Somesh Vs. Ram Krishna Chowdhry

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Court : Kolkata

Decided On : Apr-26-1900

Reported in : (1900)ILR27Cal705

Judge : Francis W. Maclean, K.C.I.E., C.J. and ;Banerjee, JJ.

Appellant : Somesh

Respondent : Ram Krishna Chowdhry

Judgement :

Maclean, C.J.

1. This appeal must be allowed. The question arises in a suit to enforce a mortgage. On the 26th of May 1898, a preliminary decree for foreclosure was made and we are told, for we have not seen the decree itself, that in terms it followed the provisions of Section 86 of the Transfer of Property Act. There was an appeal from that decree, but the decree was confirmed on the 13th August 1898. Nothing turns upon that appeal. On the 6th January 1899, upon an application made by the mortgagee, the following order was made, 'as the judgment-debtor has not paid the decretal amount within the time fixed, the order for sale of the mortgaged property is hereby made absolute.' In point of fact there had been no order for sale. There is nothing to show whether or not, on that application, the mortgagor asked the Court to postpone the day appointed for payment. 'Whether the mortgagor was served with this application, or what were the actual terms of

the application, does not appear. It will be noticed that the order was not that the defendant do stand debarred of all right to redeem the said mortgaged premises in accordance with the form of decree in schedule IV of the Code of Civil Procedure. After that order was made, the judgment-debtor, on the 8th March 1899, deposited the mortgage money in Court and the Court accepted the money. How this was done does not appear. It is not suggested that the amount deposited was insufficient. On the 26th April 1899 an application was made by the mortgagee in effect to amend the order of the 6th January 1899, upon the footing that it was made under some mistake; and the Court seems to have taken that view, and treating the expression 'order for sale,' occurring in order of the 6th January 1899, as if it ought to have been 'order for possession', held that there had been a clerical error only, and that the judgment-debtor could not take advantage of that error, and directed that the order as amended on the 26th April should relate back to, and be treated as having been made on the 6th January 1899. There was an appeal from the order of the 26th April 1899 to the District Judge, and he, on the 8th July in the same year, confirmed the decision. Hence the present appeal.

2. The question we have to decide is whether having regard to the language of the order of the 6th January 1899, and to the provisions of Sections 84 and 87 of the Transfer of Property Act, inasmuch as the mortgagor, in the interval between the 6th January and the 26th April, paid the mortgage money into Court, and the Court accepted the money, the mortgagee is now entitled to treat the mortgage as absolutely foreclosed. I think not. Apart from the question of whether there was any mistake in the drawing up of the order of the 6th January 1899, and if there was that mistake, whether the order of the 26th April ought to have the retrospective effect given to it by the lower Courts when the mortgage money in the interval had been paid into Court, the authorities appear to me to establish, and I think rightly,--I allude to the cases of Poresh Nath Majumder v. Ramjadu Majumdar (1889) I.L.R., 16 Cal., 246, and Narayana Reddi v. Papayya (1898) I.L.R., 22 Mad., 133,--that until an order for foreclosure absolute has been made under Section 87 of the Act, the mortgagor may be allowed, upon a proper application, to redeem the mortgaged property. These decisions are consistent with the old practice in Chancery in England, and with the present practice in the Chancery Division of the High Court in England, and it is, I think, reasonably clear

that Sections 86 and 87 of the Transfer of Property Act are modelled on that practice and view of the law, or, perhaps I should say, recognized principles of equity. Now, whether or not, the Court was right on the 26th April in saying that there was a mistake in the terms of the order of January 6th, 1899, and that, when the mistake was rectified, the order of April 26th had the retrospective effect, I have mentioned, I do not think it can be said to be an order for foreclosure absolute, so as to debar the mortgagor from the opportunity of redeeming the mortgaged property. The order of the 6th January, as amended by that of the 26th April 1899, was one for possession being made absolute; it says nothing about the right of redemption being barred; and it was not in conformity, as I have pointed out, with the form given in schedule IV of the Code of Civil Procedure, nor with the language of Section 87 of the Transfer of Property Act. It may be said that an order for possession absolute is inconsistent with the idea of any right to redeem still subsisting, and there is perhaps some force in that view, but the mortgagor may retort that the mortgagee elected to take an order Only for possession absolute, and did not ask for an order of foreclosure absolute, as he might have done, and that, until he has obtained an order for foreclosure absolute, the mortgagor is not absolutely barred from redeeming. I am, further, by no means satisfied that the order of the 26th April could be regarded as retrospective to the prejudice of the mortgagor, who, in the meantime, had paid in the mortgage money, and, if this view be well founded,--it is not necessary for me to express a final opinion upon it--the respondent's case would fail on this ground too.

3. Upon these grounds, I think that the order of the Court below must be discharged with costs. It must be taken that the payment into Court by the mortgagor, on the 8th of March, the sufficiency in amount not being disputed, was a good payment, and that the mortgage must be taken to be satisfied and he mortgagor must be, restored to possession.

Banerjee, J.

4. I am of the same opinion.