

Kalyan Das Vs. Jan Bibi and anr.

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Court : Allahabad

Decided On : Aug-08-1928

Reported in : AIR1929All12

Appellant : Kalyan Das

Respondent : Jan Bibi and anr.

Judgement :

Sen, J.

1. This is a plaintiff's appeal which arises out of a suit for recovery of Rs. 1,080 by enforcement of a mortgage, dated 28th August 1914, executed by one Faqire Lohar in favour of the appellant.

2. The mortgage was to secure a debt of Rs. 135. The mortgagor was indebted to the plaintiff under two earlier bonds, dated 22nd January 1911, and 18th April 1912, and the amount due to the mortgagee under these prior mortgage bonds together with interest amounted to Rs. 119. Rs. 6 were paid for expenses relating to the completion and registration of the document in suit and Rs. 10 were received before the Sub-Registrar. A tiled katcha house was mortgaged to secure this debt.

3. The stipulated rate of interest was Rs. 2 per mensem with monthly rests. The suit was instituted on 30th June 1925. The plaintiff claimed interest at Rs. 2 per

mensem with annual rests.

4. The property mortgaged originally belonged to Bhano and Manohar, who had purchased the same from one Mahesh Shukul under a sale-deed, dated 20th January 1908. Bhano and Manohar sold the house to Faqire under an instrument, dated 20th November 1909 (Ex. A) for Rs. 150. Faqire mortgaged this property in favour of Kalyan Das on 28th August 1914 (Ex. 4). He next mortgaged the property to Arjan Sahu on 12th January 1915 for Rs. 138 (Ex. E). Faqire having died his sons Sheo Japat and Ram Japat sold the house to one Sri Kishun on 22nd October 1915 for Rs. 99. The sale-deed recites that the house has collapsed and is in ruins, that there is no person willing to pay more than Rs. 99, that the vendors are hard pressed for money and that therefore they execute the sale deed in favour of Sri Kishun for this amount. On 1st December 1916 Sri Kishun sold the house to Mt. Jan Bibi for Rs. 200. He handed over to the vendee some of the earlier title-deeds, namely, his own sale-deed, dated 22nd October 1915 (Ex. B) and the sale-deed dated 20th November 1909 under which Faqire had purchased this property from Bhano and Manohar, as also the mortgage in favour of Arjun Sahu, dated 12th January 1915.

5. There were two defendants in the suit, of whom Ram Japat, the son of the mortgagor, did not contest the suit. The suit was registered by Mt. Jan Bibi, defendant 2, upon a variety of grounds. It was pleaded that the mortgage was not genuine; that it was without consideration; that the interest charged was penal and excessive; that the contending defendant was a bona fide purchaser for value; that she had rebuilt the house at a cost of Rs. 1,000 and that the plaintiff was not entitled to have the property sold in enforcement of his mortgage without paying to the vendee Rs. 1,000 as compensation for improvements made by her which she was well entitled to under Section 51, T.P. Act.

6. The trial Court held that the execution and consideration of the mortgage bond were duly proved; that no neglect was brought home to the plaintiff for not having asked for all the title-deeds relating to the house from Faqire; that the defendant believed in good faith that she was the absolute owner of the house; that she spent, at least, Rs. 800 in rebuilding and improving the house and was entitled to

the protection afforded by Section 51, T.P. Act; that the rate of interest was exorbitant and that the plaintiff was not entitled to more than Rs. 2 per mensem simple interest. The trial Court gave the plaintiff a decree for Rs. 460 and provided that defendant 2 was entitled to recover Rs. 800 from the sale proceeds and the balance, if any, was to be paid to the plaintiff.

7. The defendant submitted to the decree. The plaintiff preferred an appeal. The learned District Judge affirmed the finding of the trial Court that the defendant had spent about Rs. 800 in reconstructing the house; that she believed in good faith that she was absolutely entitled to the property and that she was therefore entitled to the benefit of Section 51, T.P. Act. The Court further held that:

'the question of interest lay solely between the plaintiff and defendant 1, the mortgagor and the mortgages. No third party had any right whatever to come in and urge that the rate of interest was excessive or penal. This finding must, therefore, be reversed, and the rate of interest will stand as claimed.'

8. The defendant not having filed any cross-appeal or cross-objection, the finding of the Court below as regards the rate of interest must stand.

9. The lower appellate Court further provided that the plaintiff was entitled to sell the property conditionally on payment of Rs. 800 to Jan Bibi.

