(1944) 10 PAT CK 0007

In the Patna High Court

Case No : Appeal No. 405 of 1943

Sheikh Rahmat Ali and another — APPELLANT

Vs

Hakim Abdul Kabir and others — RESPONDENT

Date of Decision : 04-10-1944

Acts Referred:

Citation : (1944) 10 PAT CK 0007

Judgement

Imam, J.—The appellants were the mortgagees of the properly in suit. They filed a mortgage suit for the realisation of Rs. 1200 on the basis of the mortgage bond. The Courts below dismissed the suit. The mortgage was of 1930 and the due date for re-payment was 1339 Fasli. The suit was tiled beyond time which prevented the plaintiffs from obtaining a personal decree against the mortgagor. Sometime in 1934 the mortgagor obtained a loan of Rs. 1000 from the Government under the Natural Calamities Act (Bihar and Orissa Act 1 of 1934). It appears that in 1935 there were execution proceedings arising out of a money suit and at the sale in 1935 defendant 2 Babu Satnarain Agarwal purchased the property in suit. The failure of the mortgagor to pay up the loan to the Government resulted in a certificate proceedings under the Bihar and Orissa Public Demands Recovery Act, (4 of 1914). It was found in the course of those proceedings that defendant 2 Babu Satnarain Agarwal was in possession of the property in suit. He was accordingly joined as a certificate debtor in the proceedings under the Public Demands Recovery Act. There was a certificate sale on 25th January 1941, of the property in suit as a result of those proceedings. Defendant 3 purchased the property on behalf of defendants 4 to 6. The mortgagees brought their mortgage suit in 1941. Both the Courts below took the view that the plaintiffs'' suit must be dismissed having regard to the provisions of S. 8, Natural Calamities Act (Bihar and Orissa Act 1 of 1934). The lower appellate Court while satisfied that it might be very inequitable for the mortgagees to be deprived of their right felt that it was bound to follow the law as stated in the Bihar and Orissa Act 1 of 1934. He gives the following finding:

Then when the loan was advanced the mortgagee had a further right to institute a suit for recovery of his money as practically the mortgage security had been destroyed by the provision of S. 8 of Act 1 of 1934.

It is necessary therefore to state what S. 8 of Bihar and Orissa Act of 1934 provides-It says :

(1) Every loan granted under this Act together with the interest and the prescribed charges shall be the first charge on any building erected or repaired with the aid of such loan and on any interest held by the borrower in the land on which such building is erected, or on which such repaired building stands, and such loan together with the interest and the prescribed charges shall, when it becomes repayable, be recoverable by the Collector:

(a) From the borrower - as if it were an arrear of land revenue due by him;

(b) from his surety (if any) as if it were an arrear of land revenue due by him;

(c) out of any building erected or repaired with the aid of such loan and any interest held by the borrower in the land on which such building is erected or on which such repaired building stands-according to the procedure for the realization of land revenue by the sale of immovable property other than the land on which that revenue is due;

(d) out of the property comprised in the collateral security (if any) according to the procedure for the realization of land revenue by the sale of immovable property, other than the land on which that revenue is due.

(2) If an affected owner to whom a loan has been granted under this Act transfers to any person any building erected or repaired with the aid of such loan or any interest in the land on which such building is erected, or on which such repaired building stands, the loan or any portion thereof together with the interest and the prescribed charges due from such affected owner may, in addition to any remedy available against such owner, be recoverable from the transferee as if it were a public demand payable by such transferee to the Collector." The words

every loan granted under this Act together with interest and the prescribed charges shall be the first charge on any building erected or repaired with the aid of such loan,

are important from the point of view taken by the Courts below and the submissions made on behalf of the respondents in this Court. The argument seems to have been that as the loan was the first charge on the property in suit and the property had been sold for the realisation of the dues to the Government at the instance of the Collector the previous mortgage was thus extinguished and the purchaser at the certificate sale acquired a title free from any encumbrance. I have thought it worth while to quote in full the entire provisions of S. 8 of Act 1 of 1934. It will be noticed that this section does not purport to annul in any way a previous mortgage. All that it purports to provide, however, is that the loan of the Government shall be the first charge on any building erected or repaired with the aid of such loan, that is to say, at its best, such a loan shall have priority over any other loan which may have encumbered the property previously. The words of the section do not convey to me the meaning that any previous encumbrance on the property is annulled. Section 8 then provides for the procedure by which the Collector may recover the loan as against the borrower Defendants 3 to 6 were the transferees of the property in suit by the certificate sale and defendant 2 was a transferee by the execution sale in the money suit of 1935. Sub-clause (2) of S. S provides for the procedure which the Collector may follow as against a transferee. The words

