APPELLATE CIVIL.

1918
February, 20.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RAM BARAN RAI AND ANOTHER (PLAINTIFFS) *v.* HAR SEWAK DUBE AND OTHERS (DEFENDANTS).*

Regulation No. XVII of 1806, *section* 8—*Mortgage by way of conditional sale—Suit for redemption—Plea of foreclosure under the Regulation—Procedure.*

In the case of a mortgage to which Regulation No. XVII of 1806 applies, before it can be held that the right of redemption is barred, it must be proved that the requirements of the Regulation have been strictly complied with, that is to say, that the mortgagee had served upon the mortgagor a notice, under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failure to redeem within the period of one year. *Balal Ram* v. *Taj Ali* (1) followed.

JASAN RAI executed a mortgage by conditional sale on the 27th of December, 1866. His heirs brought a suit for redemption of the mortgage. The main defence was that by virtue of proceedings taken by the mortgagee under section 8 of Regulation XVII of 1806 the mortgage had been foreclosed in 1877, and that the mortgagees were in proprietary possession ever since. The plaint stated that an application had been made by the mortgagee for foreclosure, but that he did not obtain any decree for foreclosure. The evidence produced by the defendants of the proceedings under Regulation XVII of 1806 consisted of a copy of the notice or *parwana*, dated the 13th of December, 1876, issued by the District Judge of Gorakhpur to Jasan Rai, and a copy of the final order of foreclosure passed by the said Judge on the 22nd of December, 1877, which recited that an application under section 8 of the Regulation had been made by the mortgagee on the 21st of November, 1876, that a notice had been issued on the 13th of December, 1876, to the mortgagor giving him one year within which to pay up the amount due, that from the Nazir's report it appeared that Jasan Rai was away from home and that the notice and the copy of the application had been served on his son Ram Baran Rai on the 25th of December, 1876,

* Second Appeal, No. 1145 of 1916, from a decree of W. R. G. Moir, District Judge of Gorakhpur, dated the 19th of April, 1916, confirming a decree of Muhammad Said-ud-din, Munsif of Bansgaon, dated the 21st of September, 1914.

(1) (1907) 4 A. L. J., 717.

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that proclamation had been duly made, and that the amount due had not been paid or tendered by the mortgagor. The court of first instance held that by reason of these proceedings and the non-payment of the amount due within the year of grace allowed by the notice the right of redemption had been foreclosed, and the mortgagees had become absolute owners. On appeal it was the plaintiff's contention that the proceedings were defective and invalid and were not duly proved as required by law. The lower appellate court held that the admission in the plaint of the fact that the mortgagee had applied under section 8 of the Regulation showed that the mortgagor had had notice thereof, and besides, that the order of the District Judge, dated the 22nd of December, 1877, was sufficient evidence of service of the notice; and that, as the money had not been paid or tendered, the mortgage had been foreclosed and the mortgagees' possession from 1877 was proprietary and adverse. The suit was dismissed accordingly, and hence this second appeal.

Babu *Piari Lal Banerji*, for the appellants :—

Even assuming that all the proceedings relied upon by the defendants under the Regulation were regular and valid, and that they have been properly proved, the title of the mortgagees would not be complete. Those proceedings being of a ministerial nature merely, something else would have to be done to effectively foreclose the mortgage. To do that the mortgagee had to follow up the proceedings with a suit for possession, or, if he was already in possession, with a suit for declaration of his title and possession as full owner. I rely on the observations at bottom of page 350 and top of page 351 of the report of *Forbes* v. *Ameeroonissa Begum* (1). No such suit was brought by the mortgagees in the present case. Further, the proceedings themselves were defective and invalid. It is for the mortgagee to show that he strictly complied with all the conditions and procedure prescribed by the Regulation. Non-compliance in any one respect would make the foreclosure ineffective and would not extinguish the equity of redemption. The provisions of section 8 of the Regulation are imperative; *Madhopersad* v. *Gajudhar* (2). The period of one year allowed by section 8 of the Regulation should

(1) (1865) 10 Moo. I. A., 340. (2) (1884) I. L. R., 11 Calc., 111.

be calculated from the date of service of the notice upon the mortgagor; *Mahesh Chandra Sen* v. *Tarini* (1), *Norender Narain Singh* v. *Dwarka Lal Mundur* (2). Here, assuming that the proper service of the notice has been duly proved, the date of service was the 25th of December, 1876, and the date of the final order was the 22nd of December, 1877; so that the order was passed before the expiry of one year. Moreover, the notice had to state from what date the year would begin to run and this was not done in the present case; *Madhopersad* v. *Gajudhar* (3).

