

APPELLATE CIVIL.

Before Sen J.

HARE KRISHNA MAITI

v.

GAJENDRA NATH HATOI.*

1938

June 20, 21;
July 5.

Mortgage—Sale in execution of mortgage decree—Rents and profits realised by mortgagee purchaser—Account of realisation—Rights of puisne mortgagee not made a party to prior mortgagee's suit—Redemption by puisne mortgagee—Redemption, whether on basis of mortgage decree or of the security—Code of Civil Procedure (Act V of 1908), O. XXXIV, rr. 5, 7.

A first mortgagee of a property subject to a second mortgage obtained a decree on his mortgage in a suit in which the puisne mortgagee was not a party. In execution of the decree he purchased the property and entered into possession. In a subsequent suit for redemption by the puisne mortgagee,

held: (i) that he was entitled to redeem the first mortgage on payment of the amount due under the mortgage security and not the amount payable under the first mortgagee's decree;

Jnanendra Nath Singh Roy v. Shorashi Charan Mitra (1) followed;

Matru Lal v. Durga Kunwar (2) distinguished;

Umes Ghunder Sircar v. Zahur Fatima (3) relied on;

(ii) that an account should be taken of the rents, issues and profits realised by the first mortgagee during his possession and the amount of such realisation should be deducted from the amount payable to the first mortgagee.

Jnanendra Nath Singh Roy v. Shorashi Charan Mitra (1) followed.

APPEAL FROM APPELLATE DECREE preferred by the plaintiffs.

On July 11, 1930 the defendant Gobardhan Hatoi mortgaged his property to the defendant Gajendra Nath Hatoi in the first instance to secure a loan of $1\frac{1}{2}$ *árhás* of paddy and again in January, 1931, he

*Appeal from Appellate Decree, No. 1781 of 1936, against the decree of S. K. Haldar, District Judge of Midnapore, dated July 21, 1936, affirming the decision of Subodh Chandra Mukherji, Second Munsif of Tamruk, dated April 30, 1936.

(1) (1922) I. L. R. 49 Cal. 626.

(2) (1919) I. L. R. 42 All. 364;
L. R. 47 I. A. 71.

(3) (1890) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201.

1938
 Hare Krishna
 Maiti
 v.
 Gajendra
 Nath Hatoï.

executed a mortgage in favour of one Jagadish Chandra Maiti, the father of the plaintiffs. Gajendra brought a suit on his mortgage without making the puisne mortgagee a party and in execution of the decree, which was for a sum of Rs. 399, purchased the mortgaged property. On December 7, 1933, Gajendra entered into possession and realised some rents and profits. The puisne mortgagee then brought a suit on his mortgage and obtained a decree for sale of the property, subject to the mortgage to Gajendra. Upon the death of the puisne mortgagee, his heirs filed the present suit in 1935 for redemption of the first mortgage, contending *inter alia* that he should be allowed to redeem the first mortgage on the terms of the mortgage security and not on the basis of the first mortgagee's decree, that in calculating the principal and interest payable to Gajendra the price of paddy prevailing on the date of suit for redemption should be considered and that, in taking account, the sum realised by Gajendra during his possession should be deducted from the amount payable under the mortgage. The trial Court and the first appellate Court decided against the plaintiffs, who now appealed.

The arguments in the appeal are sufficiently stated in the judgment.

Ambika Prosanna Sen Gupta and *Guru Prosanna Sen Gupta* for the appellants.

Sarat Chandra Jana and *Hiran Kumar Ray* for the respondents.

Cur. adv. vult.

SEN J. This is an appeal by the plaintiffs and it arises out of a suit for redemption. The plaintiffs' case briefly is as follows :—

The property in suit belonged to the defendant No. 2. He mortgaged it on Ashâr 27, 1337 B.S., corresponding to July 11, 1930, to the defendant No. 1. He executed a second

