

Parichhan Mistry (Dead) By Lrs. and Another

Vs

Achhiabar Mistry and Others

Civil Appeal No. 3902 of 1987

(Pattanaik, J.)

(K. Ramaswamy, G.B. Pattanaik JJ)

23.08.1996

JUDGMENT

PATTANAIAK, J. -

1. This appeal by the mortgagors is directed against the judgment of the Patna High Court dated 28-7-1980 in the second appeal arising out of a suit for redemption. The plaintiffs/appellants filed a suit for redemption of 2 bighas 3 kathas and 6 dhurs of land in respect of which a usufructuary mortgage bond Exhibit No. 1 dated 4-5-1980 had been executed in favour of the defendants. The defendants had taken the stand that under the mortgage deed the mortgagor was liable to pay rent in respect of the holding and no rent having been paid, in a suit instituted by the landlord for arrears of rent, a decree had been obtained and in execution thereof the property had been put to sale and the defendant-mortgagee paid the decretal amount in question and, therefore, a suit for redemption will not lie. The learned trial Judge, however, decreed the suit rejecting the objection put forth by the defendant and granted the relief of redemption. The defendants carried the matter in appeal and the said appeal having been dismissed, they approached the High Court in second appeal. The High Court by the impugned judgment having reversed the judgment and decree of the courts below and having dismissed the suit for redemption, the present appeal has been preferred.

2. The High Court came to the conclusion that the mortgagors having failed to pay a portion of the rent for realisation of which the landlord had filed a suit and obtained a decree and that said decree being put to execution and the mortgagee having paid up the decretal dues, the mortgagor loses his right of redemption and, therefore the suit for redemption must fail. The learned Judge came to the conclusion that the equity of redemption, in the facts and circumstances of the case was extinguished and, therefore, the mortgagor is not entitled to redeem. The short question that arises for consideration is whether in the facts and circumstances of the case the High Court was right in coming to a conclusion that right of redemption got extinguished and the mortgagor had no right of redemption. It is true that a right of redemption under a mortgage deed can come to an end, but only in a manner known to law. Such extinguishment of right can take place by contract between the parties or by a decree of the court or by a statutory provision which debars the mortgagors from redeeming the mortgage. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place, of the mortgage money. When it is extinguished by the act of the parties the act must take the shape and observe the formalities which the law prescribes. The expression "act of parties" refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by

mere assertion of his own or by a unilateral act on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner. It is no doubt true that the mortgagee would be entitled to purchase the entire equity of redemption from the mortgagor. The mortgagee occupies a peculiar position and, therefore, the question as to what he purchases at a court sale is a vexed question, but being in an advantageous position where the mortgagee availing himself of his position gains an advantage he holds, such advantage is for the benefit of the mortgagor. It has been so held by this Court in the case of Sidhakamal Nayan Ramanuj Das v. Bira Nayak [AIR 1954 SC 336 : 20 Cut LT 92] and Mritunjoy Pani v. Narmanda Bala Sasmal [(1962) 1 SCR 290 : AIR 1961 SC 1353]. This being the position of law if for some default in payment of rent a rent decree is obtained and the mortgagee pays off the same even then the mortgage in question is liable to be redeemed at the option of the mortgagor. The mortgagee cannot escape from his obligation by bringing the equity of redemption to sale in execution of a decree on the personal covenant. By virtue of purchase of the property by the mortgagee in court sale, no merger takes place between the two rights nor the mortgage stands extinguished.

3. In this view of the matter we have no hesitation to come to the conclusion that the High Court committed gross error of law in recording a finding that the equity of redemption stood extinguished and the mortgagor is not entitled to redeem. The impugned judgment of the High Court, accordingly is set aside and the judgment of the trial court, as affirmed by the lower appellate court is affirmed. The appeal is allowed, but in the circumstances, there will be no order as to costs.