APPELLATE CIVIL.

1917
November, 20.

Before Mr. Justice Piggott and Mr. Justice Walsh.

HABIB-ULLAH (PLAINTIFF) *v.* MANRUP AND OTHERS (DEFENDANTS)*

Occupancy tenant—Mortgage of part of occupancy holding—Subsequent lease of same while mortgage was yet unregistered—Rights of mortgagees and lessee.

An occupancy tenant made a usufructuary mortgage of certain plots of land comprised in his occupancy holding. He apparently gave the mortgagees possession, but refused to get the mortgage deed registered and in consequence the mortgagees were obliged to bring a suit to compel registration. Whilst this suit was pending, the occupancy tenant leased certain plots covered by the mortgage at a yearly rent for a period of five years.

Held, on suit by the lessee for possession, that the plaintiff was entitled to a decree, and that he was not bound as a condition precedent, to pay off the mortgagees. *Bahoran Upadhya* v. *Uttamgir* (1) referred to.

THE facts of this case are set forth in the following referring order of RAFIQ, J:—

The facts which have given rise to this appeal are stated in my order of remand, dated the 18th of April, 1917, but in order to make the present judgement intelligible I propose to recite some of the salient features of the case. It appears that defendant No. 5 has an occupancy holding. He executed two mortgage deeds of the said holding on the 7th of July, 1914, in favour of defendants Nos. 1 to 4. He, however, denied execution of the deeds before the Sub-Registrar, and the mortgagees brought a regular suit for compulsory registration. Before the conclusion of the suit for compulsory registration, the defendant No. 5, on the 10th of August, 1914, executed a lease of the same occupancy holding which he had mortgaged to the defendants Nos. 1—4 in favour of the plaintiff appellant for five years. Subsequent to the execution of the lease the defendant No. 5 entered into a compromise with the mortgagees and agreed to have the deeds of mortgage registered. The deeds were accordingly registered on the 13th of July, 1915. It should be noted here that the mortgagees obtained possession of the occupancy holding from the date of

* Second Appeal No. 1576 of 1915, from a decree of Durga Dat Joshi, District Judge of Azamgarh, dated the 9th of September, 1915, reversing a decree of Rameshwar Dayal Sharma, First Additional Munsif of Azamgarh, dated the 30th of July, 1915.

(1) (1911) I.L.R., 33 All., 779.

their mortgages and have remained in possession ever since. On the 26th of October, 1915, the lessee brought the suit out of which this appeal has arisen for possession of the occupancy holding on the basis of his lease. He impleaded in the case, as defendants, his lessor and the four mortgagees. Various defences were urged in bar of the claim. The court of first instance decreed the claim holding that the mortgages were collusive. The claim of the plaintiff for damages was dismissed. He preferred an appeal from the decree dismissing his suit for damages while the mortgagees preferred an appeal from the decree awarding possession to the lessee. The learned Judge who heard the appeals did not consider the question of collusion between the defendant No. 5 and defendants Nos. 1-4, that is, between the mortgagor and the mortgagees. He decided the appeals on another point. He held that if the lessor himself could not recover possession from the mortgagees without paying the mortgage money, though the mortgages were invalid at law, the lessee who claimed through him could not be in a better position. The lessee, therefore, could not get possession without paying off the mortgages. The appeal of the mortgagees was allowed and the claim of the lessee was accordingly dismissed both for possession and damages.

The lessee, who is the plaintiff in the case, has come up in second appeal to this Court, and has preferred two appeals, one from the decree in the appeal of the mortgagees and the other from the decree in his own appeal before the lower appellate court. I remanded the case at the last hearing to the lower appellate court for the trial of the issue relating to the alleged collusion between the mortgagor and the mortgagees. The learned Judge has returned a finding to the effect that no collusion has been proved. The finding is one of fact and it must be accepted. The plaintiff appellant, however, contends that he ought to succeed on the ground of his having a legal title as against the mortgagees. It is said that the mortgages to the defendants Nos. 1-4 are admittedly invalid at law, while the lease in his favour is admittedly legal and open to no objection on any legal ground. The case relied upon by the court below is one that was between the mortgagor and the mortgagees. It was held in

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that case that one who seeks equity must do equity. The mortgagor, having taken the money of the mortgagees and delivered the possession of the occupancy-holding to the latter, could not equitably demand return of possession on the ground that the mortgage was invalid without paying off the money. Both the parties had entered into a contract knowing it to be invalid and both of them were equally wrong, and if the mortgagor derived any benefit from the money raised on the mortgage it was but equitable that he should be made to return the money before getting back his property. These considerations, it is argued, do not apply to the present case. The plaintiff who is the lessee has a perfectly valid title at law, while the mortgagees have no such title. The plaintiff's position is such that he is not called upon to do any equity to the mortgagees before he can enfoce his lease. For the mortgagees the reply is that the plaintiff knew perfectly well of the existence of the mortgages because his father had attested one of the mortgage-deeds. If the contention of the lessee is allowed, all that the holder of an occupancy tenancy has to do is to execute a mortgage, deliver possession to the mortgagee and the next day give a lease for consideration to a third party and thus deprive the mortgagee of his mortgage money. The lessee need not be necessarily cognizant of the mortgage executed by his lessor. Both the lessee and the mortgagee derive their title from the occupancy tenant, and what the latter himself could not do his lessee ought not to be allowed to do. There is no case-law on the point, at least none has been cited at the Bar. I have no doubt that, whichever way I decide, the losing party is bound to go up in Letters Patent Appeal. The point is one which will probably arise in future in other cases also, and in order to set it at rest once for all, I think it desirable to refer the case to a bench of two Judges, and I do so.

