
(1870) 04 CAL CK 0014

Calcutta High Court

Case No: Regular Appeal No. 160 of 1869

Nand Lal Sen

APPELLANT

Vs

Srimati Sarasibala Debi
and Another

RESPONDENT

Date of Decision: April 22, 1870

Final Decision: Allowed

Judgement

Phear, J.

It is obvious that, neither on the 4th December 1866, when the petition was presented to the Judge of Chittagong, nor on the 15th April 1868, when this suit was instituted, had the period elapsed which, by the mortgage deed, was stipulated for the repayment of the principal sum secured; and, therefore, the question immediately arises, whether or not the suit is on that account premature? If the Zilla Court was at liberty, and had the machinery to deal with this matter precisely upon the principles which govern the English Court of Chancery, the facts of the case are possibly such as would give the plaintiff a right of suit, even before the expiration of the time agreed upon for the repayment of the principal debt ⁽¹⁾; for whenever that has occurred by reason of which the mortgagor has lost his right under the deed to call for a re-conveyance of the property, and he can only get back the mortgaged premises by virtue of the right of redemption which the Court of Equity still preserves to him, then also that Court allows the mortgagee to come in and insist that the mortgagor shall elect between the exercising of this right of redemption and being foreclosed. But we think that this mortgage transaction, notwithstanding that it wears a completely English aspect, falls within the operation of Regulation XVII of 1806. It is in all respects parallel with the mortgage common in this country, which is effected by means of a bill of absolute sale, together with a contemporaneous ikrar for reconveyance, and mortgages of this sort have always been treated as being subject to the Regulation. The words "conditional sale," as explained by the preamble, are broad enough to cover them, and there is no doubt that they are especially within the mischief against which the enactment was directed. This being so, the mortgagee can only obtain a foreclosure by following the procedure which is laid down by section 8 of the above mentioned

Regulation. And although there is some ambiguity in the words of that section relative to the time when the mortgagee may first prefer his petition for foreclosure, this is cleared up by reference to the previous section. The last clause of the 7th section runs thus:--

The whole of the provisions contained in section 2, Regulation I of 1798, and section 12, Regulation XXXIV of 1803, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year granted for an equitable right of redemption by this Regulation." This makes it evident that the year of grace, commencing as it does with the notification which follows on the mortgagee's application for foreclosure, is intended by the Legislature to be additional to the period which is stipulated for redemption in the mortgage contract; and, therefore, it follows that the application itself cannot be made before the expiration of that "stipulated period.

2. Now the "stipulated period" of redemption referred to by the Legislature in this Regulation appears to us to be the whole period prescribed by the mortgage contract for the performance of the conditions, upon the fulfillment of which the mortgagor is to be entitled to a reconveyance. We do not think that it in any case means less than this, or depends upon whether the mortgagor duly performs all those conditions or not. We see no reason for supposing that the Legislature by these words spoke, not of the period of redemption originally specified in the contract (as the words themselves certainly imply), but merely of the shorter period during which the mortgagor by performance of the conditions may have preserved his strict right to redeem under the contract.

3. From the very object of the Regulation, it is obvious that the framers of it had expressly in view the case of a mortgagor who fails to perform the conditions necessary to give him the contract right to redeem; and if they thought of the "stipulated period" as a period terminating on the first default of the mortgagor, they would surely have used some other expression than this to convey their meaning.

4. According then to our view, in the case before us, the "stipulated period" did not expire until the 4th September 1868, and consequently both the presenting of the petition for foreclosure, and the filing of this plaint, occurred before the mortgagee had any right to take a single step towards foreclosing the mortgagor's equity of redemption. All the proceedings in this matter are, therefore, inoperative; the suit is without legal foundation, and must be dismissed.

5. The plaintiff's counsel has argued that the plaintiff is at least entitled, under the terms of the mortgage, upon the facts which have happened, to obtain possession as mortgagee of the premises in suit, but this is a cause of action entirely distinct from that upon which he has sued, and we think he ought not now to be allowed to deviate from his plaint. The decree of the Judge is reversed, and the plaintiff's suit is dismissed. Each party will pay his own costs in both Courts.

(¹) See *Burrowes v. Molloy*, 2 Jo. & La., 521; *Edwards v. Martin*, 25 L.J., Ch., 284; *Roddy v. Williams*, 3 Jo. & La., 1; and Davidson's *Precedents and Forms in Conveyancing*, Vol. II, p. 536.