10. The present case illustrates one of the grossest forms of usury. The principal sum secured by the mortgage was Rs. 135. Out of it Rs. 119 represented the principal and interest due on the prior bonds, dated 22nd January 1911 and 18th April 1912. The rate of interest due under the earlier bonds was Rs. 2 per mensem. There was a stipulation in the mortgage bond in suit that the mortgage was not redeemable before the expiry of six years. The plaintiff now claims to recover Rs. 1,080 by a sale of the mortgaged property.

11. In 1914 when the mortgage was executed in favour of the plaintiff, his security was limited to a katcha tiled house presumably in a dilapidated condition. After the purchase by defendant 2 the property has been improved and its value considerably enhanced. No attempt whatsoever was made by the plaintiff

mortgagee to secure to himself the title-deeds relating to the house. The defendant on the other hand, had secured the original sale-deed dated 20th November 1909, and the subsequent title-deeds. It is significant that there is no mention of the plaintiff's mortgage in the subsequent mortgage-deed executed by Faqire in favour of Arjun on 12th January 1915. Nor is there any allusion to it in the sale deed in favour of Sri Kishun dated 22nd December 1915. Section 51, T.P. Act provides that:

'when the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction, either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.'

12. Section 51 is based upon the principle that he who seeks equity must do equity. It must distinctly be kept in view that cases founded upon the equitable rule of estoppel are beyond the purview of Section 51. The rule of estoppel referred to above has been stated by Mr. Justice Storey in his Equity Jurisprudence, First English Edition, para. 1237. at p. 861:

'If the true owner stands by and suffers improvements to be made on estate, without notice of his title he will not be permitted in equity to enrich himself by the loss of another; but the improvements will constitute a lien on the estate.'

13. It cannot be said that the prior mortgagee is the true owner who has stood by and it is doubtful if the rule of equitable estoppel can be extended to his case. Assuming that Section 51, T.P. Act, applies to the case of simple mortgagee seeking to enforce his mortgage, no question arises as to whether he has been sufficiently vigilant in safeguarding his own title or in asserting his right with reference to the property covered by the mortgage security. It is the subsequent transferee who has put up improvements and has to prove her good faith. The true rule has been stated by Dart to be that:

when a purchaser for value is evicted in equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements except improvements made after he has discovered the defect of title and will be debited with the rent which he has received' (Dart 7th Edn., p. 944).

14. This view seems to be in accord with the rule of law enunciated in *Mill v. Hill* [1851] 3 H.L.C. 828. In the case of *Thakur Chunder Paramanick v. Ramdhone Bhattacharji* 6 W.R. 228. Sir Barnes Peacock, C.J., is reported to have observed as follows:

'We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil and we think it should be laid down as a general rule that, if he, who makes the improvement, is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil the option of taking the building or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess.'

15. The defendant does not appear to have acted either on the assumption of a risk or under circumstances of doubt relating to the security of her title. Registration does not per se amount to notice. There are no circumstances disclosed by the present case which entail an obligation upon the defendant to search the registry. The crucial question in the case is: Did the defendant reasonably and honestly believe that she was absolutely entitled to the property at the time when she put up the new building? If the defendant erroneously but honestly believed that she was absolutely entitled to the property conveyed to her by Sri Kishun and that she was not a trespasser or an assignee from a trespasser and that she had not a limited interest in the property and was not a tenant, she

was justified in spending money upon improvements by reason of the principle underlying Section 51, T.P. Act. The Transfer of Property Act is not exhaustive and does not exclude any equitable principle such as may regulate the rights and liabilities of the parties in a case not specifically provided by the legislature. It is doubtful how far Section 51, T.P. Act is in terms applicable to the facts of the present case. Mt. Jan Bibi has not been evicted from the premises by a person having a better title. It cannot be said that a prior simple mortgagee seeking to enforce the mortgage has a better title to the property. Nor can it be said that Mt. Jan Bibi is a person evicted from the premises by reason of the institution of the suit although she might ultimately be evicted at the instance of the auction purchaser. In construing Section 51, T.P. Act, this Court has to adhere to the natural and etymological meaning which can be assigned to the words 'evicted therefrom by any person having a better title.' Mt. Jan Bibi not being a person evicted and, the plaintiff as prior simple mortgagee, having only a right to sell the property for the recovery of his mortgage dues, not being a person having a better title, Section 51, T.P. Act does not in terms apply, but the rule of equity upon which Section 51 is based, may very well be extended to the case of Mt. Jan Bibi and upon that basis the decree of the Court below may very well be affirmed.

16. In view of all the circumstances of the case the learned Judge was justified in ordering the plaintiff to pay the costs of improvements as a condition precedent to bring in the mortgage property to sale. I would therefore dismiss this appeal with costs.

Weir, J.

17. I agree.

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