

Rebati Mohan Das Vs Nadiabashi De and Another**None**

Court: Calcutta High Court**Date of Decision:** Jan. 24, 1918**Acts Referred:**

Criminal Procedure Code, 1898 (CrPC) â€” Section 145

Citation: 44 Ind. Cas. 521**Hon'ble Judges:** Richardson, J; Beachcroft, J**Bench:** Division Bench

Judgement

Richardson, J.

This second appeal is preferred by defendants Nos. 1 and 2 in a suit for recovery of possession of certain land. At the date

of the suit the defendant No. 2 was a tenant of defendant No. 1. We are informed that there is reason to believe that defendant No. 2 has since

purchased the rights of defendant No. 1. As to the facts found, it appears that on the 31st March 1895, one Jamaraddi mortgaged the property in

suit with other properties to the plaintiffs. The property in suit is a raiyati holding.

2. On the 6th May 1896 Hara Chandra Das, the father of defendant No. 1, in execution of a money-decree obtained by him against the mortgagor

purchased the property and subsequently in the same year obtained actual possession from the Court.

3. In 1907 the plaintiff brought a suit upon the mortgage of 1895 against the heirs of the mortgagor and others. To that suit he did not make the

father of defendant No. 1 a party. Accordingly on the 29th May 1907 Hara Chandra Das applied by a petition to be joined as a party defendant.

The plaintiff opposed the application, which was rejected by the Court. The mortgage suit proceeded and in the result the plaintiffs obtained a

mortgage decree in the usual form and in execution purchased the property themselves on the 9th September 1908. On the 2nd March 1909 the

plaintiffs obtained symbolical possession from Court. Their subsequent efforts to obtain actual possession led to a criminal proceeding u/s 145,

Criminal Procedure Code, which was decided on " the 24th February 1909 in favour of defendant No. 1. The plaintiffs then instituted the present

suit on the 18th June 1912. At this stage of the suit all that is claimed by the defendants-appellants is that the plaintiffs" title to eject them from the

disputed land is subject to their right to redeem the plaintiffs--a right which the Courts below have by these decrees concurrently refused to

recognise. In denying any right to redeem in the defendants-appellants the Courts below have acted on two grounds. The first ground appears to

be that they were under the impression that the defendants did not claim the right to redeem in this suit and were unwilling to redeem. The second

ground which is the more substantial ground is that the defendants, if they ever had any right to redeem, are precluded from exercising that right by

reason of the application which Hara Chandra Das made in the mortgage suit of 1895. I will deal first with the second of these two grounds.

4. The petition which Hara Chandra Das presented to the Court in that suit has not been produced by either of the parties to the present suit. But

we have the order of the Court on the petition passed on the 30th May 1907. The order begins in this way: ""I have heard the Pleader for the

plaintiff and the Pleader for the person who "prays to be added as a defendant. The plaintiff"s Pleader objects to the third party being joined as a

defendant."" Then it goes on to say: The plaintiffs sue on a mortgage of a raiyati. The third person who seeks to be made a defendant says he

purchased the land at a money sale and got himself registered in the sherista of the landlord. He claims the land on the strength of such recognition

also."" He concludes with these words: ""I do not think I should be justified in adding this person as a defendant against the will of the plaintiff,

particularly when he claims a title which may be pleaded as defeating the plaintiff"s right of mortgage."" Now upon the terms of that order it is clear

that Hara Chandra Das"s application to be made a party was rejected at the instance of the mortgagee plaintiffs. The grounds on which the Munsif

based his order are not very clear. It may be that Hara Chandra Das indeed set up a title which was paramount to the mortgage title of the

plaintiffs. His plea may have been of the same nature as the plea which was put forward by the purchaser of a part of the mortgaged property in

the case of Radha Kani Chakravarti v. Ramananda Shaha 13 Ind. Cas. 698 : 39 C. 513 : 16 C.W.N. 475 : 15 C.L.J. 369. If that was the plea of

Hara Chandra Das, it is possible that if he had been made a party and the plea had been tried it would have proved unsuccessful in the event as it

did in the case cited. But, apart from that plea, it is not at all clear. Hara Chandra Das did not also set up the case on which the defendant No. 1

now relies. The pleadings in the present suit lend some support to the view that Hara Chandra Das also put forward the contention that the

plaintiffs" mortgage was not a bona fide transaction. If, therefore, Hara Chandra Das had been permitted at his own instance to become a party

defendant in the suit, he might have filed a written statement putting forward both defences to the plaintiffs' claim. As a matter of fact, however, he

was not made a party, he had no opportunity of filing a written statement or of stating his case in a formal way. In that state of things, in my opinion,

the Courts below were wrong in holding, on the authority of such cases as *Nilkant Banerji v. Suresh Chandra Mullick* 12 C. 414 : 12 I.A. 171 : 9

