

Musammat Zaibunnissa and ors. Vs. Parichhat and ors.

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Court : Allahabad

Decided On : Jul-16-1914

Reported in : AIR1914All242; 25Ind.Cas.611

Judge : Piggott, J.

Appellant : Musammat Zaibunnissa and ors.

Respondent : Parichhat and ors.

Judgement :

Piggott, J.

1. This is a second appeal by the plaintiffs in a suit for redemption. The facts of the case were somewhat complicated, and I must congratulate the learned Munsif of Jhansi on the exceedingly lucid and well-considered judgment in which he has set forth those facts and dealt with the issues arising therefrom. It is necessary, however, to disentangle the essential facts bearing on the single point which is now before me for consideration. On the 15th July 1871 a number of co-sharers in village Chumadwara executed a mortgage by conditional sale in favour of one Pakkri, who was the ancestor of most of the defendants respondents. The mortgage purported to be with possession and redeemable after a term of eight years. There was a special provision permitting any of the co-sharers concerned to redeem his own fractional share in the property mortgaged. On the 22nd of August 1879, when the period limited for payment of the mortgage-debt had expired, the

mortgagee issued a notice for foreclosure under Section 8 of the Bengal Regulation XVII of 1806 against all the representatives of the original mortgagors. The issue of this notice was followed by certain transfers on the part of some of the mortgagors of their shares in the equity of redemption. The predecessors-in-title of the present plaintiffs-appellants thus acquired the equity of redemption in a share of 6-annas and odd out of the property mortgaged within the year of grace allowed by the said Bengal Regulation. They deposited in Court what they alleged to be the proportionate amount of the mortgage-debt due in respect of this share. The mortgagee refused to accept the money so deposited and brought a regular suit, in which he claimed both foreclosure and recovery of possession in respect of this share of 6-annas and odd. The learned Munsif has described the said suit as one for recovery of proprietary possession, remarking that mortgage possession was already with the plaintiff. This seems to me scarcely correct, for the judgment of September the 6th, 1881, which terminated this suit, shows that the mortgagee, the plaintiff in that case, alleged that he had failed to obtain possession of more than a small fraction of the property, mortgaged to him. This point was put in issue between the parties but was not determined. The Court held that, whether or not the mortgagee had succeeded in obtaining possession of the whole of the property specified in the mortgage-deed of July the 15th, 1871, the mortgagors were in any case entitled to redeem on payment of the principal only of the mortgage-debts, it further held that the defendants in that suit, that is to say, the predecessors-in-title of the present plaintiffs-appellants, had in fact deposited the entire amount necessary to redeem the fractional share of 6-annas and odd which was then in suit. The Court accordingly found that the mortgage had been redeemed, so far as this share was concerned, within the year of grace allowed by Bengal Regulation XVII of 1806, and on this finding it dismissed the plaintiffs' suit for foreclosure and recovery of possession. Now the present suit is brought in respect of a share of 2-annas and odd. It is admitted that this share forms part of the share of 6-annas and odd which was in controversy in the suit of 1881. It is further admitted that the share now in suit can be divided into two fractions, one of which belonged in 1881 to one Bilasi, who is mentioned in the mortgager deed of July the 15th, 1871, while a smaller fraction belonged to one Banke Rai, the son of one Lallu who was one of the mortgagors under the said deed. I have noted this point because as regards

the fractional share which formerly belonged to Bilasi, the defendants in the present suit set up a further plea that this particular share had never been validly mortgaged to them under the deed of 1871, so that their possession over the same had never been that of mortgagees but was from the first that of trespassers in unlawful possession. This point was considered by the learned Munsif and decided by him in favour of the defendants; but it has not been decided by the lower Appellate Court. The learned District Judge has in effect treated the case on the assumption that the share now in suit was covered by the mortgage of July the 15th, 1871, and had been in the possession of Pakku as mortgagee from that date up to the date of the foreclosure proceedings and suit of 1879 to 1881. In effect what the learned District Judge has found is that the relationship of mortgagor and mortgagee between the predecessors-in-title of the parties to the present suit ceased, either when the ancestors of the present plaintiffs deposited in Court the full amount necessary to redeem the share of 6-annas and odd then in question, or at any rate when a competent Court by its judgment of 6th September 1881 definitely decided, as between the parties, that the full amount necessary to redeem the mortgage of this share had been deposited and on this finding dismissed the suit by the mortgagee for foreclosure and recovery of possession. From that time, in the view taken by the lower Appellate Court, the possession of the predecessor-in-title of the defendants-respondents ceased to be that of a mortgagee, but became proprietary and adverse as against the original mortgagors and their descendants or successors-in-interest. This is the point which is now before me for determination.