Service of the notice has not been duly proved; it has to be established by evidence. The mere recital in the Judge's order, or the endorsement of the Nazir on the back of the notice, that the mortgagor had been duly served is not legal proof and not even *primâ facie* evidence of due service; *Norender Narain Singh* v. *Dwarka Lal Mundur* (2). Besides, on the defendant's own showing, the notice was not served on the mortgagor Jasan Rai but on his son. The use made by the lower appellate court of the pleadings in the plaint was not at all justified. There was no admission at all of due service of the notice or of compliance with any of the formalities prescribed by the Regulation. In this connection there are some important observations at pages 406, 407 of the case in I. L. R., 3 Calc., 397, and at page 118 of the case in I. L. R., 11 Calc., 111. The defendants have not proved that before commencing the proceedings under the Regulation they made a previous demand of payment: the omission to make such demand vitiates the proceedings altogether; *Karan Singh* v. *Mohan Lal* (4). A recital in the application for foreclosure itself of a previous demand having been made is no proof thereof; *Sitla Bakhsh* v. *Lalta Prasad* (5). The case of *Badal Ram* v. *Taj Ali* (6) was a case of a suit for redemption like the present, and fully supports me. No question of adverse possession arises in this case. The foreclosure proceedings being invalid, the right of redemption was not extinguished thereby, and the mortgage subsists. Mere assertion of an adverse title will not enable a mortgagee in possession to convert his possession as mortgagee

(1) (1868) 1 B. L. R., (F.B. rulings), 14.
(2) (1877) I. L. R., 3 Calc., 397.
(3) (1884) I. L. R., 11 Calc., 111.
(4) (1882) I. L. R., 5 All., 9.
(5) (1886) I. L. R., 8 All., 388.
(6) (1907) 4 A. L. J., 717.

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into adverse possession as owner, or, in other words, to cut down the period of redemption from 60 years to 12 years; *Sheopal* v. *Khadim Hossein* (1), *Ali Muhammad* v. *Lalta Bakhsh* (2).

Pandit *Lakshmi Narayan Tewari* (with Munshi *Haribans Sahai*), for the respondents:—

It has been contended by the appellant that, inasmuch as the mortgagee did not follow up the proceedings under the Regulation with a suit to establish his title, the foreclosure failed to be effective. Reliance was placed for this proposition upon certain passages in the judgement of the case reported in 10 Moo. I. A., 340; but there are other passages at pp. 350 and 351 which lay down that where proceedings are taken under section 8 of the Regulation the only issue, in so far as the right of redemption is concerned, thereafter left to be considered, is whether the payment or deposit had or had not been made before the expiry of the year of grace. In the present case admittedly there was no such payment or deposit. It has been held in later cases, after consideration of the passages mentioned above, that the mortgagee's title became absolute as soon as the year of grace expired without payment having been made, and that it was not necessary for the mortgagee to institute a suit thereafter for perfecting his title; *Ali Abbas* v. *Kalka Prasad* (3) *Batul Begam* v. *Mansur Ali Khan* (4).

The right of redemption was extinguished by the expiry of the year of grace, *ipso facto*; the final order was not a necessary ingredient. Even without the final order, and the recording of a final order is not a requirement prescribed by section 8 of the Regulation, the equity of redemption would be extinguished by lapse of the year without the deposit. Any real or alleged irregularities in the final order are, therefore, immaterial, and cannot be made the basis of any valid arguments against the respondents.

Regarding most of the cases cited by the appellants a distinction is to be drawn between two classes of suits which may follow proceedings taken under the Regulation; the first being suits instituted by the mortgagee with the object of getting a pronouncement from the court of the completeness of his title, and the

(1) N.-W. P., H. C. Rep., 1875, 220.
(2) (1878) I. L. R., 1 All., 655.
(3) (1892) I. L. R., 14 All., 405.
(4) (1901) I. L. R., 24 All., 17.

second being suits brought by the mortgagor for redemption. The questions that arise for determination in the two classes of suits are different, and the *onus* of proof is on a different party. In a suit for redemption brought after the close of proceedings under the Regulation the only question for determination is whether or not the deposit was duly made. This was clearly pointed out in the case in 10 Moo. I.A., 340. It was with reference to a suit by a mortgagee to recover possession that it was laid down in the case in I. L. R., 3 Calc., 397, that it was essential to prove strict compliance with the conditions laid down by the Regulation; *vide* top of p. 405, "in an action of this kind *etc.*" In a suit for redemption brought many years after the completion of the proceedings under section 8 it would be very hard on the mortgagee to throw upon him the burden of proving everything. That was never intended by the Privy Council. With the exception of the case in 4 A. L. J., 717, all the other cases cited by the appellants related to suits brought by a mortgagee to enforce foreclosure; they are, therefore, distinguishable. The case of *Badal Ram* v. *Taj Ali* (1) has extended to suits for redemption the rule that was laid down by the Privy Council with special reference to suits for enforcement of foreclosure brought by a mortgagee. It is submitted that there is no warrant for this extension. On the other hand, such extension would appear to be contrary to the intention of the Privy Council. As regards the question of proof of service of the notice, the lower appellate court has found that it has been proved. In second appeal that finding cannot be challenged on the ground of insufficiency of evidence. Further, the dictum against the propriety of presuming in favour of the due performance of all the requirements of section 8 of the Regulation was laid down with reference to suits by mortgagees and is not applicable to the present case. Personal service on the mortgagor himself was not indispensable; *Field*: Regulations of the Bengal Code, p. 377, *Madho Singh* v. *Mahtab Singh* (2). If it be held that the *onus* of proof in the present case lay on the mortgagees, the case may be remanded for a finding as to previous demand, service of notice, *etc.*, as was done in the case in I. L. R., 5 All., 9.

