

(1879) 07 AHC CK 0006

Allahabad High Court

Case No: None

Kanauji Lal

APPELLANT

Vs

Basant Rai and Others

RESPONDENT

Date of Decision: July 8, 1879

Citation: (1880) ILR (All) 455

Hon'ble Judges: Straight, J; Spankie, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. The plaintiff, respondent, is the auction-purchaser of the ten biswas zamindari share of Zalim Singh, the subject of dispute. He avers that the share was mortgaged on the 17th June 1859 to the defendants for Rs. 2,200, and for a term of five years, and that on the 21st May 1861, Zalim Singh executed a deed of sale of the property in favour of the mortgagees, giving them credit for Rs. 2,200, the mortgage-money, Rs. 250 in cash, and retaining Rs. 5,800 to be paid on account of debts to the plaintiff: Lalta Prasad and others sons of Zalim Singh, sued to set aside the sale and succeeded in Saining a final decree in their favour from the Sudder Dewany Adawlat, North-Western Provinces, on the 22nd August 1864: the defendants, however, continued in possession of the share as mortgagees: there was a stipulation in the mortgage-deed that Zalim Singh was to receive Rs. 75 yearly as "malikana" or proprietary allowance: this sum the mortgagees deducted yearly from he principal sum advanced on the mortgage, leaving now a balance of Rs. 925 due to the mortgagees:the plaintiff claims to redeem the share of Zalim Singh on payment; of Rs. 925, or such sum as the Court shall declare to be due. The defendants contend that the purchase of the interest of the sons of Zalim Singh by the plaintiff at auction gave him no right of suit: they had no right during their father's lifetime: Zalim Singh had admitted the sale to defendants and he had ineffectually endeavoured to recover possession of the share, but the High Court, North-Western Provinces, on the 27th May 1867 rejected his claim: the plaintiff's suit to redeem the mortgage on

the ground that the sale of the 21st May 1861 was invalid was barred by Section 13, Act X of 1877 and the admission of Zalim Singh. They also contend that they were entitled to repayment of the sale consideration and that the allowance of Rs. 75 ceased from the date of the sale, and that there was no condition in the mortgage-deed for the deduction of this sum yearly from the principal sum advanced on mortgage. Zalim Singh himself realized this sum prior to the sale. The Subordinate Judge held that the defendants, who objected to the sale of the share in execution of the decree and against whose objection an order was passed on the 15th November 1867, ought to have contested that order in a regular suit within the period prescribed by law : they had not done so, and the order became final, and they could not now contend that Zalim Singh had no rights that could be sold: the plaintiff, therefore, had a clear right of suit. He also held that the property in dispute could not be considered liable for the consideration of the sale-deed, that deed having been set aside by the Sudder Dewany Adawlat in 1864: the defendants themselves have admitted all along that they were mortgagees: as they had failed to show that the proprietary allowance of Rs. 75 had been paid yearly, the sum should be deducted from the amount of the mortgage-loan. He accordingly gave a decree to plaintiff as claimed. The defendants appealed and repeat their original pleas. The Judge held that the mortgage of 1859, which had merged in the sale of 1861, revived when that sale was cancelled under the decision of the Sudder Dewany Adawlat of 1864: the sale was set aside because it was invalid under the Hindu law. He accepts the argument of the Subordinate Judge in regard to the finality of the order u/s 24.6, Act VIII of 1859, and he further holds that defendants were not entitled to any refund of Rs. 8,000, as sale-consideration, before redemption could be allowed: if they are entitled to that sum they could only claim it from Zalim Singh personally: they could not claim it from the plaintiff who had purchased the equity of redemption. The defendants had never brought a suit for the recovery of the money. The Judge also allowed the deduction of Rs. 75 yearly from the mortgage-loan as there was no proof that the allowance had been paid.

2. In second appeal the same pleas are urged. The decision of the Sudder Dewany Adawlat of the 22nd August affirmed that of the Judge, dated 1st March which set aside the sale of 1861 as not having been made for legitimate family purposes but for the gratification of the personal extravagance of Zalim Singh. It was, therefore, invalid under the Hindu law. But though the sale was set aside possession was not given to the plaintiffs, the sons of Zalim Singh. The defendants remained in possession as mortgagees. The sale having been declared altogether inoperative, and having been completely set aside, it cannot; be said that the mortgage was extinguished by the execution of the sale-deed. The defendants were simply left in possession as mortgagees. The mortgage transaction has never been impugned, and the plaintiff as the representative of the original mortgagor has certainly a right to redeem the mortgage.

3. The Courts below appear to have rightly held that, as the defendants objected to the sale by auction of the rights of Zalim Singh and an order was passed against them on the 15th November 1867, which they had never contested in a regular suit, they could not now deny that the plaintiff had purchased whatever rights still remained to Zalim Singh and his sons. In holding this to be the case, the lower Appellate Court has followed the ruling in *Badri Prasad v. Muhammad Yusuf* ILR All. 381 of this Court in Full Bench.

4. The lower Appellate Court has not, as urged by the appellants, misunderstood this Court's decision of the 27th May 1867. That decision ruled that, although the sale by Zalim Singh was set aside, yet Zalim Singh (then plaintiff) could not equitably be allowed to retain the purchaser's money and to eject the purchaser from the property sold. He must be held estopped by his own act from pleading the invalidity of the sale. But this decision was passed as against Zalim Singh himself, who on the strength of the *Sudder Dewany Adawlat's* decision of the 22nd August was seeking to obtain possession of the property from the defendants. But it does not follow that the defendants have a lien on the property to the extent of the purchase-money. They are not in possession under the sale-deed, but were in possession as mortgagees, and as such have continued to be recorded in the Collector's books. The sale had already been declared invalid, when the plaintiff purchased Zalim Singh's rights at auction and acquired by his purchase the right of redeeming the mortgage. If the purchase-money had been received by Zalim Singh, who is no longer alive, the purchasers might have sued to recover the purchase-money from him during his life, and might possibly in execution of their decree have proceeded against Zalim's rights and interest in the property. They did not adopt this course, though the sale was, as has been observed, completely set aside by the judgment of the *Sudder Dewany Adawlat* in 1864. Any claim to recover the money now would appear to be barred by time, and the defendants, mortgagees, can have no right now to make the property responsible for the repayment of the purchase-money on account of the sale in 1861, which was held to be altogether invalid, as against the plaintiff who has purchased the equity of redemption of the mortgage in 1859, and that too after the objections of these defendants had been overruled, and the order made against them on the 15th November 1867, had become final.

5. The finding of the lower Appellate Court regarding the Rs. 75, "malikana," is one of fact, with which we cannot interfere. The Judge in deducting this yearly allowance from the principal of the mortgage-loan has not acted contrary to law, and the plea that he should not have done so, because the term of the mortgage had expired, has no force, inasmuch as the mortgagees have continued to hold possession under the mortgage and as long as they do so are bound by its conditions. We dismiss the appeal and affirm the judgment with costs.