

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

1925
May, 26.

MUHAMDI BEGAM (DEFENDANT) v. TUFAIL HASAN
(PLAINTIFF).*

Civil Procedure Code, section 11—Suit for redemption of a usufructuary mortgage—Decree not providing for extinction of mortgagor's right to redeem—Second suit for redemption not barred.

A decree based on a compromise in a suit for redemption of a usufructuary mortgage contained the following provision:—"On payment of Rs. 225 to the defendant within one month of the date of the compromise the plaintiff would be entitled to get the property redeemed and to be put in possession, but after the expiry of the fixed period, he will be entitled to execute his decree on payment of Rs. 225. Parties shall bear their own costs."

The plaintiff failed to pay the amount in time and failed to apply for execution within three years. He then filed a second suit for redemption.

Held that, inasmuch as there was no provision in the former decree that the plaintiff's right to redeem should be extinguished, the mortgage still subsisted and the second suit was not barred. *Hari Ram v. Indraj* (1) and *Arura v. Bur Singh* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Baleshwari Prasad*, for the appellant.

Hafiz *Mushtaq Ahmad*, for the respondent.

SULAIMAN, and DANIELS, JJ.:—This is a defendant's appeal arising out of a suit for redemption. It appears that on a previous occasion the plaintiff instituted a suit for redemption of this very mortgage and obtained a compromise decree in December, 1916. The decree as framed was not in accordance with the compromise and was accordingly subsequently

* First Appeal No. 10 of 1925, from an order of Ganga Nath, First Subordinate Judge of Moradabad, dated the 5th of November, 1924.

(1) (1922) I.L.R., 44 All., 730.

(2) (1924) I.L.R., 5 Lah., 371.

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corrected in April, 1924. The amended decree stood as follows :—

“ On payment of Rs. 225 to the defendant within one month of the date of the compromise the plaintiff would be entitled to get the property redeemed and to be put in possession; but after the expiry of the fixed period he will be entitled to execute his decree on payment of Rs. 225. Parties shall bear their own costs ”.

The plaintiff failed to pay the amount in time and failed to apply for execution within three years. He, however, has brought a second suit for redemption of that property. The trial court dismissed the suit holding that the claim was barred by the provisions of section 11 of the Code of Civil Procedure. On appeal the learned Subordinate Judge has taken the contrary view and remanded the case for trial of the other points involved in the case. In our opinion the view taken by the lower appellate court is correct. When it is borne in mind that the original mortgage-deed was a usufructuary mortgage, a suit for redemption of that mortgage, in spite of a default of payment of the mortgage money within the time fixed, can be brought. If there had been no compromise, the proper course would have been that the property would be sold and the mortgage money realized thereby. By mere lapse of the time fixed, the mortgagee does not become the absolute proprietor of the mortgaged property. The case, however, was compromised and the decree was passed in terms of the compromise. The compromise nowhere expressly stated that in default of the payment of Rs. 225 within one month the plaintiff's right to redeem would be extinguished or that his exclusive remedy would be to apply for execution. We may note that the decree as originally framed bore a clause that in default of payment his right to redeem would be extinguished, but the court

subsequently corrected this, holding that it was not in accordance with the compromise. It seems to us that when under the compromise the parties did not agree that the plaintiff's right to redeem would be extinguished absolutely, he is not prevented from bringing a second suit for redemption, and the mortgagee is still a mortgagee and has not become the absolute proprietary of the property. In support of our view we may refer to the case of *Hari Ram v. Indraj* (1) which has been followed by the Punjab High Court in the case of *Arara v. Bur Singh* (2).

We accordingly dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr. Justice Daniels.

ZORAWAR SINGH AND OTHERS (DEFENDANTS) *v.* BHAGWAN SINGH AND ANOTHER (PLAINTIFFS).*

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 233 (k)—Partition—Specific property claimed in partition proceedings, but not given to applicant—Subsequent suit for declaration of ownership—Suit held to be barred.

The applicants for partition in a court of revenue asked, for reasons stated in their application, that certain specified property, recorded in the name of one *D*, might be assigned to themselves. The property claimed, however, after the partition was completed, still remained recorded in the name of *D*.

Held, on suit in a civil court for a declaration that the plaintiffs were the owners of the aforesaid property, that the suit was barred by section 233 (k) of the United Provinces Land Revenue Act, 1901.

Held, also, that the application of section 233 (k) is not limited to cases in which a question of proprietary right has

* First Appeal No. 160 of 1924, from an order of Shambhu Nath Dube, Subordinate Judge of Muttra, dated the 1st of August, 1924.

(1) (1922) I.L.R., 44 All., 730.

(2) (1924) L.L.R., 6 Lah., 371.

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