the loan or any portion thereof together with the interest and the prescribed charges due from such affected owner may in addition to any remedy available against such owner, be recoverable from the transferee as if it were a public demand payable by such transferee to the Collector

are important. That is to say, the Collector may proceed against the transferee to recover the amount as if it were a public demand payable by such transferee in addition to any remedy which was available to him against the previous owner. The Collector in this case proceeded to make defendant 2 a certificate debtor under the provisions of the Bihar and Orissa Public Demands Recovery Act. He therefore proceeded to realise from the transferee the amount due as if it were a public demand payable by such transferee. The proceedings were legally taken under the Bihar and Orissa Public Demands Recovery Act. In this connation S. 26, Bihar and Orissa Public Demands Recovery Act, has an important bearing: This section states that

where the property is sold in execution of a certificate there shall vest in the purchaser merely the right, title and interest of the certificate debtor at the time of the sale even though the property itself be specified.

Therefore defendants 3 to 6 merely acquired the right, title and interest of the certificate-debtor at the time of the sale. The loan of the Government having been satisfied by the sale it could not be said that the loan continued to be a first charge on the property sold. I am satisfied therefore that nothing in the provisions of the Bihar and Orissa Act, 1 of 1934, stands in the way of the mortgagee and that the suit was improperly dismissed by the Courts below. The effect of S. 8 was not to destroy the mortgage of the plaintiffs. In my opinion the effect of S. 8 was merely to postpone it until the dues of the Government were realised. The dues having been realised by the sale under the Bihar and Orissa Public Demands Recovery Act, all that the purchaser at that time acquired was the right, title and interest of the certificate debtor which was in this case the right of redemption. I would accordingly allow the appeal, set aside the judgment and decree of the Courts below with costs. Let the usual preliminary decree be drawn up in this Court. The period of grace will be six months after which interest will run at the rate of six per cent per annum.

Fazl Ali, C.J.

2. The position in law in this case seems to me to be a perfectly simple one. The respondents, namely, defendants 3 to 6 under S. 26, Public Demands Recovery Act, merely acquired the right, title and interest of the certificate debtor namely defendants 1 and 2. Defendant 1 is the mortgagor and defendant 2 was a purchaser in execution of a money decree and therefore he purchased the property in suit subject to mortgage. If defendants 1 and 2 were liable to pay up the mortgage dues, defendants 3 to 6 who acquired their right, title and interest, must be similarly held to be liable to pay up the mortgage dues. As my learned brother has very rightly pointed out, S. 8 of Act 1 of 1934 does not destroy the plaintiffs'' mortgage. There is nothing in the section to show that any previous mortgage shall stand annulled. The only provisions upon which reliance was placed were firstly section 8 (1) which provides that the loan granted under the Act together with the interest and the prescribed charges shall be the first charge on any building erected or repaired with the aid of such loan and on any interest held by the borrower in the land; and, S. 8 (1) (a) which states that the loan with interest shall be recovered by the Collector from the borrower as if it were a land revenue due by him. Now, so far as the provision as to there being a first charge is concerned it does not affect the legal position. The plaintiffs have not claimed priority in respect of their dues. The loan which was advanced by the Government has been paid up with interest. The only question is whether the plaintiffs'' mortgage can now be enforced against the property. As I have already stated, inasmuch as defendants 3 to 6 merely acquired the right, title and interest of defendant 2 who purchased the property subject to mortgage, the mortgage loan can be enforced against the property in the hands of defendants 3 to 6. The second provision, namely that the loan can be recovered as if it were an arrear of land revenue also does not affect the present case. The proceedings which were started for the realisation of Government dues were proceedings under the Public Demands Recovery Act. Schedule 1 of the Act provides what kind of public demands can he recovered by the certificate process prescribed in the Act and S. 3 of the Schedule provides that any money which is declared by any law for the time being in force to be recoverable or realizable as an arrear of revenue or land revenue will be a public demand recoverable by the certificate process.

Therefore the effect of S. 8, sub-s. (1) cl. (a) which provides that a loan contracted under Act 1 of 1934 will be recoverable as if it were an arrear of land revenue is that it can be recovered by means of a certificate proceeding; but once it is recovered by the sale of some property, the person who purchases the property merely acquires the right, title and interest of the certificate debtor. Section 26, Public Demands Recovery Act, is not abrogated by any of the provisions of Act, 1 of 1934, and that being so, it cannot be held that the mortgage can no longer be enforced against the mortgaged property.