(1939) 09 PAT CK 0013

In the Patna High Court

Surya Narain Acharya APPELLANT

Vs

Ram Tarak Misra and Another RESPONDENT

Date of Decision : 20-09-1939

Acts Referred:
Transfer of Property Act, 1882 — Section 101, 92

Citation : AIR 1940 Patna 64

Hon'ble Judges : Agarwala, J

Bench : Division Bench

Judgement

Agarwala, J.—This is an appeal by the plaintiff from a decision of the Subordinate Judge of Purulia modifying a decision of the Munsif of Raghunathpur. On 27th September 1918, defendant 1 and his brothers executed a usufructuary mortgage in favour of defendant 3 to secure a loan of Rs. 450. Subsequently, on 9th April 1930, defendant 1 executed a mortgage with respect to his interest in the property in favour of the plaintiff to secure a loan of Rs. 200. A few days later, that is to say, on 15th April 1930, in consideration of a salami of Rs. 1200, the mortgagors agreed to grant defendant 3, the prior mortgagee, a lease of the mortgaged properties. Out of the salami, Rs. 450 was set off against the prior mortgage and the balance was paid in cash. This ''transaction was evidenced by a registered lease. The plaintiff sued on his bond of 1930 impleading the mortgagor, the prior mortgagee, and the subsequent mortgagee.

2. The first Court decreed the suit, but that decision has been reversed by the Court below on appeal by defendant 3, the mortgagee. The sole question is whether defendant 3 by redemption of his prior mortgage has lost his rights as a mortgagee. The matter appears to be concluded by Section 101, T.P. Act. The material portions of that Section are:

Any mortgagee of an immovable property may purchase or otherwise acquire the rights in the property of the mortgagor without thereby causing the mortgage to be merged as between himself and any subsequent mortgagee of the same property.

By the agreement of 15th April 1930, defendant 3, the prior mortgagee, has acquired permanent rights in the property and the Section clearly provides that as between the prior mortgagee and any subsequent mortgagee the prior mortgage shall not be considered to have been merged in the other interest which has been acquired.

3. The learned advocate for the appellants contends that Section 92, T.P. Act, is the Section which is applicable to the facts of this case. According to this argument defendant 3 was a person who had advanced to a mortgagor money with which the mortgage had been redeemed and therefore was a person subrogated to the rights of the mortgagee whose mortgage had been redeemed provided that the mortgagor has, by a registered instrument, agreed that that person shall be subrogated.

4. Now, as there was no agreement ''by a registered instrument that defendant 3 should be subrogated to the position of a prior mortgagee, it is contended that he could no longer rely upon his position as a mortgagee. The paragraph of Section 92 on which the learned advocate relies clearly does not refer to a mortgagee whose. mortgage has been redeemed by the mortgagor with money which has been obtained from the mortgagee himself. There is no other point in this second appeal which [is therefore dismissed with costs.

