Gauri and ors. Vs. Mangla and ors.

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Court : Allahabad

Decided On : Feb-23-1926

Reported in : AIR1926All463; 94Ind.Cas.442

Appellant : Gauri and ors.

Respondent : Mangla and ors.

Judgement :

Mukerji, J.

1. This appeal raises a nice question of law and on the point there does not appear to be any clear authority. The Respondent No. 1 brought the suit, out of which this appeal has arisen, for recovery of a certain plot of land, over which there is a grove, by way of redemption. He alleged an ancient mortgage said to have been made by his father Kallu in the year 1863 for a sum of Rs. 500 in favour of three persons, Dewan, Yad Ram and Kanhaiya, being the ancestors of the Defendants Nos. 3 to 7. It is common ground that out of the entire area mortgaged the mortgagees made a sub-mortgage, in favour of certain persons, of all but the plot in suit, for a sum of Rs. 400. The sub-mortgage has been redeemed by the plaintiff and only the plot in suit remained unredeemed. The mortgagee interest of the Defendants Nos. 3 to 7 was sold by auction on the 21st of January 1878 to the father of the Defendants Nos. 1 and 2. The plaintiff impleaded all the seven persons in his suit, viz. Defendants Nos. 1 and 2, as the auction-purchasers of the

rights of the descendants of the original mortgagees and also the descendants of the original mortgagees themselves. The Defendants Nos. 1 and 2 and the Defendants NOS. 3 to 7 contested the suit separately.

2. The common defence was that there was no mortgage and the special defence of the Defendants Nos. 3 to 7, some of whom are the appellants before me, was that they were occupancy tenants of the plot in suit and even in the case of redemption they could not be ousted. The suit has succeeded in both the Courts below. They both found the mortgage established and subsisting. In this Court the learned Counsel for the appellants has taken virtually two points viz. (1) the mortgage has not been established, and (2) in any case the Defendants Nos. 3 to 7 were tenants and could not be ousted in spite of their redemption. As an argument relating to the second point it was urged that the Courts below ought to have taken proceedings under S, 202 of the Agra Tenancy Act.

3. Taking the first point first: The ground No. 2, viz. the evidence of Bhagwan, is not legally sufficient to prove the mortgage, was taken because of the rather meagre grounds given by the lower appellate Court for coming to the conclusion that the mortgage had been proved. The Court of first instance deals with the entire evidence in full and it shows that there was sufficient material from which the existence of the mortgage could be inferred lawfully. It appears that there is a village record of the year 1254F. (corresponding to 1848 and not 1833) and it does not mention any mortgage by Kallu although it does mention another mortgage by a different person. In the Settlement Record of 1863 the mortgage in question is mentioned in all its details. It would be a reasonable inference to draw that between these two dates, viz. 1848 and 1863, the mortgage in question was made. Then comes the acknowledgment of 1876 in the deed of sub-mortgage. I hold that there was sufficient material before the Courts below for the purpose of holding that there was a mortgage of 1863 and that it did subsist at the date of the suit.

4. The next question is whether the lower Courts should have directed the Defendants Nos. 3 to 7 to institute a suit in the revenue Court to obtain a declaration that they are occupancy tenants of the land in suit. The Courts below

have not gone into this question, they being of opinion that the Defendants Nos. 3 to 7 were estopped from raising any plea which would disentitle the plaintiff from recovering what is his own. I thick the Courts were right. The position taken up by the learned Counsel for the appellants before me, was this. He alleged that after the mortgagee interest of the ancestors of the Defendants No. 3 to 7 passed to the father of the Defendants Nos. 1 and 2 on the 21st of January 1878, the ancestors of the Defendants Nos. 3 to 7(the mortgagees) took the land from the auction-purchaser as a tenant, cultivated the same, acquired an occupancy tenancy and then planted the grove. It is said that it was a pure accident that the original mortgagees themselves took the land for cultivation instead of some other persons.

5. The argument is that if instead of the original mortgagees themselves somebody else had obtained a letting of the land and had acquired an occupancy right in the land it could mot be said that he was a necessary party to the suit and that he should be ejected. The argument no doubt has some force, but in my opinion it ought not to be allowed to prevail. The mortgagees were bound by their contract to hand over the property to the mortgagor intact and without any diminution in its value or in the income to be derived from it. It is immaterial whether they sold the mortgagee interest by a private treaty or whether the same was sold at an auction-sale in execution of a decree against them. They were precluded by their contract with the mortgagor from themselves doing anything which might put a hindrance to the redemption of the property. It is true that by the auction-sale the mortgagee rights in the property passed to the father of the Defendants Nos. 1 and 2. The auction-purchaser became a privy to the contract on account of the property and not on account of any personal covenant entered into between himself and the original mortgagor. But the personal contract between the original mortgagor and the original mortgagees subsisted and the latter cannot be heard to say that their entire character as mortgagees ceased with the sale of their mortgagee rights and they became free to do anything although that anything might put an obstacle in the redemption of the mortgage.

6. There is no direct authority on the point either way. But on broad principles I am not at all inclined to let the original mortgagees profit by an act of their own to the

detriment of the interest of the mortgagor whose rights they were bound to guard on general principles recognized in Section 76(e) of the Transfer of Property Act. There can be no doubt that creation of an occupancy right, (assuming that such has been created in this case) seriously affects the usefulness of a piece of land. If the Defendants Nos. 3 to 7 are allowed to bold the land as occupancy tenants it is clear the plaintiff would not be permitted to cut any of the trees standing on the land or to bring the land under cultivation. I think that the Courts below were right in their opinion. In the view I take of the case it is no longer necessary to consider whether Section 202 of the Tenancy Act is applicable to the case. Mr. Mital has strenuously argued that the suit is not for an agricultural holding and Section 202 has no application to it. He relied on the allegation in para. 9 of the plaint and on the admission of the Defendants Nos. 3 to 7 in their written statement as regards that paragraph. The question, however, does not arise and need not be considered. The result is that the appeal fails and is hereby dismissed with costs which will include counsel's fees in this Courts on the higher scale.