

ALLAHABAD HIGH COURT

Loknath Misir

Vs.

Daulata Kuer

Civil Revn. No. 1428 of 1951

(Brij Mohan Lall, J.)

17.12.1952

JUDGMENT

Brij Mohan Lall, J.

1. This is an application in revision by the defendants mortgagees arising out of a claim brought under Section 12, U.P. Agriculturists' Relief Act. The mortgage sought to be redeemed was a possessory mortgage and was executed on 28-5-1909 by one Sm. Daulata Kunwar in favour of two persons, viz. Gaya Rai and Prayag Dube. Padam Nath, the predecessor-in-interest of the present applicants, acquired the mortgagee rights by pre-emption and took possession of the mortgaged property as a usufructuary mortgagee. Later on, Sm. Daulata Kunwar executed a lease of the mortgaged property in favour of two persons, viz., Jagarnath Singh and Sri Bahadur Singh. The lessees brought a suit No.231 of 1922 for redemption of the mortgage. Shrimati Daulata Kunwar was arrayed as a defendant to that suit. The predecessors of the present applicants were the main defendants to that suit. On 27-9-1923 the suit was decreed. A preliminary decree was prepared under Order 34, Rule 7 directing the then plaintiffs to pay a sum of Rs. 1700/- till 27-3-1924. It was also stated in the decree that, in case the payment was not made within the aforesaid time, the right of redemption would be extinguished. No payment whatsoever was made. The present claim for redemption under Section 12, U.P. Agriculturists' Relief Act was brought in 1949 by three persons, viz. Shrimati Daulata Kunwar and the aforesaid two lessees. Various pleas were taken in defence. But the only one which is material for the purposes of the present revision was that the decision in Suit No.231 of 1922 operated as res judicata and the right to redeem had been extinguished.
2. Both the Courts below have taken the view that the lessees' right to redeem has been extinguished by reason of the aforesaid decision and that that decision operates as res judicata. They are, further, of the opinion that Sm. Daulata Kunwar's right is not so extinguished. The claim for redemption has therefore been decreed in favour of Sm. Daulata Kunwar only.

3. The point urged by the learned counsel for the applicants is that not only the lessees' right but also the right of Sm. Daulata Kunwar has been extinguished as a result of that decision. It is argued that that decision operates as res judicata against the lessees and also against Sm. Daulata Kunwar as res judicata between co-defendants.

4. The decree that was prepared in Suit No.231 of 1922 was not in accordance with law. In accordance with Order 34, Rule 7, as it stood before the amendment of 1929, the decree should have said that in the event of non-payment the mortgaged property would be sold. Foreclosure was not a penalty which, under the law as it then stood, could be imposed on the defaulting mortgagor. After the aforesaid amendment the Court can neither order sale nor foreclosure when a mortgagor under a usufructuary mortgage fails to make a deposit within the time allowed by law. But the present case is to be decided according to law as it stood prior to the said amendment. Under that law the penalty to be imposed on the defaulting mortgagor was, as already stated, that the mortgaged property should be sold. But that was not mentioned in the decree and a penalty of a wrong nature, not warranted by law, viz., that the right to redeem would be foreclosed, was mentioned in the decree. It is argued by the learned counsel for the applicants that since the Court, rightly or wrongly, imposed that penalty and since the decree was not appealed against, the right to redeem has been extinguished. With this contention I am unable to agree. Even in cases where the penalty of foreclosure is rightly imposed, e.g. in the case of mortgages by conditional sale, it is not the preliminary decree itself which extinguishes the right of redemption finally. Even under the law as it stood prior to the amendment, a final decree had to be passed under Order 34, Rule 8, before the right to redeem could be lost. The preliminary decree simply indicated what consequences would follow in the event of non-payment of the mortgage money. But those consequences did not take effect automatically on default of payment within the prescribed time. The passing of the final decree was a condition precedent to the coming into existence of those consequences. Had it been the intention of law to let those consequences follow automatically, it would have been unnecessary to enact Rule 8, Order 34 which provides for the preparation of the final decree. I am, therefore, of the opinion that even in cases where the Court could legitimately include a clause in the preliminary decree to the effect that in case of non-payment of the mortgage-money by the depositor the right to redeem would be lost, such right could not be extinguished unless the final decree was passed. Much less such a right could be lost by a preliminary decree in which this clause was improperly included.

5. Section 60, Transfer of Property Act lays down that at any time after the principal money has become due the mortgagor has a right to redeem, provided that the right conferred by this section has not been extinguished by an act of the parties or by decree of a Court. There is no question of the right being extinguished by an act of the parties in the present case. The decree of the Court also did not, as held above extinguish the right. Therefore, the right of redemption remained intact, notwithstanding the preliminary decree passed in the aforesaid terms in Suit No.231 of 1922.

6. I am fortified in the view taken by me by the case of - '*Suraj Bali v. Rang Bahadur*'', In that

case also it was held that unless the final decree was passed, the right to redeem could not be extinguished

7. Reliance was placed by the learned counsel for the applicants on the case of - '*Lachman Singh v. Madsudan*²', That case is clearly distinguishable on facts. What had happened in that case was that a preliminary decree was passed, under Section 92, Transfer of Property Act (which corresponded to the present Order 34, Rule

¹ AIR 1950 All 88

² 4 All LJ 447

7) as it stood before its repeal in 1908, on payment of a sum of Rs. 2555. The deposit was made. The mortgagors took possession. The mortgagee went up in appeal. The appellate Court enhanced the amount to be paid by the mortgagors. This extra payment was not made by the mortgagors. The mortgagee then put in an application under Section 93 (which corresponded to present Order 34, Rule 8) got back possession and refunded the amount to the mortgagors. The latter took back the amount and the mortgagee went into possession. It was held that a subsequent suit for redemption brought by the mortgagors was untenable. The reason is obvious. The matter did not rest with the preliminary decree only. A final decree was passed under Section 93 of the Act. This decision, therefore, does not militate against the view which I have taken, viz. that a preliminary decree by itself does not put an end to a mortgagor's right to redeem even if it purports to say so.

8. The learned counsel for the applicants referred to certain remarks made by Banerji and Aikman, JJ., in the Full Bench case of - '*Sita Ram v. Madho Lal*³.'. In that case their Lordships remarked that if the decree says that the right would be extinguished and the decree is not appealed against, the right would be extinguished. This was a mere obiter dictum. The decision of their Lordships was that in that particular case the right had not been extinguished.

9. I am, therefore, of the opinion that the aforesaid decisions do not lend support to the contention put forward by the learned counsel for the applicants. The right of redemption has, in my opinion, not been extinguished.

10. No question of res judicata can possibly arise. The two points that arose for decision in the present case are (1) whether the right of redemption has been extinguished? and (2) What is the amount now due? None of these points was in issue in the former suit. The first point, viz. whether the right has been extinguished as a result of the former decision, could not possibly have been in issue in the former suit. As to the second point, the issue in that suit was as to what was the amount then due and not what is now due. It is, therefore, obvious that the former decision cannot operate as res judicata.

11. It will, therefore, follow that the right of redemption remains intact not only 'qua' Sm. Daulata

Kunwar but also 'qua' the lessees. In the circumstances, this revision must fail. It is hereby dismissed. As nobody has appeared for the opposite parties, no order is made for costs.

Revision dismissed.

³24 All 44 (FB)