Ind. Jur. 439 : 4 *Sar. P.C.J* 685 : 6 *Ind. Dec. (N.S.)* 281 (P.C) and *Jaggaswar Dutt v. Bhuban Mohan Mitra* 33 C. 425 : 3 C.L.J. 205 that the

defendant-appellants are precluded in the present suit from asserting any right to redeem. In the case of *Nilkant Banerji v. Suresh Chandra Mullick*

12 C. 414 : 12 I.A. 171 : 9 *Ind. Jur.* 439 : 4 *Sar. P.C.J* 685 : 6 *Ind. Dec. (N.S.)* 281 (P.C) decided by the Privy Council the defendant who

claimed the right to redeem had been made a party to the mortgagee's suit. In that suit he had set up the paramount title which he claimed and he

had said nothing about his right to redeem. Having been a party to the suit and the suit having been dismissed as against him on the ground that as

he claimed a paramount title he was not a proper party to the suit, it was held that in the subsequent suit brought by the mortgagee for possession

of the property, it was too late for him then to set up a new title under which he would have the right of redemption. The present case is almost the

converse of that case. *Hara Chandra Das* was not permitted to become a party to the mortgage suit; and, as I have said he had no opportunity in

that suit to put forward the case that even if he failed to establish a paramount title he had at least a right which would entitle him to redeem the

plaintiffs. In my opinion, therefore, the Courts below are wrong in their conclusion that in the present suit the defendant-appellants are debarred

from setting up a right of redemption.

5. Coming next to the first ground I find it somewhat difficult to reconcile the statements in the judgment of the Courts below that the appellant

claims no right to redeem with the fact that this question is discussed in both the Courts in connection with issues Nos. 2 and 9 framed by the first

Court. As regards the lower Appellate Court, it appears that the right to redeem was expressly asserted and insisted upon in paragraph 4 of the

grounds of appeal filed in that Court. As to the plaintiffs' pleadings paragraphs 6 and 8 of the plaint embody an admission of the right of the

defendants to redeem, should they be able to prove that the decree under which *Hara Chandra Das* obtained possession was not a decree

founded upon a collusive transaction. In paragraph 6 of the plaint the plaintiffs say: "Particularly, even if the defendant No. 1 or his predecessor

Hara Chandra Das had any decree, still the plaintiffs' mortgage being preferential, they had no right to retain the land of the schedule in their

possession without redeeming the same." In paragraph 8 the plaintiffs say again: "If it is held that defendant No. 1 has any right to redeem any

mortgage, then he may be given the opportunity to pay what is justly due to the plaintiffs on account of their mortgage; and if that opportunity he

not availed, then a decree for possession may be awarded to the plaintiffs."" Each party was, as usual, disputing the validity of the transaction under

which the other claimed title. The plaintiffs said that Hara Chandra Das's money-decree was based on a collusive deed without consideration. The

defendants impugned the mortgage of the plaintiffs on very much the same ground. What the Courts below have found is that both the transactions

were bona fide and real transactions. It would seem to follow from the admissions in paragraphs 6 and 8 of the plaint that the plaintiffs' right to

eject the defendants must be subject to the defendants' right to redeem the plaintiffs. There is nothing, so far as I can see, in what happened in the

previous suit or in the conduct of the present suit by the defendants to debar them from this right of redemption, to which on the facts found they

are clearly entitled. In that view, in my opinion, the decree of the Court below must be modified and the right of the defendants to redeem the

plaintiffs declared.

6. The result, therefore, is that this appeal is allowed, the right of the defendants-appellants to redeem the plaintiffs in respect of the property in

dispute is declared and the case remitted to the Court of first instance for that Court to take the proper accounts, determine the amount which the

defendants should pay the plaintiffs for the purpose and make a decree accordingly. The appellants are entitled to their costs of this appeal. We

make no order as to the costs in the Courts below. The costs of the further enquiry as to accounts now directed will be in the discretion of the

Court of first instance.

7. Let the record be sent down as soon as possible.

Beachcroft, J.

8. I agree.