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Court : Kolkata

Decided On : Nov-17-1887

Reported in : (1888)ILR15Cal357

Judge : Mitter and ;Beverley, JJ.

Appellant : Umesh Chunder Das

Respondent : Chunchun Ojha, Heir and Representative of the Late Jugodumba Debia Ojain

Judgement :

Beverley, J.

1. After shortly stating the facts as above, continued: The only question before us in second appeal is whether the lower appellate Court was right in holding that the Regulation did not apply in this case, but that the mortgage must be foreclosed under the provisions of the Transfer of Property Act, which came into force on 1st July 1882.

2. The material facts as regard this question are these: The deed of conditional sale was executed and the due date expired while the Begulation was still in force. Notice of foreclosure, it is alleged, was also served while the Begulation was in

force, but when the year of grace expired the Begulation had been repealed.

3. The Advocate-General for the appellant contends generally that the mortgagor's right to foreclosure under the provisions of the Regulation having accrued while the Regulation was still in force, that right is saved by Section 2, Clause (c) of the Transfer of Property Act; and in this particular case he relies on a decision of this Court in Mohabir Pershad Narain Singh v. Gungadhar Pershad Narain Singh 14 C. 599. Mr. Woodroffe, on the other hand, supports the decision of the lower appellate Court on the authority of the decision of the Full Bench of the Allahabad Court in Gunga Sahai v. Kishen Sahai 6 A. 262, and of the Full Bench of this Court in Bhobo Sundari Debi v. Rakhal Chunder Bose 12 C. 583, and of a Division Bench of this Court in Baijnath Pershad Narain Singh v. Moheswari Pershad Narain Singh 14 C. 451; and the attempts to distinguish this case from that relied on by the Advocate-General on the ground that in the present case notice of foreclosure was served after the Transfer of Property Act bad been passed, though before it came into force.

4. As regards the general question raised by the Advocate-General, it seems to me that, as a Division Bench of this Court, we are precluded from considering it by the decision of the Full Bench above referred to, in which it was held by a majority of the Judges (in conformity with the decision of the Allahabad Court) that where the mortgage was executed and the due date expired while the Regulation was in force, but no proceedings for foreclosure had been instituted under the Regulation at the time of its repeal, foreclosure could only be sued for under the provisions of the Transfer of Property Act. The Full Bench, however, did not decide as to the procedure which should be followed in cases where proceedings had been instituted under the Regulation prior to its repeal. In the case of Baijnath Pershad Narain Singh 14 C. 451 notice of foreclosure had been served and the year of grace had expired before the Regulation was repealed, and relying upon those facts the Court held that the mortgagee had thereby acquired an immediate right to have a decree declaring the property to be his absolutely. In Mohabir Pershad Narain Singh 14 C. 599, as in the present case, the notice of foreclosure was served while the Begulation was still in force, but the Regulation had been repealed before the year of grace expired. Mr. 'Woodroffe accordingly argues that

the fall and complete right of the mortgagee to a decree for foreclosure and possession had not accrued, and that the ratio decidendi relied on in the case of Baijnath Pershad Narain Singh is wanting in the present case. But the Judges who decided the case of Mohabir Pershad Narain Singh were of opinion that the mortgagee had acquired a right to bring a suit under the Regulation at the expiration of the year of grace, and they held that that right was saved by Clause (c) of Section 2 of the Transfer of Property Act. Without going so far as this (which perhaps may seem to militate somewhat against the principle laid down by the Pull Bench) it appears to me that it may fairly be said that, proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by Section 6 of the General Clauses Act. Mr. Woodroffe argues that the proceedings referred to in that section are judicial proceedings only, and that, the service of notice of foreclosure being merely a ministerial proceeding, that section cannot apply. But I see no sufficient reason for narrowing the plain meaning of the term in this manner. If the Eegulation merely provides a mode of procedure for foreclosure, it seems to me to be only consonant with reason that when that procedure has been put in force it should be continued, and that what has been done should not be set aside in order that a new procedure under a totally different law should be substituted. For this reason, though not prepared to agree in its entirety with the reasoning of the Judges who decided the case of Mohabir Pershad Narain Singh, I am prepared to follow the decision in that case, and to hold that in the present case the mortgagee was entitled to foreclosure under the provisions of the Eegulation.

