ishri and ors. Vs. Het Ram

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SooperKanoon Citation : sooperkanoon.com/463219

Court : Allahabad

Decided On : Apr-25-1927

Reported in : AIR1927All619

Appellant : ishri and ors.

Respondent : Het Ram

Judgement :

1. This appeal and Appeal No. 420 of 1925, arise out of a suit brought by the plaintiff for recovery of possession of a one-third of mahal Shib Kuar of village Bithani and for redemption of the remaining two-thirds of that mahal.

2. The facts that led to the suit giving rise to the present appeals ace shortly these: Four biswa share of village Bithani, was, along, with six other villages, mortgaged in the year 1880 to one Ram Prasad for a sum of Rs. 1,000. The same share was again mortgaged, along with three other villages, in the year 1885 to Man Kanwar.

3. The four biswa share subsequently was converted into a 20-biswa mahal called mahal Shib Kuar.

4.The heirs of the prior mortgagee put the mortgage of 1880 in suit, and obtained a decree for sale in 1894. The subsequent mortgagee of 1885 was not impleaded as a party in that suit. The entire mahal Shib Kuar was sold in execution of the decree obtained by the heirs of the prior mortgagee, and was purchased by one Chhiddu Singh in 1897.

5. Thereafter one Umrao Singh brought a suit in 1902, for a declaration that one third of mahal Shib Kuar belonged to him, and was not subject to the prior mortgage of 1880, and that the decree obtained on the basis of that mortgage was ineffectual to adversely affect his interest in the one-third share of the mahal. He also prayed for recovery of possession of that share. Umrao Singh's suit was decreed with the result that Chhiddu Singh lost one-third of mahal Shib Kuar, In 1910 Lala Brij Mohan the successor-in-interest of the puisne mortgagee, brought a suit for sale on the basis of the mortgage of 1885, and impleaded Chhiddu Singh, amongst others, as a defendant to the suit. The suit of Brij Mohan was decreed but it was provided by the decree that mahal Shib Kunwar was to be sold subject to the prior incumbrance created by the mortgage deed of the year 1880. That decree was put into execution and mahal Shib Kuar of village Bithani was sold and purchased by Brij Mohan. Having purchased the entire mahal Brij Mohan succeeded in taking possession of the entire mahal without redeeming the mortgage of 1880.

6. In 1920 the heirs of Chhiddu Singh applied for restoration of possession of the entire mahal on the ground that Brij Mohan was not entitled to actual possession of the mahal without redeeming the prior mortgage of 1880, and as such was bound in law to restore back possession of that mahal to Chhiddu Singh. This application was allowed by the execution Court, and the heirs of Chhiddu Singh succeeded in getting back possession of the entire mahal. Thereupon the plaintiff, who is the assignee of Brij Mohan, brought the suit giving rise to the present appeals claiming the reliefs noted at the inception of this judgment.

7. The defendants to the suit were the successors-in-interest of Chhiddu Singh, The plaintiff maintained that only two-thirds of mahal Shib Kuar was subject to the prior mortgage of 1880, and therefore, Chhiddu Singh's possession over the remaining one-third of the mahal was as a trespasser, and he was bound to restore back possession of the one-third mahal to the plaintiff. He expressed his willingness to pay Rs. 381-130 as a condition precedent to the redemption of the regaining two-thirds share of the mahal. He alleged that on a correct calculation two-thirds share of mahal Shib Kuar was rateably liable only for a sum of Rs. 381-13-0 out of the amount for which the prior mortgagee had obtained a decree in

1894.

8. The suit was resisted by the defendants mainly on three grounds. They contended that Chhiddu Singh's possession after the year 1897 was adverse to the subsequent mortgagee, the predecessor-in-title of the plaintiff, and the suit was barred by. Article 134, Sch. 1, Limitation Act. It was further contended by the defendants that the suit was barred by Section 47, Civil P.C. Thirdly, they maintained that even if the plaintiff be held entitled to a decree for redemption, he can only be allowed to redeem the prior mortgage of 1880 on condition of his paying to the defendants the principal amount secured by the mortgage coupled with interest at the stipulated rate computed from the date of the mortgage to the date of delivery of possession.

