

APPEAL FROM ORIGINAL CIVIL.

Before Costello and Lort-Williams JJ.

1934
 May 10.

BIBHUTIBHUSHAN MAJUMDAR

v.

MAJIBAR RAHMAN.*

*Mortgage—Sale—Conditions of sale—“ Purchaser not liable for ‘outgoings’ ”
 —Statutory charge in favour of Calcutta Corporation—Dues of the
 Corporation, if to be paid out of sale-proceeds—High Court (Original
 Side) Rules, Chap. XXVII.*

The conditions of sale, in a mortgage suit, contained the usual provision that “ the purchaser shall not be liable to pay the outgoings previous to the date of payment of the purchase money, etc.” The notification of sale did not mention the statutory charge which the Corporation of Calcutta had for its dues, but, at the time of the sale, a letter was read out, by which the Corporation gave notice of its dues and claimed that the same should be paid out of the proceeds of the sale.

Held that the sum due to the Corporation must first be deducted from the purchase price and the balance only paid to the plaintiff mortgagee.

APPEAL by plaintiff, mortgagee.

One Zohara Bibi mortgaged the premises to the plaintiff on the 9th July, 1926.

In 1929, this suit was filed against five persons, as heirs of the mortgagor, and two others as puisne mortgagees. A preliminary mortgage decree was made on the 7th May, 1930, and the final decree for sale on the 14th December, 1931. The sale was held by the Registrar on the 3rd February, 1933, and one of the conditions contained in the notification of sale was as follows :

The purchaser shall not be liable to pay the outgoings previous to the day of payment of the purchase-money and the rents and outgoings shall be apportioned where necessary.

At the sale, a letter from the Law Officer of the Calcutta Corporation was read out, in which he set

*Appeal from Original Order No. 121 of 1933, in Original Suit No. 2390 of 1929.

out various dues of the Corporation, relating to the premises and claimed to be paid out of the sale proceeds.

The property was purchased by the respondent Haji Abdur Rahim, who was the assignee of the lease mentioned in the judgment. Under the lease, the lessee was liable to pay all rates and taxes.

All other facts appear from the judgment.

Arun Sen (with him *S. M. Bose*) for the appellant. The respondent, as assignee of the lessee, was liable for the taxes and cannot make the mortgagee pay the same.

P. N. Chatterjee (with him *Pugh*) for the respondent, purchaser. I have purchased free from liability for outgoing. Also, as the Corporation claimed to be paid out of the sale proceeds, the effect of the sale was the same as a sale under Order XXXIV, rule 12 of the Civil Procedure Code.

Pugh (continuing). The purchaser is entitled to a proper conveyance in which every party interested in the property must join. The sale must be free from incumbrance. The mortgagee's security was merely charged property.

Sen, in reply. Particulars of the charge claimed by the Corporation were read out and as a result of it a proper price was not obtained. The purchaser is now estopped from raising the question of the defect in title. *Vide* Chapter XXVII, rule 43 of the Rules of the Original Side.

LORT-WILLIAMS J. This is an appeal against an order, made by Mr. Justice Ameer Ali, in a mortgage suit. The preliminary decree in the suit was made on the 7th May, 1930, and the Registrar reported that Rs. 5,110 odd was due to the plaintiff. In the final decree, made on the 14th December, 1931, it was ordered *inter alia* that the premises be sold and, in pursuance of these two decrees, the property was sold on the 3rd February, 1933, and purchased by one Haji

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Abdur Rahim for Rs. 6,450. The sale was subsequently confirmed, and, after payment of the commission of the Registrar and the Accountant-General, there is now lying in Court, standing to the credit of the suit, a sum of Rs. 6,151 odd. The plaintiff's dues amount, now, to Rs. 6,530 odd, and, apart from his costs, which have not yet been taxed, the money in Court will not be sufficient to meet his claim, and he has given up his costs up to the preliminary decree. That being the position, the plaintiff asked for payment out to him of the sum lying in Court.

The purchaser, in answer to his petition, urged that there was a sum of Rs. 1,749 odd owing to the Corporation of Calcutta for consolidated rates, that this sum ought to be paid out of the sum lying in Court, and the balance only be paid to the plaintiff. His contention was that, under the conditions of sale, it was provided that the purchaser should not be liable to pay the outgoings previous to the date of payment of the purchase money, and that the rents and outgoings should be apportioned where necessary. This condition is usual, and is included in the Form of Conditions of Sale in Appendix J, Form No. I of the Rules and Orders of the High Court on the Original Side.

