
(1901) 07 CAL CK 0001
In the Calcutta High Court

Shujat Ali and Others

APPELLANT

Vs

Bhiku

RESPONDENT

Date of Decision : 16-07-1901

Acts Referred:

Civil Procedure Code, 1882 — Section 280, 281, 282

Citation : (1902) ILR (Cal) 25

Hon'ble Judges : Rampini, J;Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rampini and Gupta, JJ.—This is an appeal against a decision of the District Judge of Sarun, dated the 11th of August 1898.

2. The suit out of which the appeal arises relates to certain mortgage transactions between the parties. The details of these mortgage transactions are set out in the judgments of the lower Appellate Court and the Court of first instance, and it is unnecessary for us to recapitulate them here. It is sufficient to say that the appellant before us is the defendant No. 1, and on his behalf it has been urged, first that the suit is barred by limitation; secondly, that the District Judge is wrong in saying that an attachment in the case of a mortgage decree is illegal and unnecessary; thirdly, that the lower Courts are wrong in finding that the plaintiffs, when they took the zurpeshgi of the 1st of August 1879 from the defendants Nos. 2 and 3 intended to keep alive the prior mortgages of 1864 and 1866, which the defendants Nos. 2 and 3 paid off with the money then received from the plaintiff; fourthly, that when the defendants Nos. 2 and 3 executed the zurpeshgi of 1879 in favour of the plaintiffs their equity of redemption was foreclosed.

3. In support of the first of these grounds the learned pleader for the appellant argues that the suit is barred under Article 11 of the second schedule to Act XV of 1877, not only as regards present possession, but altogether. That article

prescribes a period of one year's limitation for a suit brought "by a person against whom an order is passed under Sections 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his rights to, or to the present possession of, the property comprised in the order." Now the pleader for the appellant contends that this article of "limitation precludes the plaintiffs suing in any way after the lapse of one year from the date of the order, in order to establish his right of any kind with regard to the property. We cannot take this view of the meaning of the article. It has been held that the plaintiffs' right to present possession of the property is barred. But" the lower Courts are of opinion that the plaintiffs are entitled to sue to enforce their mortgage lien over the property comprised in the order u/s 335 of the CPC within twelve years, and it appears to us that this view is correct. The plaintiffs, when seeking to establish their mortgage lien over the property to recover their mortgage debt, are not seeking to establish a right to the property, but merely suing to recover a debt which is owing to them and as security for which they have got a charge upon the property.

4. Then, the second ground of appeal is that the attachment in the case of a mortgage decree is illegal and unnecessary. It seems to us immaterial whether the view of the Judge on this point is correct or not. The Subordinate Judge held that there was no subsisting attachment issued at the instance of the defendant No. 1, when the plaintiff's zurpeshgi of 1879 was executed, and the District Judge says with regard to this question: "As to the second issue the learned Subordinate Judge seems also to be correct, and attachment in the case of a mortgage decree is illegal and unnecessary." This latter part of the sentence seems to us a mere addition to his finding that the Subordinate Judge was right in holding that no attachment was subsisting at the date of the zurpeshgi. But whether he is correct in this additional reason or not, it appears that his finding as to the subsistence of the attachment during (he execution of the mortgage in favour of the plaintiffs is a finding of fact, which concludes us. And whether or not such attachment was subsisting is immaterial in this case in the view we take as to the prior mortgages of 1864 and 1866.

5. This leads us to consider the third ground of appeal, namely, that the lower Appellate Court was wrong in holding that the plaintiffs, when they took the zurpeshgi of 1879, intended to keep alive the prior mortgages of 1864 and 1866. In the first place, it appears to us that this is a question of fact. But whether it be a question of fact or not, we think that the view which the lower Courts have both taken of this question is one which is supported by the judgment of the Privy Council in the case of Gokaldas Gopal Das v. Puran Mal Premsukhdas ILR (1864) Calc. 1035. According to that decision the plaintiffs in this case had a light to maintain their prior mortgages for their own protection or to extinguish them, and it must be presumed that they acted in accordance with what is best for their own interests. Both the lower Courts have held that they did act in accordance with their interests, and that they intended to keep alive the mortgages of 1864 and 1866. The judgment of the Privy Council above referred to seems to be authority for the view which the lower Courts have taken on this

question. It is to be noted that the mortgage of 1879 was not taken merely to pay off the prior mortgage's of 1864 and 1866. The consideration for that mortgage was Rs. 3,500, and only Rs. 1,400 was devoted to paying off the prior mortgages. Therefore the plaintiffs were not merely assignees of the mortgages of 1864 and 1866, but they were also in the position of subsequent mortgagees, and therefore they were entitled on the authority of the case of Gokaldas Gopal Das v. Pur an Mal Premsukhdas ILR (1864) Cal 1035, to act as they are held to have done. But even supposing that they were not subsequent mortgagees, but more outsiders and strangers, we think that the view of the lower Courts is supported by the cases Dino Bandho Shau Chowdhry v. Nistarini Dasi 3 C. W. N. 153 and Amar Chandra Kundu v. Roy Goloke Chandra Chowdhry (1900) 4 C. W. N. 769, in which the doctrine laid down in the case of Gokaldas Gopal Pas v. Puran Mal Premsukhdas (1864) I. L. R. 10 Calc. 1035, has been extended to others besides subsequent mortgagees.

6. Then with regard to the fourth ground of appeal, we would observe in the first place that this ground was apparently not raised before the District Judge. There is no trace of any such plea in his judgment, and the appellant is therefore, strictly speaking, not entitled to raise it before us. However this may be, it appears to us that this plea has no force. It is true that the heirs of Madan Gopal obtained an ex-parte decree against the defendants Nos. 2 and 3 on the 19th of February 1877, and an application for review of this ex-parte decree was applied for and was pending, when the heirs of Madan Gopal and the defendants Nos. 2 and 3 entered into a compromise, by which it was stipulated that on payment of the zurpeshgi and baihal-wafa money the deeds would be returned, and would become inoperative between the parties and the defendants Nos. 2 and 3 would get back the property. A solenamah was filed, and it appears to us to have been agreed by the solenamah that the foreclosure decree should be set aside as between the parties. We, therefore, think that the effect of the solenamah was to prevent the foreclosure decree from becoming absolute and the right of the mortgagor being extinguished. It has been said that the terms of the decree were that a decree absolute for foreclosure was given and the rights of the mortgagor extinguished. We do not think that can be so, and we are unable to take the view that it was so, because the terms of the decree are not before us. But however this may be, it would seem to us from the solenamah filed in this case that the effect of the decree was set aside and the mortgagor's rights were, still subsisting, so that the zurpeshgi which they executed in favour of the plaintiffs in 1879, was a perfectly valid and good zurpeshgi.

7. For all these reasons; we see no ground to interfere with the decision of the lower Appellate Court and we dismiss this appeal with costs.