mortgage in favour of the father of the plaintiffs on Pous 27, 1337, corresponding to January 1931. In the year 1931, the first mortgagee brought a suit upon his mortgage being Title Suit No. 375 of 1931 claiming the sum of Rs. 465-14. That suit was decreed on compromise for a sum of Rs. 399. In execution of that decree the first mortgagee purchased the mortgaged property on January 19, 1933, and took delivery of possession on December 7, 1933. The second mortgagee was not made a party to this mortgage suit. Between these two latter dates the second mortgagee brought a suit on his mortgage being Title Suit No. 833 of 1933. In this suit he impleaded the first mortgagee, but he did not seek to redeem the first mortgage. A decree was passed in this mortgage suit and the property was sold subject to the charge of the first mortgagee. The sons of the second mortgagee, who are the plaintiffs in this suit, then brought the present suit. In this suit they alleged that the first mortgage decree was a fraudulent one and they prayed that it may be set aside on that ground. In the alternative they prayed for redemption. Both Courts have held that the first mortgage decree was a valid one and they have refused this portion of the plaintiffs' prayer. They have, however, granted the plaintiffs a decree for redemption upon certain terms. The plaintiffs have appealed on the ground that the terms imposed upon them are not warranted by law. This is the main point in controversy in the present appeal.

In order to appreciate all the points in dispute in this appeal it will be necessary to state certain facts. The first mortgage was effected to secure a loan not of money but of $1\frac{1}{2}$ *ārhas* of paddy. The price mentioned in the mortgage bond for $1\frac{1}{2}$ *ārhas* of paddy was Rs. 127-14. The bond stipulated that the mortgagor would have to pay 4 *kuris* of paddy as interest every year and that compound interest would be calculated on this amount. It also provided that, if the mortgagor made default in payment, the actual amount of paddy due would be calculated and the

1933

*Hare Krishna**Maiti*

v.

Gajendra
*Nath Hatoi.**Sen J.*

1938
 Hare Krishna
 Maithi
 v.
 Gajendra
 Nath Hatol.
 ———
 Sen J.

prevailing market price thereof would be ascertained and on this sum 24% interest would be charged till realization. The trial Court held that the clause regarding interest was a penal clause and it granted the plaintiffs a decree for redemption on his paying the first mortgagee the sum of Rs. 127-14 as principal and a further sum of Rs. 127-14 as damages in lieu of interest. The price of paddy was calculated at the rate fixed in the bond. The plaintiffs were also directed to pay interest at 15% per annum from the date of suit till the date fixed for redemption and thereafter at the rate of 6%. Against this decision the plaintiffs appealed to the District Judge. There the plaintiffs contended that the price of the paddy should have been calculated not at the rate prevailing on the date of the first mortgage but at the rate prevailing on the date of the institution of the present suit for redemption. The second point urged before the learned District Judge was that the first mortgagee should be directed to furnish an account of the rents and profits received by him from the date on which he took possession of the mortgaged property and that this sum should be deducted from any amount which the plaintiffs would have to pay to redeem the first mortgage. The learned District Judge relying upon the case of *Kalu Sharip v. Abhoy Charan Karmokar* (1) held that the plaintiffs were bound to pay the sum of Rs. 399-2 which was the amount of the compromise decree passed in the first mortgage suit before they could be allowed to redeem the first mortgage. He held that the redemption must be on the footing of the compromise mortgage decree. He did not, therefore, give effect to the plaintiffs' claim that the market rate prevailing on the date of the redemption suit should be the basis of calculation of the amount payable by the plaintiffs for redeeming the mortgage. He also decided against the plaintiffs' claim for an account from the first mortgagee on the ground that the first mortgage was no longer in existence and that the first mortgagee

(1) (1920) 25 C. W. N. 263.

was in possession not as mortgagee but as a purchaser at an execution sale. He then stated that as the amount of the decree passed by the trial Court was smaller than the amount of the compromise decree, the appellants could have no grievance and he, accordingly, maintained the decree and dismissed the appeal with costs. The plaintiffs have now appealed to this Court.

Two grounds have been argued in this Court on behalf of the appellants. First it is argued that the plaintiffs should be allowed to redeem the first mortgagee not on the footing of the first mortgage decree but on the terms of the first mortgage, the amount payable being calculated on the basis of the market price of paddy prevailing on the date of this suit. The second ground is that the first mortgagee should be made to render accounts of the rents and profits received by him since he has taken possession of the property in suit and that this amount should be deducted from the amount payable by the plaintiffs. It was also argued that in calculating the amount payable by the plaintiffs the decision of the trial Court that the claim for interest in the bond of the first mortgage was penal should not be interfered with as the defendants had not appealed from or cross objected to that decision. On behalf of the respondent the contention is that the plaintiffs should not be allowed redemption except on their paying the amount of the mortgage decree. Next it was argued that, if the plaintiffs are allowed to redeem on paying the amount due under the mortgage bond and not under the decree, the calculation of the price of paddy should be made at the rate fixed in the bond.

