

(1996) 11 PAT CK 0027

Patna High Court

Case No: Appeal from Appellate Decree No. 149 of 1983

Bibi Shamsunissa

APPELLANT

Vs

Gurcharan Koeri and Others

RESPONDENT

Date of Decision: Nov. 6, 1996

Final Decision: Dismissed

Judgement

S.N. Jha, J.

This Second Appeal is by the Defendant. The Plaintiff-Respondents instituted Title suit No. 79 of 1970 before the Munsif, Chapra, seeking decree of redemption of the Zarpeshgi deed dated 28.7.16 (at some places the date of the deed is mentioned as 28.7.17) executed by their ancestor Gopal Mahto in favour of Akram Hussain for Rs. 200/-. Akram Hussain instituted Mortgage suit (T.S. No. 47 of 1933) and got the land auction sold in Execution Case No. 898 of 1935. Akram Hussain himself purchased the land on 12.2.36. His son Ahmad Hussain latter sold it to the Defendant in 1948. The Plaintiffs tendered the amount of zarpeshgi to the Defendant and on refusal deposited the same in court as required u/s 83 of the Transfer of Property Act. On the Defendant's refusal to accept the deposit they instituted the suit. According to the Plaintiffs, the decree in the mortgage suit (Suit No. 47 of 1933) was obtained fraudulently by suppressing material facts and playing fraud upon the court. The decree and the auction purchase being fraudulent, the subsequent sale by the auction-purchaser did not confer valid title upon the Defendant. According to the Defendant, she is a bonafide purchaser for value and, therefore, whatever be the nature of the decree in Mortgage Suit No. 47 of 1933 and the auction purchase, her right, title and interest in the land should not be disturbed.

2. The trial court come to the conclusion that both the ex parte decree in Mortgage Suit No. 47 of 1933 and the auction sale were fraudulent but the act of fraud committed by Akram Hussain and Ors. could not affect in any way the rights of the purchaser i.e. the Defendant as she was neither in collusion with Hussain and Ors. nor was aware of the fraud. Accordingly, the court declined to grant decree of

redemption in favour of the Plaintiffs. On appeal by the Plaintiffs the appellate court confirmed the finding as to the fraudulent nature of the decree and auction sale. It held that the Defendant did not acquire any valid title and interest in the land by virtue of the purchase. In coming to the said conclusion the appellate court also held that no delivery of possession of the land was effected pursuant to the auction purchase and the sale certificate had remained a paper transaction.

3. This appeal was admitted on 12.8.83 on the following questions of law:

(a) Whether the suit for redemption for part of the security was at all maintainable?

(b) Whether the Plaintiffs (read Defendant) being bonafide purchaser for value, could be dislodged from the purchased property?

The appeal came up for final hearing on 8.5.92. A learned Single Judge of this Court held that the suit having been filed with respect to part of the mortgaged property, in fact, one of the plots in suit not being covered by the mortgage bond, the suit was not maintainable as court could not grant partial redemption. The first question having, thus, been answered in favour of the Defendant-Appellant, the learned Judge did not think it necessary to go into the other question. Accordingly, on the basis of the finding on first question the judgment and decree of the appellate court below was set aside and the appeal was allowed.

4. The Plaintiffs challenged the judgment of this Court in the Supreme Court in SLP (Civil) No. 8447 of 1992, giving rise to Civil Appeal No. 3403 of 1993. They took the plea that the stand taken on behalf of the Defendant to the effect that the Plaintiffs have sought redemption with respect to only two plots out of which one was never the subject matter of mortgage and, as such, the suit for redemption was not maintainable, was an error of record. The Supreme Court, *prima facie*, found substance in the contention that the suit had been dismissed by the High Court under misconception about factual position with respect to subject matter of dispute. Accordingly, on 27.7.93 it set aside the judgment of this Court and remitted the matter back to this Court for disposal in accordance with law. That is how this appeal has come up for hearing before me.

5. Mr. Krishna Prakash Sinha, learned Counsel for the Appellant, reiterated the contention which was made before the learned Single Judge earlier that the subject matter of mortgage was the land of plot Nos. 557, 558, 559, 564 and 565 having total area of 74 decimals or 17 kathas 15 dhurs but the suit had been instituted seeking redemption with respect to only plot Nos. 565 and 551, the latter not being the subject matter of the mortgage at all. He referred to Exhibit 3, the mortgage bond, as well as the particulars of land of mentioned in the schedule of the plaint.

6. Mr. Shashi Shekhar Dwivedi, learned Counsel for the Respondents, stated that the lands have been described in the schedule of the plaint by their revisional survey numbers while in the mortgage bond they were described by their cadastral survey

numbers. He submitted that in any view of the matter, the plea in regard to the Plaintiffs seeking only partial redemption not having been taken in the courts below, the Appellant cannot be permitted to do so for the first time in the second appeal, pointing out that the issue involves disputed questions of fact, which cannot be decided in second appeal. Counsel in this connection referred to the pleadings of the parties, to wit, paragraph 3 of the plaint and paragraph 6 of the written statement. In paragraph 3 of the plaint the Plaintiffs averred that their ancestor Gopal Mahto had executed mortgage with respect to 17 kathas 15 dhurs lands as described in the schedule of the plaint. The said averments were admitted by the Defendant in paragraph 6 of the written statement in the following words:

Yeh ki beyan dafa 3 arzi naalish is qudar sahi hai ki Gopal Mohto ne mawazi 17 kathas 15 dhurs erazi kastkari hasab tafsil arzi naalish banam Sheikh Akram Hussain bazariye wosika zarpeshgi mawarkhe 28.7.1917 Isvi baewaz mobalig 200/- ke zarpeshgi kiya....

