
AIR 1959 Ori 122

Orissa High Court

Case No: Second Appeal No. 101 of 1954

Somanath Pradhan and
Others

APPELLANT

Vs

Sanno Govindo Misra
and Others

RESPONDENT

Date of Decision: July 31, 1958

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 7, 11
- Transfer of Property Act, 1882 - Section 60, 92, 93

Citation: AIR 1959 Ori 122

Hon'ble Judges: S. Barman, J; G.C. Das, J

Bench: Division Bench

Advocate: J. Brahma, for the Appellant; P.C. Chatterji, for the Respondent

Final Decision: Dismissed

Judgement

G.C. Das, J.

This appeal by some of the defendants against the concurrent decision of the court below raises inter alia rather an interesting question of law whether a second suit for redemption would lie. The plaintiff's suit for redemption was decreed by the Courts below and their decree directed the defendants to deliver possession of the suit lands to the plaintiff within three months from the date of the decree. The plaintiff was an assignee from defendant 3, a legal representative of the original mortgagor. Defendants 1 and 2 were the mortgagee and defendants 4 to 14 purchased different parcels of the mortgagee's interest from defendants 1 and 2.

2. The plaintiff commenced a suit for redemption, simpliciter, to redeem a registered usufructuary mortgage, dated 25-9-1909 executed by Dandapani Mirsa, the late grandfather of defendant 3 in favour of the father of defendants 1 and 2, for a sum of Rs. 30/-. Both the original mortgagor and the mortgagee are now dead. After the death of

Dandapani, his son, since dead, and grand on the third defendant, by a registered deed of sale dated 10-8-1928, sold the mortgaged property to the present plaintiff

The first and the 2nd defendants who are the sons of the original mortgagee, since deceased, it is admitted, were in possession of the mortgaged security ever since the mortgage was executed. According to the recitals in the mortgage bond, (Ext. 1), the rents and profits of the mortgaged property were to be first applied towards the payment of interest and the surplus towards the principal. The plaintiff's whole case was that the entire mortgage had since been redeemed and there is no further money due. However, if any amount is found by the court to be due, the plaintiff was ready to pay the same. Accordingly the suit for redemption of the mortgage was filed.

3. Defendants 1 and 2 and defendant 11 filed separate written statements. Though the defendants 5 to 7, 9, 10, 13 and 14 adopted the written statement filed by the first defendant, the suit ultimately was contested by defendants 1 and 2 only. They contended, inter alia, that the plaintiff had filed a suit (O. S. 831 of 1928) previously and obtained a preliminary decree for redemption on 9-8-1929. That decree directed that if the plaintiff pays a sum of Rs. 529-9-1 within three months from the date of the decree, he would be allowed to redeem the property, but in case such payment is not made on or before 9-11-1929, the plaintiff shall be debarred from all rights to redeem.

The plaintiff in fact did not make any payment within the time allowed. Hence in terms of the said decree his right to redeem is now barred by principles of res judicata. The lands, at the time of the mortgage, were not surveyed and were noted as 21 Varanams, 15 Nautis. But after the survey and settlement, the lands under mortgage were actually found to have an area of only A. 2.94 cents. Hence, the other lands besides these A. 2.94 cents belonged exclusively to the defendants. The right to redeem was also challenged on another ground.

The plaintiff in the meantime, by means of an oral sale sold away his right of redemption for a sum of Rs. 88/- and put the defendants 1 and 2 in possession thereof. Thus they are in possession of the disputed property in their own rights since this sale in 1930, and their names stood duly recorded in the settlement records of the year 1938. They, being the absolute owners of the disputed properties, have, in the meantime, sold away 2.20 acres to different defendants and have kept only 74 cents to themselves. Their further case was that the father of these defendants had repaid a sum of Rs. 435-9-1 towards an old mortgage in respect of this property due to one Narayan Das as also towards the Mustajari dues payable to the Zamindar.

The other defendants while adopting this written statement, as stated earlier, denied that lot Nos. 1 and 7 of the plaint schedule ever belonged to the plaintiff, and lot No. 3 purchased by the fifth defendant belonged to the first defendant alone. Lot No. 8 according to them was not included within the mortgage security and hence no decree should be passed against these lots. They further contended that the plaintiffs suit for

redemption is barred by limitation.

