

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice Ziaul Hasan

1935
March 25

LALA SALIK RAM (PLAINTIFF-APPELLANT) v. BABU JANG
JIT BAHADUR SINGH AND OTHERS (DEFENDANTS-
RESPONDENTS)*

Transfer of Property Act (IV of 1882), section 101—Words “or otherwise than subject thereto” in section 101, Transfer of Property Act, meaning of—Mortgage—Prior mortgagee obtaining possession by foreclosure—Subsequent mortgagee not impleaded—Subsequent mortgagee seeking possession under foreclosure decree, whether must redeem prior mortgagee in possession—Interest—Rate of interest, reduction of.

Where a prior mortgagee holding a non-possessory mortgage obtains a foreclosure decree without impleading a subsequent mortgagee and enters into possession, the subsequent mortgagee seeking foreclosure under his mortgage, must redeem the prior mortgage before he can obtain possession. There is no difference in principle between a mortgagee who has obtained possession under a sale made in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage. The words “or otherwise than subject thereto” in section 101 of the Transfer of Property Act refer to the second eventuality mentioned in that section namely that of the subsequent mortgagee trying to sell the property and not to that of his seeking foreclosure. No doubt a subsequent mortgagee who has obtained a decree for sale can avail himself of either of the two alternatives provided for in the section, namely, he can either redeem the prior mortgage or sell the property subject to that mortgage, but a subsequent mortgagee seeking foreclosure of the property cannot foreclose and obtain possession of the property subject to the charge of the prior mortgagee who is already in possession on the basis of a prior foreclosure decree. In the latter case the subsequent mortgagee has no alternative but to redeem the prior mortgage. *Ram Sanahi Lal v. Sital Prasad* (1), *Sukhi v. Ghulam Safdar Khan* (2), and *Mathura Prasad v. Ghunshiam Das*, (3), referred to and relied on.

*First Civil Appeal No. 2 of 1933, against the decree of Dr. Chowdhry Abdul Azim Siddiqi, Subordinate Judge of Bara Banki, dated the 16th of September, 1932.

(1) (1931) I.L.R., 53 All., 1023. (2) (1921) I.L.R., 43 All., 469.

(3) (1930), 8 O.W.N., 179.

Messrs. *Radha Krishna* and *S. N. Srivastava*, for the appellants.

Messrs. *Hardhian Chandra*, *R. N. Shukla* and *Sukhdeo Prasad*, for the respondents.

ZIAUL HASAN, J.—This is a plaintiff's appeal in a suit for foreclosure. The suit was brought on the basis of three mortgage deeds, exhibits 1, 2 and 3 dated the 28th of May, 1925, 5th September, 1925 and 22nd November, 1927, respectively, executed by Jang Jit Bahadur Singh defendant No. 1 in favour of the plaintiff-appellant. All the other defendants, nos. 2 to 11, were impleaded as subsequent transferees of the mortgaged properties. Interest on all the three mortgages was stipulated at the rate of two per cent. per mensem, compound, with six-monthly rests.

The Court below, the learned Subordinate Judge of Bara Banki, decreed the plaintiff's suit but reduced the rate of interest under the Usurious Loans Act to one per cent. per mensem with six-monthly rests. The lower court also held that as defendant no. 10, Ram Phal Singh, had foreclosed part of the mortgaged property in pursuance of a prior mortgage in his favour and had obtained possession of that property, the plaintiff would not be entitled to obtain actual possession over that property unless and until he pays money due to defendant No. 10 under the mortgage deed exhibit F5.

It is on these two points that arguments were addressed to us on behalf of the plaintiff-appellant. One of the grounds of appeal, namely, ground no. 4 was against defendant No. 11 but it was not pressed before us.

