

Durga Prasad and Another Vs Chunni and Others

Court: Allahabad High Court

Date of Decision: March 18, 1940

Acts Referred: North Western Provinces Rent Act, 1881 " Section 31, 32

Citation: AIR 1940 All 528 : (1940) 10 AWR 512

Hon'ble Judges: Iqbal Ahmad, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Iqbal Ahmad, J.

This is a defendants" appeal arising out of a suit for redemption of a mortgage dated 24th July 1882. The mortgage was

with respect to zamindari share, groves and an occupancy plot and was executed by three brothers named Khuman, Thakuri and Channi in favour

of Mt. Shibbo, the predecessor-in-interest of the defendants-appellants. The family pedigree of the mortgagors is as follows:

AMAR

|||

Khuman Thakuri Channi

|| _____

Himanchal |||

|| Mathuri Chaturi Murli

|| _____

|||

_____| _____ Pati Lal Lilawati

|||

Chunni, Kuber, Dwarka,

(plff.) (plff.) (plff.)

2. Channi, one of the mortgagors, died shortly after the execution of the mortgage leaving three sons shown in the above pedigree. Mathuri, one of

the sons of Channi, had attained majority, but his other two sons were then minors. On 17th August 1887, Khuman, Thakuri and Mathuri sold

their seven-ninth share in the equity of redemption of the zamindari and groves mortgaged to the sons of Mt. Shibbo. The sale however was not

with respect to the occupancy plot. As a result of this sale the mortgagee or her sons became absolute owners of seven-ninth of the zamindari and

the groves mortgaged. The suit giving rise to the present appeal was brought by the grandsons of Khuman for redemption of the remaining two-

ninth share of the mortgaged property. It would appear from the facts stated above that Chaturi and Murli retained their equity of redemption in the

entire mortgaged property and it is common ground that after their death their share in the equity of redemption devolved on Pati Lal therefore

became entitled to the two-ninth share in the equity of redemption. Pati Lal also died before the present suit was filed. The plaintiffs' claim as

formulated in the plaint was that on the death of Pati Lal they became entitled to a two-ninth share in the equity of redemption, and as such, were

entitled to redeem the mortgage to that extent. The defendants contested this allegation of the plaintiffs on the ground that the heir of Pati Lal was

his sister Lilawati and the plaintiffs were not his heirs under the law. This contention of the defendants was accepted by both the Courts below and

there is no controversy about it in the present appeal.

3. In the trial Court the plaintiffs put forward an alternative ground in support of their claim. They submitted that as one of the items of the

mortgaged property was an occupancy plot and as that plot was not sold by the mortgagors, the plaintiffs, as heirs of Khuman, one of the

mortgagors, were entitled to a one-third share in that plot, and as such had the right to maintain the suit. In reply to this alternative case the

defendants alleged that Khuman, Thakuri and Mathuri had relinquished their occupancy rights in the plot in the year 1888 in favour of the

mortgagee and, accordingly, they maintained that the plaintiffs did not inherit any share in the occupancy plot from Khuman. The trial Court

appears to have accepted the fact of relinquishment of rights, but held that as the alleged relinquishment was not by all the tenants and was not ""in

favour of the whole body of landholders,"" the relinquishment was invalid. It further made the following observations on this part of the case:

As a matter of fact no question of the surrender of occupancy rights could have arisen at the time because, as I have said above, plot No. 63 was

in possession of the mortgagee under the usufructuary mortgage and there was no question of relinquishing its possession in favour of the

defendants. The alleged surrender, in my opinion, therefore was simply a meaningless affair and the defendants as legal representatives of the

original mortgagee are in possession of plot No. 63 as mortgagees.