4. The learned Munsif, who heard the suit at the first instance, held that the suit is not barred by either the principle of res judicata or by limitation. He disbelieved the story of oral sale and negated the case of the 1st and the 2nd defendants being in possession of the mortgaged property in their own right. Besides, he held that defendants 5, 7, 9, 10 and 11 had not been able to prove that they had any paramount title to any portion of the mortgaged security. Accordingly, he decreed the plaintiffs suit. Against this judgment an appeal was preferred to the District Judge, Berhampur, which was heard by the Additional Subordinate Judge. Before the learned Additional Subordinate Judge, three contentions were raised: (1) The right to a fresh suit for redemption was not available to the plaintiff, he having already obtained a decree for redemption previously in the year 1929; (2) the right of redemption whatever the plaintiff had, has since been extinguished by act of parties, namely, by the oral sale effected in favour of defendants 1 and 2; and (3) Section 17 of the Orissa Money Lenders Act was wrongly applied to the present case. If at all, a preliminary decree for accounts should have been passed. The learned Subordinate Judge negated all the foregoing contentions & dismissed the appeal. It is against this judgment that the present second appeal is laid.

5. Mr. J.C. Bramha counsel for the appellants raised two contentions before this court: (1) The plaintiff's suit is not maintainable since a second suit, for redemption would not lie in the circumstances of the case, the mortgage-bond being in anomalous mortgage, and not a usufructuary mortgage, and (2) Even if the suit is held to be maintainable and the mortgage is held to have been discharged under the provisions of Section 17 of the Orissa Money Lenders Act (Orissa Act III of 1939) the appellants would be entitled to get at least a sum of Rs. 287-8-0 which they had paid in satisfaction of a previous mortgage. Mr. P.C. Chatterji learned counsel on behalf of the respondent, on the other hand contended that the decree in the previous redemption suit being only a preliminary decree, the plaintiff is entitled to bring a fresh suit, since the decree had not been made final. For this part of his contention, he submitted that it would not matter very much whether, the mortgage was an anomalous mortgage or a usufructuary mortgage. His whole argument was that unless there is a final decree for redemption, the plaintiff's right to redeem is not extinguished.

6. It is well settled now that unless there is an order for foreclosure or a decree for sale, the mortgage would, in the eye of law, subsist. Once the mortgage is in subsistence, the right of redemption is not extinguished. If the right of redemption is not extinguished, successive suits for enforcing that right could be filed. Prior to the passing of the Transfer of Property Act, there was a long controversy on the question whether in the absence of any well-known rule of law or statute, Judges in India could graft upon the natural contract of the parties the equitable rule of redemption which had been established by the Court of Chancery in England.

The Privy Council seems to have thought that the doctrine, that the time stipulated in the mortgage deed is not of the essence of the contract, was unknown to the ancient law of India and should not be introduced by Judges as a rule of equity and good conscience. This controversy has since been set at rest by the introduction of the Transfer of Property Act. By the Transfer of Property Act the most important right possessed by the mortgagor is the right to redeem the mortgage before it is foreclosed or the estate is sold by the mortgagee.

The law treats the contract as a mere pledge and disregards the part which gives the estate to the mortgagee as meaningless form. Hence notwithstanding any default in payment, the mortgagor continues to be the owner or to use the language of the English Law "retains an equity of redemption" which may be successfully asserted by him against the mortgagee. Thus, the right of redemption on the part of the mortgagor and the right to foreclose on the part of the mortgagee are co-extensive. The right to redeem can only be destroyed as provided u/s 60 of the Transfer of Property Act, that is, by the act of parties or by a decree of court.

7. Now coming to the first contention raised by Mr. Brahma, it has first to be seen whether the mortgage-bond (Ext. 1) is a usufructuary mortgage-bond or an anomalous one. The bond itself has been described as a usufructuary mortgage-bond. In the body of the document the term "usufructuary mortgage bond" has been used throughout, and there is a recital for delivery of possession in favour of the mortgagee of the mortgaged-properties. It further authorised the mortgagee to retain such possession until payment of the mortgage-money together with the rents and profits accruing therefrom, in lieu of interest, and the surplus to be appropriated towards the payment of the mortgage-money.

There is, however, a recital by which the mortgagor bound himself to make a payment of Re. 1/2 towards certain public dues. Although other recitals conform to the definition of "usufructuary mortgage" as given in Section 58(d) of the Transfer of Property Act, Mr. Brahma contended that on this recital alone, it would be an anomalous mortgage. In support of his contention, he relied upon a decision of the Judicial Committee reported in *Jawahir Singh v. Someshar Dutt* ILR 28 All 225. The facts in that case were that a deed of mortgage after providing for payment of interest at certain rate and stating that if as a mark of favour the mortgagors let the interest remain unrealised the principal should be payable with compound interest stipulated by Clause (6) that "if the mortgagee took possession" she will be entitled to receive the net profit in lieu of interest and during her possession the interest and profits shall be deemed equal. Clause (11) was to the effect that if during the period of possession of the mortgagee the profits do not cover the amount of interest, we the mortgagors will make good the deficiency.

