

1908
January 4,

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burdett.

TEJPAL (PLAINTIFF) v. GIRDHARI LAL (DEFENDANT).*

Pre-emption—Mortgage—Property purchased by vendees subject to an unregistered mortgage—Pre-emptor bound to take the property subject to the mortgage.

Property the subject of a suit for pre-emption was purchased by the vendees subject to an unregistered mortgage for Rs. 99. *Held* that the pre-emptor must take the property subject to this unregistered mortgage irrespective of the question whether he had notice of it or not.

THIS was a suit brought to enforce payment of a sum of Rs. 129-3-0, secured by a mortgage of the 25th of November 1900, by sale, if necessary, of the mortgaged property. The principal amount secured by the mortgage was Rs. 95 and therefore the mortgage was not compulsorily registrable. After the execution of this mortgage, namely, on the 26th of January 1901, the mortgaged property was sold by Bahraich the mortgagor to Bhagwan Singh, Karan Singh and Tota Ram, and the purchase deed in their favour was duly registered. At the date of the sale the purchasers had notice of the unregistered mortgage, and therefore must be taken to have purchased the property subject to it. Subsequently the defendant respondent Girdhari Lal claimed a right to pre-empt this sale, and succeeded in his claim and obtained possession of the property. The plaintiff then brought the present suit, and it was defended by Girdhari Lal on the ground that at the time of pre-emption he had no notice of the plaintiff's mortgage and therefore was not bound by it. The Court of first instance (Munsif of Shikohabad) held that the defendant purchased subject to all the liabilities which attached to the property in the hands of the vendees, and was therefore liable to satisfy the mortgage. On appeal the lower appellate Court (Subordinate Judge of Mainpuri) reversed this decision, holding that the pre-emptor was not affected by the notice of the mortgage which the vendees had; that he had no knowledge of the mortgage when he pre-empted the sale, and that therefore the property in his hands was not liable for the mortgage debt. Against this decree the plaintiff appealed to the High Court.

* Second Appeal No. 608 of 1905, from a decree of A. Rahman, Subordinate Judge of Mainpuri, dated the 11th of April 1905, modifying a decree of Gokul Prasad, Officiating Munsif, Shikohabad, dated the 12th of May 1904.

Babu Jogindro Nath Chaudhri, for the appellant.

Pandit Baldeo Ram Dave, for the respondent.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiff to enforce payment of a sum of Rs. 129-3-0, secured by a mortgage of the 25th of November 1900, by sale, if necessary, of the mortgaged property. The principal amount secured by the mortgage was Rs. 95 and therefore the mortgage was not compulsorily registrable. After the execution of this mortgage, namely, on the 26th of January 1901, the mortgaged property was sold by Bahraich the mortgagee to Bhagwan Singh, Karan Singh and Tota Ram and the purchase deed in their favour was duly registered. At the date of the sale the purchasers had notice of the unregistered mortgage and therefore must be taken to have purchased the property subject to it. Subsequently the defendant respondent Girdhari Lal claimed a right to pre-empt this sale, and succeeded in his claim and obtained possession of the property. The plaintiff then brought his suit, and it was defended by Girdhari Lal on the ground that at the time of pre-emption he had no notice of the plaintiff's mortgage and therefore was not bound by it. The learned Munsif held that the defendant appellant purchased subject to all the liabilities which attached to the property in the hands of the vendees, and was therefore liable to satisfy the mortgage. On appeal the learned Subordinate Judge reversed this decision, holding that the pre-emptor was not affected by the notice of the mortgage which the vendees had; that he had no knowledge of the mortgage when he pre-empted the sale, and that therefore the property in his hands was not liable for the mortgage debt.

From this decision the appeal now before us was preferred. On behalf of the respondent reliance was placed upon section 50 of the Registration Act, which provides that every document of the kind mentioned in clauses (a), (b), (c) and (d) of section 17, which include a deed of sale, shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property and not being a decree or order. This section, it has been frequently held, does not protect a purchaser who purchased with knowledge of an

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unregistered incumbrance. Therefore it is clear that the vendees Bhagwan Singh, Pota Ram and Karan Singh were liable to satisfy Tejpal's mortgage. They in fact must be taken to have purchased the property subject to the mortgage.

The question then is, as the pre-emptor Girdhari Lal in any better position than the vendees? We think not, and for this reason: a right of pre-emption is not a right of repurchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale under which he derived his title. A person who chooses to pre-empt, therefore, must take upon him the burden of the obligations subject to which the sale was made as well as the benefits accruing therefrom. In other words, he can get no more than that for which the vendee bargained. The vendees in this case acquired the property subject to the plaintiff's mortgage, and the pre-emptor if he chose to pre-empt must also take subject to it. The pre-emptive property was not in fact an unincumbered property, but one subject to the plaintiff's mortgage, an incumbrance which the purchasers were liable to satisfy, and which the pre-emptor, who has enforced his right to have his name substituted as purchaser, must, we think, satisfy. The vendees had distinct notice of the incumbrance, and even if they concealed their knowledge of it from the pre-emptor, they cannot thereby give him a better right than that which they themselves possessed. The question may be looked at from another point of view. The consideration for the sale to the vendees was not alone the money actually paid in cash, but also the amount of the mortgage, for the payment of which they became responsible. In holding, therefore, that the pre-emptor is bound to satisfy the mortgage-debt, we simply require him as pre-emptor to pay the entire of the purchase money. It is well settled law in this Court that a pre-emptor must pre-empt the whole of the bargain between vendor and vendee or not at all. He cannot take a portion of it only. Here part of the bargain was that the vendees should accept the liability of the vendor in respect of the plaintiff's mortgage. Therefore the successful pre-emptor took subject to that liability.

For these reasons we think that the lower appellate Court was wrong in reversing the decision of the learned Munsif. We therefore allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts. We extend the time for payment of the mortgage debt up to the 1st of April next.

Appeal decreed

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

NIRANJAN (PLAINTIFF) v. GAJADHAR (DEFENDANT).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 177—Question of proprietary title—Jurisdiction—Civil and Revenue Courts.

Held that the question whether a tenant, defendant in a suit for ejectment, is a tenant of one kind or another is not a question of proprietary title within the meaning of section 177 of the Agra Tenancy Act, 1901. *Chhitar Singh v. Rup Singh* (1) dissented from.

THE facts of this case are as follows:—

Niranjan Ahir applied as owner of a fixed rate tenant's holding for ejectment of one Gajadhar from a small plot of land. Gajadhar pleaded that he was the fixed rate tenant entitled to the holding. The suit under section 58 of Act No. II of 1901 was tried by an Assistant Collector, who dismissed it. The plaintiff appealed to the Court of the District Judge upon the ground that a question of proprietary title, within the meaning of section 177 (e) of the Tenancy Act, had been in issue and was in issue in the appeal. The District Judge, however, being of opinion that no such question was involved, referred the case to the High Court under section 195 of the Tenancy Act in view of the decision in *Chhitar Singh v. Rup Singh* (Weekly Notes, 1906, p. 247).

Babu Parbati Churan Chatterji, for the respondent.

KNOX and AIKMAN, JJ.—On the facts stated by the learned District Judge of Jaunpur we hold that no question of proprietary title was in issue in the Court of first instance and that no such question is a matter in issue in this appeal. The learned District Judge is right therefore in his view that he had no

*Miscellaneous No. 268 of 1907 on a reference made by W. R. G. Moir, District Judge of Jaunpur, dated the 26th of July 1907, against the order of Rup Narain, Assistant Collector, First Class, of Jaunpur, dated the 27th of November 1906.

(1) Weekly Notes, 1906, p. 247.

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