

Raghunath Singh and ors. Vs. Sheo Partap Singh and ors.

Raghunath Singh and ors. Vs. Sheo Partap Singh and ors.

SooperKanoon Citation : sooperkanoon.com/472334

Court : Allahabad

Decided On : Feb-06-1929

Reported in : AIR1929All408

Appellant : Raghunath Singh and ors.

Respondent : Sheo Partap Singh and ors.

Judgement :

1. This second appeal arises out of a suit brought by the plaintiff-respondents against the defendant-appellants for redemption of two mortgages both dated 22nd June 1864. One of them was a mortgage by conditional sale. The property mortgaged was shares in five villages, and the money secured was Rs. 6,999. It was a condition that the usufruct should be held equivalent to interest on the money. The second deed was of the same date and secured a loan of Rs. 1,600 which was to carry interest at 12 annas per cent. per mensem. So far as the present appeal is concerned the parties admit that this second deed operated as a further charge.

2. The facts of the case, which it is necessary to give for the purpose of this appeal, are briefly as follows:

3. In 1877 foreclosure proceedings were taken by the mortgagees, but they proved abortive, because the mortgagees did not pursue the matter to an end by the necessary legal process. In 1880 there was a partition between the mortgagees of

certain villages. The defendants were parties to that partition. Two out of the five villages formed part of the property which was the subject-matter of that partition suit. The mortgagees in that partition suit claimed that they were absolute owners of the shares in the two villages which the plaintiffs are now asking to redeem. It is clear that they claimed an absolute title on the ground that the foreclosure proceedings in 1877 had given them an absolute title by foreclosure. It is also clear that the defendants either did not contest this proposition or that the point was decided against them. In 1892 the plaintiffs brought a suit similar to the present one for redemption of the five villages. It was then held, after the matter had come up to this High Court, that they could not claim to redeem the two villages which were dealt with in the partition proceedings of 1880. The High Court having held this, remanded the case to the Subordinate Judge to decide the question of the redemption of the three remaining villages on its merits. The Subordinate Judge, thereupon, allowed redemption of the three villages for a sum that was arrived at by taking the proportionate value of the three villages (the proportion being reckoned according to the respective revenue payable on the three as against the five villages). He did not allow any interest on the Rs. 1,600 secured by the deed of further charge. We have looked into his judgment, and we find that no reason was given by him for ignoring the question of interest. Against this decision of the Subordinate Judge there was an appeal by the plaintiffs, that is to say the mortgagors, who wished to be given the property without payment of any sum, their contention being that the usufruct had sufficed to liquidate the principal and (possibly) the interest. On the other hand, the mortgagees filed a cross-objection complaining that the Subordinate Judge had allowed them no interest on the money advanced under the deed of further charge. The appellants withdrew their appeal, and under the law then in force the cross-objection automatically was rejected. It may be mentioned that under the law the mortgagees could have filed a cross-appeal, but did not do so. The decree of the Subordinate Judge allowed the plaintiffs to redeem the mortgage on payment of the proportionate amount of the principal money secured by the mortgages provided that they paid that amount (i.e., Rs 4,208) within six months, and the decree went on to say that if the money was not paid within that period, the suit would stand dismissed. The money was not paid,

4. We now have this present suit brought in 1924, i.e. 32 years after the previous suit was brought. The plaintiffs claim in it to have a right to redeem the three villages. They take up the position in the plaint that the previous suit settled the amount of mortgage money due at that date, and that this sum has been realized in full by the defendants by the profits of the mortgaged property.

5. The defence to this suit was as follows: Firstly, it was pleaded that the right of the plaintiffs to redeem was barred by the dismissal of their previous redemption suit in 1892. Secondly, if this were held not to be so, at any rate the plaintiffs could not rely upon the decision in that suit as to the amount required to redeem but were bound to pay what should be found to be due on a consideration of the matter independently of the decision in that case. Thirdly, it was argued that there should be no reduction of the amount of mortgage money with interest recoverable by the mortgagees by reason of the mortgagees having acquired an absolute title in two of the villages under the partition proceedings in 1880.

6. The finding of the Subordinate Judge is as follows: He holds that the right of the plaintiffs to redeem is not barred by the dismissal of their previous suit in 1892; secondly, that the decision of the Subordinate Judge in the previous suit as to the amount then due for redemption holds good and cannot be reopened: thirdly, that the mortgagee-appellants are only entitled to get a proportion of the mortgage money as they have become absolute owners of two of the mortgaged villages. From all these three findings the appellants appeal.

