

Kaiser Khan and ors. Vs. Khaja Abdul Ghani and ors.

Kaiser Khan and ors. Vs. Khaja Abdul Ghani and ors.

SooperKanoon Citation : sooperkanoon.com/867631

Court : Kolkata

Decided On : Mar-14-1941

Reported in : AIR1942Cal138

Appellant : Kaiser Khan and ors.

Respondent : Khaja Abdul Ghani and ors.

Judgement :

B.K. Mukherjea, J.

1. This is an appeal on behalf of the plaintiff and arises out of a suit commenced by him for declaration of his title to the properties in suit on the basis of a purchase at a mortgage sale and for confirmation of possession in respect of the same. The material facts are not in controversy and may be shortly stated as follows : The property in suit is premises No. 6 Middle Road, Entally, situated in the suburbs of Calcutta and it belonged admittedly to one Asraf Serang. Asraf Serang mortgaged it to one Girish Das by an indenture of mortgage dated 14th May 1903 to secure an advance of Rs. 1000 only. On 20th September 1906, Asraf sold the property to one Abdul Aziz who in Ms turn mortgaged these premises along with certain other properties known as 'Harinbari' properties to one Abdul Gani, the defendant in this suit, as security for a loan of Rs. 2000. On 17th February 1914 Girish Das, the first mortgagee instituted a suit on the basis of his mortgage bond, and both Asraf and Abdul Aziz were made parties to the suit. Abdul Gani, the second mortgagee, was

however left out and was not impleaded as a party defendant. Girish Das obtained a decree in execution of which the mortgaged premises were sold and were purchased by the present plaintiff on 14th September 1916. The plaintiff got possession on 30th May 1917.

2. In April 1918, Abdul Gani instituted a suit (being suit No. 510 of 1918) in the original side of this Court for enforcement of the mortgage bond executed in his favour by Abdul Aziz. The present plaintiff was made a party defendant to that suit, and in para. 8 of the plaint, Abdul Gani asserted his right to redeem the prior interest of the plaintiff Kauser Khan acquired by his previous purchase, in premises No. 6, Middle Road, Entally. There was a decree passed in that suit on 5th May 1922, which directed inter alia that the Harinbari properties should be sold first, and if the sale proceeds were not sufficient to satisfy the mortgage money, then premises No. 6, Middle Road, would be sold. This decree was made final on 23rd January 1929. The Harinbari property having been sold already at the instance of another creditor, Abdul Gani got permission of this Court to sell the Middle Road property and that was put up to sale on 25th May 1935, and purchased by Abdul Gani himself. The plaintiff has now brought this suit against Abdul Gani and he seeks a declaration that Abdul Gani did not acquire any rights against him on the strength of his subsequent purchase and that the title which the plaintiff acquired on the basis of his purchase remains unaffected. The defendant Abdul Gani raised a number of defence's, and contended inter alia that he had no knowledge of the mortgage suit instituted by Girish Das, whereas Girish Das and the plaintiff were both aware of the defendant's mortgage. It was urged that by virtue of the sale in execution of the decree of that Court to which the plaintiff was a party, the defendant had acquired a title which would prevail over the rights of the plaintiff, if any, and as he was not impleaded as a party in the mortgage suit of Girish Das, he had a right to obtain possession of the disputed premises.

3. The trial Court decreed the suit in part. It held that the plaintiff acquired a title to the property by his purchase but that the defendant was entitled to redeem him. The plaintiff therefore could retain possession of the property only so long as the defendant did not pay the purchase money with interest at the rate of 6 per cent. per annum upon the same. The defendant was given two months time, within

which he was to make the payment. Against this decision, the defendant took an appeal to the Court of the District Judge of 24-Parganas. The Additional District Judge who heard the appeal, reversed the decision of the trial Court and dismissed the plaintiff's suit. The learned Judge was, of opinion that as the plaintiff was made a party to the mortgage suit instituted by the defendant in the original side of this Court, and an order for sale of the property was made in his presence, he was bound by the decree and order made in that suit, and if he wanted to establish his own title to the property, he should have done so in the High Court suit. It is the propriety of that decision that has been challenged before us in this second appeal.

4. The plaintiff, as has been said above, seeks to establish his title as a purchaser at a sale held at the instance of Girish Das who obtained a mortgage decree against Asraf and Abdul Aziz, and his case is that the subsequent purchase by the defendant at the Sale held in execution of his own mortgage decree could not affect his title. The case of the plaintiff put forward in this extreme form is manifestly untenable. It is not disputed that the defendant who was a puisne mortgagee was not made a party to the mortgage suit of Girish Das. As has been held in a series of cases of this Court, of which the cases in *Gangadas Bhattar v. Jogendra Nath* ('07) 11 C.W.N. 403, *Jugdeo Singh v. Habibullah Khan* ('07) 6 C.L.J. 612 and *Nihar Mala Debi v. Saroj Bhandu* : AIR1933 Cal728 can be taken as types, the purchaser of the mortgaged property in such cases acquires the property as it existed at the date of the sale, discharged of the mortgage lien, but subject to the rights of the parties who were omitted from the suit. It is also essential that the mortgagee must have no notice of the rights of the parties who were left out of the suit at the time when the mortgage suit was instituted: vide *Krishtopada Roy v. Chaitanya Charan Mandal* ('23) 10 A.I.R. 1923 Cal. 274; *Digambar Suthar v. Suajan* : AIR1929 Cal233 . In this case, we have a definite finding by the trial Judge, that Girish was not aware of the rights of the defendant as a puisne mortgagee, and consequently, it may be said that at the date of the purchase the plaintiff acquired a title to the property subject to the rights of redemption which could be exercised by the defendant.

