
(1920) 04 AHC CK 0069
In the Allahabad High Court

Syed Shah Mahdi Hasan

APPELLANT

Vs

Syed Ismail Hasan and Others

RESPONDENT

Date of Decision : 15-04-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5

Citation : AIR 1920 All 136 : 56 Ind. Cas. 172

Hon'ble Judges : Grimwood Mears, C.J;P.C. Banerji, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In our opinion the decision of the Court below refusing to decree the plaintiff's claim for redemption is erroneous. A mortgage was made on the 17th of February 1895 in the form of a zarpeshgi lease in favour of Muhammad Siddiq. The mortgagee paid a portion of the zarpeshgi money and took possession of three of the mortgaged villages, namely, Imamnagar Rahmatpur and Bhasaura Khurd. The mortgage was in respect of the whole of Imamnagar and shares in the other two villages, The present suit is one for redemption of the three villages and it is alleged that the mortgage money has been discharged by the usufruct.

2. The Court below has dismissed the suit on the ground that the plaintiff's right of redemption in regard to all the three villages has become extinct. As regards Imamnagar the Court finds that a 2/5ths share has already been sold and the plaintiff doe's not own that share. As regards the remaining 3/5ths the learned Subordinate Judge was of opinion that the plaintiff's right of redemption had become extinct because a final decree for sale had been obtained by another mortgagee and that the said decree was in the course of execution in the Collector's Court. As for the two remaining villages, that Court was of opinion that the plaintiff had transferred his rights as regards one and in regard to the other such rights as he owned had also been transferred.

3. As regards Imamnagar we think the view taken by the learned Subordinate Judge is erroneous. The fact that a final decree for sale has been obtained by another mortgagee in respect of a 3/5ths share does not extinguish the rights of the mortgagor completely with regard to the aforesaid 1/5ths share. In Order XXXIV. rule 5, it is not provided, as was provided in Section 89 of Act IV of 1882, that after the passing of a final decree or order absolute" as it was called u/s 89 of the Act of 1882, the right of the mortgagor to redeem becomes extinct. Even u/s 89 of the Transfer of Property Act of 1882 the right became extinct only in regard to the mortgage the holder of which had obtained a decree for sale. If that decree is paid off, it cannot be said that the mortgagor's right has become extinct. Under the present CPC which repeals Section 89, the mere passing of a final decree does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree. In the present case it is admitted that no sale has taken place, and we are informed that the amount of the mortgage upon which the decree was obtained has been paid off by the plaintiff. In any case the plaintiff's right as regards the remaining 3/5ths in Imamnagar not having ceased to exist, he has the right of redemption as regards at least that share. If the plaintiff is entitled, as we hold he is, to redeem a part of the mortgaged property, he is entitled to redeem the whole upon payment of the whole of the mortgage money or if he can prove that the whole of the mortgage money has been realised by the mortgagee from the usufruct of the mortgage money.

4. As regards the remaining two villages we express no opinion on the question whether the plaintiff's right has or has not become extinct, inasmuch as by reason of our decision that he still owns a 3/5ths share in the village of Imamnagar, he is competent to sue for redemption of the mortgage.

5. We accordingly allow the appeal, get aside the decree of the Court below and remand the case to that Court with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause, and the costs in this Court will include fees on the higher scale.