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(1910) 06 CAL CK 0005

Calcutta High Court

Case No: None

Mir Eusuff Ali and Others	APPELLANT
Vs	
Panchanan Chatterjee	RESPONDENT

Date of Decision: June 1, 1910

Citation: 6 Ind. Cas. 842

Hon'ble Judges: Mookerjee, J; Carnduff, J

Bench: Division Bench

Judgement

1. This is an appeal on behalf of the third, fourth, fifth and sixth defendants in an action to enforce a mortgage security executed in favour of the father of the plaintiff-respondent by the first two defendants on the 20th September, 1897. A large number of properties was included in the mortgage bond. On the 9th November, 1898, the mortgagors sold eleven of these plots to the mortgagee, and agreed that a sum of Rs. 447-9-10 was to be deducted from the amount then due on the mortgage. Shortly after, on the 22nd April, 1899, the mortgagors transferred another parcel to a stranger, by name Herasatulla, who paid Rs. 75, to the mortgagee and obtained a release from him in respect of the property purchased. On the 30th May, 1906, the plaintiff commenced the present action for recovery of the mortgage money with interest. He made allowance in the plaint for the two payments already mentioned, as also for another small. sum paid in 1901, and he asked for recovery of the balance by sale of the mortgaged properties other than those purchased by himself and by Herasatullah. The claim was contested by the present appellants, who had purchased the equity of redemption in the remaining properties comprised in the mortgage security on the 7th July, 1904. Their defence, in substance, was that the plaintiff mortgagee was not entitled to exclude from the scope of the suit and the decree the properties purchased by himself and by Herasatullah; in other words, the essence of the defence was that the properties in the hands of the present appellants ought not to be made liable for a larger sum than what would be fairly chargeable upon them if the entire mortgage money were distributed over all the properties comprised in the mortgage security. This

argument has been concurrently negatived by the Courts below on the ground that, as the purchase by the mortgagee and the release in favour of Herasatullah were antecedent to the purchase by the defendants, they were in the same position as the mortgagors themselves, who could not claim contribution as against the mortgagee. In this view, the Courts below have made the usual decree for sale in respect of the entire claim. The defendants have now appealed to this Court and on their behalf, it has been argued that the properties in their hands are not liable for the entire mortgage debt, and the burden of that debt ought to be proportionately abated. In our opinion, this contention is supported neither by principle nor by the authorities.

2. It may be conceded that, as a general rule, the rights of persons who have acquired an interest in the mortgaged estate since the mortgage, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If, therefore, a mortgagee with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser. But this rule does not apply when the mortgagee releases a portion of the mortgaged property before the residue is transferred to third person. No doubt, if he does release, he diminishes his own security but, as Subsequent purchasers can only take subject to the mortgage, the mortgagee may throw the whole burden of the mortgage debt on the residue. It was pointed out by this Court in the case of Debendra Nath Sen v. Mirza Abdul Samed 10 C.L.J. 150 : 1 Ind. Cas. 264, that, although a purchaser of mortgaged premises is not estopped by his mere acceptance of the deed from disputing the validity of the mortgage or the amount due under it, on the ground of objections which were open to the mortgagor, yet he is limited to such objections or defences only as might have been pleaded by the mortgagor himself; and he cannot even set up all of these, for he is not permitted to urge defences strictly personal to the mortgagor. The appellants, therefore, by their purchase of the 7th July, 1904, occupy the same position as their vendors, the mortgagors, and it is not open to them to compel the mortgagee to grant a proportionate abatement of the mortgage debt, unless it is established that such a defence would have been available to the mortgagors themselves. Now, what was the position of the mortgagors at the time when they transferred the equity of redemption to the present appellants? They had transferred their interest in some of the mortgaged premises to the mortgagee. The effect of the transaction was that the mortgagee became entitled to hold the properties purchased by him free of the mortgage lien, if he applied the purchase money towards the satisfaction of the mortgage debt. It is difficult to appreciate upon what principle the mortgagors could be allowed to resile from the position they had deliberately assumed, and to contend that the mortgagee was bound, in substance, to allow credit, not merely for the purchase-money, but for an additional sum, which, upon a fair valuation of the properties purchased by him, might be determined to be the difference between the