The first question for determination therefore is whether or not the Court below was justified in reducing the stipulated rate of interest. Reliance was placed on three deeds of mortgage executed by the defendant No. 1 in 1924 in all of which the stipulated rate of interest was two per cent. per mensem compound or even more with six-monthly rests. The first is exhibit F2 dated the 4th

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of January, 1924. This deed provides for interest at 25 per cent. per annum compoundable six-monthly. The second is referred to in exhibit 13, copy of a plaint in a suit brought by the mortgagee, Ram Lakhan Lal on the basis of that mortgage. This deed was executed by defendant no. 1 on the 1st of September, 1924, and it provided for interest at 24 per cent. per annum with six-monthly rests. The third is exhibit F5 dated the 18th of July, 1924. It was executed not only by the defendant No. 1 but also by his brothers and the rate of interest stipulated was 24 per cent. per annum compoundable six-monthly. Reference was also made to exhibit 9, judgment in the suit brought by defendant No. 10 on the basis of this mortgage in order to show that the rate of interest was not reduced by the Court in spite of contest by the defendants. It will thus be seen that all the mortgage deeds stipulating a high rate of interest were executed in 1924. On the other hand we find that in a mortgage deed (exhibit F1) executed by defendant No. 1 on the 23rd of July, 1921, in favour of defendant No. 10, the rate of interest was twelve annas per cent. per mensem simple. Similarly in exhibit G12 which is a copy of a preliminary decree for foreclosure passed by the Additional Subordinate Judge of Fyzabad in a suit brought by a certain Thakur Jagdish Singh against Jang Jit Bahadur Singh on the basis of a mortgage dated the 7th of October, 1927, simple interest was allowed at the rate of 12 per cent. per annum. Exhibit 12 is another decree in favour of one Har Kishore Lal on a mortgage executed by defendant No. 1 on the 27th of September, 1928 and in this case also simple interest was allowed at the rate of 12 per cent. per annum. With regard to the mortgage deed exhibit F1 it was said that the rate of interest was low as the deed mortgaged properties of great value but there is nothing on the record to show what was the value of those properties. In my opinion the learned Subordinate Judge was right in considering

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the rate of interest stipulated for in the three mortgages of the plaintiff-appellant as excessive. It is excessive not only on the face of it but also with regard to other mortgage deeds executed by defendant No. 1. It may also be mentioned that according to the heading of the plaint in this case defendant No. 1 was twenty-five years of age in 1932 so that he must have been a lad of seventeen or eighteen only in 1925 when he executed two of the mortgage deeds in question in favour of the appellant. Further, the plaint also shows that he was in jail at the time when the suit was brought and exhibit 3 shows that he borrowed the money by that deed for defending himself in a criminal case. In view of all these circumstances I am of opinion that the Court below was perfectly justified in reducing the rate of interest to 12 per cent. per annum compoundable six-monthly. It may be observed that the learned counsel for the appellant challenged the lower Court's finding about interest in respect to exhibit 2 only and not about exhibits 1 and 3.

The second question in the appeal relates to the rights of the plaintiff-appellant and Ram Phal Singh defendant No. 10 between themselves. Ram Phal Singh also held in his favour three mortgages exhibits F1, F2 and F5 dated the 23rd of July, 1921, 4th January, 1924 and 18th July, 1924, respectively. On the basis of the deed exhibit F5, he foreclosed the property in 1928 and obtained possession of it. The learned Subordinate Judge held that as the deed exhibit F5 was prior to the plaintiff's mortgages, the plaintiff should redeem that mortgage before he could take possession of the property which he was seeking to foreclose. This was to my mind a perfectly correct view of the law. As against defendant No. 10, two points were urged on behalf of the appellant. The first was that as defendant No. 10 had not impleaded the present plaintiff in his suit for foreclosure, the decree obtained by him is not binding on the plaintiff-appellant. The second

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was that the mortgage under which Ram Phal Singh obtained his foreclosure decree being only a non-possessory mortgage, Ram Phal Singh was not entitled to remain in possession of the property against the appellant. Neither of these two contentions appears to me to have any force. In the Full Bench case of *Ram Sanehi Lal v. Sital Prasad* (1), it was held that the doctrine of allowing a prior mortgagee, who has entered into possession of the mortgaged property as auction purchaser, to set up his prior mortgage as a shield, is a doctrine of equity available as a means of defence and on page 1045 of the report, the learned Acting Chief Justice referring to the Privy Council case of *Sukhi v. Ghulam Safdar Khan* (2) remarked:

“The question of allowing a prior mortgagee, whose mortgage had long since become barred by time but who was in possession of the property under a decree obtained without impleading the subsequent mortgagee, to set up his prior mortgage as a shield even though the limitation for the mortgage had run out, was prominently before their Lordships; and their Lordships allowed Ghulam Safdar to recover the amount due on his mortgage of 1883. This, to my mind, is a clear authority for the proposition that a prior mortgagee, if he is in possession, can set up in defence a prior mortgage as a shield, although in his suit he had not impleaded the subsequent mortgagee and even though a fresh suit to enforce it would now be barred by time.”