If we cannot make good the deficiency we will pay it with interest at the, rate mentioned above at the time of redemption. The mortgagee took possession under the mortgage. In the aforesaid circumstances, it was held that in a suit for redemption on the construction

of the deed, although the prima facie meaning of Clause (6) namely, that the mortgagee accepted the profits in lieu of interest was no doubt qualified by Clause (11), the latter clause was not to be rejected as being inconsistent with the former one. The mortgagors were liable to pay compound interest on the deficiency which they undertook to pay by Clause (11). On reading the bond as a whole, their Lordships were of opinion that the bond was an ordinary mortgage and not a usufructuary one. In the given case, reading the mortgage-bond as a whole, there is no doubt that the parties intended it to be a usufructuary mortgage from the very beginning. Besides, the previous suit for redemption both parties proceeded upon the footing that the suit-bond was a usufructuary mortgage bond and a preliminary decree was passed on that footing.

A close reading of the bond leaves one in no doubt that it is a usufructuary mortgage bond and not an anomalous one. Strong reliance was placed on the case of AIR 1934 205 (Privy Council) . The facts in that case were that by a mortgage certain shares in five villages were mortgaged by way of conditional sale, the mortgagees being placed in possession with no liability to account for mesne profits. The principal money was repayable at the end of three years. A further principal sum was secured by a further charge.

This was done on 22-6-1864: In 1892 the mortgagor instituted a redemption suit alleging that nothing was due under the security and claiming to be put in possession of his shares in the aforesaid five villages or if the Court should find that any sum was due that it might order redemption subject to the payment of such sum. The result of that suit was that as to the shares in two of the villages it was decided that there was no right of redemption any longer existing and that as to the shares in the other three villages the plaintiff could redeem them on payment of proper proportion of the mortgage money.

A decree was accordingly passed. By that decree it was ordered that the plaintiff is entitled to a decree for possession by redeeming the mortgage on payment of Rs. 4208-6-0 by 15-11-1896. If he pays the said sum he will get all the costs except the pleader's fee incurred by him and in case of his default, the suit will stand dismissed and the costs incurred by the defendants will be charged against him. An appeal therefrom was also dismissed. No payment of the mortgage-money was ever made and the mortgagees remained in possession.

Thereafter in 1924 a second suit for redemption was commenced. In that suit, the plaintiff averred that the whole of the amount of Rs. 4208-6-0 had been satisfied out of the increased profit of the mortgaged properties and accordingly he claimed possession of shares in three villages by redemption, on the footing that the mortgage-money had been satisfied or if any amount of the mortgage-money be proved due, a decree for redemption on condition of payment of that amount, may be passed. On these facts one of the main points for decision was whether the second redemption suit was maintainable.

Their Lordships of the Judicial Committee on these facts held that the right to redeem is a right conferred upon the mortgagor by an enactment, of which he can only be deprived by means and in manner enacted therein for that purpose. The provision in a decree in a suit for redemption that in case of default by the plaintiff in payment, his case will stand dismissed cannot be construed as meaning that the plaintiff was to be debarred of all rights to redeem and that the decree was an order of a Court extinguishing the right to redeem within the meaning of the proviso to Section 60 of the Transfer of Property Act.

Thus, their Lordships held that a second suit for redemption will be maintainable in such cases. While coming to this decision they relied upon a previous decision of the Board in (1925) 48 MLJ 667 (Privy Council) . On the question of res judicata their Lordships categorically held that unless it could be said that a decree involved a decision that the mortgagor's right to redeem was extinguished, it cannot operate by way of res judicata so as to prevent the Court u/s 11, C. P. C. from trying a second suit for redemption.

Therefore, the whole question that falls to be considered in this case is whether the right to redeem has been extinguished by the previous suit. The right, as I have stated earlier, can be extinguished by two ways: (1) by act of parties, and (2) by the decree of a Court. As far as the act of parties is concerned, the defendants relied upon the oral sale affected in favour of the 1st and 2nd defendants. Mr. Bramha frankly conceded that he would not challenge this finding of fact which is binding on this Court. Therefore the narrower question to be examined is whether by virtue of the preliminary decree in O. S. 831 of 1928 the right to redeem had been extinguished, for if the right to redeem is extinguished then the relationship of the mortgagor and the mortgagee would not subsist. In the case of [Maruti Babaji Vs. Manohar](#), a Division Bench of Bombay High Court came to the conclusion that by reason of the decree of the year 1889 the right of the mortgagor to redeem the mortgage was extinguished and therefore, the suit to redeem the same did not lie and was barred by the principle of res judicata.