4. Having arrived at the finding that the alleged relinquishment or surrender of the occupancy plot was not proved the trial Court held that the

plaintiffs were entitled to redeem the two-ninth share in the mortgaged property and accordingly passed a decree for the redemption of that share

conditional on the payment of Rs. 128-5-7 within a certain time. The defendants appealed in the lower Appellate Court and that Court affirmed the

decree of the trial Court. On the question of the alleged relinquishment of occupancy rights in the mortgaged plot the lower Appellate Court made

the following observation:

But what is difficult to accept was the relinquishment of occupancy rights in 1888 particularly when in 1882 the mortgagors had given that holding

in the complete possession of the mortgagees.

5. These remarks, in my opinion, amount to a finding by the lower Appellate Court that the relinquishment of occupancy rights set up by the

defendants was not proved. Apart from this, the lower Appellate Court also held that

if there was any relinquishment of that holding it must be held to be invalid.... The surrender if made was thus legally invalid and unenforceable.

6. No exception can be taken to the conclusion of the Courts below that the relinquishment, if any, was invalid. At the time of the alleged

relinquishment the North-Western Provinces Rent Act (No. 12 of 1881) was in force and provision about the procedure to be adopted by a

tenant for relinquishing his holding was made by Sections 31, 32 and 33 of that Act. There is nothing in the present case to show that the

mortgagors relinquished their occupancy rights in compliance with the provisions contained in those sections. Moreover the relinquishment of a

holding can be only by all the tenants or not at all. In the present case Chaturi and Murli were admittedly minors on the date of the alleged

relinquishment and it is not alleged that they or their guardian were parties to the relinquishment. Further the relinquishment contemplated by

Section 31 can be only in favour of the landholder. In the present case it is not alleged that the sons of Shibbo were the landholders. At any rate it

is not the case that there was no landholder of the occupancy plots other than the sons of Shibbo. There is yet another ground for not accepting the

validity of the alleged relinquishment. The relinquishment contemplated by Section 31 is by a tenant in possession. Here admittedly the tenants were

not in possession and possession of the occupancy plot was with the mortgagees. There could, therefore, be no valid relinquishment.

7. The question then arises whether the plaintiffs were entitled to a decree for redemption of the two-ninth share. In my judgment they were not.

On the purchase made by the sons of Shibbo of the shares of some of the mortgagors in some of the items of the mortgaged property the integrity

of the mortgage was broken, and thereafter the only right that each mortgagor had was to redeem his own share. This was the view taken by this

Court in Ahamad Husain and Others Vs. Muhammad Qasin Khan and Others and Mt. Jagannath Kunwar and Others Vs. Jaipal and Others . It

was held in these cases that the integrity of a mortgage is necessary for the benefit of the mortgagee alone and where the integrity has been broken

and a suit for redemption is brought there is no equity in favour of one of the mortgagors to redeem the remaining property, although the same is

more than his own legitimate share. In the case before me the plaintiffs have no share in the zamindari and the groves mortgaged and they retain

only the equity of redemption in the mortgaged plot. The two-ninth share in the zamindari and the groves vests in Lilawati and she is no party to the

present litigation. The plaintiffs cannot therefore be allowed to redeem Lilawati's share. Their only right is to redeem the mortgaged plot. In this

connexion it must be noted that Lilawati could not under the law inherit Pati Lal's share in the occupancy plot and that the plaintiffs alone are now

the occupancy tenants of that plot. The plaintiffs are therefore entitled to redeem that plot on payment of the proportionate part of the mortgage

debt.

8. In the view that I take I cannot dispose of this appeal without having a finding from the lower Appellate Court on the following point: What is the

proportionate part of the mortgage debt attributable to the occupancy plot mortgaged which the plaintiffs must pay as a condition precedent to a

decree for redemption of that plot? Parties will be allowed to adduce additional evidence on the point. The lower Appellate Court is requested to

send its finding to this Court within four months from today's date. On receipt of the finding the usual ten days will be allowed for filing objections.

The point that the plaintiffs were not entitled to redeem the two-ninth share as the integrity of the mortgage was broken was not taken in either of

the Courts below and this matter shall be taken into consideration by me in determining the question of costs when I decide this appeal.