5. I am of opinion therefore that the decree of the lower appellate Court must be reversed, and the case remanded to that Court for determination of the question whether the notice was duly served.

Mitter, J.

6. I concur. The Full Bench decisions in Gunga Sahai v. Kishen Sahai 6 A. 262 and in Bhobo Sundari Debi v. Rekhal Chunder Bose 12 C. 588 do not, as pointed out by my learned colleague, support the view of the law taken by the District Judge in this case. In those cases the mortgagee had not taken any steps to

foreclose the mortgage under Eegulation XVII of 1806 when the Transfer of Property Act came into operation, and it was held that the mortgagee after the repeal of the aforesaid Eegulation could not adopt the procedure laid down in it to effect a valid foreclosure. But here all the steps that are necessary to be taken under the Regulation had been taken when it was in force. All that remained was to bring a suit for foreclosure which is not provided in the Regulation. That suit has now been brought, and the (plaintiff) appellant does not ask us to apply to it the procedure laid down in any repealed Regulation, but the procedure which is now in force. The Full Beach decisions therefore will not help us in deciding the question raised in this appeal. The case of Baijnath Pershad Narain Singh v. Moheswari Pershad Narain Singh 14 C. 451 is also inapplicable, because the plaintiff in that ease had acquired the right of an absolute owner, and the relation between him and the defendant as mortgagee and mortgagor had ceased to exist when the Transfer of Property Act came into operation. In this case that relation still subsisted when that Act came into operation.

7. But the case of Mohabir Pershad Narain Singh v. Gungadhur Persad Narain Singh 14 C. 599 is exactly in point. There, as in this case, the steps for the purpose of effecting foreclosure had all been taken under Regulation XVII of 1806 when it was in force, and the relation of mortgagee and mortgagor had not ceased to exist when the Transfer of Property Act came into operation.

3. It has been contended before us on behalf of the respondent that that ease has not laid down the law correctly, but I am unable to accept this contention as valid, because it is (a) contrary to a well-settled principle of construction that in matters of substantive right a statute is not to be so read as to affect it unless it does so in express language or by necessary implication; it is (b) contrary to the provisions of Section 2, Cause (c) of the Transfer of Property Act itself; and it is (c) also contrary to Section 6 of the General Clauses Act No. I of 1868.

8. Under the law in force, before the Transfer of Property Act came into operation, the appellant mortgagee had the right of foreclosing the mortgage by causing a notice to be served through the principal Civil Court of the district upon the mortgagor, informing him that his right of redemption would be gone if the

mortgage money be not paid in full within one year from the date of the service of the notice. This is a substantive right, and not an inchoate right, i.e., a mere chance of being developed into a substantive right as contended for on behalf of respondent. This right was vested in the plaintiff in the capacity of a mortgagee, and on the expiration of the year of grace he acquired a new right, i. e., that of an absolute owner. But the one right is as much a vested right as the other. There is nothing in the Transfer of Property Act which in express words or by necessary implication takes away this right.

9. The right accuring to a mortgagee under Regulation XVII of 1806 when the notice prescribed in it has been served on the mortgagor will not be affected by the Transfer of Property Act, as provided in Clause (c) of Section 2. It is a right conferred by the Regulation, but arises out of the relation of mortgagee and mortgagor constituted in this case before the Act came into operation. It is therefore expressly saved by the clause in question. Then, again, on the service of the notice of foreclosure in this case a certain liability on the part of the mortgagor arose out of that relation, viz., the liability of losing the right of redemption if the mortgage money in full be not paid within one year. That liability also remained unaffected by this clause.

10. The contention on behalf of the respondent, as already stated is also contrary to the provisions of Section 6 of the General Clauses Act. The service of notice upon the mortgagor in this case was an act done. It was a valid and effectual act at the time when it was done, because at that time the Regulation which prescribed its doing was in force. We are asked to undo the effect of that Act, and to hold that notwithstanding it was valid and effectual at the time when it was done, it should be treated as if it had not been done after the Transfer of Property Act came into operation, because the Regulation under which it was done has been repealed by that Act. That is precisely what Section 6 of the General Clauses Act says inter alia that we must not hold. It says that' the repeal of any Statute, Act or Regulation shall not affect anything done before the repealing Act shall have come into operation.' The case of Mohabir Pershad Narain Singh v. Gunga Pershad Narain Singh 14 C. 599 must therefore, in my opinion, be followed.

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