2 filed a written statement alleging inter alia that they had no notice of the mortgage of the 21st of March 1885 in favour of Lalji Lal; that as regards the 4 annas share of Athar released by them in favour of the Maharaja of Darbhanga, the fact was that the said Maharaja was the first mortgagee in respect of the said 4 annas share; and that the said Maharaja purchased the said 4 annas share in execution of his decree upon the mortgage and, therefore, they had no right to sell the said 4 annas share in execution of their own decree. They further alleged that as they were prior mortgagees, the plaintiffs had only the right to redeem.

9. The learned District Judge has held that the defendants had no knowledge of the mortgage-bond of the 2lst March 1885 in favour of Lalji Lal at the time they instituted their suit on the basis of their bond of the 15th of August 1884 and that, therefore, the decree en the basis of the latter bond was binding upon the plaintiffs and that it was a valid decree He further held that the effect of the defendants not making plaintiffs parties in their suit was that the plaintiffs'' right of redemption is still in existence. He also held that the plaintiffs could (sic) only on payment of the full (sic) sum now due under the decree of the defendants Nos. 1 and 2, and he has accordingly made a decree to that effect.

10. The plaintiffs prefer this appeal and the substantial questions raised by the learned Counsel on their behalf are that the learned District Judge was wrong in holding that the plaintiffs were bound to pay the entire amount due under the decree of the defendants Nos. 1 and 2 in order to redeem the 1 anna 17 gandas

2 kawries share of Athar purchased by them; and that he was further wrong in holding that the defendants Nos. 1 and 2 had no knowledge of the mortgage of Lalji Lal. In my opinion the grounds taken by the learned Counsel are well founded and ought to prevail.

11. As regards the knowledge of the defendants Nos. 1 and 2, the plaintiffs produced a copy of the petition filed on behalf of the defendants Nos. 1 and 2 in the execution case of Lalji Lal on the I6tb of May 1892 referred to above which has been marked as Ext. 7 in this case. The learned Judge has held that the petition has not been properly proved and the reasons given by him are that no proper attempt was made to get the original thereof, that it has not been shown that the petition was a bona fide petition, and that the petition makes an incorrect statement of fact inasmuch as it alleges that the mortgage of the defendants Nos. 1 and 2 was subsequent to that of Lalji Lal''s mortgage. Now the plaintiffs filed the certified copy before the District Judge and asked him to send for the original thereof from the record-room. The petition did not give the number of the case in which it was filed and the plaintiffs, who were not parties to the execution case in which it was filed, were not in a position to give further details as regards the record in which it was to be found. They did all they could, namely, to produce the certified copy and to ask the Court to sind for the original thereof. The learned Judge made a requisition for the original but the requisition was not complied with on the ground that the date of disposal of the case was not given in the copy of the petition and that, on looking into the index of the year 1892, no number of the execution case in which it was filed, was to be found. For this the plaintiffs cannot be found fault with. They were not in a position to give further details than what was available to them from the certified copy and the evidence of the plaintiffs'' witnesses "No, 1, Booni Lal Das, and No. 4, Ram Ashray Prashad, is, in my opinion, sufficient to prove that the original could not be traced and that the copy produced was a copy of the petition filed on behalf of the defendants Nos. I and 2. No doubt the petition made a mis-statement of fact inasmuch as it stated that the bond of the defendants Nos. 1 and 2 was subsequent in date to that of Lalji Lal, but that only shows want of due care on the part of the defendants'' advisers who could easily have found out, on a reference to the execution case, that Lalji Lal''s bond was subsequent to the defendant''s bond. This fact cannot go to throw any doubt as regards the bona fides of the petition. In fact, there does not appear any reason to hold that the petition was not a bona fide one. There were a large number of other properties to be sold in execution of Lalji Lal''s decree and the prayer made was a proper and natural one, viz., that the property mortgaged to the defendants might be sold after the sale of other properties. No one else was interested in making a false statement and filing an application to that effect. It must, therefore, be considered to be a bona fide application filed on behalf of the defendants and it must be held that they had knowledge of a mortgage in favour of Lalji Lal, but they did not pursue their enquiry far enough as they ought to have done. Under the circumstances, the conclusion is irresistible that they had

notice of Lalji Lal''s mortgage before they instituted their suit on 12th September 1898.

12. But even assuming that the defendants had no notice of Lalji Lal''s mortgage, I do not think that their position is in any way altered. The fact remains that Lalji Lal was a subsequent mortgagee and he was not impleaded as a party in the suit brought by the defendants to enforce their prior mortgage. The result was that the decree obtained by the defendants on the basis of their mortgage was not binding upon Lalji Lal, and the plaintiffs, who now stand in the shoes of Lalji Lal, have still the right of redemption left in them.

