

(1920) 08 CAL CK 0019
In the Calcutta High Court

Sheikh Kalu Sharif and Others

APPELLANT

Vs

Abhoy Charan Karmokar

RESPONDENT

Date of Decision : 11-08-1920

Acts Referred:

Citation : 62 Ind. Cas. 445

Hon'ble Judges : Acutosh Mookerjee, Acting C.J.; Ernest Fletcher, J

Bench : Division Bench

Judgement

Mookerjee, Acting C.J.

1. This is an appeal under Clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for recovery of possession of land upon declaration of title, The subject-matter of the litigation is an occupancy holding which belonged to one Salimuddi Sharip. the plaintiff purchased it in 1910 in execution of a decree, and the sale was made expressly subject to a mortgage in favour of one Mendu Khan. Mendu Khan subsequently sued to enforce his security; but in that suit the original mortgagor alone was joined as a party; the plaintiff, for some unexplained reason, was not joined as a defendant. A. decree was obtained in due course by the mortgagee and at the execution sale, which followed, the mortgagee became the purchaser. Subsequently he transferred the property to the third defendant, from whom the plaintiff now seeks to recover possession.

2. The Court of first instance held that the plaintiff was entitled to a decree for possession without redeeming the purchaser at the mortgage sale. Upon appeal, the District Judge reversed that decision and held that although the title of the plaintiff as the holder of the equity of redemption might be declared, his claim for possession must be rejected as he had not offered to redeem the purchaser at the mortgage-sale. On appeal to this Court Mr. Justice Walmsley has reversed the decision of the District Judge and has restored the decree of the Court of first instance on the authority of the decisions in the cases of Grish Chunder Mondul v. Iswar Chunder Rai 4 C.W.N. 452 and Habibullah v. Jugdeo Singh 6 C.L.J. 609. We are of opinion that this decree cannot be supported.

3. On the facts stated, it is plain that the plaintiff is the purchaser of the equity of redemption while the contesting defendant is the purchaser at the mortgage-sale. The plaintiff, as holder of the equity of redemption, is not entitled to recover possession, after the mortgage sale has taken place, The fact that he was left out of the mortgage suit does not nullify the decree in that litigation. The true result is, as was pointed out, upon a review of the earlier decisions, in *Jugdeo Singh v. Habibullah* 6 C.L.J. 612 : 12 C.W.N. 107 that the omission to make the plaintiff a party to the mortgage-suit leaves unaffected his right to redeem [of. *Brojonath Koondco Chowdry V. Khelut Chunder Ghose* 14 M.I.A. 144 : 8 B.L.R. 104 (P.C.) : 16 W.R. 33 (P.C.) : 2 Suth. P.C.J. 480 : 2 Sar. P.C.J. 711 : 20 E.R. 740, *Umes Chunder Sircar v. Zahur tatima* 18 C. 164 : 17 I.A. 201 : 5 Sar. P.C.J. 507 : 9 Ind. Dec. (N.S.) 110; *Gobind Lal Roy v. Ram anam Misser* 21 C. 70 : 20 I.A. 165 : 16 Ind. Jur. 536 : 6 Sar. P.C.J. 356 : 10 Ind. Dec. (N.S.) 679; the *Hnyin v. Maun Mya Su* 5 Ind. Cas. 151 : 37 C. 239 : 14 C.W.N. 214 : 11 C.L.J. 166 : 3 Bur. L.T. 27 : 12 Bom. L.R. 234 : 20 M.L.J. 153 : 37 I.A. 19 (P.C.). It is not necessary for our present purpose to consider whether the mortgagee can still sue the plaintiff on his mortgage [of. *Debendra Narain Roy v. Ramtaran Banerjes* 30 C. 599 : 7 C.W.N. 766 (F.B.); *Mulla Veetil v. Achuthan Nair* 9 Ind. Cas. 513 : 21 M.L.J. 213 : 9 M.L.T. 431 : (1911) 1 M.W.N. 165 . It is abundantly clear that he need not sue again on his mortgage *Ganga Das Bhattar v. Jogendra Nath Mitra* 5 C.L.J. 315 : 11 C.W.N. 403 and is not bound to deliver up possession to the plaintiff till he has been redcemed by the latter on the footing of the mortgage decree. This view is supported by the decisions in *Bar Pershad Lal v. Dalmirdan Singh* 32 C. 891 : 9 C.W.N. 728 : 1 C.L.J. 371; *Protap Chandra Mandal v. Ishan Chandra Chowdhury* 4 C.W.N. 266 and *Rebati Mohan Das v. "Nadiabashi De* 44 Ind. Cas. 52 : 22 C.W.N. 543 : 28 C.L.J. 256. The cases of *Grish Chunler Mondul v. Iswar Chunder Roi* 4 C.W.N. 452 and *Habibullah v. Jugdeo Singh* 6 C.L.J. 609 may perhaps be difficult to reconcile with those just mentioned, but their correctness is open to doubt.

4. The plaintiff respondent has at this stage offered to redeem the defendant but for this, we would have directed that the decree should declare his right to redeem and disallow his claim for recovery of possession.

5. The result is that this appeal is allowed, the decree made by Mr. Justice Wamlsley set aside, and the case remitted to the District Judge so that a decree may be made in favour of the plaintiff as if this were framed as a suit for redemption. An account will betaken by the District Judge of the amount due on the mortgage decree, including interest thereon up to the date when the mortgagee purchaser was placed in possession by the Court, The interest due thereafter will be set off against the profits received from the land by the mortgagee purchaser. *Ganga Das Bhattar v. Jogendra Nath Mitra* 5 C.L.J. 315 : 11 C.W.N. 403. The plaintiff must pay the contesting defendants their costs in all the Courts, which will be added to the sum due under the mortgage decree. If the aggregate sum so calculated is deposited by the plaintiff in Court to the credit of the contesting defendants, within six months from the date when the

decree is drawn up by the District Judge pursuant to this judgment, the plaintiff will recover possession upon redemption. If the plaintiff fails to make the deposit as directed, the suit will stand dismissed with costs in all the Courts.

Fletcher, J.

6. I agree.