2. On behalf of the appellants attention is drawn, first of all, to the provisions of Section 60 of the Transfer of Property Act, IV of 1882, and to those of Article 148 of the first Schedule to the Indian Limitation Act, IX of 1908. It is contended that the suit now before the Court is one against a mortgagee to recover possession in consequence of the mortgage-debt having been fully satisfied, and it is further contended that the right to bring such a suit subsists in favour of the successors-in-interest of the original mortgagors so long as the right to bring a suit for redemption has not been extinguished by act of parties or by order of the Court. To this the reply of the respondents is that the right in question has been extinguished by the order of the Court embodied in the judgment of 6th September

1881, already referred to, and by the failure of the representatives-in-interests of the original mortgagors to enforce within the period of 12 years their right to recover possession over the share now in suit, which was conferred upon them by that decision. It is contended that the provisions of Article 148 above referred to are excluded by the simple fact that this is not in reality a suit against a mortgagee, but is a suit to recover possession of immoveable property to which the provisions of Article 144 of Schedule first to the Indian Limitation Act would apply, and that it is barred under that Article by the fact that the defendants and their predecessors-in-title have been in adverse possession from the year 1881 onward. The cases principally relied on in support of the appeal are Pokhpal Singh v. Bishan Singh 20 A. 115 : A.W.N. (1897) 214 and Sita Ram v. Madho Lal 24 A. 44 (F.B.) : A.W.N. (1901) 194. Along with these may be mentioned the case of Khijarajmal v. Bairn 32 C. 296 (P.C.) : 32 I.A. 23 : 1 C.L.J. 584 : 9 C.W.N. 201 : 7 Bom. L.R. 1 : 2 A.L.J. 71 and that of Srinath Das v. Khettar Mohan Singh 16 C. 693 (P.C.) : 16 I.A. 85. Or. behalf of the respondents it is contended that the case above referred to in the 24th volume of the Allahabad Law Reports is really decisive in their favour and that none of the cases relied upon on behalf of the appellants really justify the maintenance of the present suit. Reference is also made to the case of Mukhan v. Bhagirath Pershad 8 O.C. 33 and Lotf Housein v. Abdool Ali 8 W.R. 476. The litigation which began with the mortgagee's issue of notice of foreclosure on the 22nd of August 1879 and ended with the dismissal of the mortgagee's suit on the 6th of September 1881 was all conducted before the Transfer of Property Act came into force. The Privy Council case referred to in Srinath Das v. Khettar Mohan Singh 16 C. 693 (P.C.) : 16 I.A. 85 is quoted as authority for the proposition that, inasmuch as 12 years had not elapsed between the 6th of September 1881 and the coming into force of the Transfer of Property Act, IV of 1882, the respective rights of the mortgagors and the mortgagees in the present suit would be governed from the 1st of July 1882 onward by the provisions of the Transfer of Property Act. This may be admitted, but it has no real bearing on the essential question in this case, namely, the effect of the litigation between the parties terminating in the decree of 6th September 1881. The Transfer of Property Act itself introduced a series of provisions carefully drafted in order to secure that, in any suit for foreclosure or for redemption litigated under the provisions of that Act,

there should be an adjudication once and for all on every question in controversy between mortgagor and mortgagee and a final decree determining once and for all the mortgage relation between the parties. If the foreclosure proceedings in the present case had taken place after the 1st of July 1882, the mortgagee would presumably have obtained a preliminary decree in the terms of Section 86 of Act IV of 1882. The predecessors-in-title of the present plaintiffs would have paid into Court within the period limited by the decree the sum found by the Court to be necessary in order to redeem the mortgage, in so far as the share in which they were interested was concerned. On their making such payment, the decree would have operated in their favour as extinguishing the rights of the mortgagee and giving them right to be put into possession of the mortgaged property under the provisions of Section 87 of the same Act. It can scarcely be denied that under these circumstances no subsequent suit for redemption could have been brought by these mortgagors or their successors-in-title. It seems clear, however, that the passing of the Transfer of Property Act could not make it incumbent upon any mortgagor or mortgagee to bring a further suit for foreclosure or for redemption under the terms of that Act, if there had been a previous litigation between the parties under the law previously in force, that is to say, under the Bengal Regulation XVII of 1806, which had the effect of determining all matters in dispute between the parties in connection with their mortgage just as completely as they would have been determined in a suit under the Transfer of Property Act after that Act came into force. Under Sections 7 and 8 of the Bengal Regulation XVII of 1806 when once the mortgagor had paid into Court, within the year of grace allowed him by the notice issued under the second of these two sections, the full amount necessary in order to redeem the mortgage, there was nothing further for him to do in the way of redemption. The mortgage was to be finally foreclosed and the conditional sale made conclusive unless the mortgagor should redeem the mortgaged property in the manner provided by Section 7 of the said Regulation within the prescribed year of grace. The manner prescribed by Section 7 of the said Regulation is the payment or tender of the money due under the mortgage to the mortgagee or his legal representative, or in the alternative the deposit of the amount due in the Dewani Adalat of the Zilla or city in which the mortgaged property is situated. Now in the present case, when the tender was made by the