That was a suit filed under the provisions of Deccan Agriculturists' Relief Act and u/s 44 of the said Act a compromise was entered into. The mortgagor did not conform to the conditions of the compromise and the mortgagee subsequently applied to foreclose the mortgage. Since Section 93 of the Transfer of Property Act was not applicable the Court ordered that no fresh order was necessary. Nothing happened for forty years and the mortgagor thereafter filed a fresh suit for redemption, and their Lordships if I may say so with respect, were right in coming to the conclusion that the right of the mortgagor to redeem had been extinguished and accordingly the suit to redeem the same did not lie and was barred by the principle of res judicata.

It may be remembered that the general principle that, in the absence of a binding agreement to the contrary, the right to redeem and the right to foreclose are co-extensive have been embodied in the Transfer of Property Act. But an exception to this rule has been introduced by the Deccan Agriculturists' Relief Act. Vide Babaji v. Vithu ILR 6 Bom 734. Hence, an exception having been made by a special statute in the Deccan

Agriculturists" Relief Act, the case reported in [Maruti Babaji Vs. Manohar](#), is of no avail.

8. The real test is whether by virtue of the preliminary decree in O. S. No. 831 of 1928, the right to redeem had been extinguished. The decree, Ext. 4 in paragraph 2 stated that:

"If such payment is not made on or before the said 9th day of November, 1929 the plaintiff shall be debarred from all right to redeem the property." It is admitted that Ext. 4 was only a preliminary decree which followed the judgment (Ext. 3). Ext. 3 states that: "In the result, there will be the usual preliminary mortgage-decree for redemption in favour of the plaintiff." The real test, therefore, is whether the mortgagees have acquired any right thereunder and could the mortgagees put that decree into execution? The mortgage in this case was executed in the year 1909 and the preliminary decree was passed in 1929. The present CPC was enacted in 1908. The preliminary decree was passed before the 1929 amendment of the Transfer of Property Act came into force. Hence, this case is governed by the old provisions in the Transfer of Property Act and the Civil Procedure Code. The relevant sections are sections 92 and 93 of the Transfer of Property Act, 1882. These sections merged in the Rules 7 and 8 of the Code of Civil Procedure, 1908. Rule 7 prescribes for a preliminary decree in a redemption suit. Clause (d) of that rule enacts that if payments are not made on or before the day fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all rights to redeem the property.

Then Rule 8 makes provision for a final decree in a redemption suit. Sub-rule (2) of Rule 8 states that where such payment is not made, and the mortgage is not a simple or usufructuary mortgage, the Court shall on an application made in that behalf by the defendants pass a decree that the plaintiff and all persons claiming through or under him be debarred from all rights to redeem the mortgaged-property. Thus, Rule 7 while declares the right to redeem, Rule 8 finalises it and makes it enforceable. The question was elaborately dealt with in the case of [Suraj Bali and Others Vs. Rang Bahadur Singh and Another](#), .

The matter came up to the Allahabad High Court on an application u/s 115 of the CPC against an order in a suit for redemption. It appears that a preliminary decree for redemption was passed on 7-9-1907, directing the mortgagor to make certain payments and to redeem the properties. The mortgagor did not pay the amount as required under the preliminary decree, nor did the mortgagee apply for a final decree and the matter rested there,

The trial Court dismissed the suit holding that the right of the plaintiff to redeem had been extinguished by the preliminary decree and the claim for redemption was barred by res judicata and also by limitation. The lower appellate Court, however, held that the earlier preliminary decree of 1907 did not extinguish the right of redemption and that the defendants had failed to prove that the mortgage was more than 60 years" old and accordingly, the claim was not barred by limitation. In the result, the Court of appeal

below set aside the decree of the trial Court. Against this order an application u/s 115 C. P. C. was filed before the Allahabad High Court.

It was contended before the High Court on behalf of the defendants that the right to redeem was extinguished by the decree of the year 1907. Mr. Justice Seth, in the circumstances, held that interpreting the decree literally it did not put an end to the right to redeem. It was drawn up in accordance with the language of Section 92 of the Transfer of Property Act, which provided for a preliminary decree for redemption in a mortgage suit. That section laid down that a Court passing a preliminary decree for redemption shall order that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property.