In the case of *Mathura Prasad v. Ghansham Das* (3), BISHESHWAR NATH and PULLAN, JJ., also held that even though the puisne mortgagee was not a party to the decree obtained by the prior mortgagee, yet it was open to the prior mortgagee when he has obtained possession under a sale made in execution of the decree to set up his rights under the prior mortgage as a shield against the puisne mortgagee. There seems to me no difference in principle between a mortgagee who has obtained

(1) (1931) I.L.R., 53 All., 1023. (2) (1921) I.L.R., 43 All., 469.

(3) (1930) 8 O.W.N., 179.

possession under a sale made in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage. Moreover, the lower Court's order is perfectly in accord with section 101 of the Transfer of Property Act which runs as follows:

"Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclosure or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto."

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It was said that this section allowed two alternative courses to the subsequent mortgagee, namely, either to redeem the prior mortgage or to take the property subject to that mortgage. It seems to me that the words "or otherwise than subject thereto" refer to the second eventuality mentioned in the section, namely that of the subsequent mortgagee trying to sell the property and not to that of his seeking foreclosure. No doubt a subsequent mortgagee who has obtained a decree for sale can avail himself of either of the two alternatives provided for in the section, namely, he can either redeem the prior mortgage or sell the property subject to that mortgage, but I do not see how a subsequent mortgagee seeking foreclosure of the property can foreclose and obtain possession of the property subject to the charge of the prior mortgage who is already in possession on the basis of a prior foreclosure decree. It is therefore clear to my mind that in the latter case the subsequent mortgagee has no alternative but to redeem the prior mortgage and this is what the learned lower Court has held.

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The appeal has, in my opinion, no force and I would dismiss it with costs.

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SRIVASTAVA, J. :—I agree.

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By THE COURT (SRIVASTAVA and ZIAUL HASAN, JJ.) :—

As per Court's judgment, we dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH

Before Mr. Justice Bisheshwar Nath Srivastava, Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

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AJODHIA PRASAD (JUDGMENT-DEBTOR—APPELLANT) v. BANSI-LAL *alias* BANSIDHAR AND OTHERS (DECREE-HOLDERS—RESPONDENTS)*

Limitation Act (IX of 1908), Article 182(7)—Decree payable in instalments—Decree-holder given power to execute decree for entire amount decreed on default in payment of any instalment—Default in payment of instalment—Execution application made only about instalments which fell due within three years of the application but more than three years after first default—Application for execution, whether within time.

Where a compromise decree directs payment of the decretal amount by instalments on particular dates and provides that in case the defendant fails to pay any instalment at the stipulated period then the entire decretal amount might be realized by execution, an application made more than three years after the first default but relating only to instalments which fell due within three years of the application is within time and is governed by Article 182, clause (7) of the Limitation Act. *Ram Prasad Ram v. Jadunandan Upadhia* (1), *Manindra Nath Roy v. Kanhai Ram Marwari* (2), *Brahm Kishun Narain Deo v. Harihar Munder* (3), *Kishan Chand v. Bhai Gopal Singh* (4), and *Koran, Musammatt v. Bhai Manak Singh* (5), relied on. *Raichand v. Dhondo Laxuman* (6), and *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* (7), dissented from.

*Execution of Decree Appeal No. 48 of 1933, against the order of Saiyid Abid Raza, Additional Subordinate Judge of Kheri, dated the 24th of July, 1933.

(1) (1931) A.L.J., 772.

(2) (1918) 4 P.L.J., 365.

(3) (1931) I.L.R., 11 Pat., 419.

(4) (1913) P.R., No. 6.

(5) (1933) A.L.R., Peshawar, 11.

(6) (1918) I.L.R., 42 Bom., 728.

(7) (1904) I.L.R., 31 Cal., 297.