(1930) 02 AHC CK 0014

Allahabad High Court

Case No: None

Amba Prasad and Others		APPELLANT
	Vs	
Moonga Ram and Others		RESPONDENT

Date of Decision: Feb. 4, 1930

Hon'ble Judges: Mukerji, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Mukerji, J.
The facts of the case are complicated and will have to be gone into at some length.

2. It appears that a 10 biswas share in village Mangora, as described in the plaint, was under a very ancient usufructuary mortgage with one Mr. Wright, in or about 1838. On 19th March 1874 some of the persons in whom the right to redeem was vested made a mortgage of the same property, viz., 10 biswas share, in favour of Durga Prasad, a predecessor-in-title of the appellants before us. The mortgage in favour of Mr. Wright was for Rs. 2,200. The mortgage that was made in favour of Durga Prasad was for Rs. 2,800. Durga Prasad was also one of the persons entitled to share in the property, as a co-mortgagor. It was therefore agreed that Durga Prasad should pay down in cash Rs. 800 to his mortgagors and should pay Rs. 2,200 to Mr. Wright or his successor-in-title for redemption. The difference between Rs. 2,200 and Rs. 2,800 was to be provided for by Durga Prasad himself, inasmuch as Durga Prasad was a co-mortgagor under the ancient mortgage of 1838. Durga Prasad, it appears, obtained assignment of a part of the mortgaged property in 1879. The history behind his purchase is that in 1870 one Akkhay sold to Madho Singh 1  biswas share for Rs. 80. Madho Singh''s heirs'' names were recorded in the khewat. In 1879, Durga Prasad''s name was substituted in place of those of Madho Singh''s sons. The lower appellate Court has found, and we must accept that finding as correct, that Madho Singh was really a benamidar for Durga Prasad. In the result, before the mortgage of 1874 in his favour, Durga Prasad held two shares in the

property, namely 10 biswas, under the purchase of 1870.

3. Having acquired the mortgage of 1874, Durga Prasad proceeded to redeem the mortgage of 1838. At this stage, the mortgagee rights of Mr. Wright had become vested in one Faqruddin. Durga Prasad instituted a suit against Faqruddin and it was found that Faqruddin had purchased a 5 biswas share out of the 10 biswas mortgaged with him. In the result, by the judgment of the Court, dated 1st September 1875, Durga Prasad was given a decree for redemption of the remaining 5 biswas alone, Durga Prasad thereupon paid Rs. 1,100, being one-half of the mortgage amount, Rs. 2,200, and obtained delivery of possession.

4. The present plaintiffs professed to be the transferees of some of the co-mortgagors of Durga Prasad. They claimed redemption of the entire 5 biswas share in the hands of Durga Prasad''s heirs, the appellants before us.

5. Durga Prasad''s heirs raised various defences to the suit, many of which we need not consider at all now. They claimed large sums of money as due to them under the terms of the mortgage of 1874.

6. The learned Munsif dismissed the suit because he was unable to find out what was the plaintiff''s share in the mortgage property. He held that the plaintiffs could not, in the circumstances of the case, obtain redemption of more than their proper share in the property.

7. The learned Subordinate Judge was of opinion that the plaintiffs were entitled to redeem the entire 5 biswas share. He thought that because the alleged purchase by Durga Prasad of 1879 was a fictitious one, he having acquired the property benami through Madho Singh in 1870, there was no acquisition by Durga Prasad of any share of the mortgaged property after the mortgage of 1874. The learned Judge, therefore, held that there was no breach of the integrity of the mortgage. The integrity, according to the learned Judge, having not been broken, the plaintiffs were entitled to redeem the entire 5 biswas share of the zamindari property. Various points have been argued on behalf of the appellants and we shall take them up separately.

8. The first question is whether the plaintiffs are entitled to redeem the entire 5 biswas share or only their legitimate share, according to the proper calculations. On this point we are of opinion that the plaintiffs cannot redeem anything more than their proper share of the mortgaged property. Accepting the learned Subordinate Judge''s finding that there was no purchase by Durga Prasad after the mortgage, the fact remains that at the date of the mortgage of 1874, Durga Prasad was already a co-sharer in the property. The result of redemption by Durga Prasad was that one of the co-mortgagors redeemed the mortgage. By virtue of a statement in the deed of 1874 itself, it is clear that Durga Prasad had a share in the property. He, having redeemed Faqruddin, was in the position of several mortgagors redeeming the mortgage. Such being the case, no co-mortgagor can ask Durga Prasad or his heirs

to and over to him more than his own legitimate share. The principle on which the entire property is handed back on redemption does not apply to this case. If the property redeemed is going to be security for the money advanced, Durga Prasad is as much entitled to hold the property as the plaintiffs would be on payment. One result of allowing, to-day, redemption of the entire 5 biswas share is, that tomorrow Durga Prasad''s heirs would be entitled to go and ask for redemption of their shares. It seems to be absolutely clear to us, therefore, that the plaintiffs cannot redeem anything more than their legitimate share of the mortgaged property.

