
(1870) 02 CAL CK 0019

Calcutta High Court

Case No: None

S.M. Kamini Debi

APPELLANT

Vs

Ramlochan Sirkar

RESPONDENT

Date of Decision: Feb. 1, 1870

Judgement

Macpherson, J.

Mr. Marindin objected to the questions which I have embodied in the third issue being raised, on the ground that they are not raised in the plaint, and on the ground that, as the plaint is based wholly on charges of fraud, the plaintiff should be held strictly to the case made in it. It is quite impossible to say that the issue is properly raised in the plaint, or that the question involved in it was present to the mind of the person who framed the plaint. Nevertheless, I allowed the issue to be raised, and I think that, under the circumstances I was right in so doing. The question is purely one of law arising on the face of the plaintiff's statement of her case, and it is not a new question as between these parties, having been discussed on the application for an injunction made to Mr. Justice Norman in September 1867, and a strong opinion upon it having then been expressed by that learned Judge See post, page 460.

2. As to this issue, I am of opinion that the defendant must be declared to be a trustee for the plaintiff as regards the eight-anna share of the Talook Ramlochanpur purchased by him in execution of his decree.

3. Without saying that an equity of redemption can never be seized and sold, I have no doubt that a mortgagee cannot properly, in execution of a simple decree for a sum of money, the repayment of which is secured by a mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged, and that a mortgagee who attaches and sells his mortgagor's equity of redemption, and purchases it (directly or indirectly) himself, is a trustee for the mortgagor, and cannot acquire an irredeemable title against him.

4. It is true that the Court of Chancery will not as a rule prevent a mortgagee from pursuing all his remedies at once. But in England, an equity of redemption cannot be seized and sold, and the collateral remedies open to the mortgagee can be only proceedings against securities, or against the person or against the property, other than the equity of redemption of the mortgagor. The fact therefore that, according to English law, all the remedies may be pursued at once, does not show that, if there were in England a general power of attaching and selling an equity of redemption, such as there is in this country, a mortgagee could, in the exercise of that power, sell and purchase his mortgagor's equity of redemption. On the contrary, the whole tendency of the English law is against such an inference. It is undoubted law that, when a mortgagee has a power of sale, if he sells in exercise of that power, he cannot himself purchase, that is to say, if he does purchase, he will be declared to be merely a trustee for the mortgagor. The mortgagee who sells (except where in judicial sales he obtains leave to bid as his trustee), is not allowed to purchase the mortgaged estate--*Downes v. Grazebrook* 3 Mer., 200.

5. No doubt, and this is Mr. Marindin's strongest point, a second mortgagee, even though under his own security he be a trustee for sale, may buy from the first mortgagee selling under his power, and may in all respects acquire an irredeemable title as if he were a stranger to the estate, provided he has not availed himself of his position to obtain an undue advantage in the purchase, or otherwise acted *mala fide*--*Shaw v. Bunny* 33 Beav., 494. Even in that case, however, the Lord Justice Turner expressed his very grave doubts as to whether it was properly held that the mortgagee could divest himself of his character of mortgagee, and his remarks on the subject are well worthy of consideration.

6. But the case of a second mortgagee buying from a first mortgagee who sells under a power is quite different from the present case. A second mortgagee has no connection with the first mortgagee, and when he purchases, is a stranger, so far as that mortgage is concerned. But in the present case, the mortgagee purchased at a sale brought about by himself, in order to realise the debt for which the property was under mortgage to him. It is one thing to buy at a sale held by a third party in satisfaction of a prior mortgage; it is another thing to buy at a sale held at the suit of the purchaser himself, in execution of a decree which he has obtained for money as security for which the property sold is under mortgage to him.

7. I have myself repeatedly refused to permit a mortgagee to sell the equity of redemption of his mortgagor, in satisfaction of a simple money decree, for the amount secured by his mortgage; and I have seen, on the appellate side, very striking practical examples of the evil consequences of allowing such sales. It is, in fact, a not uncommon trick to deprive the mortgagor of his property through the means of such sales. No one will ever give a fair price for an equity of redemption, when the mortgagee is present himself as a bidder, and giving notice of his claims as mortgagee. The equity of redemption in such a case is knocked down to the mortgagee for a small sum which is carried to the mortgagor's account, in part satisfaction of the decree, and the property vests absolutely in the

mortgagee, who then at his leisure proceeds to further execution of his decree, in order to realise the balance remaining due under it.

8. One view of the matter is that, when the mortgagee purchases, the mortgage debt is satisfied. But I think that the more correct view is that the mortgagee purchasing is a trustee for the mortgagor who still has the right to redeem. Mr. Justice Phear has lately expressed a similar opinion, in the case of Bolanauth Koondoo Chowdry v. Govindomoye Dossee 3 B.L.R., O.C., 83; and although he did not actually decide the question, Mr. Justice Norman took the same view of it, when the application for an injunction was argued before him, and his observations on the point in his judgment of the 26th September 1867 are very pertinent ⁽²⁾.

