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**(1922) 02 CAL CK 0049**

**Calcutta High Court**

**Case No:** None

Nitya Gopal Tewary and Others

APPELLANT

Vs

Ramsasi Roy and Others

RESPONDENT

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**Date of Decision:** Feb. 6, 1922

**Citation:** AIR 1923 Cal 296 : 67 Ind. Cas. 394

**Hon'ble Judges:** Pearson, J; N.R. Chatterjea, J

**Bench:** Division Bench

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### **Judgement**

1. The question raised in the appeal is whether the plaintiff should be allowed to redeem in the present suit, which is one for recovery of possession, on a declaration that the mortgage-bond was fraudulent, collusive and without consideration and that the decree obtained, therefore, was also fraudulent and collusive.

2. It is found by the Courts below that the mortgage was not fraudulent and the suit was accordingly dismissed.

3. It is contended before us, as it was before the lower Appellate Court, that the plaintiff should be allowed to redeem in the present suit and in support of that contention the case of Bal Kishen Lal v. Topeswar Singh 14 Ind. Cas. 815 : 5 C.L.J. (SIC) 17 C.W.N. 219 is relied on.

4. In that case it appears that there were allegations of fraud which had failed, but notwithstanding that the plaintiff was allowed to redeem in that suit. It is to be observed, however, that what was attacked as fraudulent was not the mortgage but the decree which was obtained upon the mortgage against the father of the plaintiff who was the Kurtha of a Mitakshara family. That decision of Mookerjee, J., cannot be laid to be directly in point.

5. On the other hand, Mr. Justice Mookerjee discussed this question in two earlier cases. In Kokilasari Dasi v. Rudranand Goswami 5 C.L.J. 527 where it was held that "a plaintiff must ordinarily succeed on the case he has made in the plaint and that,

unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption, cannot properly be converted into an action to redeem."

6. In another case *Ghurphekni v. Purmeshor Dayal* 5 C.L.J. 653 at p. 659, it was held that "where a plaintiff has rested his case upon fraud, when the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground. Although, therefore, a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit it, be converted into one for redemption on the assumption that the mortgage was valid and binding, a plaintiff must ordinarily succeed on the case he has made in the plaint, and that, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem, as it would in reality amount to the conversion of a suit of one character into a suit of another and inconsistent character."

7. These cases do not appear to have been cited before the learned Judges in the case of *Bal kishan Lal v. Topeswar Singh* 14 Ind. Cas. 815 : 5 C.L.J. (SIC) 17 C.W.N. 219. Although the decision on the question whether a suit for possession can be converted into a suit for redemption are not uniform, no case has been cited in support of the contention that, where the mortgage has been challenged as fraudulent, and the fraud attempted to be proved and the plaintiff failed to prove it, he should be allowed to redeem.

8. On the other hand, in the case of *Ram Dao Mondal v. Indromoni Dasi* 3 C.W.N. 325 Macpherson, J., observed: "I know of no case in which a suit based on fraud and fought out on the ground of fraud and dismissed in the First Court on the ground of there having been no fraud has, in the Appellate Court, been converted into one for redemption."

9. We are unable to hold that there are any special circumstances in the case. It is unnecessary to discuss the matter further because that is not the only difficulty in the way of the plaintiff. The property has been found to have been dedicated to a Thakur and the Thakur is not a party to the suit. Any decree for redemption passed against the defendants in the absence of the Thakur would, therefore, be infructuous.

10. In these circumstances, we think that the present suit must fail. This, however, will not prevent the plaintiff from bringing any suit that he may be advised for redemption.

11. The appeal must accordingly be dismissed with costs.