9. The next point is, what is the amount of the plaintiffs'' share? This has not been determined by the lower appellate Court. The learned Munsif found himself not to be in a position, from the evidence, to come to a conclusion. The lower appellate Court has not coma to any finding. We shall have to ask the learned Subordinate Judge to come to a finding of his own on the evidence, as it stands.

10. The next point argued before us on behalf of the appellant was that as no money had been deposited prior to the institution of the redemption suit, the suit should have bean dismissed in its entirety. It is argued that one of the terms of redemption was that the money was to be deposited in the month of Jeth. This argument is really concluded by the Full Bench case of Saiyid Ahmad Beg and Another Vs. Dharmun Rai and Others, and the non-deposit or non-tender of the mortgage money in the month of Jeth is no ground for dismissing the suit in its entirety. The equities of the case, if necessary, may be settled by making a proper order as to costs.

11. The next point is as regards the accounts. In the deed of mortgage of 1874, one of the terms was that when redemption is asked for, the mortgagee would be entitled to all the arrears of takavi and rent that may be "due" by the mortgagors themselves and the tenants. The learned Subordinate Judge has held that this meant arrears recoverable under the three years of limitation. We think that this view was the right one on the terms of the deed itself. We, therefore, uphold this part of the judgment.

12. The next point that has been urged for the appellant is that interest should have been allowed to the defendants on the sum of Rs. 2,800 from the data of the mortgage, namely 19th March 1874 till recovery of possession from Faqruddin by Durga Prasad. The learned Subordinate Judge has allowed interest on the sum of Rs. 800 only. As regards the interest on the balance, we are of opinion that the defendants are not entitled to anything further. They have failed to prove that they had deposited the sum of Rs. 2,200 almost immediately after the execution of the deed of the mortgage or that they had deposited it at all.

13. The next point is that the defendants are entitled to interest on the sum of Rs. 400, being one-half of the sum of Rs. 800 which the mortgagors took, believing that it was going to be a mortgage of 10 biswas. There is no stipulation in the mortgage

deed for any interest for any sum that might be taken by the mortgagors. The Interest Act does not apply and we do not think that on pure equitable grounds we should allow any interest on such an ancient transaction, which was entered into about 55 years ago. To allow interest would really mean prevention of redemption.

14. Then, we have been told that there was a clerical error in the calculation of the profits. This is pointed out in para. 7 of the grounds of appeal taken in this Court. As the question of accounts will have again to be gone into, we need not consider whether there is any error in the decree of the lower Courts in the calculation.

15. Then exception has been taken on behalf of the appellants as to opening of the question of malkana. The learned Subordinate Judge at p. 37 of the judgment says:

The question of malkana allowancedue to the mortgagors has not been gone into by the learned Munsif... I do not mean to bold that malkana has or has not been paid to the mortgagors. That will be a point for the learned Munsif to decide.

16. The learned counsel for the appellant has urged that the plaintiffs are not entitled to claim credit for malkana unless they have taken an assignment of the same from the mortgagors. On behalf of the respondents it has been urged that whether there is an assignment or not, the malkana is payable to the vendors of the respondent and therefore to the respondents themselves under the terms of the deed. These points have not been gone into or decided and we would leave them open for the consideration of the Court of first instance.

17. In the result we have to send down an issue for determination by the lower appellate Court. Till the issue is decided, we shall not be in a position to say on what condition the case should go back to the learned Munsif or whether it is to go back to him at all. The issue is:

What is the share of the plaintiffs in the 5 biswas share sought to be redeemed? If it is found that the plaintiffs'' share is nil, or that it cannot be ascertained on the evidence that stands on the record, the whole suit will have to be dismissed.

18. We allow six weeks'' time to the lower appellate Court for remitting of findings. No further evidence will be allowed to be adduced. One point has to be noted. This appeal was really an appeal against an order of remand. The appellant has paid full court-fee as if it were an appeal against a decree. In passing final orders in this appeal, we shall consider the question of costs.