9. As to the case of Toyluckmohun Tagore v. Govind Chunder Sen 1 Hyde, 289, it contains no decision of the point by the Appellate Court. Although the learned Chief Justice may have expressed an opinion as to it, Morgan, J., carefully guards himself from concurring in the opinion expressed, and states that the question was one which it was not necessary to decide.

10. I think the defendant should be declared a trustee of an eight-anna share of Talook Abad Ramlochanpur for the plaintiff, and that he should be ordered to deliver it up to the Receiver, and to account for his receipts and dealings with it during the time he has been in possession. There will be a declaration that the defendant holds an eight-anna share of the Talook Abad Ramlochanpur, under his purchase of the 25th June 1866, as a trustee for the plaintiff; and he will be ordered to give up possession of it to the Receiver, and to account for his receipts from and intromissions with the property.

⁽²⁾ Before Mr. Justice Norman.

Ramlochan Sirkar v. Srimati Kamini Debi.

Sept. 26th, 1867.

This was an application by the defendant, for an injunction to restrain the plaintiff from proceeding to sell certain property, under an order of Court dated July 4th, 1867. The plaintiff was mortgagee of the property in question, which had been mortgaged to him by the defendant.

Mr. Kennedy for the defendant.

The Advocate-General contra.

Norman, J. (after stating the facts).--The Advocate-General contends that a mortgagee, having obtained judgment on the covenant in a mortgage deed, can, in execution of that decree, put up for sale the equity of redemption of the mortgagor, and he referred to a case of Toyluckmohun Tagore v. Gobind Chunder Sen 1 Hyde, 289, decided by Mr.

Justice Wells. I may observe that the case referred to was reversed on appeal. Mr. Hyde in a note says that the judgment, as regards the construction of Act VI of 1855, was not disturbed. But my own recollection of the matter is that the judgment of the Court of Appeal rested on the narrow ground, which was sufficient to enable the Court to reverse the judgment of the Court below, and so to prevent the injustice which, as Mr. Justice Wells himself points out, resulted from his decision.

The Court did not find it necessary to go into other and more difficult questions, which it would have been necessary to consider before they could have upheld the judgment in favor of the defendant. I do not mean to say that an equity of redemption in a chattel may not be liable to sale u/s 205, or that it may not be attached u/s 234, or that a person who is under no special obligations to the debtor, in respect of such property, may not sell it, as he would any ordinary chattel.

In the case before the Court, the plaintiff is a mortgagee. He holds the property as a pledge for the payment of the debts due to him. Courts of Equity will watch closely to prevent a mortgagee from making any unfair use of his position to the prejudice of his debtor; they will not allow a person, standing in the relation of mortgagee, to take advantage of the necessities of the debtor to obtain any collateral advantages beyond the payment of the principal, interest, and costs. They will even let a man loose from an express agreement made by him to render a mortgage irredeemable.

Mortgage deeds often contain powers of sale. Lord St. Leenards says:--"This power of sale in a mortgage is of the nature of a trust; the mortgagee, like any other trustee, is bound to use all the means in his power to get the fairest and best price for the property." Lord Eldon, in *Downes v. Grazebrook* 3 Mer., 208, says:--"He is bound to bring the estate to the hammer under every possible advantage to his cestui qui trust." Vice-Chancellor Knight Bruce, in *Matthie v. Edwards* 2 Coll., 480 says:--"A mortgagee, having a power of sale, cannot exercise it in a manner purely arbitrary, but is bound to exercise it with discretion; not to throw away the property, but to act in a prudent and business-like manner, with a view to obtain as large a price as may, fairly and reasonably, with due diligence and attention, be under the circumstances obtainable." In the same case on appeal 16 L.J. Ch., 407, Lord Cottenham said:--"If the power is exercised for exorbitant purposes, without a due regard for the interest of the parties, the Court will interfere." Vice-Chancellor Kindersley, in *Faulkner v. The Equitable Reversionary Interest Society* 28 L.J. Ch., 137 says:--"A mortgagee has his rights; he has a beneficial interest, and that interest is the realizing of his security; in other words, getting paid his mortgage money, principal, interest, and any costs he may incur,--that is his right; but this Court will not allow him to exercise that right, without a due consideration of the interest of the mortgagor, and undoubtedly the interest of the mortgagor to which, in my opinion, the mortgagee is bound to attend, requires that the sale shall take place as beneficially to the mortgagor, as if the mortgagor were himself selling the property." A similar opinion was expressed by Lord Justice Turner in *Marriott v. The Anchor Reversionary Company* 30 L.J. Ch., 574.

