

## Digambar Suthar and Others Vs Suajan and Others

**Court:** Calcutta High Court

**Date of Decision:** April 18, 1928

**Acts Referred:** Transfer of Property Act, 1882 " Section 89

**Citation:** AIR 1929 Cal 233

**Hon'ble Judges:** Mukerji, J; Garlick, J

**Bench:** Full Bench

### Judgement

Mukerji, J.

This appeal arises out of a suit which was instituted by the plaintiff for recovery of possession after declaration of title to the

lands of Schedule 2 of the plaint. These lands form a part of plot 1, Schedule 1, of the plaint. One Balaram Aeharjya, the predecessors of

defendants 5 to 8 executed, a simple mortgage of the lands of Schedule 1 in favour of one Krishna Mangal Sen, the predecessors of defendants 11

to 13, on 10th November 1893. In December 1893 the said Balaram Aeharjya executed a usufructuary mortgage of the lands in suit in favour of

the predecessors of defendants 1 to 4 and thereafter in June 1894 sold the said lands to them. In 1900 Krishna. Mangal Sen sued on his mortgage.

In that suit defendants 1 to 4 or their predecessor were not parties. Krishna Mangal obtained a decree on 19th January 1901, which was made

absolute on 31st November 1903. At the execution sale that followed the father of defendants 9 and 10 purchased the lands of Schedule 1 on 8th

June 1904 and they obtained delivery of possession through Court on 13th October 1904. On 25th June 1908 defendants 9 and 10 sold plot 1,

Schedule 1, to the plaintiff and put him in possession thereof. Defendants 1 to 4 then instituted a suit against the plaintiff for recovery of possession

of the disputed lands and obtained a decree on 16th August 1918 and succeeded in recovering khas possession by eviction of the plaintiff. In the

decree passed as aforesaid a reservation was made in favour of the plaintiff in the following words:

This decree will not, however, affect any equitable right of the defendant (i.e., the present plaintiff) to which he may be entitled under his prior

mortgage.

2. The plaintiff then instituted the present suit on 13th August 1921.

3. The Munsif dismissed the suit. The Subordinate Judge has reversed that decision and has decreed the suit declaring the plaintiff's title to the land

and ordering that defendants 1 to 4 will be at liberty to redeem the property on payment of Rs. 229-12-0 within two months and that in default of

such payment within the said period the right of the said defendants to redeem would be barred and the plaintiff would be entitled to obtain khas

possession. Defendants 1 to 4 have then preferred this appeal.

4. The validity of the decree is challenged on various grounds which may be broadly classed under two heads : 1st, as regards the maintainability of

the plaintiff's prayer for khas possession ; and 2nd, as regards the basis on which redemption has been allowed.

5. To deal with the first contention it is necessary to consider the rights of the parties, that is to say, those of the plaintiff as transferee from a

purchaser at a sale held in pursuance of a decree for sale under the provisions of the Transfer of Property Act (4 of 1882) and those of the

contesting defendants, namely, defendants 1 to 4 who are the owners of the equity of redemption but were not impleaded in the suit. As regards

the rights of a purchaser at a mortgage sale where the suit is properly constituted, that is to say, where all persons having interest in the property

comprised in the mortgage are parties thereto two views fundamentally different from each other, may be taken : he may be regarded as having

acquired the equity of redemption as it stood at the date of the mortgage together with the lien of the mortgagee or he may be looked upon as

having acquired the property as it stood at the date of the sale, that is to say, the property discharged of the mortgage lien. If the suit is properly

constituted as aforesaid the title of the purchaser will be absolute and relate back to the time of the executions of the mortgage and it will make no

difference to the rights of the purchaser whichever of the aforesaid two views be proceeded upon. The difference arises where the constitution of

the suit is defective, that is to say, where all persons having interest in the property mortgaged have not been joined as parties in the suit. In such a

case different results follow according as one view is taken, or the other, of the rights of the purchaser at the sale, and this has led to a divergence

of judicial opinion in this country. This conflict has been summarized in the judgment of Suhrawardy, J., in the case of Kristopada Roy and Others

Vs. Chaitanya Charan Mondal and Others, , and the points that have been noticed in that judgment are the more important of those that have been

cited on behalf of the parties before us. On behalf of the appellants reliance has been placed on the two Full Bench decisions of the Allahabad High

Court, namely, the cases of Hargu Lal Singh v. Gobind Rai [1897] 19 All. 541 and Madan Lal v. Bhagwan Das [1899] 21 All. 235 (F.B.). In the

former of these cases a part of the mortgaged property was sold by the mortgagor, after the execution of the mortgage, to some third parties but

the vendees were not made parties to the suit, and it was held that the auction-purchaser at the mortgage sale had no title to possession as against

the vendees.