Babu *Piari Lal Banerji* (with him Mr. *R. Malcomson*) for the appellant :—

The plaintiff has not received any portion of the mortgage-money, by payment of which the mortgagees got possession. He has derived no benefit under the mortgage transaction. As between him and the mortgagees there are no benefits to be returned, and so no equities in favour of the latter against the

former. The equities being equal, the law must prevail, and the legal estate is with the plaintiff, the transfer to him being valid and the mortgage being invalid. The present point did not arise in the case relied on by the lower court, namely, the case of *Bahoran Upadhya* v. *Uttamgir* (1). There it was the mortgagor himself who came forward to recover possession, and the court held that he must refund the benefit first. The ruling in the case of *Chhiddu* v. *Sheo Mangal Singh* (2) is not applicable to the present case. There the plaintiff, zamindar, was aware of the existence of the mortgage. In the present case it has not been proved that the plaintiff had acted in bad faith or in collusion with the mortgagor in order to defraud the mortgagees. It is not proved that he had any knowledge of the existence of the mortgage. The fact that the plaintiff's father was an attesting witness of the mortgage deed proves nothing; mere attestation of a deed is no notice of its contents; *Nand Lal* v. *Jagat Kishore* (3). There is no reason why the plaintiff should be called upon to pay the mortgage-money. If a person transfers property by a deed which is imperfect and then transfers it to another by a deed which is perfect and the second transferee sues the first for possession, it is not open to the latter to plead that he shall first be repaid the money which he had paid to the transferor. Similarly where there are two deeds, one of which is unregistered and the other registered, the holder of the registered deed can always succeed on the strength of his title and is never made to pay the consideration advanced by the holder of the unregistered deed.

Mr. *S. M. Yusuf Hasan*, for the respondents :—

If the mortgagor himself had been suing for recovery of possession he would undoubtedly not be given a decree for dispossessing the mortgagees except on repayment to them of the money which they had advanced. His lessee who derives title from him can have no higher rights. To give the plaintiff a decree for possession without requiring him to redeem the mortgages would be to allow the mortgagor in a round about way to defraud the mortgagees, which he would not be allowed to do if

(1) (1911) I.L.R., 33 All., 779. (2) (1916) I.L.R., 39 All., 186.

(3) (1916) 14 A. L. J., 1103 (1113).

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he himself came into court. The lease is an obvious dodge to defraud the mortgagees; the fact that it was given while the mortgagees were in possession shows that the mortgagor was acting dishonestly. The mortgagees' possession was sufficient notice to the lessees. Equity demands at any rate that the lease should be transferred to the mortgagees until their money is repaid.

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

PIGGOTT and WALSH, JJ. :—The essential facts out of which these two appeals arise are as follows :—One Mahadeo, an occupancy tenant, executed, on the 7th of July, 1914, three mortgage-deeds, one in favour of Sarup and Manrup and the other two in favour of Ram Jas and Ram Phal. The deeds in question purported to give the aforesaid mortgagees possession of plots of land forming part of Mahadeo's occupancy holding. One plot was given in the first mentioned mortgage and six more plots were added in the other two. After executing these documents Mahadeo refused to get them registered, and eventually the mortgagees were driven to institute a regular suit in order to obtain registration. When this suit was instituted Mahadeo declined to contest it, and it was decreed against him on his own confession, so that registration was at last effected in the month of July, 1915, almost one year after execution. We must take it, however, on the findings of the courts below, that possession had at once been given to the mortgagees of the plots specified in their mortgages. In the meantime, that is to say, on the 10th of August, 1914, before the suit by the mortgagees had been instituted and while the question of registration was still pending before the District Registrar, Mahadeo executed another deed by which he purported to lease 20 plots of land, including the six plots specified in the mortgages in favour of Ram Jas and Ram Phal, but not including plot No. 859 specified in the mortgage in favour of Sarup and Manrup, to the plaintiff Habib-ullah at a yearly rent. Habib-ullah failed to obtain possession, and thereupon brought the present suit, impleading as defendants the four mortgagees, the tenant Mahadeo and one Debi Din, with whose position we are not now concerned. It would seem that in the courts below it was not noticed that the plaintiff's claim did not include plot No. 859, and that the mortgages in favour of Ram Jas and Ram Phal

