ALLAHABAD HIGH COURT

Gopal Nath Shukul

Vs.

Narain Shukul

S.A. No. 657 of 1922

(Daniels, J.)

08.03.1923

JUDGMENT

Daniels, J.

1. This is a second appeal in execution proceedings arising out of a decree for sale on a mortgage. The appellant Gopi Nath Shukul is the mortgagor. The respondent Sat Narain Shukul is the mortgagee-decree-holder. The decree provided for sale of the mortgaged shares in arazi Ragunathpur and arazi Bansgopal appertaining to Hariharpur in the Gorakhpur district. Two prior mortgagees held a mortgage on a portion of this area. The decree was subject to a condition that the plaintiffs should not be entitled to bring to sale the property covered by this prior mortgage if they failed to pay the decretal amount due to the prior mortgagees. No time was given within which this payment was to be made. The condition simply was that without paying the decretal amount the mortgagees decree-holders should not be entitled to bring this portion of the property to sale.

2. The decree was made absolute on 10th May, 1913. The mortgagees pub in two applications for execution, both of which proved infractions, on 3rd May, 1916, and 29th April, 1919, respectively. These applications were probably put in mainly for the purpose of saving limitation as both of them were ultimately dismissed for default. The decree-boilers not having at that time paid the amount of the prior mortgage decrees they excluded the property covered by these decrees from the property which they sought to bring to sale. After the second execution application had been dismissed the mortgagors themselves paid up the amount due to the prior mortgage. The decree-holders then on 26th April, 1920, put in the application out of which this appeal arises for sale of the entire property, stating in their application that as the amount due to the prior mortgagees had been paid by the mortgagors themselves, there was now no longer any need for the decree-holders to pay it. The mortgagors objected to the execution on two grounds, which form the issues for decision, in the present appeal.

(1) That the decree-holder was not entitled to the benefit of a payment made by his judgment-debtor, and that not having redeemed the prior mortgage himself he was debarred from seeking execution against this portion of the property.
(2) That as regards this portion of the property the application was barred by limitation.

3. The second ground may be very shortly disposed of. It is admitted that the two previous applications save limitation in respect of the property covered by them. It is urged that they do not save limitation with regard to this portion of the property because execution was not asked for against this portion of the property in those applications. This proposition cannot be supported and no authority has been adduced in favor of it. It has never been held necessary that an execution application in order to save limitation should be directed to the same property which is applied for in the subsequent application or even indeed the same person. Thus an execution application against the principal debtor has been held to save limitation against the surety, she only ground which has been seriously pressed is the first. This plea was accepted by the Subordinate Judge but was rejected by the District Judge who held that it was immaterial whether the payment was made by the mortgagor or by the subsequent mortgagee. The case came originally before Stuart, J., who agreed with the Court below on this issue but remanded an issue under Order 41, rule 25, on the question of limitation. I have been asked to re-consider the question and to disregard the opinion expressed by Stuart, J., in his remand order. On the side of the respondents it is contended that it is not open to me to do so and reference has been made to certain oases referred to by Mr. Agarwala on page 1055 of his Indian Practice, third edition. As I understand the law, where a Court at the first bearing does not decide the case but merely remits certain specific issues it is open to the Court before which the case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order. I am supported in this view by the decision in *Masihun-nissa Bibi v. Kanis Sughara Bibi*[1] as well as by several older rulings of the Court such as those in *Mubarak Hussain v. Bihari*[2] and *Lachman Prasad v. Jamna Prasad*[3] In the recent case it was held that it was open to the Court before which the case ultimately came to reconsider the view of the law on which the order of remand was based. By parity of reasoning it is equally open to the Court before which the case comes to reconsider the view of the law taken in the same order on any other issue. There are authorities of other High Courts to the same effect, e.g., *Ganendra Nath Ray Choudhry v. Surya Kant Ray Choudhry*[4] and *Bara Estate, Ltd. v. Anup Chandra*[5] the last being the decision of a Full Bench presided over by Sir Edward Chamier. A consideration of principles must show that this must be so. An order remanding issues under rule 25 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand. It is quite otherwise with an order of remand passed under Order 41 rule 23 for this is an order which does finally determine, subject to any right of appeal, the issues which it decides. On the merits of the issue, the plea put forward by the appellant is two-fold. He urges first that by not paying the money within a reasonable time the decree-holder must be deemed to have waived his right to pay it. He had, it is urged, decided

that the remaining property was sufficient for the purposes of his decree and that it was not worth while paying an additional amount for the purpose of being able to include in his execution application the property covered by the prior mortgages.

4. Secondly if is urged that the decree must be literally construed and that as the decree says that the decree-holder shall not be able to sell the property until he pays the money, a

[1](1921) 43 All. 377-19 A.L.J. 139 = 60 I.C. 975
[2](1894) 16 All. 306 = (l694) A.W.N. 97
[3]10 All 162 = (1887) A.W.N. 295
[4]17 C.W.N. 462 = 15 I. C. 39
[5]2 Pat. L.J. 663= 1917 Pat. 342= 2 Pat. L.W. 71= 41 I.C.337

payment by the original mortgagor is of no avail to him.

5. The difficulty in the way of accepting the second contention is that if it be allowed, it would be open to the mortgagor by stepping in before the decree-holder and paying up the money himself absolutely to debar the decree-holder from executing this portion of his decree. The mortgagor wag equally, in fact more than the decree-holder, under an obligation to pay this amount to the prior mortgagees, and it is doubtless on this ground that Stuart, J, held that the payment must be taken to have been made on account of the decree-holder.

6. As regards the first point it does not appear that the Court which passed the decree intended to put any time limit, reasonable or otherwise on the payment of this amount. It simply said to the decree-holder:" So long as you do not pay the amount you cannot take out execution against this portion of the property." The order was passed for the protection of the prior mortgagees' rights. It was therefore open to the decree-holder to make the payment so long as the right to execute his decree had not become time-barred and that right was 6tilt open to him when the judgment-debtor stepped in and made the payment. It was suggested, and I was at first much impressed by the argument, that the decree-holder has taken an unfair advantage of a payment by the mortgagor which the decree-holder would not himself have made. On the other hand it cannot be denied that the original liability is that of the mortgagor, and if the decree-holder himself had made the payment he would at once have been entitled to add the amount to his decree and to realize it from the mortgagor in addition to the amount of his own decree by sale of the entire mortgaged property. It does not therefore appear that any injustice has been done by the decree passed by Court below. I am therefore unable to accept the appeal which I accordingly dismiss with costs including in this Court fees on the higher scale.
Appeal dismissed.