As regards the second ground, the contention of the respondent is that he is not bound to render an account of what he received as the rents and profits of the properties taken possession of by him in execution of the mortgage decree as he was in possession not as a mortgagee but as an auction purchaser.

1938

*Hare Krishna
Maiti*

v.

*Gajendra
Nath Hatoi.**Sen J.*

1938
 Hare Krishna
 Maiti
 v.
 Gajendra
 Nath Hatoi.
 Sen J.

The first question which has to be decided relates to the terms upon which the redemption should be allowed. In my opinion the learned District Judge has erred in law in holding that the account in this redemption suit should be taken on the footing of the mortgage decree. It is now well established that, in suits of this description, the account should be taken not on the footing of the previous mortgage decree but on the footing of the security which the plaintiff seeks to redeem. In this connection I would refer the learned District Judge to the case of *Jnanendra Nath Singh Roy v. Shorashi Charan Mitra* (1). This case has been rightly relied upon by the learned Munsif. The learned District Judge has omitted to notice that there has now been a change in the law regarding the terms upon which redemption may be allowed. Formerly s. 89 of the Transfer of Property Act was in force and it provided that where a suit is brought by a mortgagee for sale and an order absolute for sale is made the mortgagor's right to redeem and the security were both extinguished. In other words, an order absolute for sale under s. 89 of the Transfer of Property Act substituted the rights under the decree for sale for those under the mortgage. The decision of the learned District Judge would have been quite correct if s. 89 of the Transfer of Property Act was still in force. That section has, however, now been repealed and in its place we have O. XXXIV, r. 5 of the Civil Procedure Code, wherein the words "the defendant's right to redeem and the security shall both be extinguished" have been omitted. The law now is the same as what it was before the enactment of s. 89 of the Transfer of Property Act. The law as it then prevailed has been laid down by the Judicial Committee of the Privy Council in the case of *Umes Chunder Sircar v. Zahur Fatima* (2). Their Lordships of the Judicial Committee held that a second mortgagee desiring to redeem is bound to pay the whole amount due under

(1) (1922) I. L. R. 49 Cal. 626.

(2) (1890) I. L. R. 18 Cal. 164;
 L. R. 17 I. A. 201.

the first mortgage and not merely the price realised at the sale held in execution of the first mortgagee's decree. After the decision of this case, s. 89 came into force. The law was altered and the cases decided after the enactment of s. 89 were to the effect that if the first mortgagee obtained a decree for sale without making the second mortgagee a party to the suit, and the mortgaged property was sold in execution of the decree, the second mortgagee afterwards suing for a decree for sale under his mortgage is entitled to a decree for sale on payment of the amount due under the decree, and that he was not bound to pay the entire amount of the first mortgage. That was decided by the Judicial Committee of the Privy Council in the case of *Matru Lal v. Durga Kunwar* (1). Then came the amendment of the Civil Procedure Code and the repeal of s. 89 of the Transfer of Property Act. The effect of the repeal of s. 89 of the Transfer of Property Act and the introduction of O. XXXIV, r. 5 of the Civil Procedure Code was to restore the state of law which prevailed at the time when the Privy Council decided the case of *Umes Chunder Sircar v. Zahur Fatima* (*supra*). In this connection I would refer to the case of *Sukhi v. Ghulam Sajdar Khan* (2) wherein the Privy Council decided that the position now is the same as it was at the time of *Umes Chunder Sircar's* case. Thereafter the case of *Jnanendra Nath Singh Roy v. Shorashi Charan Mitra* (3) was decided by this Court and it was held that a puisne mortgagee seeking to redeem the first mortgagee is bound to pay not the amount of the first mortgagee's decree but the amount due under the first mortgage. I hold, therefore, that the plaintiffs must pay not the amount due under the mortgage decree passed in the suit on the first mortgage, but that they should pay the amount which will be found to be due on the taking of an account on the footing of the first mortgage, subject to this that they will not be liable to pay interest as provided in the

1938

Hare Krishna
*Maiti*v.
Gajendra
*Nath Hatoi.**Sen J.*

(1) (1919) I. L. R. 42 All. 364 ;

L. R. 47 I. A. 71.

(2) (1921) I. L. R. 43 All. 469 ;

L. R. 48 I. A. 465.

(3) (1922) I. L. R. 49 Cal. 626.