13. The next question which arises for determination is on what terms are the plaintiffs entitled to redeem. This raises the question as to whether the defendants Nos. 1 and 2 were justified in releasing the 4 annas share of Athar in favour of the Maharaja of Darbhanga in their Suit No. 77 of 1898. Now the position is, that there'' wis a first mortgage of 4 annas of Mouza Athar in the year 1877 in favour of Balbhadar Sahu and others. There was a second mortgage of the entire 5 annas 17 gawlai 2 kawries of Athar in the year 1884, in favour of the ancestors oft the defendants Nos. 1 and 2. Then there was a third mortgage of 1 anna 17 gandas 2 kawries share of Mouza Athar in favour of Lalji Lal, the predecessor in interest of the plaintiffs. The first mortgagee, obtained his decree on the 19th September 1883. The second mortgigeej obtained his decree on the 2nd oft August 1905 without impleading the third mortgagee and the third mortgagee obtained his decree on the 15th of February 1886. There is no evidence to show that at the time of the defendants Nos. 1 and 2''s mortgage the 4 annas share of Mouza Athar had already been sold and put chased by the Maharaja of Darbhanga in execution of the decree under the first mortgage. All that we find is a statement in the judgment of the High Court of Calcutta passed on the 1st April 1908 in the appeal against the decree dated the 2nd August 1905 to the effect that the name of the Maharaja of Darbhanga was subsequently omitted from the record as it was found that he had been a purchaser of the 4 annas share of mortgaged property in favour of Awadh Narayan. This is no evidence, as against the plaintiffs of the facts that 4 annas share had already been purchased by the Maharaja of Darbhanga before the second mortgage of the defendants. As the plaintiffs were not made parties to the suit of the defendants, as they ought to have been, the statement in the judgment of the High Court referred to above cannot be used as evidence against them. As it has not been shown as against the plaintiffs that the defendants were justified in law in releasing the 4 annas share of Athar, it must be held that the plaintiffs are entitled to call upon the defendants to show in their ptesence that the release was a legal and valid one. All that we have gc t on the record is that at the time of the second mortgage of the defendants, a decree had already been passed on the basis of the first mortgage, but that would not extinguish the right of the mortgagor. As has been held by the Full Bench of the Calcutta High Court in the case of Bibijan Bibi v. Sachi Bewath [1904] 31 Cal. 864, and by this Court in the case of Muhammad Musa v. Babu Singh 1922 Pat.

92, the equity of redemption in fat extinguished by merely passing of the decree in a mortgage suit. The equity of redemption subsists until the sale is held and the sale proceeds are distributed. Therefore, in the absence of any evidence to show that the 4 annas share of Mouza Athar could not be sold by the defendants in execution of their mortgage decree, it must be held that the defendants having released a portion of the mortgaged property [from their mortgage lien, they are bound to apportion the mortgage debt upon the remaining portion which is now in the hands of the plaintiffs. They cannot by releasing a portion of the mortgaged property, throw the entire burden of the mortgage-debt on the remaining portion so as to affect third parties. That the defendants Nos. 1 and 2 were not in possession of all the facts of the first mortgage and were not justified in releasing the 4 annas, is evident from the fact that even in their written statement in the present suit they stated that the first mortgage was in favour of the Maharaja of Darbhanga whereas it was in favour of one Balbhadar Prashad Sahu. It must, therefore, follow that the plaintiffs are entitled to redeem 1 anna 17 gandas 2 kawries share of Mouza Athar on payment of the mortgage-money, principal with interest, at the rate stipulated in the mortgage-bond from the date of the mortgage upto the date of redemption which can be legitimately apportioned upon the 1 anna 17 gandas Zkawries share purchased by them The result is, that this appeal is allowed and it is declared that the plaintiffs are entitled to redeem 1 anna 17 gandas 2 kawries share of Mouza Athar on payment of the amount of principal and interest from the date of the bond upto the date of redemption at the rate stipulated in the bond proportionate to the 1 anna 17 gandas 2 kawries share of Mouza Athar. In other words, the amount which the plaintiffs are bound to pay in order to redeem 1 anna 17 gandas 2 kawries of Athar will bear the same proportion to the entire amount principal with interest at the bond rate upto the date of payment as 1 anna 17 gandas 2 kawries bears to 5 annas 17 gandas 2 kawries. The decree of the lower Court will be varied accordingly. The plaintiffs shall get six mouths from this date within which they should pay the sum found due, and if the plaintiffs fail to redeem within the said period, the defendants Nos. 1 and 2 will be entitled to sell the 1 anna 17 gandas 2 kawries share of the Athar free of the lien of the plaintiffs. The plaintiffs-appellants are entitled to the costs of the appeal.

Das, J.

14. I agree.