It is not disputed that consolidated rates, and other similar municipal rates, are included in such a term as "outgoings" when used with reference to premises such as these. But it is provided by section 205 of the Calcutta Municipal Act, 1923, that the consolidated rates shall, subject to certain conditions, be a first charge upon the premises, and it is contended by the plaintiff that the expression "outgoings" cannot be held to cover such a charge.

It should be noted in passing that the notification of sale, published by the Registrar, gave full particulars of the property to be sold, and mentioned

specifically that it was subject to a lease for twenty-five years commencing from 1st December, 1919. at a monthly rent of Rs. 30, the lessee to pay the whole of the municipal tax. But no mention was made of this charge, or of any other encumbrance, although our Rules provide, in Chapter XXVII, Rule 9, which deals with Sales by the Registrar, that where a property is to be sold subject to an encumbrance, the nature and amount of such encumbrance shall be stated.

Against this, the plaintiff argues that, at the sale, a representative of the Corporation read out a letter, a copy of which appears at page 10 of the paper book, in which the Officiating Law Officer of the Corporation said :

With reference to the sale of the premises, I beg to state that the sums mentioned below are due to the Corporation in respect of the consolidated rates in respect thereof. I submit that the dues of the Corporation should be paid out of the proceeds of the sale of the property. I beg to notify the claim of the Corporation to the intending purchasers at the time of the sale.

These dues included the amount of a decree with regard to which an application was being made for attachment of the premises, the amount of another decree declaring the amount to be a charge on the premises, and an amount due upon certain *Bustee* Rate Bills. It will be noted that nothing was said in that letter about any statutory charge which the Corporation had over the property in respect of rates, and although every one must be presumed to know the law, including, presumably, the Calcutta Municipal Act, no notice of this encumbrance was given either at or before the sale.

That being the position, Mr. Justice Ameer Ali decided in favour of the purchaser, that the sum due to the Corporation must first be deducted from the sum lying in Court, and that the balance only must be paid to the plaintiff. In our opinion, the learned Judge's decision was right, and he approached the question from the right angle. The crucial point is, what was sold. It seems clear that the property was

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sold subject to a condition that the purchaser should not be liable to pay for outgoings prior to the date of payment of the purchase money, and, secondly, that he purchased it free from any encumbrance or charge. It would be strange indeed if, after he had purchased the property upon that condition, he found himself liable to pay for those very outgoings in another form, by reason of the statutory charge which existed in favour of the Corporation. Still stranger would it be if, after he had bought the property on the faith of a notification of sale which made no mention of any prior mortgage or charge of any kind, but did make specific mention of the fact that the property was subject to a lease, he found that what he had purchased was subject to a statutory charge in favour of the Corporation.

It appears, from what the learned Judge says in his judgment, that the usual practice is either for the Registrar, or for some representative of the Corporation, to mention at sales held by the Registrar, any claim which the Corporation may have for rates and taxes in respect of the premises, and, so far as we can ascertain, the usual practice for some years has been for the Registrar to pay out of the purchase money any such sum due to the Corporation. It may be that the Registrar and the Corporation have regarded this procedure and practice as equivalent substantially to carrying out the provisions of Order XXXIV, rule 12, of the Code of Civil Procedure, which provides that when any property is sold which is subject to a prior mortgage, the Court, may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

It is clear that this property was sold subject to a clean title being given, free from any prior mortgage or charge, and until the mortgagee is in a position to

give such a title, he is not entitled to the purchase money. He cannot give any such title until this first charge in favour of the Corporation has been disposed of. Consequently, the money in Court cannot be paid out to him unless and until this claim has been settled, and I can see no objection to its being settled in accordance with the usual practice, that is to say, by payment to the Corporation by the Registrar out of the purchase money.

But we desire to observe that the rules, conditions and forms provided in Chapter XXVII of the Rules of this Court for Sales by the Registrar, are not sufficiently clear or explicit, especially upon the points which we have had to consider in this appeal, and we think that these rules and forms of conditions of sale ought to be amended, in order to remove any doubt about such matters, and similar doubts which may arise upon sales by the Registrar.

At first sight, it appeared to us, that the effect of the learned Judge's decision was that some hardship would be suffered by the mortgagee. But, on further consideration, it becomes apparent that this is not really so. The true position is that the mortgagor has wasted the mortgagee's security by failing to pay the rates as they became due, and by thus causing a first charge to be imposed upon the property in priority to the rights of the mortgagee. The mortgagee ought to have been more active in protecting his rights.

The result is that this appeal must be dismissed with costs.

COSTELLO J. I agree.

Appeal dismissed.

Attorney for appellant: *C. C. Mitra.*

Attorney for respondent: *M. H. Huq.*

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