

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

1936
March, 11

BHARATH RAM AND OTHERS (PLAINTIFF-APPELLANTS) *v.* BENI
DUTT AND OTHERS (DEFENDANTS-RESPONDENTS)*

*Civil Procedure Code (Act V of 1908), Order XXI, rule 62—
Objection by mortgagee to execution sale—Summary dis-
missal—Mortgagee not suing to enforce mortgage—Suit for
mortgage money, whether maintainable—Section 68(1)(d),
Transfer of Property Act (IV of 1882), applicability of, to a
case for possession of mortgaged property lost by mortgagee's
default.*

Where on the sale of mortgaged property in execution of a simple money decree an objection of a mortgagee in possession under order XXI, rule 62, C. P. C., is summarily dismissed and the mortgagee fails to bring a regular suit for enforcement of his mortgage, he cannot sue for recovery of his mortgage money under section 68(1) (d), Transfer of Property Act.

Section 68(1)(d), Transfer of Property Act, has no applica- tion to a case where the dispossession of mortgaged property is due to the mortgagee's default and no disturbance of posses- sion is made by the mortgagor.

Messrs. *Hyder Husain* and *P. N. Chaudhri*, for the appellants.

Mr. Hargovind Dayal, for the respondents.

SRIVASTAVA, J.:—This is a plaintiffs' appeal against an appellate decree of the learned Additional Subordi- nate Judge of Gonda upholding the decree of the Munsif of that place.

The facts of the case are that Sobhag Dat and Beni Dat were two brothers who owned a share in village Bansgaon. Sobhag Dat made a will of his half share to his wife's brother Udho Ram on the 21st of March, 1928. On the 11th of February, 1930, Udho Ram made a gift of the share which he had received from Sobhag Dat to Beni Dat. Thus Beni Dat became the exclusive owner of the entire share. On the 14th of May, 1930,

*Second Civil Appeal No. 232 of 1934, against the decree of Pandit Dwarka Prasad Shukla, Additional Subordinate Judge of Gonda, dated the 30th of April, 1934, upholding the decree of Babu Mahesh Chandra, Munsif, Gonda, dated the 24th of August, 1933.

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Beni Dat made a mortgage with possession of 4·10 acres out of his share in favour of Basdeo, father of the plaintiffs-appellants. Before the execution of this deed of mortgage one Ram Chhab, a creditor of Sobhag Dat, had obtained a simple money decree against Udho Ram and Musammat Amardei, the widow of Sobhag Dat, to be realised from the assets of the deceased Sobhag Dat. In execution of this money decree Ram Chhab put 2 acres odd out of the mortgaged property to sale. The plaintiffs made an objection under Order XXI, rule 62, but it was disallowed and the attached property was sold. The auction purchaser also obtained formal delivery of possession against the plaintiffs. Thereupon the plaintiffs brought the present suit for recovery of the mortgage money amounting to Rs.600 or in the alternative for having the security made good by their being given possession over other land in lieu of the land from which they had been dispossessed. Both the lower Courts have held that the appellants ought to have filed a regular suit to enforce their mortgage after the summary dismissal of their objection under Order XXI, rule 62 and having failed to do so they were not entitled to the relief claimed against the defendant-respondent Beni Dat.

The learned counsel for the plaintiffs-appellants has based his arguments on the provisions of section 68 of the Transfer of Property Act and on the covenant for quiet enjoyment contained in the mortgage deed. He has contended that there was no duty cast on the mortgagees to exhaust all possible remedies and that their objection under Order XXI, rule 62 having been dismissed and formal delivery of possession having been obtained by the auction purchaser, the plaintiffs were entitled to bring a suit for recovery of the mortgage money. Section 68(1)(d) of the Transfer of Property Act provides that the mortgagee has a right to sue for the mortgage money where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortga-

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gor or any person claiming under a title superior to that of the mortgagor. In the present case the mortgagor had admittedly put the mortgagee in possession of the mortgaged property and no disturbance of possession was made by him. Nor can it be said that the auction purchaser was claiming under a title superior to that of the mortgagor. I am also inclined to agree with the Courts below that the order disallowing the objection under Order XXI, rule 62 is manifestly incorrect. The decree obtained by Ram Chhab as already stated was realisable from the assets of Sobhag Dat. The property in suit could not be regarded as such assets. Section 68(1)(d) has no application to a case where the dispossession is due to the mortgagee's own default. It was pleaded in the lower Court that Ram Chhab was acting in collusion with the mortgagees. Whether this was so or not I have no doubt that if a suit had been instituted by the mortgagees after the summary dismissal of their objection they could have easily protected their possession against the claim of the auction purchaser. In these circumstances I am inclined to agree with the Courts below that the suit of the plaintiffs was not maintainable under section 68 of the Transfer of Property Act. As regards the covenant for quiet enjoyment contained in the mortgage deed exhibit 1 it does not, in my opinion, advance the plaintiffs' case any further. It seems to me that the covenant does no more than provide for the same protection as is given in section 68(1)(d) of the Transfer of Property Act. The words "any other person" used in the deed seem to refer only to persons who cause disturbance under a title and not to a person like the auction purchaser in the present case.

For the above reasons I am of opinion that the suit has been rightly dismissed. I accordingly dismiss the appeal with costs.

Appeal dismissed.