market-value and the settled price. It has not been suggested that the effect of the purchase by the mortgagee was to extinguish his mortgage security in its entirety. This view which at one time found favour with some of the learned Judges of the Allahabad High Court, has been subsequently abandoned--Nand Kishore v. Raja Hari Raj 20 A. 23.--nor has it been disputed that a mortgagee may purchase from the mortgagor the equity of redemption either in part or in whole; the relation between them is not so far analogous to that between a trustee and cestui que trust, as to preclude a purchase of the equity of redemption by the mortgagee. He may, therefore, deal with the mortgagor in respect of the mortgaged estate. This rule is subject to the qualification that the Courts, if called upon to scrutinise the transaction, will look upon it with jealousy, and will set aside a purchase made by the mortgagee when, by the influence of his position or by constructive fraud, he has gained an unconscionable advantage and has purchased the property for such a low price as may be taken to be fairly indicative of fraud or undue influence But, in the absence of fraud or undue influence or fiduciary relation, the mortgagee may purchase the equity of redemption of the mortgagor upon the same footing as any other person Webb v. (sic) (1806) 2 Suh & Lef. 661 : 9 R.R. 122, Ford v. Olden (1867) L.R. 3 Eq. 461 : 36 L.J. Ch. 651 : 15 L.T. 558. In the case before us, there is no foundation for any possible suggestion that the purchase by the plaintiff-mortgagee should be cancelled on the ground of either fraud or undue influence. What then is the result of such purchase on the position of the mortgagee ? It has been argued, on behalf of the mortgagee, that, if he takes a conveyance of a part of the mortgaged premises from the mortgagor, his position is not affected at all and he is entitled to proceed against the property still left in the hands of the mortgagor for the realisation of the balance of his debt. It has been strenuously argued, on the other hand, on behalf of the mortgagor, that the effect of a purchase by the mortgagee of a part of the mortgaged premises, is always to extinguish the mortgage pro tanto. In our opinion, both the contentions are too broadly expressed, and neither of them can be accepted as strictly correct and well-founded on principle. The true principle is that the effect of the transaction must be judged by its nature. If the sale was intended to be one of the equity of redemption merely, the mortgagee acquired the property subject to his mortgage, and in such a contingency, it would be right to hold, that, while there is no extinguishment of his right to enforce the mortgage against the remainder, the mortgage is extinguished to the extent of the amount fairly chargeable upon the property purchased by him. If, on the other hand, the sale was of the property freed of the mortgage, and the intention of the parties was that the mortgagee should hold the portion transferred to him freed from the Mortgage debt, and the purchase money should be applied in reduction of his dues, it would obviously be erroneous to maintain that the mortgagee was still bound to apportion the debt. In this latter contingency, unless the purchase might be successfully impeached on the ground of fraud or undue influence, it would manifestly be equally erroneous to ask the mortgagee to allow credit for a larger sum than what was deliberately settled as the priod of the portion

purchased by him. If this distinction is borne in mind, the judicial decisions, to which reference has been made by the parties in support of their respective eases, may be easily reconciled. In Gaya Prasad v. Salik Prasad 3 A. 682, the transfer by the mortgagor to the mortgagee appears to have been not of the equity of redemption merely, but of the entire interest in the property; in other words, the intention was that the mortgagee should hold the purchased portion free of the charge. On the other hand, in Chunna Lal v. Anandi Lal 19 A. 196, and Bisheshur Dial v. Ram Sarup 22 A. 284 the purchase by the mortgagee was of the equity of redemption only, and it was held that the mortgagee could not, even as against the mortgagor, throw the burden of the entire debt upon the property which remained in the hands of the latter, while he himself held property which was justly bound to bear a proportionate share of the mortgage debt. In the second of these cases, which was decided by a Full Bench, it was ruled that when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt, as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. This view is in accord with that taken in Lakhmidas Ramdas v. Jamna Das Shankarlal 22 B. 304. In the course of the judgment, however, the learned Judges declined to consider what the position might have been if the purchase by the mortgagee had been made under a private contract with the mortgagor, and not at an auction. But it was pointed out by Sir Francis Maclean, C.J., in Mutty Lal Pal v. Nunda Lal 8 C.L.J 92. 12 C.W.N. 745, that in this respect, there is no distinction in principle between a purchase at a private sale and a purchase at an execution sale, although it is conceivable that the terms of the contract in the case of a private sale, may show, on t he face of it, whether the transfer was intended to be merely of the equity of redemption or of the entire interest, that is, whether the intention of the parties was that the mortgagee should take the portion purchased subject to or freed from his own charge. That a mortgagee may, however, at an execution sale, purchase a portion of the mortgaged property free of his mortgage, is clear from the cases of Sesha Ayyar v. Krishna Ayyangar 24 M 97, Kanhyalal v. Narhar 27 B. 297, Bokra Thakur Das v. Collector of Aligarh 28 A. 593 : 3 A.L.J. 439 : A.W.N. (1906) 150 and Raghunath Prasad v. Jamna Prasad Rawat 29 A. 233 : A.W.N. (1907) 31 : 4 A.L.J. 66. The distinction, therefore, is not so much between a private sale and an execution sale, as between a purchase of the equity of redemption and a purchase of the entire interest in the property. This view is supported by the cases of Mahomed Taki v. Thomas 4 C.L.J. 317 and Amir Chand v. Bukshi Sheo Persad 4 C.L.J. 573, 34 C. 13, though the Courts are not agreed as to whether the question of apportionment, when it arises, can be decided in execution proceedings or should be determined in a suit properly framed for the purpose and in the presence of all the necessary parties. Harendra Kumar Guha v. Dindayal Saha 4 C.L.J. 195. In the case before us, it is clear, from the

conveyance executed by the mortgagors in favour of the mortgagee, that the price paid by the latter was intended to represent the value of the entire interest and not merely of the equity of redemption. It was further intended that this purchase-money should be applied in reduction of the debt, and that the mortgagee should hold the property purchased freed from the mortgage lien. There is no suggestion that the price paid was so inadequate as to indicate that the mortgagee took fraudulent advantage of the position of the mortgagor. Indeed, the sale has not been impeached, and so far as we can gather from the record, no question appears to have been raised at any stage, either as to fraud or undue influence. It is not open to the mortgagors, therefore, to claim credit for a larger amounat than what was fixed as the purchase-money, and, as between the motgagors and the mortgagee, the latter is entitled to hold the property exempt from the mortgage line. The appellants, who are purchasers of the interest of the mortgagors in the other properties, stand in no higher position; they have consequently no legitimate ground for complaining that the mortgagee seeks to throw the burden of the remainder of the mortgage-debt upon the properties in their hands.