predecessors-in-title of the present plaintiffs, it was not accepted by the mortgagee as sufficient. It remained, therefore, for the Court to adjudicate upon the question of its sufficiency on the motion of one party or of the other. If the mortgagors had brought a suit for a declaration that the amount deposited by them was sufficient and, if necessary, for possession of the mortgaged property and had obtained a decree as prayed for. it can scarcely be denied that that decree would have been a conclusive adjudication as between the parties and would have put an end to all mortgagor and mortgagee rights as between them. In the present case it happened that a suit was brought by the mortgagee for foreclosure and for recovery of possession; There was an adjudication between the parties that the amount deposited had been sufficient, and on this finding, the Court dismissed the mortgagee's suit. In the case of *Sita Ram v. Madho Lal* 24 A. 44 (F.B.) : A.W.N. (1901) 194, Aikman, J., laid down the principle that when a Court by its decree -pronounces a mortgage-debt to be satisfied, and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation, between the parties, of mortgagor and mortgagee has come to an end.' I quote these words more particularly because they express the opinion of the same learned Judge who decided the case principally relied on behalf of the appellants, i.e., *Pokhpal Singh v. Bishan Singh* 20 A. 115 : A.W.N. (1897) 214. The controversy in that case was about a usufructuary mortgage which contained a provision that the mortgage-debt should be satisfied, both principal and interest, by so many years' usufruct of the mortgaged property, and that the mortgagee should deliver up possession without payment on the expiry of the period thus specified. It was held that when under these circumstances the mortgagee held over after the time limited in the mortgage-deed had expired, his possession did not by that fact alone become adverse to the mortgagor. The suit for redemption was held to be in time up to 60 years from the date of the mortgage under the provisions of Article 148, Schedule I, to the Indian Limitation Act. In this case, however, there had been no adjudication by any competent Court and no decision by such Court pronouncing the mortgage-debt to be satisfied. In the absence of any such decision by a competent Court, or of any act on the part of the mortgagee showing that he set up an adverse title as against his mortgagor, it was held that the possession of the mortgagee continued as such and did not become adverse. I do not think that the

learned Judge who decided this case would have seen anything inconsistent between the principle there laid down by him and that enunciated by himself in the case of *Sita Ram v. Madho Lal* 24 A. 44 (F.B.) : A.W.N. (1901) 194 already referred to. The two other cases relied on behalf of the respondents point in the same direction. The Oudh case of *Makhan v. Bhagirath Pershad* 8 O.C. 33 was decided by a Bench of two Judges, one of whom is now a Judge of this Court. He examined the litigation which had taken place between the parties in that case and held that the effect of that litigation had been to put the mortgagee in possession as proprietor. A very similar point seems to have been decided in the case quoted as *Lotf Hossein v. Abdool Ali* 8 W.R. 476. That case is specially important as having been decided under the Bengal Regulation XVII of 1806. It would seem that in that case the mortgagee had issued a notice under the said Regulation, but had taken no further action when the year of grace expired without any payment having been made by the mortgagor. It was held that his possession was adverse as against the mortgagor from the date of the expiration of the year of grace. Both this case and the Oudh case already referred to are so far distinguishable from the one now before me that they were cases in which, on foreclosure proceedings taken by the mortgagee, payment of the amount of the mortgage-debt was not made by or on behalf of the mortgagor. They are, however, both of them authority for the proposition that litigation between mortgagor and mortgagee and more particularly litigation which had the effect of judicially determining the amount due under the mortgage, may have the effect of converting the possession of a mortgagee as such into adverse and proprietary possession against the mortgagor, even though no particular act on the part of the mortgagee is proved. On a review of the authorities as a whole, I am of opinion that this case is governed by the dictum of Mr. Justice Aikman already quoted from the case of *Sita Ram v. Madho Lal* 24 A. 44 (F.B.) : A.W.N. (1901) 194. The mortgage relationship between the parties was terminated by the decision of September the 6th, 1881, in which it was definitely held that the mortgage had been completely redeemed in so far as it affected the parties to the present suit. There was nothing left for the predecessors-in-interest of the mortgagors to do after that decision except to demand possession from the mortgagee, and to sue for his ejectment as a trespasser in unlawful possession in the event of his refusing to give up the share

in question. I hold, therefore, that the Courts below have rightly applied Article 144, Schedule I, to the Indian Limitation Act,' to the circumstances of the present case and have rightly held the suit to be time barred. I accordingly dismiss this appeal with costs.

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