

SUPREME COURT OF INDIA

Sidhakamal Nayan Ramanuj Das

Vs.

Bira Naik

C.A.No.150 of 1952

(Mehr Chand Mahajan, Vivian Bose and B. Jagannadhadas, JJ.)

10.04.1953

JUDGEMENT

BOSE, J. :

1. This is a defendant's appeal. The suit was for possession and, if the alternative, for redemption of the plaint properties.
2. The first plaintiff was a tenant of the suit lands under the Orissa Tenancy Act. He mortgaged them to the defendant on 13-9-1930 by way of simple mortgage. The rent, payable by the first plaintiff to the landlord, fell into arrears and so the landlord sued him for the arrears. A decree was obtained and the property was put up for sale. In order to safeguard his rights the defendant paid up the arrears and then obtained possession of the property under S. 225, Orissa Tenancy Act.
3. This latter fact was at first denied but that is no longer in dispute, therefore it must be accepted, that the defendant obtained possession under S. 225 on 27-11-1934 and that he has been in possession ever since.
4. The rent fell into arrears again and the landlord sued for a second time. This time no one paid and so the property was put up sale again. It was purchased by the defendant on 24-6-1937 for a nominal sum of Rs. 129/- and he was given possession through the Court in due course, though of course he was then, and always had been at all material times, in actual physical possession. The plaintiffs pleaded that these latter transactions were collusive and fraudulent but the finding is against them and that matter is no longer in issue.
5. On 17-9-1943 the first plaintiff sold the right to redeem to second plaintiff. The plaintiff's case is that the defendant being a mortgagee in possession was bound to pay the rent and so cannot take advantage of his own default to deprive his mortgagors of their property. When the defendant purchased at the auction he held as a basic for the plaintiffs and so is bound to return the property on being reimbursed for whatever he spent over it.
6. The position, in our opinion, is very clear and in the absence of any special statutory provision to the contrary is governed by S. 90, Trusts Act. The defendant is a mortgagee and apart from special statutes, the only way in which a mortgage can be terminated as between the parties to it is by the act of the parties themselves by merger or by an order of the Court. The maxim "once a mortgage always a mortgage" applies. Therefore, when the defendant entered upon possession he was there as

a mortgagee and being a mortgagee the plaintiffs have a right to redeem unless is either a contract between the parties or a merger or a special statute to debar them.

7. No one pleads a contract and the only statute we need examine is the Orissa Tenancy Act. The defendant obtained possession under S. 225. But under it, even if the defendant had not already been a mortgagee, he became a statutory and would still have been liable to redemption. This however did not destroy his subsisting rights as a mortgagee because sub-s. (2), S. 225 expressly preserved them to him.

8. When he purchased under the second sale he did not thereby destroy the plaintiffs right to redeem because he was at that time standing in the plaintiffs' shoes as a mortgagee in possession under S. 225(1) and his purchase so far as title was concerned had exactly the same effect as if the plaintiffs, having omitted to the decree and save themselves by all the last minute acts of grace permitted to judgment-debtors, had in the end themselves purchased the property. All that happened was that he regained his position as a mortgagee in possession under S. 225 (1).

9. There was equally no question of extinction by merger of a lower estate in a higher because what the defendant purchased was the tenant's estate and not the landlord's.

10. The first Court and the first Appellate Court dismissed the plaintiffs suit but the High Court decreed it in second appeal giving the plaintiffs a preliminary decree for redemption and making provision therein for adjustment of the equities. We uphold this decree.

11. The appeal fails and is dismissed but in the circumstances we direct that each party bear its own costs throughout. The plaintiffs were primarily in the wrong for allowing their rent to fall into arrears and they raised an issue of fraud which they failed to substantiate. That we think justifies our direction about costs.

Appeal dismissed.

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