

Hamida Bibi and anr Vs. Ahmad Hussain

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Court : Allahabad

Decided On : Mar-12-1909

Reported in : 1Ind.Cas.779

Judge : John Stanley, C.J. and ;Banerji, J.

Appellant : Hamida Bibi and anr

Respondent : Ahmad Hussain

Judgement :

1. This appeal arises out of a suit for the redemption of a mortgage made in 1858 by one Hafiz Baksh in favour of Babu Lal. The latter transferred his rights as mortgagee to one Muhammad Karim whose sole representative, by right of inheritance, is the respondent Ahmad Hussain. The mortgagor Hafiz Baksh died leaving several heirs among whom are the defendant Ahmad Hussain and the plaintiffs. The plaintiffs seek to redeem their own share of the property on payment of a proportionate part of the mortgage money. The defendant's contention was that the plaintiffs could only redeem the mortgage as a whole and were not entitled to claim redemption of their own share only. The Court of first instance overruled this objection and decreed the claim on the ground that the integrity of the mortgage was broken up by reason of the defendant having inherited a part of the mortgagor's rights. The lower appellate Court having affirmed this decree a second appeal was preferred to this Court by the defendant. Our learned colleague who heard the appeal was of opinion that the suit as framed was not maintainable and

dismissed it. From his judgment this appeal has been preferred under the Letters Patent.

2. The learned Counsel for the appellants urges that as the defendant, who represents the mortgagee, has acquired in part the share of the mortgagor, the appellants have the right under Section 60 of the Transfer of Property Act, to redeem their own share only. In our judgment this contention is well-founded. Section 60 provides in its last paragraph, that 'nothing in the section shall entitle a person interested in a share only or the mortgaged property to redeem his own share only on payment of a proportionate part of the amount due on the mortgage except where a mortgagee or if there are more mortgagees than one, all such mortgagees has or have acquired in whole or in part the share of a mortgagor.' This provision gives legislative effect to the well-known rule that when a portion of the mortgaged property becomes vested in the mortgagee himself the mortgage security is broken up and one of the mortgagors or his representative becomes entitled to redeem his share on payment only of that portion of the mortgage debt which is attributable to that share. Our learned colleague after referring to the above provision observes: 'The cases on the point appear to me to proceed on the principle that where a mortgagee has by his act recognized a severance of interest among his mortgagors and has allowed one of them to redeem his share of the mortgaged property on payment of a proportionate amount of the mortgage money he cannot justly refuse to allow the other mortgagors to redeem their shares in the same way. The present case does not fall strictly under the exception as it is worded. Here one of the mortgagors has acquired by the accident of inheritance the entire rights of the mortgagee. He has not by any act of his own recognized any severance of interest between the mortgagors.' We feel ourselves unable to agree with the last portion of the remarks of our learned brother. Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee there is a merger of rights and the integrity of the mortgage is broken up by reason of the right of redemption and the rights of the mortgagee passing to the same person. The mortgagee cannot throw the whole burden of the debt on the remainder of the property and compel the other mortgagors to redeem the whole mortgage. In order to bring about this result it is not necessary that the fusion of rights should be by act of parties. What is necessary is that the

mortgagee should have acquired the share of a mortgagor. Whether he acquires it by purchase or by inheritance or otherwise the result is the same and the mode of acquisition is immaterial. The true reason for the rule was thus stated in *Sobha Sah v. Inderjeet* 5 N.W.P.H.C. 148. 'The whole estate as to one portion of the property has merged in the mortgagee, and the mortgagor if compelled to redeem by payment of the whole debt, would have to sue the mortgagee for contribution afterwards, and thus by two suits between the same parties attain the result which under the law as above interpreted is now attained by one suit.' In view, therefore, of the fact that the defendant who inherited a part of the mortgaged property from the mortgagor, has acquired by inheritance the whole of the mortgagee's rights, the mortgage security has been broken up and the plaintiffs are entitled to redeem their interests on payment of a proportionate part of the mortgage debt. As for the inconvenience which may arise in consequence of the numerous heirs of the mortgagor being allowed to bring separate suits for the redemption of their own shares only the same inconvenience will be the result if the plaintiffs be compelled to redeem the whole mortgage, inasmuch as each of the other heirs of the mortgagors, 50 in number in this case, who are defendants to the suit, will admittedly be entitled to redeem, his own share from the hands of the plaintiffs. The principle of the rulings in *Nawab Ajimut Ali Khan v. Jowahir Singh* 13 M. I A. 404; 14 W.R. 17 (P.C.), *Kalian Khan v. Mardan Khan* 28 A. 155 and *Munshi v. Daulat* 29 A. 262 is applicable to this case. The learned Vakil for the respondent relied on *Lachmi Narain v. Muhammad Yusuf* 17 A. 63, but that case has, in our opinion, no bearing on the question before us. For the above reasons we allow the appeal and setting aside the decree of the learned Judge of this Court restore that of the lower appellate Court. The appellants will have their costs in this Court including fees on the higher scale.