The preliminary decree according to Section 92 was thus to provide that the plaintiff shall be debarred of all right to redeem the property on the happening of a certain contingency. Section 93 which provides for a final decree uses slightly different language. It provides that the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred. Thus it is manifest that while Section 92 provided that the plaintiff shall be debarred Section 93 provides that the plaintiffs be debarred.

A comparison of these two sections discloses that the preliminary decree does not itself put an end to the right of redemption, but contains a declaration that if the mortgage-money is not paid, the right of redemption shall be taken away and it is only the final decree that takes away such a right. No final decree having been passed in the suit in which the preliminary decree was passed on 7-9-1907, the right of redemption was not extinguished. So long as the right of redemption has not been extinguished a mortgagor is entitled to bring successive suits for redemption.

The form for a preliminary decree for redemption under the old Code has been given in the CPC by Dr. Nanda Lal in Schedule 1 Appendix D, at p. 2628. This decision of the Allahabad High Court was affirmed in a subsequent decision of that Court in [Loknath Misir and Others Vs. Smt. Daulta Kuer and Others](#). The Patna High Court appears to have taken a similar view in a case reported in [Joti Lal Sah and Others Vs. Sheodhayan Prashad Sah and Others](#), which was also a case under the old Act. Their Lordships of the Patna High Court relying on the decision of the Privy Council in (1925) 48 MLJ 667 (Privy Council) referred to above, and an earlier decision of the Allahabad High Court in *Sita Ram v. Madho Lal* ILR 24 All 44 (FB), held that the final decree not having been passed, the right of redemption was not extinguished and the suit was not barred by res judicata.

A similar view was also taken by the Lahore High Court in the case of *Sunkar v. Jaru* AIR 1923 Lah 680. Their Lordships of the Lahore High Court went a step further and held that when a preliminary decree in a redemption suit, stated that if the payment be not made at a certain date, the plaintiff would forfeit his right to redeem was illegal. They eventually held that the right of redemption could not be extinguished by a preliminary decree, but

could only be extinguished by a final decree.

The only other decision that I would like to refer is a decision of the Federal Court in Subbarao v. Mattapalli Raju AIR 1950 F.C. 1. Kania, C. J. in that case held that the right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. The right of redemption can be extinguished as provided in section 60 and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation is not therefore barred. If the mortgagee fails to establish that the old decree extinguished the right to redeem, there is no ground for saying that the old decree operated as res judicata and the Courts are prevented u/s 11 from trying the second suit.

In this case, their Lordships followed the decision in AIR 1934 205 (Privy Council) , and approved a decision of the Bombay High Court in [Rajaram Vithal Sutar Vs. Ramchandra Pandu](#) . Thus, in view of the above position in law, the defendants have failed to prove that the plaintiff's right to redeem has been extinguished. Accordingly, in my view the Courts below were right in holding that the second suit for redemption is maintainable. The mortgage stands discharged by virtue of the provisions in section 17 of the Orissa Money Lenders Act, and the plaintiff is entitled to delivery of possession of the mortgaged-properties,

9. The only other question that remains to be considered is regarding the payment of Rs. 287-8-0. It is not disputed that section 17 of the Orissa Money Lenders Act is applicable to the facts of the present case. Section 17 of the said Act was given retrospective effect by Orissa Act 18 of 1947 and the words "a usufructuary mortgage" were substituted by the words "any possessory mortgage" by Act 18 of 1956. In view of the finding there is no doubt that section 17 applies to the facts of this case. Mr. Bramha's contention was that even if the mortgage is held to be discharged by virtue of the provisions of section 17, the amount of Rs. 287-8-0 which he had paid on the previous mortgage bond should not be held to have been discharged.

The finding in the previous suit O. S. 831 of 1928 (Ext. 3) was that defendants 1 and 2 discharged the prior mortgage decree in O. S. 113 of 1912 and are entitled to add the same by virtue of the provisions of section 72 of the Transfer of Property Act.

In view of the fact that this sum of Rs. 287-8-0 was paid out of pocket by defendants 1 and 2, the plaintiff must pay the said sum to them. However, having regard to the fact of long possession of the mortgaged-property, there could be no order for interests on this amount.

Further, the payment of this amount will not be a condition precedent to the defendants re-delivering the properties with the title-deeds to the plaintiff and putting him in

possession thereof. If the plaintiff does not pay aforesaid "amount before re-delivery of the mortgaged properties, defendants 1 and 2 will be at liberty to execute the decree and realise said sum from the plaintiff.

10. In the result, subject to the above modification, the appeal is dismissed with costs.

S. Barman, J.

11. I agree.