Counsel urged that from the pleadings of the Defendant there cannot be any doubt that the averment of the plaint regarding execution of 17 kathas 15 dhurs lands "as described in the plaint" was accepted to be correct, in that view, there was no occasion for the Plaintiffs to lead any evidence on the point and prove the same. Counsel submitted that a party is supposed to lead evidence and prove only such facts which are in dispute.

7. Mr. Krishna Prakash Sinha submitted that the Plaintiffs in all fairness should have mentioned as to whether the numbers of plots mentioned in the schedule are those of cadastral survey or revisional survey. He also submitted that on the basis of incomplete pleadings and description of the disputed lands in the plaint, which is the basis of decree, even if the decree passed by the appellate court is upheld, the same cannot be executed.

8. I have considered the submissions of the counsel for the parties. From the documents on records, counsel have not been to resolve the dispute one way or the other as to whether the suit lands described as plot Nos. 565 area 3 kathas 10 dhurs and plot No. 551 area 14 kathas 5 dhurs do correspond to the land which was subject matter of mortgage. But that is a matter which rather goes against the Appellant than against the Respondents. The fact remains that the area of the suit land (17 kathas 15 dhurs) tallies with the area of land which was the subject matter of the mortgage. It is true that the Respondents being Plaintiffs in the court below had to make out a case that the suit for redemption covered the entire land which was the subject matter of mortgage. But as indicated above, the Defendant did not take the plea before the trial court or even the lower appellate court that the Plaintiffs were seeking only partial redemption. I am of the opinion, therefore, that the Defendant-Appellant cannot be permitted to take the plea for the first time in second appeal, which plea cannot be finally and effectively decided except by taking evidence. As regards the question of vagueness or incompleteness of the

description of the suit lands, it is for the executing court to consider the same. This question, accordingly, is answered against the Appellant and in favour of the Respondents.

9. As regards the second question, learned Counsel for the Appellant submitted that the purchase by the Defendant should not be affected by acts of fraud committed by the mortgagee and he should not be deprived of the lands which he had purchased bonafide for consideration. In support of the contention reliance was placed on [Haridas Saha Vs. Dulal Chandra Sadukhan and Others](#), In that case the Calcutta High Court held that where the mortgagor is found to have committed fraud in allowing the property to be sold for arrears of revenue to the detriment of the mortgagee, the mortgagee cannot obtain a reconveyance from the purchaser unless the purchaser is shown to have been privy to the mortgagor's fraud and to have notice of it before the purchase.

10. In the present case the facts are different. The property was purchased by the mortgagee himself and it is he who is accused of having played fraud upon the court, as distinguished from the acts of fraud committed by the mortgagor in the cited case. From the judgment under appeal it appears that the said case was cited before the appellate court below. Dealing with the point the court observed that notwithstanding the purchase of the mortgaged property the status of the mortgagee would continue to be that of mortgagee and not that of the Kastkar. What the Defendant thus had really purchased was the zarpeshgi interest of the mortgagee (Akram Hussain) and she cannot claim any other right which the mortgagee did not possess. The Calcutta decision, therefore, is of no help to the Appellant.

11. On the other hand, counsel for the Respondents cited two decisions of the Supreme Court in [Panchanan Sharma Vs. Basudeo Prasad Jaganani and others](#), and [Parichhan Mistry \(Dead\) by Lrs. and another Vs. Acchiabar Mistry and others](#), In the former case there was default on the part of the mortgagee in regard to payment of rent. The property in course of time was auction sold for violation of the terms of the mortgage. The suit filed for redemption of the mortgage was dismissed on the ground that the mortgagor had lost his title in the property on account of the sale and it was the auction-purchaser who had become the owner of the property. The Supreme Court held that the usufructuary mortgagee is entitled to remain in possession of the mortgaged property subject to his managing the property as a person of ordinary prudence, as if it were his own, subject to the conditions envisaged in the deed. Where mortgaged property is sold because of a default in payment of land revenue by the mortgagee, the mortgagor is not divested of his title to the property or his right to redemption by lapse of time.

In the latter case the Supreme Court held that even on mortgagor's default in payment of rent where a decree is obtained by the landlord and in execution thereof the property is put to sale and the mortgagee pays the decretal amount, the

mortgagor's right of redemption is not extinguished. The Supreme Court held that a right of redemption under a mortgage deed can come to an end but only in a manner known to law. Such extinguishment of right can take place by contract between the parties or by a decree of the court or by a statutory provision which debars the mortgagors from redeeming the mortgage. No doubt, the mortgagee is entitled to purchase the entire equitable redemption from the mortgagor at auction-sold held pursuant to decree for recovery of arrears of rent, where the mortgagee himself avails of his position and gains an advantage he holds, such advantage is for the benefit of the mortgagor. The status of the mortgagee would remain to be that of the mortgagor and the right of the mortgagor is not affected.

12. In view of the law laid down by the Supreme Court in the abovementioned two cases, I do not think there is any scope to take a different view. The Defendant has purchased the property from the mortgagee (his son) who had purchased the same in a auction-sold. In the eye of law it will amount to purchase of equity of redemption. The principle "once a mortgage always a mortgage" is well known. The Defendant cannot claim any other right or interest in the land than that of vendor. The Plaintiffs mortgagors are, therefore, entitled to seek redemption. The second question formulated by this Court, referred to above, is thus answered in favour of the Plaintiffs and against the Defendant.

13. In the above premises, I do not find any merit in this appeal, which is, accordingly, dismissed with cost.