Brajanath Kundu Chowdhary and Others Vs S.M. Gobindmani Dasi and Others

Court: Calcutta High Court

Date of Decision: Dec. 28, 1869

Judgement

Phear, J.
The loan, which is the basis of all these proceedings, was made in April 1863, To secure repayment of this loan, Gobindmani

Dasi and her three daughters mortgaged to the Chowdhary certain property, all of which, I believe, lies in the mofussil. On the same date, these

ladies executed a bond by way of collateral security, and further a warrant to enter up judgment on this bond. The mortgage contained a covenant

to give up possession at once; and on the same day, in order to give, I suppose, greater force to this covenant, the ladies executed a warrant to

enter up judgment in ejectment for these properties; and lastly they executed a warrant to the Chowdhary authorising them to receive the rents of

the property for a period of five years. I should have added that the time for payment of the mortgage debt was fixed at five years after the date on

which the mortgage was executed. One can hardly avoid seeing that these ladies were tried and bound in a most remarkable way, and that the

mortgagees obtained almost every conceivable security for repayment of the money advanced. The mortgagees immediately took possession and

entered into receipt of the rents of the mortgaged property, generally by virtue of the powers which I have mentioned, and in particular under the

irrevocable warrant to receive the rents for five years. They have continued in possession and receipt of the rents for upwards of six years. Also

judgment was entered up on the bond in 1863, shortly after its execution. Since that time some of the plaintiffs in the suit on the bond have died,

and the suit has been revived in the name of their representatives jointly with the survivors; and the present application, which I have to consider, is

an application by the mortgagees, plaintiffs, to be allowed to issue execution on the judgment upon the bond, more than one year having elapsed

since any proceedings in execution were last taken. I have, therefore, to say whether, under the circumstances which I have just now mentioned,

considering the parties to the suit, and having regard to what has happened since the judgment was entered up, it is right and proper that I should

allow the plaintiffs to take out execution. It is at once apparent that the plaintiffs are mortgagees possessing simultaneously two remedies for

ensuring payment of the debt, and much time was occupied yesterday in the discussion of the general rights of mortgagees under this state of things.

As I threw out during that argument, it is, undoubtedly, quite true that the Court of Chancery in England will not, as a rule, interfere with or disturb

a mortgagee to prevent him from pursuing more than one, or all, his remedies at once. The mortgagors have, by their contract, given the

mortgagees the right to the concurrent remedies, and the Court will not deprive the latter of the full benefit of the contract, unless for special

reasons; but I apprehend that the Court will always interfere, even in England, if necessary, for the purpose of preventing the mortgagee from

working oppression or vexatious harassment by an extreme use of his rights, or for the purpose of giving effect to any equity between the parties

which may arise on the facts, dehors the contract itself. That is the rule, as I have always understood it, in England, where the Court of Chancery is

thus peculiarly situated, namely, that it has sole jurisdiction and entire control over the proceedings required to enforce the mortgage rights, while it

can only interfere by injunction with the proceedings at law instituted for the recovery of the debt. In similar cases here, there are not two tribunals,

but this Court by itself would have complete control over the proceedings of both sorts, and would, therefore, be more free than the Court of

Chancery, so to adjust those proceedings as best to give effect to the rights of the parties, with the least possible harassment and cost. But in the

present case this Court is not in the situation to which rules of this kind apply; the mortgaged property is entirely out of its jurisdiction; the rights of

the parties under the mortgage of that property must be determined by the mofussil Court according to methods of proceeding which we do not

follow here; and if any parallel is to be drawn, it is the mofussil Court, and not this, which must be compared with the Court of Chancery. I think I

have simply to confine myself to the question which I first proposed,--i.e., is it right and proper as between the parties to the suit on the bond, after

all that has happened between thorn, that I should issue execution? Certainly, if I do issue execution, my order must be made with the limitation that

execution is not to go against the mortgaged property. I mentioned yesterday in Court that I had spoken with Mr. Justice Macpherson on this

point, and that the view which he entertains with regard to it coincides, as I understand it, with my own. Indeed, I believe that he makes it a

practice in cases where execution is taken out upon a collateral security, or on the money-covenant in the mortgage, always to insert in his order

for execution the condition or limitation which I have just mentioned. I have also learned from him that he is like myself unaware of any authority by

which it is laid down that an equity of redemption can be taken in execution of a decree for a money debt solely, under the attachment clauses of

