

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

BED NATH AND OTHERS (DEFENDANTS-APPELLANTS) v. RANI RAJESHWARI DEVI, PLAINTIFF, AND OTHERS, DEFENDANTS (RESPONDENTS)*

1937
April, 12

Mortgage—Redemption—Mortgagee entitled to take possession of mortgaged property if mortgage money not paid within certain period—Suit for possession by mortgagee in terms of mortgage—Redemption, if can be allowed in such suit—Necessity—Recital of necessity in deed, evidentiary value of—Hindu Law—Joint family—Alienation of joint family property by Hindu father—Enquiry of necessity by mortgagee—Lender's duty to see application of loan to meet necessity.

Where a mortgagee brings a suit for possession in pursuance of a condition in the mortgage-deed that if principal and interest are not paid off in a certain period the mortgagee can take possession of the mortgaged property, the mortgagor or persons claiming through him cannot claim to redeem in such suit. They may exercise their right of redemption in accordance with the terms of the deed in a separate suit. *Bhawani Din v. Satrohan Singh* (1), and *Hari Ram Shah v. Mahin Shah* (2), relied on. *Bakhtawar Singh v. Bakhtawar Singh* (3) and *Mohammad Sher Khan v. Seth Swami Dayal* (4), distinguished.

Recitals in mortgages or deeds of sale of the existence of necessity are admissible in evidence, but they are not evidence by themselves of the fact.

Where a mortgagee makes enquiries before advancing money and satisfies himself as to the existence of necessity he is not bound to see that the money advanced is actually applied to meet the necessity.

Mr. *Kedar Nath Tandon*, for the appellants.

Messrs. *Hyder Husain and H. H. Zaidi*, for the respondents.

THOMAS and ZIAUL HASAN, JJ.:—This is a defendants' appeal against the judgment and decree of the learned Civil Judge of Sitapur, dated the 10th of November, 1934, decreeing the plaintiff's claim.

*First Civil Appeal No. 27 of 1935, against the decree of Pandit Pradyumna Krishna Kaul, Civil Judge of Sitapur, dated the 10th of November, 1934.

(1) (1926) I.L.R., 2 Luck., 213.

(2) (1928) A.I.R., Lah., 668.

(3) (1925) 78 I.C., 232.

(4) (1922) L.R., 49 I.A., 60.

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It arises out of a suit brought by the plaintiff, Rani Rajeshwari Devi, for mortgagee possession on the basis of a mortgage-deed, dated the 19th of February, 1915, executed by Debi Sahai for Rs.1,000 carrying interest at 15 per cent. per annum compoundable with six-monthly rests. It was provided in the mortgage-deed that if the mortgage was not redeemed in 7 years the mortgagee would be put in possession of the mortgaged property for a period of ten years and during that period she would be entitled to appropriate the profits from the property in lieu of the principal amount advanced on the basis of the mortgage-deed and that the interest which would accrue would continue to carry further interest at the stipulated rate and would be paid at the time of redemption. It is alleged by the plaintiff that no payment has been made by the mortgagor either towards the principal or interest.

Debi Sahai the mortgagor died and his son, defendant No. 1, represents the interest of the deceased. Defendants 2 to 8 are subsequent transferees of the mortgaged property.

The present suit was instituted on the 14th of February, 1934.

The defendant No. 1 contested the suit on the grounds that the property mortgaged was the joint ancestral property of his father and himself and Debi Sahai could not alienate it except for legal necessity, that the mortgage debt was borrowed for illegal and immoral purposes and, therefore, he was not bound by it, that it could not be enforced against the family property and that the rate of interest stipulated in the deed was excessive and not justified under the circumstances of the case.

Defendants 2 to 4 did not put in an appearance and the case proceeded *ex parte* against them.

Ram Bharose, defendant No. 5, is the brother of the deceased mortgagor. On the 7th of May, 1921, he

took a mortgage of the same property which had previously been mortgaged to the present plaintiff and undertook to pay off the plaintiff's debt in suit. As he did not pay the plaintiff's debt he was impleaded as a subsequent transferee. His defence was that he still was a member of the joint family with Debi Sahai's son. He further relied on all the pleas raised by defendant No. 1.

Defendants 6 to 8 pleaded that Raja Sripal Singh, husband of Rani Rajeshwari Devi, plaintiff, assured their grandfather that the debt due from Debi Sahai had been paid off and, therefore, the plaintiff was estopped from enforcing her mortgage against the property which had been transferred to them.