9. All the pleas urged in defence were overruled by the trial Court, and that Court passed a decree in the plaintiff's favour in terms of the reliefs prayed for in the plaint. On appeal by the defendants the lower appellate Court held that the plaintiff's claim with respect to one-third of the mahal in dispute was barred by Section 47, Civil P.C., and dismissed the suit with respect to that share, but affirmed the decree of the trial Court with respect to the remaining two-thirds share of the mahal. The present appeal is by the defendants. All the pleas that were taken in the written statement have been reiterated in argument before us. In our judgment there is no substance in either of the pleas urged in defence.

10. Article 134, Limitation Act, applies to those cases in which the suit is a suit for possession of immovable property mortgaged, and is directed against a transferee from the mortgagee of the mortgaged property for valuable consideration. In the present case neither the defendants nor Chhiddu Singh, their predecessor-in-title, was a transferee from the prior mortgagee but was an auction-purchaser in execution of a mortgage decree. Article 134 is intended to protect the rights of persons, who are transferees for valuable consideration of absolute interest in immovable property from a mortgagee is possession, and has no application to auction-purchasers in execution of a decree for sale obtained on the basis of a simple mortgage.

11. It is to be noted that the subsequent mortgagee, not being a party to the suit brought by the heirs of the prior mortgagee, is not bound by the decree obtained in that suit. His right to redeem the prior mortgage remained unaffected, notwithstanding the sale held in execution of the decree obtained on the basis of the prior mortgage. It was this right of the subsequent mortgagee that was recognized by the decree of 1910 to which Chhiddu Singh, the predecessor-in-title of the defendants, was a party. As stated above, by that decree the mortgaged property was to be sold subject to the prior incumbrance. In other words the right of the decree-holder of 1910 to redeem the prior mortgage was judicially recognized by the decree passed in that year, and it is that right that the plaintiff is seeking to enforce in the present litigation. For these reasons we hold that Article 134 Limitation Act has no application to the case and the plaintiff's claim for redemption of two-thirds share of the mahal in dispute was not barred by limitation.

12. No doubt by the decree of 1910 the mortgaged property was ordered to be sold subject to the incumbrance created by the mortgage of 1880, but on that mortgage being put in suit and a decree being obtained under Section 89 of the Transfer of Property Act, 1882, the mortgage security was extinguished and, as such, the subsequent mortgagee is entitled to redeem the prior incumbrance on payment of the amount due under the decree obtained on the basis of the prior mortgage, and is not liable to pay to the defendants, who are the successors in-interest of Chhiddu Singh, the auction-purchaser in execution of the prior mortgage decree, the amount to which the prior mortgagee would have been entitled if the first mortgage had not been put in suit: vide Matru Mal v. Durga Kunwar [1920] 42 All. 364. The mortgage of 1880 ceased to exist in 1894 when a decree absolute for sale was passed in favour of the heirs of the prior mortgagee and the plaintiff was entitled to a decree for redemption on payment of the amount to which two-thirds of the mahal in dispute was rateably liable under the decree of 1894. On the grounds noted above we dismiss second appeal No. 402 of 1925 with costs.

13. It now remains to decide second appeal No. 420, which is an appeal by the plaintiff against the decree of the lower appellate Court, dismissing his claim with respect to one-third of the mahal in dispute. By the decree of 1910 the entire

mahal Sheo Kunwar was directed to Resold subject to the prior incumbrance created by the mortgage of 1880. That being so, notwithstanding the purchase made by Brij Mohan in 1916, he was not entitled to actual possession of any portion of the mahal in dispute unless he redeemed the prior incumbrance. Admittedly without redeeming the mortgage of 1880, Brij Mohan succeeded in getting possession of the entire mahal. As such, the application of Chhiddu Singh for restoration of possession of the entire mahal, on the ground that Brij Mohan and others were not entitled to possession of that mahal without redeeming the mortgage of 1880 was well-founded and rightly allowed by the execution Court, Now, that the plaintiff has in a properly, framed suit prayed for redemption of the prior incumbrance by payment of the proportionate amount to which the property in dispute is liable, he is entitled to get back possession of the entire property of which his predecessor-in-interest was deprived in consequence of the application for restitution filed by Chhiddu Singh having been allowed by the execution Court. So long as the prior incumbrance was not redeemed, the heir of Brij Mohan, the auction-purchaser, could not in the execution Court, resist the application of Chhiddu Singh for restoration of possession of the mahal in dispute, and accordingly we hold that Section 47 of the Civil P.C. was not a bar to the plaintiff's claim, and we allowed the appeal filed by the plaintiff.

14. The result is that modifying the decree of the lower appellate Court, we restore the decree of the trial Court with costs in all Courts.