Act VIII of 1859. The case which Mr. Kennedy has cited, Gosaindas Bara Madak Vs. Biswanath Mukhopadhya and Another , does not I think

bear out his contention. As I understand the note of that case, the decision only amounts to this, that a person who had a charge by khut on certain

property, and who had obtained a decree for making good that charge against the property,-- if he assigned his decree, his assignee was entitled to

execute that decree, notwithstanding that the property had, in the meantime, been sold under another decree; a proposition which does not seem to

have any bearing whatever on the present question, 1 had been disposed always to take the view that the attachment of sections of Act VIII do

not apply to such property as an equity of redemption; and I have been told that Mr. Justice Norman, on one occasion, formally pronounced an

opinion to that effect. But I abstain from judicially determining that point now. The principal considerations which have governed me in limiting the

execution to property other than that which is the subject of the mortgage, are simply these. The mortgagees, by obtaining the security of the

property under the mortgage contract, have got it safely preserved for themselves as against all other creditors; and this Court, in carrying out such

a contract, always considers it equitable as between the parties to it that the mortgagor should have six months'' time after the passing of the decree

within which to redeem that property; and I have never heard that the mere fact of the parties having entered into a collateral contract of security in

the shape of a bond has been taken so to alter their relations as that the Court would, in such case, deprive the mortgagor of the benefit of those

six months. But clearly, if the mortgagee has nothing to do but to bring a separate suit in this same Court on his bond or covenant, in order to entitle

himself forthwith to take the mortgaged property in execution, and to sell the mortgagor''s equitable interest in it, then the principle which induced

the Court to give the mortgagor the six months'' law would be rendered entirely inoperative and nugatory. For we should thus, in effect, have this

Court in one breath declaring that the mortgagor was entitled to six months'' time for redeeming his property by payment of the debt, and in the

next that he was entitled to no time at all for that purpose, but that the property must be immediately sold, unless he paid at once. Moreover, a sale

in execution of property, which is subject to a mortgage in favour of the judgment-creditor, can scarcely ever fail to turn out a complete

confiscation, and it very seldom happens that the judgment-debtor is able to avoid this result by converting his equity of redemption into money by

a private assignment before attachment. In view of these consequences, I have satisfied myself that the enforcement of the money-decree, although

that may be passed in a distinct suit, cannot, in this Court, be treated entirely without reference to the discretion which this Court undoubtedly

possesses for the purpose of giving effect to the equities between the parties on the mortgage transaction; and accordingly I have always thought

that while the mortgagee is undoubtedly entitled to his judgment and execution in a suit brought to enforce the money-covenant, it must be

execution as against other property of the defendant than the mortgaged property, if he has any other, and must not be such execution as would

practically defeat the mortgagor''s equity of redemption. Now, on looking more closely to the facts of this case, as disclosed by the plaintiffs

themselves, it is quite clear that, after the lapse of the first five years, and when the mortgage debt had become due, i.e., in September 1868, a

fresh agreement of mortgage was come to between the plaintiffs and the defendant Umacharan Chatterjee, who distinctly states this in his affidavit

of the 15th July 1869; and appended to the affidavit is a document containing an abstract of the terms of the new agreement purporting to be

signed by the greater part, if not all, of the present defendants, and certainly by all the original mortgagors. Moreover part of that agreement has,

undoubtedly, as I think, been carried out, for the power of attorney therein stipulated for, authorising the plaintiffs to collect the rents of the

mortgaged lands for a further period of twenty-two years, was actually executed and handed over to the plaintiffs. I was given to understand

yesterday that it was in fact from their possession or control that the document was brought into Court; unfortunately I have not the bond before

me now, but I will assume that the terms of this bond follow and are collateral to the terms of the mortgage. If it be so, I think the new agreement

for mortgage with the new collateral securities would have the effect, if not actually of displacing or setting aside the judgment on the bond, at least

of rendering it inequitable that that judgment should be executed now. If the judgment on the bond is simply a judgment which will be voided by

paying the money in the mode provided for by the original mortgage deed, it would be most unjust that the plaintiffs should have immediate

execution of that judgment when they have entered into a new agreement to wait twenty-two years for payment of their mortgage debt. Subject to

any alteration of my views which might be caused by perusal of the bond, I think I ought to dismiss this application. I further think that the plaintiffs

were bound in dealing with ladies to take care that they had independent advice. If upon this they disavowed the new agreement altogether, then I

should consider that the plaintiffs were not barred from executing the judgment.