(1924) 04 PAT CK 0027

In the Patna High Court

Sri Kanta Prasad and Others — APPELLANT

Vs

Jag Sah and Others — RESPONDENT

Date of Decision : 09-04-1924

Acts Referred:
Transfer of Property Act, 1882 — Section 60

Citation : AIR 1925 Patna 57

Hon'ble Judges : Mullick, J

Bench : Division Bench

Judgement

Mullick, J.—This appeal arises out of a suit for redemption in respect of a small parcel of land which is said to have been the occupancy holding of one Kunj Behari Das and to have been mortgaged by him in 1852 to the ancestor of the defendants. The estate in which the land fell has by reason of successive partitions been parcelled out into a number of other estates bearing different tauzi numbers but the land in suit has remained joint and is the property of the proprietors of the various estates which have been carved out of the parent estate. The plaintiffs represent only some of those proprietors and one of the points raised in this appeal is that unless all the proprietors interested in the land are joined this suit for redemption cannot proceed. This point however will be considered later.

2. Kunj Behari having died without heirs the plaintiffs claim that the occupancy holding has reverted to the proprietors and that they as part owners of the equity of redemption are entitled to redeem the property from the defendants. (Here his Lordship traced the course of the litigation in the lower Courts.) In appeal before us three points have been taken. The first point is that the proprietors of all the estates who own a proprietary interest in the land in suit should have been joined and that the suit cannot proceed in their absence. It appears, however, that on the 23rd August 1919 an application was made by the plaintiffs to implead the absent proprietors. The defendants opposed that application and on the 8th September 1919 the Munsif declined to grant the

prayer.

3. In these circumstances it does not appear to me reasonable that the defendants should be allowed to urge the ground of non-joinder. Seeing that this was a suit for redemption the Court would certainly have added the absent proprietors but for the opposition offered by the defendants. They cannot be allowed to attack the Court for doing the very thing which they wanted it to do.

4. The next point is whether the plaintiffs are entitled to redeem the whole mortgage. It is said that the defendants are the cosharers of the plaintiffs in the land in suit and that if the plaintiffs have succeeded to the mortgagor''s interest, the defendants too have succeeded to that interest jointly with them to the extent of their share. It is, therefore, contended that the mortgage has been extinguished to the extent of the proprietary interest of the defendants and that the plaintiffs cannot be allowed to redeem the whole mortgage. Now the law on this point is contained in Section 60 of the Transfer of Property Act, and it has been recently explained by the Privy Council in Mima Yad Ali Beg v. Tuka Ram AIR 1921 P.C. 125.

5. There is nothing in Section 60 to debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage.

6. Indeed some earlier cases following Ahmad Ali Khan v. Jawahir Singh S.D., N.W.P. 425 have laid down that mortgagor is bound to offer to redeem the whole. The matter is further complicated in cases where the property is joint and indivisible and the transferee of a portion of the equity of redemption cannot point to any defined share as his.

7. The Bombay High Court have held that one of several coparceners may redeem the whole property leaving it to the mortgagee who has purchased a portion of the equity of redemption to have his rights ascertained and defined in a suit for partition: Bhikaji v. Lakshman [1891] 15 Bom. 27 Note.

8. I think, therefore, there can at least be no objection to a suit by a part-owner of the equity of redemption for the redemption of the whole mortgage, and it is for the mortgagee to object to such redemption so that the equities might be investigated. No objection was, however, made by the defendants at any stage of the present case in the Courts below; nor was the objection taken in the memorandum of appeal before Mr. Justice Ross or in the memorandum of appeal before us. The ground is now taken for the first time by notice served upon the respondents to-day, notwithstanding the rule of this Court which prescribes that additional grounds to a memorandum of appeal can only be taken with the permission of the Court. The ground involves a mixed question of fact and law, and, in my opinion, it is impossible to investigate it at this late stage. The defendants, therefore, cannot be allowed to urge that a part of the mortgage security has been extinguished and that the decree for the redemption of the whole is wrong.

9. The third point is the substantial point which was argued before Mr. Justice Ross. It was urged before him that the Crown got no title to the property by escheat. Mr. Justice Ross found that the property was the brit tenure of Kunj Behari. The Subordinate Judge in the Court of first appeal had found that the property was the rent-free tenure of Kunj Behari Das under the maliks of the village and he apparently considered that such a finding was sufficient to justify an escheat. Mr. Justice Ross, however, correctly points out that there could be an escheat only of an absolute hereditary mokarrary tenure and that although the tenure here might be hereditary and rent free there was no evidence that it was permanent. Our attention has been drawn to the glossary of terms used in the survey and settlement proceedings in Bihar and Orissa which shows that a brit tenure is a service tenure and it is urged that this definition is sufficient to allow an inference of permanency to be raised.

10. In my opinion the inference if any is exactly the other way. A service tenure is not necessarily permanent; and until the defendants can show that Kunj Behari held the land in perpetuity they cannot succeed. In our opinion the judgment of Mr. Justice Ross on this point was right and the landlords were entitled to the reversion of the land upon the death of Kunj Behari Das. The decree therefore for redemption should, in my opinion, be maintained.

11. A point was taken as to that part of the decree which directed the assessment of mesne profits. It was contended that the plaintiffs were not entitled to mesne profits from the date of the suit. The plaint however, contains an allegation that before the suit the plaintiffs had tendered the redemption money several times to the defendants. That allegation is not denied in the written statements, and in the circumstances the plaintiffs are entitled to mesne profits which they assess at Rs. 10 from the date of the suit. The result therefore is that the appeal is dismissed with costs.