7. The Subordinate Judge has also decided one point in favour of the mortgagees, namely, he held that although in the previous redemption suit no interest was allowed on the Rs. 1,600 secured by the deed of further charge, yet the mortgagees were entitled to get interest from the date of that suit in 1892. Against this decision the respondent-mortgagors have filed a cross-objection, maintaining that the effect of the decision in the former case was a bar to a claim for any interest whatever.

8. It will thus be seen that there are four findings of the Subordinate Judge the correctness of which is in question in this appeal. We will deal with them in the order in which they have been stated.

9. The question whether the fact of a redemption suit being brought and being dismissed for failure of the mortgagors to pay the sum decreed for redemption will operate under the rule of *res judicata* to prevent the bringing of a subsequent suit for redemption has been decided by a Full Bench of this Court,: see *Sita Ram v. Madho Lal* [1901] 24 All. 44. This was again followed in a two Judge decision *Hari Ram v. Indraj* A.I.R. 1922 All. 377. There is also a decision of their Lordships of the Privy Council which appears to affirm the principle followed in these decisions: *Maina Bibi v. Chaudhry Vakil Ahmad* . In that case a mortgage was not in question but the heirs of a Muhammadan were suing his widow for recovery of property held by her as a lien against her dower. They brought one suit and got a decree, but failed to pay the money required under that decree. They subsequently brought another suit, and this was held to be permissible. It appears, therefore, to us that one cannot question the right of the plaintiffs to sue for redemption notwithstanding their failure to redeem under the decree of the previous suit.

10. As to the second point whether the Subordinate Judge was right in holding that he was bound by the previous suit in respect of the amount then found due, we may refer to a Bombay Full Bench decision: *Ramji v. Pandhannath* [1919] 43 Bom. 334. It was there held by the Chief Justice of the Bombay High Court and one other Judge (a third Judge dissenting) that in similar circumstances an earlier decree, although ending in dismissal of a suit by reason of non-payment of the sum decreed, would operate as *res judicata* in respect of all matters decided at that date. On the other hand, we have been referred to the Allahabad decision just mentioned: *Hari Ram v. Indraj* A.I.R. 1922 All. 377, as an authority for the contrary. It was there stated by Ryves, J., that the parties would be relegated to their position as it was at the commencement of the previous suit. It is sufficient to say that the present matter was not in issue before that Court, and the sole question then was the right to bring a second suit, Furthermore, this Allahabad decision uses the same language as was used by a Subordinate Judge and quoted with approval by their Lordships of the Privy Council in *Maina Bibi v. Chaudhri Vakil Ahmad* . This latter case clearly and emphatically decided that in similar circumstances matters decided in a previous suit could not be reopened. It decided particularly that where the rate of interest was decided in an earlier suit, dismissed for the same reason that the earlier suit was dismissed in this case, the

subsequent suit could not call it in question. The authority, therefore, is clear for holding that any matter arising in the earlier suit which was decided cannot be reopened in the present suit.

11. As to the third question the appellants contend that the whole of the mortgage money should be thrown on to the three villages which the plaintiffs are now allowed to redeem, and that no redemption should be allowed, because their right to redeem two of them has disappeared. So far as we are able to understand the argument on which this contention is based, it appears to be this. By their laches in the partition proceedings referred to above the plaintiffs lost any right to redeem the two villages. Consequently they should get no benefit in the present suit from that laches. They should not be allowed to claim that the mortgage money payable for redemption of the three villages is less than that for the whole five. There can, however, be no question that by the partition proceedings the appellants have become absolute owners of two of the villages. Their rights as mortgagees in these two villages have merged in their rights as owners. Consequently the integrity of the mortgage has been broken, and that being so, the plaintiffs are entitled to claim redemption of the three villages for a proportionate amount of what would be required to redeem the five. These conclusions result in the dismissal of the appeal.

12. There remains the respondents' cross-objection. In describing the facts of the previous litigation above we showed that in the former suit the Subordinate Judge refused to allow any interest on the principal mortgage money. The grounds for that decision were not obvious, but that decision in itself was impugned by the mortgagees in their cross-objection stood. When that cross-objection was dismissed by reason of the withdrawal of the appeal, the decision of the Subordinate Judge on this point remained undisturbed. It therefore decided something which cannot be reopened. We hold then that the mortgages cannot be decreed any sum by way of interest and consequently the present cross-objection must be upheld.

13. The consequence is that this appeal fails and is dismissed with costs. The cross-objection is successful and is decreed with costs. The decree of the lower

Court will be modified by excluding the sum awarded as interest, that is to say Rs. 1967-7-0. The mortgage debt will then be, up to the date of the lower Court's decree Rs. 5243-13-0 less than Rs. 1967-7-0. The rest of the decree will stand except that the costs decreed against defendants 1 and 2 in the lower Court will be proportionately reduced.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com