(1) (1907) 4 A. L. J., 717. (2) N.-W. P., H. C. Rep., 1871, p. 325.

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Babu *Piari Lal Banerji*, was not heard in reply.

PIGGOTT and WALSH, JJ. :—This was a suit in which the plaintiffs claimed redemption of a mortgage by conditional sale effected on the 27th of December, 1866. The plaintiffs are the son and grandson of the original mortgagor, and the defendants are the sons and grandsons of the original mortgagee. The fact of the mortgage is admitted, and we find that it was never pleaded that the said mortgage, if redeemable at all, was redeemable only for a larger sum than that tendered by the plaintiffs. The defendants, however, contended that the equity of redemption had been extinguished by reason of certain proceedings taken in the year 1876 by the mortgagee under section 8 of Regulation XVII of 1806. Both the courts below have found in favour of the defendants on this point and have added a finding that the present suit is barred by limitation. This latter finding, as it stands, is difficult to accept. The suit was one for redemption and was brought within the statutory period of limitation. Either the equity of redemption has been extinguished, or it has not. Of course, if it has been extinguished, the suit fails, not by reason of any bar of limitation, but because the plaintiffs have failed to prove their cause of action, namely, a subsisting right to redeem. If on the other hand, the equity of redemption has not been extinguished, the suit is obviously within time. The essential question for determination is whether the proceedings taken by the mortgagee in the year 1876 had the effect of extinguishing the equity of redemption. This must depend in the first instance upon whether the mortgagee caused the mortgagor, or his legal representative, to be served with a copy of his own written application for foreclosure and also with a notice or *parwana* under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The evidence by which it is sought to prove these facts consists of certain records of the proceedings of the court of the District Judge of Gorakhpur. There is abundant authority to support the proposition that such records cannot be accepted as *primâ facie* proof of the fact of service. It has been contended before us on behalf of the respondents that most of the decisions on the point were pronounced in

cases in which the mortgagee had come into court asking for a decree for possession, or a decree declaring his proprietary title, after he had taken the requisite proceedings under Regulation XVII of 1806. There is, however, a Bench decision of this Court in which the same principles have been applied to a suit for redemption exactly on all fours with the suit now before us. We refer to the case of *Badal Ram* v. *Taj Ali* (1). We have been asked to consider the decision in that case; but we do not ourselves see any adequate reason to dissent from it, and in any case we prefer to follow it on the principle of *stare decisis*. The evidence relied upon by the learned District Judge as proving that the equity of redemption was extinguished by reason of the proceedings taken in 1876 was not evidence which could be accepted as establishing the facts sought to be proved on behalf of the defendants, and the decision of the District Judge on this point is based upon an erroneous view of the law and is open to interference by this Court under section 100 of the Code of Civil Procedure. We may note that the Bench case to which reference has already been made was also decided in second appeal. These considerations are sufficient to dispose of the present appeal. We set aside the decrees of both the courts below, and in lieu thereof we give the plaintiffs a decree for redemption, to be drawn up in the form prescribed by order XXXIV, rule 7, of the Code of Civil Procedure, allowing redemption of the property in suit on payment of the sum of Rs. 393-1-0 (rupees three hundred and ninety-three and anna one only) on account of principal and interest, within three months from this date. The plaintiffs will be entitled to their costs in all three courts.

Appeal decreed.

APPELLATE CRIMINAL.

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February, 26

Before Justice Sir George Knox and Mr. Justice Walsh.

EMPEROR *v.* MAHA RAM AND OTHERS.*

Act No. XV of 1872, (*Indian Christian Marriage Act*), *sections* 3 *and* 68.—"*Persons professing the Christian religion*"—*Marriage between two bhangis celebrated according to caste rites by two* "*Christians*"

One Maha Ram, whose father was a Christian, but who himself was found not to be a Christian within the meaning of section 3 of the Indian Christian

* Criminal Appeal No. 873 of 1917, from an order of E. H. P. Rose, Additional Sessions Judge of Mainpuri, dated the 17th of September, 1917

(1) (1907) 4 A. L. J., 717.