The principles laid down in these cases were acted upon in *Orme v. Wright* 3 Jur., 19, *Ord v. Noel* 5 Madd., 438, *Hobson v. Bell* 2 Beav., 17; by the Lords Justices in *Davey v. Durrani* 26 L.J. Ch., 830; by Stuart, V.C. in *Jenkins v. Jones* 29 L.J. Ch., 493; and in *Marriott v. The Anchor Reversionary Company* 80 L.J. Ch., 122; and in the same case on appeal 30 L.J. Ch., 574.

If it were necessary to decide the question, I should be strongly disposed to hold that, in equity, a mortgagee standing, with respect to the mortgaged property, in the position of a pledgee, and having in that capacity acquired, by his contract with the mortgagee, certain known and defined rights, and come under certain well known obligations, and especially the obligation of restoring the pledged property on payment of the debt, cannot, by any voluntary act of his own, divest himself of the character of mortgagee and the obligations incident to it. He may mark out his right as mortgagee; and in so doing, may foreclose the mortgage, or obtain a decree for sale in the usual course; but in marking out that remedy, the right of the mortgagor to come in and redeem within the time usually allowed by the practice of the Court, would be secured to him. The mortgagor would ordinarily have six months allowed him, within which he might redeem. See *Parker v. Housefield* 2 Myln. & Keen, 419, *Meller v. Woods* 1 Keen, 16, *Newman v. Selfe* 38 L.J. Ch., 527, *Bell v. Carter* 22 L.J. Ch., 933. In *Shaw v. Bunny* 33 Beav., 494, a subsequent mortgagee bought the mortgaged property from a prior mortgagee who sold in exercise of a power of sale, and claimed to hold the property discharged from any right of redemption. Even in that case, Lord Justice Turner doubted the right of a mortgagor to denude himself of that character and of the obligation which he had undertaken, and of the trust which would attach in him to reconvey on payment of the money secured to him by the mortgage. Lord Justice Knight Bruce, whose opinion prevailed, thought that there was in that case nothing to prevent the second mortgagee from buying in the circumstances under which he bought, and retaining his purchase.

But he said that, if the mortgagee had availed himself of his position as a mortgagee to secure to himself any facility or advantage connected with the purchase, that might have made a difference.

I am certainly not satisfied that, if a mortgagee sells the equity of redemption of the mortgaged premises in execution of a decree on collateral security, he would not be divesting himself of his obligation as regards the mortgagor.

The point was adverted to before Lord Thurlow in an earlier case on this subject--*Lyster v. Dolland* 1 Ves., 431. The case was eventually decided, and the mortgagor let in to redeem on another ground.

In the present case the plaintiff has a mortgage extending over different properties for a floating and uncertain balance of costs, and other moneys to be advanced. He has a decree for the advance down to a particular time, when he says the suits were terminated. In execution of that decree, on an application to the Court of the

24-Pergunnas, he procured an estate of the defendant to be sold subject to his mortgage. The defendant says that the plaintiff has bought in the equity of redemption of this estate worth rupees 1,00,000 for rupees 10,000.

I am not now dealing with the plaintiff's rights under that purchase. If the sale is not an extinguishment of the mortgage debt, as was suggested by the Vice-Chancellor of England, in an analogous case, the plaintiff may find that his title under it is much less secure than he supposes. He is now seeking to bring to sale the defendant's rights and interest in the decree in the administration suit which appears to constitute the entire remainder of her property. If he had sought to sell the entire decree out and out, throwing in the mortgage, as the mortgagee did in the case before Lord Thurlow, the property might probably fetch a fair price, But the equity of redemption, if sold subject to the plaintiff's mortgage, with entire uncertainty as to what may be the amount of the charge which will eventually fall on it, must fetch absolutely nothing.

Suppose, a man has three estates, each worth rupees 25,000, mortgaged to him to secure a sum of rupees 40,000, the total value of the equity of redemption would, of course, be rupees 35,000. But, suppose the mortgagee sold at different sales, held at different places, the equity of redemption of each estate separately, how much, can it be supposed, would be realized by the three sales. No one can doubt that the interest of the mortgagor would be utterly sacrificed: probably the equity of redemption would go for next to nothing; indeed it would be doubtful if, under the most favorable circumstances, a fifth of the value of the equity of redemption would be realized.

Holding then, as I do, that the attempted sale is fraudulent and oppressive, and a shameless abuse of the process of this Court, I have no hesitation in staying the sale by an injunction restraining the plaintiff from proceeding with the same.

I adopt the course of granting an injunction at once, because I am satisfied, from all the circumstances of the case, that, if I allowed the sale to proceed, irremediable injury would be done. The plaintiff must pay the costs of this motion.