Abbas Ali Sarkar Vs Salimuddin Sarkar

Court: Calcutta High Court

Date of Decision: Aug. 24, 1920

Acts Referred: Transfer of Property Act, 1882 â€" Section 65

Citation: 62 Ind. Cas. 692

Hon'ble Judges: Asutosh Mookerjee, Acting C.J.; Ernest Fletcher, J

Bench: Division Bench

Judgement

Mookerjee, Acting C.J.

1. This is an appeal by the plaintiff in a suit for recovery of possession on redemption. The subject-matter of the litigation is a non-transferable

occupancy holding, which originally belonged to one Kamal Changa. On the 23th August 1906 the occupancy raiyat executed a mortgage of the

holding by way of conditional sale to the present defendant. On the 14th December 1912 the mortgagor conveyed the holding to the plaintiff. The

result was that as against the landlord the subject-matter of the transfer was extinguished and the plaintiff did not as against him acquire a valid title

to the holding on the basis of his conveyance. The position of the mortgagee was also imperilled, because the mortgagor, so long as be retained the

tenancy, would be held liable for the rent by the landlord, but as soon as he had parted with his interest in the holding, the landlord would be

entitled to treat the tenancy as forfeited and would be competent to re-enter upon ejectment of the mortgagee in possession. The defendant

apprehended this danger, entered into negotiations with the landlord and obtained a new lease from him on payment of a premium. Thereupon, on

the 27th January 1916, the plaintiff instituted the present suit for redemption and for re-transfer to him of the occupancy holding which had been

mortgaged to the defendant on the 26th August 1906. The answer of the defendant was that the subject matter of the mortgage was no longer in

existence, that it had been extinguished when the tenantry was forfeited and that there was no properly in respect whereof the plaintiff could claim

to exercise a right of redemption. The plaintiff contended that he was entitled to invoke (be aid of the doctrine of equity which was recognize d in

the case of Keech v. Sandford (1726) 2 White and Tudor''s Leading Cases in Equity 706 Cas. Ch. 61 : 2 Eq. Cas. Abr. 741 : 22 E.R. 629,

which furnished an illustration of a constructive trust arising upon renewal of a lease by a trustee in his own name and for his own benefit. The

Court of first instance gave effect to this contention and made a decree for redemption. The District Judge has reversed that decision and has

dismissed the suit.

2. On the present appeal, which was heard in the first instance by Mr. Justice Chatterjea and Mr. Justice Newbould, it was contended that the

plaintiff was entitled to treat the new lease as taken for his benefit and consequently to claim redemption. The Court thereupon held that before the

Question raised could be decided, it was necessary to have an express finding upon two points, namely, first, whether the original tenancy was

subsisting when the defendant took settlement from the landlord or whether the landlord was aware of the sale to the plaintiff when be accepted

rent from the defendant in the name of the original tenant and, secondly, whether the defendant obtained the settlement from the landlord by taking

advantage of his position as mortgagee in possession.

3. Upon the first point the District Judge has held that the original tenancy was not subsisting when the defendant took settlement from the landlord

and that the landlord was then not aware of the sale to the plaintiff. Upon the second point the District Judge has held that the defendant did not

obtain settlement from the landlord by taking advantage of his position as mortgagee in possession and, that, on the other hand, the settlement with

him was made on the usual terms, and he came in on exactly the same conditions as any other person applying for a settlement. The propriety of

these conclusions has not been questioned in second appeal. But the appellant has urged that he is entitled to a decree for redemption, even though

the questions remitted to the District Judge have been answered against him. We are of opinion that there is no foundation for this contention.

