

Mohan Sardar and ors. Vs. Hem Chandra Mandal and ors.

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Court : Kolkata

Decided On : Jun-07-1928

Reported in : AIR1929Cal648

Appellant : Mohan Sardar and ors.

Respondent : Hem Chandra Mandal and ors.

Judgement :

C.C. Ghose, J.

1. The facts involved in this appeal, shortly stated are as follows:

2. One Kushai Sardar for himself and as guardian of his nephew who was then a minor, being defendant 2 and one Amrita Sardarni, as mother and guardian of a minor son, being defendant 3, executed a mortgage in favour of one Nafar Chandra Mandal on 17th Ashar 1310, for a sum of Rs. 525. Kushai had a brother named Kunai, who is dead, and defendant 2 is the son of Kunai. Defendant 3 is the son of one Gadai who was another son of Kunai. The original mortgagee died sometime ago leaving him surviving his three sons being plaintiffs 1,2 and 3. The plaintiffs including one Poran plaintiff 4 brought a suit on the mortgage on or about 20th February 1918, the total claim being laid at Rs. 997. Defendant 4, Nitai Mandal, was added as a party defendant as the subsequent purchaser of an 8 anna share in the mortgaged premises from defendants 2 and 3.

3. The suit came on for hearing before the Munsif at Khatra and by his judgment dated 12th February 1919, the learned Munsif decreed the suit with costs, i.e., passed a preliminary decree on the mortgage. There was appeal to the Subordinate Judge of Bankura but the appeal was dismissed with costs on 23rd January 1920. Thereafter an application was made for a final decree and it appears that on 26th August 1922 an ex parte order was made by which the preliminary mortgage decree was made final and absolute. Subsequently it was sought to set aside the exparte order of 26th August 1922, on the ground that no notice had been served upon the defendants before the final decree was passed and that one of the plaintiffs namely Poran Mandal had died in Pous 1328 and one of the judgment-debtors had died in Ashar 1328, and that, therefore, the suit itself had abated under Order 22, Rule 4, Civil P.C. The matter came before the learned Munsif on 29th March 1923, and by his order of that date the learned Munsif refused to set aside the previous order of 26th August 1922. There was an appeal against the last mentioned order and it appeared that substitutions had been made in the records in places of the deceased plaintiff and the deceased defendant on a date which was beyond the usual period of three months from the deaths in question. The learned Subordinate Judge by his order dated 30th July 1923, allowed the appeal and sent the matter back to the Court of first instance for retrial of the plaintiffs' application for substitution and final decree. Thereafter the matter having come back to the learned Munsif, the latter by his order dated 29th March 1924 held that the prayer for substitution could not be granted and that the suit having abated should be dismissed. The ground of this decision was that no substitution had been made in place of the deceased plaintiff, Poran Mandal, within three months from the date of his death. There was appeal to the Subordinate Judge of Bankura against the last mentioned decision and that officer held by his judgment dated 28th February 1925, that so far as the plaintiffs were concerned, the claim had not abated in the circumstances of the case, and that so far as the defendants were concerned their liability remained intact at any rate to the extent of 5/6th share. The result was that according to the learned Subordinate Judge, the order of abatement was set aside and a final decree passed to the extent of a 5/6th share in the mortgaged premises.

4. The present appeal is against this last-mentioned order and it is contended on behalf of the surviving defendants that, having regard to the facts disclosed on the record, it ought to have been held that the suit having abated as against one of the plaintiffs mortgagees, it remained improperly constituted and that no final decree could be passed; in other words, the contention is that the mortgaged security being one and indivisible, it can neither be enforced nor redeemed piecemeal.

5. As will be seen from what is stated above, the contention on behalf of the appellants arises because of the fact that one of the plaintiffs i.e., plaintiff 4 and one of the mortgagors had died and that no substitution had been made in their places. As regards the question of what is the effect of the non-substitution of the heir of one of the mortgagors, the matter has now been set at rest by the decision of this Court about to be referred to. In the case of *Hara Chandra Roy v. Mahomed Hussain* A.I.R. 1921 Cal. 554 which was a suit on a mortgage in which all the heirs of the mortgagor had not been made parties, it was held that the suit could not be dismissed. Mookerjee, J., observed as follows:

It is clear that the plaintiffs were at the least entitled to a decree for a proportionate share of the mortgage money as against the defendants who were on the record. Even if it is assumed that the persons who had been left out, could, if joined, have successfully urged the plea of limitation that would not afford a defence in favour of the persons who had been joined as parties within the prescribed time. This view is supported by the decision in *Imam Ali v. Baijnath Ram Sahu* [1906] 33 Cal. 613. In that case an objection was taken that certain parties had not been brought on the record in time and that if they were added as parties the suit must be deemed as bound by limitation as against them. It was ruled that where the purchaser of a portion of the equity of redemption is added as a party (defendant) not by the Court but upon an application by the mortgagee after the prescribed period of limitation although the mortgage suit is barred as against the added defendants, yet such mortgagee is entitled to succeed in respect of a proportionate part of his claim as against the remaining owners of the equity of redemption.

6. To the same effect is the decision of the ease of Khirodamayi Dassi v. Habib Shaha : AIR1925 Cal152 . In that case a person having a share in the equity of redemption had not been made a defendant but it was held that there should be a decree proportionate to the shares of the persons actually made defendants mortgagors. My learned brother Suhrawardy, J, went through all the cases and applied the rule laid down in the case reported in Hara Chandra Roy v. Mahomed Hussain A.I.R. 1921 Cal. 554. In this connexion reference may also be made to the case of Dina Nath v. Nabo Kumar A.I.R. 1921 Cal. 792. I am, therefore, of opinion that the present suit in the circumstances which have happened could not fail and there should be a decree proportionate to the shares of the mortgagors who were already on the record.

7. But it is argued that the matter is complicated by the fact that no substitution was made in place of the deceased plaintiff Poran Mandal who died in Pous 1328. It appears that the suit was properly constituted at the time when it was instituted. Now on the facts in this case it appears that the mortgage in question was in favour of one Nafar, the father of plaintiffs 1, 2 and 3. The plaintiff who had died, i.e., Poran Mandal, was plaintiff 4. He was neither a proper nor a necessary plaintiff, because he was in no way a successor-in-interest of Nafar. The heirs of Nafar being on the record, the suit in my opinion was clearly maintainable, and that it did not matter in the slightest if no substitution was made in place of the deceased plaintiff Poran Mandal.

8. In this view of the matter the present appeal fails and must be dismissed with costs.

Suhrawardy, J.

9. I agree.