

Sachidanand Prasad

Vs

Babu Sheo Prasad Singh

Civil Appeal No. 180 of 1963

(R. S. Bachawat, Raghuvar Dayal, K. Subha Rao JJ)

06.05.1965

JUDGMENT

BACHAWAT, J. –

The plaintiffs-appellants instituted Title Suit No. 91 of 1950, out of which this appeal arises, for redemption of two usufructuary mortgages created by plaintiffs No. 1 and ancestors of plaintiffs Nos. 2 to 6 dated July 5, 1927 and April 15, 1928 in favour of the defendant for Rs. 1,000 and Rs. 1,300 respectively. The mortgage dated July 5, 1927 was in respect of 7.20 acres of occupancy raiyati lands, consisting of four plots Nos. 149, 155, 955 and 957, in village Hichapur under the Tikari Raj. The mortgaged lands were part of a larger holding of 23.69 acres under khata No. 59, and the annual rent of the entire holding was Rs. 153-3-0. The mortgage deed provided that the mortgagee would pay Rs. 33-14-9 out of the total rent payable to the landlord and the mortgagors would pay the balance rent. There was default in payment of rent for several years. The landlord obtained a decree for arrears of rent, and at the rent sale held on June 18, 1934, the mortgage-defendant purchased the Hichapur land arkalal.

The mortgage dated April 15, 1928 was in respect of 7.20 acres of lands in village Utrain under kahas mahal. The mortgaged lands were part of a larger holding of 19.88 1/2 acres in khata No. 269. The rent of the entire holding was Rs. 155-4-0. The mortgage deed provided that the mortgagee would pay Rs. 68-10-9 out of the total rent and the balance rent would be payable by the mortgagors. There was default in payment of rent for several years. Certificate proceedings were started for the recovery of the arrears of rent, and at a certificate sale held on January 22, 1934, the Utrain lands were purchased by the defendant in the farzi name of Deonarain.

It appears that out of the sum of Rs. 33-14-9 payable by the mortgagee annually on account of the rent of the Hichapur lands, the mortgagee consistently paid Rs. 33 annually, but did not pay the balance sum of 14 annas 9 pies, whereas the mortgagors consistently defaulted in payment of the sum of Rs. 119-4-3 payable by them annually on account of the total rent. It also appears that out of the sum of Rs. 68-10-9 payable by the mortgagee annually on account of the rent of the Utrain lands, the mortgagee consistently paid Rs. 68 annually but did not pay the balance sum of 10 annas 9 pies, whereas the mortgagors consistently defaulted in payment of the sum of Rs. 86-9-3 payable by them annually on account of the total rent.

The trial Court decreed the suit. The first appellate Court allowed the appeal in part, passed a decree for redemption of 3.93 acres of plot No. 955 only on the ground that this portion of the land was not sold at the rent sale and gave leave to the defendant to withdraw Rs. 1,000 deposited by the plaintiff in respect of the mortgage dated July 5, 1927. The High Court dismissed a second appeal preferred

by the plaintiffs. The plaintiffs now appeal to this Court by special leave.

The plaintiffs contend that the purchases at the rent sale and the certificate sale were made by the mortgagee by availing himself of his position as such and having regard to s. 90 of the Indian Trusts Act and Illustration (c) to it, the purchases endured for the benefit of the plaintiffs and they are entitled to redeem the entire mortgaged lands. The defendant-mortgagee disputes this contention, and claims that the aforesaid sales extinguished the equity of redemption.

Section 90 of the Indian Trusts Act and Illustration (c) to it are as follows :

"Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

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(c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.":

In *Basmat Devi v. Chamru Sao* (1) A. I. R. 1964 S. C. 1707, a part of one entire holding was mortgaged, both the mortgagor and the mortgagee were liable to pay the rent of the holding, both of them defaulted in payment of the rent, the default of both contributed to the passing of a rent decree and the sale of the holding in execution of the decree, the default of the mortgagee being substantial, and the mortgagee purchased the holding at the execution sale. On these facts, this Court held that the mortgagee clearly gained an advantage by availing himself of his position as such, and having regard to s. 90 of the Indian Trusts Act his purchase must ensure for the benefit of the mortgagor, and the mortgagor was entitled to redeem the mortgaged property. In that case, Das Gupta, J. observed :

"Whether this would be true even where the portion which the mortgagee is liable to pay is so very small that the property is not ordinarily likely to be brought to sale for that amount, it is unnecessary for us to decide in the present case."

The question left open by Das Gupta, J. arises for decision in the present case. This is a case where the mortgaged property is part of a larger holding, the mortgagee agreed to pay a portion of the rent of the entire holding, and the mortgagors agreed to pay the balance rent payable in respect of it. The mortgagors defaulted in payment of the rent payable by them. The mortgagee paid almost the entire amount of the rent payable by him but defaulted in payment of a trifling sum. The portion of the rent which the mortgagee failed to pay is so small that it is impossible to say that the property was brought to sale for it or that his default was in any real sense a contributory cause of the sale of the property. It is not shown that non-payment of the trifling sums by the mortgagee was made mala

fide or with the ulterior object of the property being put up for sale and his becoming the purchaser of it. The mortgagee did not gain any advantage by availing himself of his position as such or of a situation brought

The first appellate Court, however, gave a decree for redemption of 3.93 acres of plot No. 955 in Hichapur village and gave liberty to the mortgagee to withdraw the entire sum of Rs. 1,000 deposited by the plaintiffs in respect of the mortgage of the Hichapur lands. Before the High Court the plaintiffs contended, relying upon the last paragraph of s. 60 of the Transfer of Property Act, 1882, that they were entitled to redeem the aforesaid 3.93 acres of Utrain lands on payment of the proportionate amount of the mortgage money payable under the mortgage dated July 5, 1927. The High Court negated this contention. The Courts below observed that 3.93 acres of plot No. 955 of the Hichapur lands were not sold at all at the sale held on June 18, 1934, but quite inconsistently, the Courts below also observed that the aforesaid sale held on June 18, 1934 was a rent sale and was made in execution of a rent decree. Learned counsel on behalf on both parties conceded before us that there could be no rent sale in respect

In the result, the appeal is dismissed with costs.

Appeal dismissed.

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