4. The principle applicable to cases of this character is well-settled. The mortgagee is not a trustee for the mortgagor except in a very special and

modified sense Turner v. Walsh (1909) 2 K.B. 484 at p. 496 : 78 L.J.K.B. 753 100 L.T. 832 : 25 T.L.R. 605; Cholmondeley v. Clinton (1820)

2 J. & W. 182 : 22 R.R. 84 : 37 E.R. 527 but if a mortgagee renew a lease, prima ficie he ''doth but graft upon his stock, and it shall be for the

mortgagor''s benefit'' Rushworth''s case (1676) 2 Freeman 13 : 22 E.R. 1026, Rakestraw v. Brewer (1728) 2 P. Wms. 511 : 24 E.R. 839. The

mortgagee, however, stands in a different position to the trustee; the trustee cannot acquire the renewed lease for himself, the mortgagee can, for as

against him there is only a presumption that he acquires for the mortgager, and that may be rebutted Biss In re Biss v. Biss (1903) 2 Ch. 40 : 72

L.J. Ch. 473 : 88 L.T. 403 : 51 W.R. 504. Consequently, a new lease obtained bona fide by the mortgagee, after giving all parties interested

notice, and an opportunity of renewal, has been held not to be in trust for the mortgagor, see Nesbiit v. Tredennick (1808) 1 Ball & B. 29 : 12

R.R. 1, where it was pointed out that in all previous cases the party had obtained renewal by being in possession, or it was done behind the back

or by some contrivance in fraud of those interested in the old lease, and there was either a remnant of the old lease, or a tenant right of renewal, on

which the new lease could be ingrafted, but that here no part of the mortgagee''s conduct showed a contrivance, nor was he in possession and all

that the mortgagee treated for was a new lease, giving full opportunity to the lessee to dispose of his interest, or to renew, if able to do so. The

same principle has been held applicable in cases of partners, and'' it has been decided, more than once, that if one partner obtains in his own name,

either during the partnership or before its assets have been sold, a renewal of a lease of the partnership property, he will not be allowed to treat this

renewed lease as his own and as one in which his co-partners have no interest Featherstonhaugh v. Fenwick (1810) 17 Ves. Jur. 298 : 11 R.R. 77

: 34 E.R. 115 and Clegg v. Fishwick (1849) 1 Mac. & G. 294 : 1 H. & Tw. 396 : 19 L.J. Ch. 49 : 13 Jur. 993 : 84 R.R. 61 : 41 E.R. 1278. At

the same time, the purchase of a reversion on a lease stands on a different footing. It cannot be said that a person buying a reversion prima facie

does so by virtue of any interest in the lease. Hence in Bevan v. Webb (1905) 1 Ch. 620 : 74 L.J. Ch. 300 : 93 L.T. 298 : 53 W.R. 651, where

there was no evidence that the purchase of the reversion had been obtained by virtue of the purchaser being interested in the lease and the lease

was not renewable by custom or by contract, a partner who had purchased, out of his own moneys, the reversion of a lease which was assumed to

belong to the partnership, was held to be entitled to retain it for his own benefit See Griffith v. Owen (1907) 1 Ch. 195 : 76 L.J. Ch. 92 : 96 L.T. 5

: 23 T.L.R. 91.

5. In the case before us, it is manifest that there is no room for application of these equitable principles in favour of the plaintiff. It has been found

that the defendant did not take advantage of his position as mortgagee in possession, to obtain a new lease from the superior landlord. He was

driven to take that step by reason of the conduct of the plaintiff and his vendor, who acted in contravention of the provisions of Section 65 of the

Transfer of Property Act. The mortgagor was bound to protect the interest of the mortgagee, but notwithstanding this implied covenant, he

proceeded to transfer a non-transferable occupancy holding in favour of the plaintiff, with the result that the defendant was brought into direct

contact with the landlord who became entitled to eject him as a trespasser. In these circumstances, the benefit of the lease obtained by the

defendant unquestionably did not belong to the plaintiff. In our opinion, the Subordinate Judge has correctly held that the plaintiff is not entitled to a

decree for redemption, and his view is supported by the judgment of this Court in Radha Kant Chakravarti v. Ramananda Shaha 13 Ind. Cas. 698

: 39 C. 513 : 16 C.W.N. 475 : 1 C.L.J. 369. The decree of the Subordinate Judge is, therefore, affirmed and this appeal dismissed with costs of

the two hearings in this Court as well as of the hearing on remand before the District Judge.

Fletcher, J.

6. I agree.