6. In the latter case the aforesaid decision was re-affirmed and applied to a case in which in a prior mortgagee's suit on his mortgage the puisne

mortgagee and the purchaser at the sale on his mortgage decree to which the prior mortgagee was not a party were not made parties. To these

may be added the case of Entholi Kizhakki Kandy Kanaran v. Vallath Koylil Unnoli [1907] 30 Mad. 500, in which the Allahabad case first

mentioned above was followed and applied to a case where a mortgagor, subsequent to the mortgage, sold the mortgaged properties to another

person, who, however, was not impleaded in the mortgagee's suit. The appellants also rely on the case of Agore Nath Banerjee v. Debnarain Guin

11 C.W.N. 314, in which the aforesaid Allahabad decisions were applied to a case where a person who had purchased a portion of the

mortgaged property from the mortgagor subsequent to the mortgage was not impleaded in the suit. They also rely upon the decision of this Court in

the case of Kristopada Boy v. Chaitanya Charan Mandal (1), in which Walmsley, J., appears to have expressed himself as approving of the

principle of the Allahabad decisions abovementioned. Reference has also been made on behalf of the appellants to such cases as Habibullah v.

Jugdeo Singh [1907] 6 C.L.J. 609, in which it was held that a purchaser in execution of a mortgage-decree has no right to retain possession of the

property obtained through civil Court against a purchaser of the equity of redemption, who was not a party in the suit on the mortgage, and who

had obtained and remained in possession till the sale in execution of the decree in the mortgage suit and Girish Chunder Mandal v. Iswar Chunder

Roy 4 C.W.N. 452, in which also the position was similar-eases which have been disapproved of in the more recent decisions of this Court, e. g.,

Kalu v. Abboy Charan AIR 1921 Cal. 157, Bhagaban Chandra Kundu Vs. Tarak Chandra Basak and Others, , and Bhodai Sheikh Vs. Barada

Kanta Dutta, . On behalf of the respondent reliance has been placed upon the Bombay decisions of which Dadoba Arjunji v. Damodar Raghunath

[1892] 16 Bom. 486, is the type, and which lay down that the auction-purchaser is entitled to a conditional decree which allows the party

excluded from the suit an opportunity to redeem. Special reliance is also placed on behalf of the respondent upon two decisions of this Court,

namely, the cases of Jugdeo Singh v. Habibullah Khan [1907] 6 C.L.J. 612, and Gangadas Bhattar v. Jogendra Nath Mitter 11 C.W.N. 403, in

both of which cases there are observations which are clearly in conflict with the decisions of of this Court upon which the appellants have relied,

though the former of these two cases was one in which all the owners of the equity of redemption except one were made parties to the suit, and

what was actually held in the latter case was that it was not obligatory on the auction purchaser to institute a fresh suit for enforcing his security

against the party who was left out of the previous suit but that he might sue for possession giving the omitted party an opportunity to redeem.

7. The respondent further relies upon cases of which *Protab Chandra v. Ishan Chandra* 4 C.W.N. 266, is a specimen in which the auction-

purchaser seeks to retain the possession which he has obtained in consequence of his purchase as against the owner of the equity of redemption

who was excluded from the suit. To go back to the two views stated above and to consider the aforesaid cases in the light of these views,

according to one of them the purchaser acquires the property subject to the rights of the parties omitted from the suit, and according to the other

view he acquires title to it only as against those parties who are parties to the suit. I have referred to the more important of the authorities that have

been relied upon on this point and do not see any use referring to others which are either irrelevant or of lesser importance. The appellants have

tried to distinguish some of the decisions on which the respondent relies on the ground that the ratio decidendi of those cases was that the

mortgagee had no notice of the assignment of the equity of redemption at the time when he instituted the suit on his mortgage whereas in the

present case the transfer in favour of the predecessor of defendants 1 to 4 having been by means of a registered instrument the mortgagee must be

held to have had notice in view of the decisions of the Judicial Committee in the cases of *Hetram v. Shadiram* AIR 1918 P.C. 34 and *Tilakdhari*