3. We have next to consider the effect of the release granted by the mortgagee in favour of the subsequent purchaser, who acquired a portion of the property before the remainder was purchased by the present appellants. Here again, it is clear that the appellants occupy the same position as the mortgagors did at the time of the transfer by them. [Gaya Prasad v. Salik Prasad 3 A. 682]. Now, what was the true position of the mortgagors when they transferred a portion of the property to Herasatulla, who obtained a release from the mortgagee by payment of a sum of money? It is a firmly settled doctrine that, as between the original parties, the release of a part of premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt. No doubt, as against others who have liens upon the remainder of the mortgaged premises, a mortgagee, with notice of such lien, has no right to release any portion of the mortgaged premises to the injury of the owners of such liens. The principle, on which this rule is based, is thus explained in Brooks v. Benham (1897) 70 Conn. 92; 66 Am. St. Eep. 87: "While the Whole of the debt is secured by the whole of the land, each parcel of the land, as between the different proprietors, is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land ; and, if its owner should be compelled to redeem the mortgage, he can resort to the others for a rateable contribution, and for that purpose, is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage in cumbrance, is to make, as respects that, any such subrogation impossible. The mortgagee, therefore, releases at his peril, if he has notice of the conveyance out of which the equities in question arise; and, if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the'' residue of that share in favour of the owners of the remaining parcels." This statement of the reason for the rale makes it manifest that

it has no application as between the mortgagor and the mortgagee when the rights of no other persons intervene and require protection. To put the matter in another way, as between the mortgagor and mortgagee, the latter is entitled to release a portion of the hypothecated property and diminish his own security to that extent. It is not obligatory upon him to proceed against all the properties rateably or to exhaust them for the satisfaction of his debt. This principle is recognised in the cases of Raghu Nath v. Harlal 18 C. 320, Hara Kumari Chowdhurain v. Eastern Mortgage and Agency Co. 7 C.L.J. 274, and Krishna Ayyar v. Muthukumaraswamiya. Pillai 29 M. 217. While, therefore, we adhere to the view taken in the cases of Imam Ali v. Baij Nath Ram Sahur 3 C.L.J. 576 : 33 C. 613 : 10 C.W.N. 551, and Hakim Lal v. Ram Lal 6 C.L.J. 46, namely, that a mortgagee, who has a security upon two or more properties which, he knows, be long to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected, Kettlewell v. Watson (1882) 21 Ch. D. 685 (714), we are of opinion, that this doctrine has no application to the present case, where the release took place at a time when the appellants had not purchased any interest in the mortgaged premises, and the mortgagors alone were the persons affected by the release. We must not, however, be assumed to adopt the rule, laid down by the learned Judges of the Allahabad High Court, that such release may he granted even to the prejudice of persons who had previously acquired an interest in the mortgaged properties. That view is clearly opposed to principles of equity, justice and good conscience, and though recognised in Sheo Prasad v. Behari Lal 25 A. 79; Sheo Tohul Ojha v. Sheodan Rai 28 A. 194 : 2 A.L.J. 630 : A.W.N. (1905) 244; Ghafur Hasan Khan v. Muhammad Kifayat-ulluh Khan 28 A. 19 : A.W.N. (1905) 165 : 2 A.L.J. 413 and Pirbhu Narain Singh v. Amir Singh 29 A. 369 : A.W.N. (1907) 83 was not adopted in Ram Ranjan v. Indra Narain 33 C. 890 and the case of Krishna v. Muthu 29 M. 217, if it lays down a similar principle, cannot, to that extent, be supported.

4. The contrary view, which accords with the rule adopred by this Court, was followed in Ponnusami v. Srinivasa 31 M. 333. We must hold, therefore, that the mortgagors have no just grievance against the mortgagee on account of the release granted by him to the purchaser; and the appellants, who subsequently acquired an interest in the property, stand in no better position [Gaya Prasad v. Salik Prasad 3 A. 682]. Both the grounds, therefore, upon which the appellants seek to compel the mortgagee to grant a proportionate abatement of the mortgage debt, are unsustainable. Their position is not better than that of the mortgagors, and in the events which have happened, the latter cannot require the mortgagee to apportion the mortgage debt among the several properties comprised in the security, and to look to each only for its proportionate share. The mortgagors cannot claim that such apportionment is necessary for the just protection of their own interest, or because the mortgagee has become owner of a part of the property by payment of what really represents the value of the equity of redemption.

5. The result, therefore, is that the decree made by the Court below must be affirmed, and this appeal dismissed with costs.