1938
Hare Krishnu
Maiti
 v.
Gajendra
Nath Hatoi.
 Sen J.

mortgage deed. This clause has been found to be penal and there is no cross-objection or appeal as regards this decision either in the Court below or here. They will pay as compensation in lieu of interest a sum equivalent to what is found to be due as principal on the mortgage. As regards interest after the institution of the present suit the plaintiffs shall pay interest @15% per annum till the date to be fixed for redemption and thereafter interest @6%. This sum will be subject to certain deductions which I shall mention later.

The next question which will have to be decided is the basis of calculation regarding the price of paddy. The basis of calculation should be not the price fixed in the mortgage bond but the price prevailing at the date of this redemption suit. The position of the plaintiffs is as if the first mortgage suit had not been brought. In such circumstances if the plaintiffs wished to redeem the mortgage they would have had to tender either the amount of paddy due under the mortgage-bond or its equivalent in money. It is clear from the terms of the mortgage bond that the price fixed in the mortgage bond for an *ârhâ* of paddy was the market price prevailing at the time. The price was fixed for the purpose of registration and stamp duty. After stating the price of the paddy there is a clause which says that the mortgagor shall deliver the paddy due or pay the price thereof at the market rate. This must mean at the market rate prevailing on the date of payment. It is quite clear to my mind that the first mortgagee cannot insist upon anything more than receiving the amount of paddy which would be due under the mortgage bond. The plaintiffs would, therefore, be entitled to offer the first mortgagee this paddy or its equivalent value in money. I hold that the calculation should be on the basis of the price of paddy prevailing on the date of this redemption suit.

The last point for decision is whether the first mortgagee should be made liable to account for the rents and profits of the land received by him for the

period during which he has been in possession and whether the amount found on taking such account should be deducted from the amount found to be due from the plaintiffs to the defendant on the taking of accounts on the footing of the mortgage. The learned Munsif, following the case of *Jnanendra Nath Singh Roy v. Shorashi Charan Mitra (supra)* gave his opinion that the plaintiffs are entitled to this deduction but he has omitted to order this in the concluding portion of his judgment. The lower appellate Court has held that the mortgage security having been extinguished by the mortgage decree, the first mortgagee was not in possession as a mortgagee but as an auction-purchaser and that he was not liable to account. The decision of the learned Judge is based on the same view which induced him to reject the plaintiffs' claim that they should be permitted to redeem on the basis of an account to be taken on the footing of the mortgage security and not on the footing of the previous mortgage decree. It is, in my opinion, well-settled law that in the circumstances of the present case the mortgage is not extinguished by the decree for sale. So long as the equity of redemption subsists the mortgage must subsist. The plaintiffs should be put in the position as if there had been no mortgage suit at all. This is the view expressed by their Lordships in the case of *Jnanendra Nath Singh Roy v. Shorashi Charan Mitra (supra)*. The mortgagee in possession cannot get interest on his mortgage as well as the profits realised by him during his occupation of the land. An account shall, therefore, be taken of the rents and profits realised by him from the land from the date on which he went into possession. The rents and profits so realised shall be deducted from the amount found to be due to the defendant No. 1 from the plaintiffs on account of the mortgage.

There has been no finding arrived at as to the price of paddy on the date of this redemption suit. The case shall have to be remanded to the trial Court to determine this point on the evidence already

1938

Hare Krishna
Maiti
 v.
Gajendra
Nath Haloi.

Sen J.

1938
Har Krishna
Maiti
 v.
Gajendra
Nath Hatoi.
 Sen J.

on the record. Thereafter the trial Court shall pass the usual preliminary decree for redemption in the light of the observation made above.

He shall have an account taken of the amount due to the defendant No. 1 on the footing of his mortgage, bearing in mind the observations made above regarding interest. The defendant No. 1 shall account for the rents and profits received by him since he was in possession of the land and the amount found to have been so received shall be deducted from the amount found to be due on the mortgage account. The value of the paddy shall be calculated at the rate found to be prevailing on the date of this redemption suit. The period fixed for redemption having expired the Court shall fix a fresh period. The plaintiffs shall be entitled to their costs in both the Courts below. This appeal is allowed with costs.

Leave to appeal under s. 15 of the Letters Patent asked for is refused.

Appeal allowed.

G. K. D.