
(1870) 04 CAL CK 0003

Calcutta High Court

Case No: Special Appeal No. 2690 of 1869

Braja Nath Kundu
Chowdhry and Others

APPELLANT

Vs

Gaur Narayan
Mazumdar and Another

RESPONDENT

Date of Decision: April 22, 1870

Judgement

Norman, J.

On the 26th January 1840, Annada Prasad Roy, zamindar of Basudebpur, granted Kismat Basudebpur, in patni, to Hari Narayan Mazumdar, ancestor of the defendant, at a rent of rupees 145-7-3; and on the 19th of September 1844, he granted a fresh patni, at a reduced rent of rupees 90, being a remission of rupees 55-7-3 from the former jumma. The plaintiff sues to set aside the lease of September 1844, by which the patni rent was so reduced.

2. The plaintiff's title is as follows:--

In September 1840, Annada Prasad Roy, by a deed in the English form, mortgaged the zamindari of Basudebpur, with other property, to Nabakrishna Sing. On the 9th of October 1844, Annada Prasad Roy mortgaged the same lands to the plaintiff. The plaintiff brought a suit; and in 1856 obtained a decree for the redemption of the mortgage of September 1840. He paid off that mortgage; but on the record before us, there is nothing to show whether he took an assignment of it for the purpose of keeping it on foot as a security against incumbrances created by the mortgagor subsequently to the date of the first mortgage, and before the date of the mortgage to himself in October 1844. The plaintiff, after paying off the mortgage of 1840, obtained a final decree for foreclosure as against Annada Prasad in July 1862.

3. The lower Appellate Court, reversing the decision of the first Court, has declared the patni lease of September 1844 not binding on the plaintiff, and therefore decreed the suit in his favor.

4. From this decision the defendant appeals.

5. It has been properly observed, by Baboo Ashutosh Dhur in the argument, that the patni lease of September 1844 was valid as against the plaintiff, and as against the other incumbrancers holding under titles acquired from Annada Prasad subsequently to the date of that lease, which, with interest, are of very-large amount, say rupees 2,00,000 at the least; and that the defendant would have been entitled to redeem Nabakrishna's mortgage for the purpose of protecting himself. I think that argument is well-founded. There is nothing to show that the grant of the patni lease of 1844, by which the rent was reduced, was not a perfectly honest and fair transaction. There is nothing to show, or raise the least suspicion, that the reduction was made for the purpose of defrauding persons who were to become creditors of Annada Prasad as subsequent incumbrancers. The reason for the reduction recited in the lease is that the assets had become diminished. The lease was only impeachable so far as it might tend to affect the interests of Nabakrishna as prior incumbrancer. As between the defendant and Annada Prasad, or as between the defendant and any person claiming under Annada Prasad, it was perfectly good. If the defendant had redeemed Nabakrishna, and the plaintiff had afterwards sought to redeem the defendant, he could only have done so, on the terms of confirming the patni lease, which was prior in date to his own charge. I know of no principle in the law of mortgages, as it exists in this country, which would enable the plaintiff by paying off Nabakrishna to place the defendant in a worse position, which would enable the plaintiff to tack his own charge to that of Nabakrishna, so as to give to himself priority over the defendant to the extent of all the advances made by him directly, or made by others, and got in by him subsequent to the date of the plaintiff's lease.

6. The plaintiff has not shown that he has kept on foot the mortgage to Nabakrishna as a distinct and distinguishable security, as was done in *Watts v. Symes* 1 De G. Mac. & G., 240; S. Ch., 21 L.J. Ch., 713; and if he has not done so, I think that we must treat the case as if the debt to Nabakrishna had been paid off and extinguished, upon a principle similar to that which has been applied in England to cases where the purchaser of an equity of redemption pays off a first mortgage. Generally speaking, the rights under the first mortgage are deemed to be extinguished by such payment; thus, in *Toulmin v. Steere* ⁽¹⁾, it was held by Sir William Grant, Master of the Rolls, that the purchaser of an equity of redemption who had paid off a prior mortgage out of the purchase-money, and taken a conveyance of the estate from the mortgagee, could not set up that mortgage as against an annuitant who had originally taken subject to it. No injustice is done by applying that rule in the present case. There can be no doubt but the assets in the hands of the plaintiff are abundantly sufficient to satisfy the charge which, if kept alive, is alone entitled to priority over the defendant's patni.

7. The result is, that in my opinion the defendant's patni lease of September 1844 is valid and binding on the plaintiff. The suit must be dismissed with costs in all the Courts.

(¹) 3 Merivale, 210; but see remarks on this case by Knight Bruce, L.J., in *Watts v. Symes*, 1 De G. Mac. & G., 240; and Fisher on the Law of Mortgage, Vol. II., 787.