only affected six out of the 20 plots specified in the plaint. The case was contested as if the area affected by the mortgages and by the lease were identical. The court of first instance held that the mortgages, being mortgages of an occupancy holding, were contrary to the express provisions of the Tenancy Act and conferred no title on the mortgagees. The lease in favour of the plaintiff Habib-ullah, on the other hand, was a valid contract of lease for a period of five years, permissible under the provisions of the Act. The learned Munsif, therefore, held that the plaintiff had a good title to possession over the land in suit as against all the defendants, subject only to the framing of the decree in such a form as to safeguard the rights of the additional defendant Debi Din. With this qualification the court of first instance overruled all the objections taken by the mortgagees and decreed the plaintiff's claim. There was an additional claim for damages, based upon allegations of fact which the learned Munsif found not to be substantiated by the plaintiff's evidence, and this part of the claim was, therefore, dismissed. There were two appeals to the District Judge, one by the plaintiff against the order dismissing his claim for damages and the other by the mortgagee-defendants against the decree awarding possession to the plaintiff. The learned District Judge, referring to the decision of a Bench of this Court in *Bahoran Upadhya* v. *Uttamgir* (1), has held that the plaintiff is not entitled to recover possession without refunding the mortgage-money, and he has accordingly dismissed the plaintiff's claim altogether. On this view of the case the appeal filed in the court below by the mortgagees was allowed and the cross-appeal of the plaintiff was dismissed. Hence there are two appeals now before us, both brought by the plaintiff against the two decrees passed by the lower appellate court. The learned Judge of this Court before whom the matter first came found it necessary to remit certain issues for determination by the court below and afterwards referred the appeal to a Bench of two Judges for consideration of the question of law involved. In our opinion the facts of the case are not covered by the ruling upon which the learned District Judge has relied. The plaintiff accepted his lease after the

(1) (1911) I. L. R., 33 All., 779.

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execution of the three mortgages in question, but before their registration, and it is certainly not proved by any evidence on the record that he had notice of the existence of these mortgages, much less that he was acting fraudulently or in collusion with the occupancy tenant in order to defeat the rights of the mortgagees. Something has been made in argument of the fact that the plaintiff's father witnessed the execution of one of the mortgage-deeds, but, after considering the evidence given by this man Faqire in the trial court, we are satisfied that it is not proved that Faqire knew that the land comprised in the mortgage-deed which he witnessed was also included in the lease afterwards taken by his son, Habib-ullah. Under these circumstances it seems to us that Habib-ullah is as much entitled to maintain the present suit for recovery of possession as lessee under the terms of the contract in his favour, as he would have been to maintain a suit against a rival lessee, that is to say, against a person to whom Mahadeo had also granted a lease of a portion of the same land, in respect of which it could be contended that it was not binding on Habib-ul-lah either because it was subsequent in date or because it was for some other reason invalid in law. The equitable principle upon which the case of *Bahoran Upadhya* v. *Uttamqir* (1) was decided does not seem to us to affect a *bonâ fide* transferee from the occupancy tenant. If the mortgagees have any remedy, it is as against Mahadeo.

The appeal before us challenges the decision of the court of first instance on the question of damages. This matter has not been adequately gone into on the facts by the lower appellate court, but we are content to say that no sufficient cause has been shown to us for dissenting from the finding on the strength of which this part of the plaintiff's claim was dismissed by the court of first instance. The arguments before us have proceeded on the assumption that the plaintiff has not hitherto succeeded in obtaining possession under his lease and that his allegations to the contrary in his plaint were not well founded. On this basis the claim for damages as brought must be dismissed, but otherwise we are of opinion that the decrees of the lower appellate court must be set aside and decrees of the court of first

(1) (1911) I.L.R., 33 All., 779.

instance restored The respondents will pay the costs in this and in the lower appellate court.

Appeal allowed.

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Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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AHMAD KHAN AND OTHERS (OBJECTORS) *v.* MUSAMMAT GAURA (APPLICANT).*

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 181—*Mortgage —Suit for sale—Application for final decree—Limitation.*

An application for a final decree in a suit for sale on a mortgage being an application in the suit and not an application in execution, the fact that one such application has been made within the prescribed period of limitation does not operate to extend the period of limitation in favour of a second application, the first having been dismissed for default.

THE facts of this case were as follows:—

The respondent obtained a preliminary decree for sale on the 27th of August, 1908. She applied for a final decree on the 26th of August, 1911, but the application was dismissed for default of both parties on the 9th of April, 1912. The respondent again applied for a final decree on the 10th of September, 1912. This application was resisted on the grounds that after the dismissal of the previous application the present application was not maintainable and that it was barred by time. The first court held that the proper remedy of the respondent was to apply for the revival of the previous application and that the subsequent application was not maintainable. The lower appellate court reversed the decision of the first court and remanded the case for proceeding with the application. The judgement-debtors appealed to the High Court.

Maulvi *Iqbal Ahmad*, for the appellants:—

When the first application was dismissed for default, the proper remedy of the decree-holder was either to appeal against the order of dismissal or to apply under order IX, rule 9, of the Code of Civil Procedure for an order setting aside the dismissal. The present application is neither in form nor in substance an application under order IX, rule 9, and was presented long after the period prescribed for such an application by article 163 of the

*First Appeal No. 72 of 1917, from an order of Sudarshan Dayal, Second Additional Subordinate Judge of Jaunpur, dated the 20th of March, 1917