5. In the mortgage suit that was instituted by the defendant in the original side of this Court, he definitely accepted this position, and there was an express prayer in the plaint for allowing him to redeem the interest which the plaintiff acquired at the previous mortgage sale. The plaintiff, for reasons best known to his legal advisers, put forward a defence that as he was a bona fide purchaser for value without notice of the defendant's right, the defendant could not assert any right of redemption against him. This defence was obviously unsupportable, but it is quite clear from the pleadings of the parties that the plaintiff was made a party to the mortgage suit of the defendant in the capacity of a person having a prior right and the relief which the defendant claimed against him, was entirely on that footing. The decree that was passed in the mortgage suit is rather peculiar. It directed that the mortgagee, Abdul Gani, should proceed in the first place against the Harinbari properties with which the present plaintiff was not concerned and if the sale proceeds proved insufficient to wipe off his dues, he could then proceed to sell No. 6 Middle Road, Entally. It was not said that the sale would be held free of the rights of the plaintiffs, but the Additional District Judge says that that must be the effect of the order which was made in the presence of the plaintiff. I am unable to accept the view that has been taken by the learned Judge.

6. Under Order 34, Rule 12, Civil P.C., the Court can direct a sale of the mortgaged property at the instance of a subsequent mortgagee, free from any prior mortgage, only when the prior mortgagee gives his consent, and in that case he is bound to give the prior mortgagee the same interest in the proceeds of the sale as he had in the properties sold. I cannot agree with Dr. Sen Gupta that the plaintiff was a consenting party to this order as it was at his instance that a direction was given to sell the Harinbari property first. We do not know why the plaintiff was advised to plead in the written statement in the mortgage suit that the Harinbari properties should be sold first. No question of marshalling arises on the facts of the present case; but even if the order for sale of the Harinbari properties was made at the instance of the plaintiff, we cannot from that fact alone infer that the plaintiff consented to have premises No. 6 Middle Road, Entally, sold by the second mortgagee free and clear of his previous charge even though no order was made giving him a prior charge on the sale proceeds. I am also not impressed by the argument of Dr. Sen Gupta that the plaintiff ought to have set up his prior

rights in the mortgage suit itself and invited the Court to pass an order in his favour and that the omission to plead his rights in the mortgage suit would operate as a bar to his raising this question again on the principle of constructive res judicata. To attract the doctrine of constructive res judicata, it must be shown that there were allegations made by the defendant in his plaint in the mortgage suit which impugned or sought to displace the prior title of the plaintiff: vide, *Radha Kishun v. Khurshed Hossein* ('20) 7 A.I.R. 1920 P.C. 81. Far from containing any allegation in derogation of the plaintiff's title, the defendant expressly admitted his prior interest and claimed only a right to redeem.

7. It is true as Dr. Son Gupta points out that the present plaintiff in his written statement in the mortgage suit resisted Abdul Gani's claim for redemption and set up an indefeasible title to the property on the basis of his prior purchase. But simply because he claimed certain rights which were not and could not be allowed by the Court, it cannot be suggested that he lost or waived his right to be redeemed by Abdul Gani. It is not disputed before us that though the plaintiff was a purchaser at the mortgage sale held at the instance of the first mortgagee, he could use the first mortgage as a shield against the puisne encumbrancer. It seems to me that the plaintiff has been misadvised all through and at every step he took up such positions as can never be supported in law. The decree in the mortgage suit is no doubt obscure, but we think it should be interpreted in such a way as to make it conformable to law. In my opinion the order passed for sale in the original side of this Court must be taken to be a direction to sell the property subject to and not free of the plaintiff's prior rights.

8. The result, therefore, is that the plaintiff can have a declaration of his title on the basis of his purchase with respect to the properties, subject to the defendant's right of redemption and the question now is on what terms the defendant should be allowed to redeem. Dr. Sen Gupta is right in saying that the defendant cannot be compelled to pay the purchase money which the plaintiff himself had to pay. Both sides admit that the defendant should be allowed to redeem on the basis of the mortgage decree obtained by Girish Das. Dr. Sen Gupta says further that though his client is willing to pay interest on the decretal amount at the Court rate of 6 per cent. per annum from the date of the decree, yet he is entitled to get credit

for all sums that the plaintiff realized as profits out of the disputed premises ever since he obtained possession in 1917. We do not think that this position is quite sound. The plaintiff purchased not only the interest of the first mortgagee but of the mortgagor Asraf Serang as well and the defendant himself being a simple mortgagee is not entitled to get possession till the date of his purchase. We think, on the whole, that it would be fair and equitable if we do not allow any interest on the decretal amount in consideration of the fact that the plaintiff has been in possession of the property for a very considerable period of time.

9. It is, therefore, ordered that the defendant or his heirs would be entitled to redeem the interest of the plaintiff in premises No. 6 Middle Road, Entally, on depositing the actual amount that was allowed to Girish in the final decree passed in the mortgage Suit No. 31 of 1914 of the second Court of the Subordinate Judge. Alipur, within six months from this date. On payment being made within this time the plaintiff or his heirs would be bound to deliver over possession of the properties to the defendant or to his heirs. In default of payment, the title of the plaintiff or his heirs to the disputed properties will be declared and their possession confirmed. We direct that the parties do bear their own costs in all the Courts. Let a decree be drawn up accordingly.

Biswas, J.

10. I agree.

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