*Lal v. Khedan Lal* AIR 1921 P.C. 112. They also seek to distinguish other cases cited on behalf of the respondent on the ground that in ""those

cases the purchaser was within time in enforcing his security while in the present case he has no such remedy available to him. The respondent has

on the other hand made an attempt, though somewhat vain, to distinguish the decision of this Court upon which the appellant has relied. I do not

propose to go into further details but desire to state that I agree generally with *Suhrawardy, J.*, as he expressed himself in the case of *Kristopada*

*Roy and Others Vs. Chaitanya Charan Mondal and Others*, in so far as he was of opinion that an attempt to reconcile the conflicting decisions of

this Court is futile, and if the case had not presented some exceptional features which obviate the necessity of a reference to a Pull Bench I should

have been prepared to adopt that course in order to remove the conflict that exists.

8. The exceptional features of the present case are two : they are that in the mortgage suit the equity of redemption was entirely unrepresented and

that any remedy which the purchaser or the present plaintiff could have on the basis of the mortgage was barred long ago. The Judicial Committee

have authoritatively explained the meaning of Section 89, T.P. Act (4 of 1882) in the cases of *Hetram v. Shadi Ram* (15) and *Matru Mal v. Durga*

*Kunwar* AIR 1920 P.C. 79. It is now plain beyond controversy that an order u/s 89 of the Act for the sale of the mortgaged property has the

effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished. I

do not feel called upon in the present case to express any opinion on the question whether this proposition applies to a decree obtained in a suit in

which the equity of redemption is entirely unrepresented. If it does the purchaser at the sale did not acquire any rights under the mortgage the same

having already been extinguished by the order and substituted by the right of sale. On the other hand it is possible to take, the view that the decree

is to be treated as a nullity, as on general principles it would be, having been passed in respect of property which was entirely unrepresented and

so to hold that the purchaser acquired nothing. In *Jones on Mortgages* the following passage occurs:

Section 1406. The owner of the equity of redemption by purchase from the mortgagor is of course an essential party to a bill to bar the equity by

foreclosure. Such owner is in fact the only necessary party defendant. Equally with the mortgagor he is unaffected by any foreclosure proceeding to

which he is not made a party, and moreover the decree is generally regarded as void....

9. Sir Rashbehari Ghose in his *Law of Mortgage* 4th Edn., Vol., 1, pp. 620-621, observes thus:

If the owner of the equity of redemption is not a party to the suit the purchaser cannot claim the position of an assignee of the security, as it would

still remain in the mortgagee. And this seems to be the law even in America where the general rule that the security is transferred to the purchaser

does not hold good if the owner of the equity of redemption, who is said to be the only necessary party, is not made a defendant. In all other cases

the Security passes to the purchaser ; for the sale though it fails to be effectual in every other respect, operates as an assignment of the mortgage to

the purchaser who may, if he chooses proceed de nova to foreclose those who were, not represented in the suit.

10. Whatever difference Section 89, T.P. Act, may make in the latter class of cases there is nothing in the Act which militates against the view

expressed in the other part of these observations as regards the rights of a purchaser at a sale in pursuance of a decree in the equity of redemption

is entirely unrepresented. Then again, assuming for a moment that the sale had operated as an assignment of the security, the rights of the purchaser

at the auction sale, and of the plaintiff as assignee from the said purchaser in the present case is irretrievably barred. The result is that whatever

view may be taken of the rights of a purchaser at a sale under circumstances such as are disclosed in the present case, the plaintiff's suit must

necessarily fail. It is therefore unnecessary to consider any other matter in connexion with this appeal.

11. In this view of the matter, this appeal must succeed and the decree of the Subordinate Judge being set aside, that of the trial Court dismissing

the suit should be restored with costs in this and the lower appellate Court.

Garlick, J.

12. I agree.