The learned Civil Judge framed the following issues:

- (1) Is exhibit 2 genuine?
- (2) Was the alienation in question effected for paying off antecedent debts as alleged?
- (3) Was the money advanced by the plaintiff advanced for illegal and immoral purposes?
- (4) Is a suit for possession not maintainable under the terms of the deed after a lapse of 19 years from the date of the mortgage?
- (5) Is the plaintiff estopped from bringing this suit against defendants 6—8 for reasons alleged in paragraph 12 of their written statement?

His finding on issue No. 1 is that the mortgage-deed, exhibit 2, is genuine.

He considered issues 2 and 3 together and decided issue 2 in favour of the plaintiff and issue 3 against the defendants.

On issue 4 he held that the claim was within time and the suit for possession was maintainable.

On issue 5 the finding is against the defendants. He accordingly decreed the suit for mortgagee possession of the mortgaged property with costs and directed that the defendants may exercise their right of redemption in accordance with the terms of the deed, if they so choose by filing another suit.

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Bed Nath and Ram Bharose, defendants 1 and 5, have come up in appeal against the said decree and their learned counsel has raised the following four points:

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(1) that the mortgage deed was not executed for paying off the antecedent debts as alleged by the plaintiff,

(2) that the money was taken for illegal and immoral purposes,

(3) that the defendants should have been allowed redemption in this suit, and

(4) that the rate of interest was high.

With regard to the first contention, the definite case put up by the plaintiff is that the mortgage-deed, exhibit 2, was executed for payment of two antecedent debts due to Hari Prasad and Bhagwan Din and that she made enquiries about these debts through Kasim Ali Khan and when she was satisfied that the alleged necessity existed she advanced the money.

The defendants, on the other hand, have definitely pleaded that the debt was incurred for gambling, drinking and for payment to prostitutes.

It is stated in the mortgage-deed, exhibit 2, that it was executed for payment of the debt due to Bhagwan Din in respect of a simple bond, dated the 7th of July, 1913, executed by the mortgagor, Debi Sahai, for Rs.300 and for payment of another bond in favour of Hari Prasad for Rs.500 executed by the mortgagor on the 3rd of August, 1914.

It is thus clear that the deed itself recites the necessity for the loan. It stated that money was borrowed by Debi Sahai for payment of two antecedent debts. Recitals in mortgages or deeds of sale of the existence of necessity are admissible in evidence, but they are not evidence by themselves of the fact. To substantiate the allegation of the existence of necessity the plaintiff has adduced oral evidence.

The plaintiff is a *pardanashin* lady and the evidence of Kasim Ali Khan, P. W. 3, shows that he was deputed by her to make the necessary enquiries. He has stated that he settled the transaction with Debi Sahai on behalf of the plaintiff, that Debi Sahai represented to him that he wanted the money to pay off the debts to Hari Prasad and Bhagwan Din and that he (Kasim Ali Khan) made enquiries from Hari Prasad and Bhagwan Din about the existence of their debts and learnt that the money was due to them. His evidence shows that a representation was made by Debi Sahai and acted upon.

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We have carefully considered the evidence of this witness and the criticisms which were made by the learned counsel for the appellants, but we are not prepared to reject his evidence. Bhagwan Din contradicts Kasim Ali Khan on some points, but Kasim Ali Khan was directly concerned with this matter and is expected to remember the details much better than Bhagwan Din. The transaction is being challenged after twenty years, and it is hard to expect the witnesses to remember the details. The learned Judge has believed his evidence and we also believe him.

P. W. 2, Bhagwan Din states that Debi Sahai executed a bond for Rs.300 in his favour and that Kasim Ali Khan made enquiries from him about this bond.

In support of their allegation, the defendants have relied on the evidence of D. W. 5, Bachchu Lal, D. W. 6 Mata Din, and D. W. 8 Gallhu. These witnesses have tried to prove that out of 1,000 advanced to Debi Sahai, Rs.100 were spent on prostitutes; Rs.300 were paid to Gur Charan Lal for the plaintiff's husband on account of money borrowed on a previous occasion for gambling; Rs.400 were lost again in gambling at the house of the plaintiff's husband and Rs.150 were paid to certain wine dealers from whom liquor was purchased.

In our opinion these witnesses are false witnesses and the trial court was perfectly right in rejecting their evidence.

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The learned counsel for the appellants invited our attention to exhibit A19 which is a statement of Bhagwan Din witness in a criminal case in which he has stated that Debi Sahai was a drunkard. We are of opinion that that statement was not based on the personal knowledge of the witness. He has in cross-examination in this case stated that he "did not see Debi Sahai drinking wine with his own eyes".

It was further pointed out that Hari Prasad was not paid off and he actually had to file a suit, *vide* exhibits A8, A9 and A10, which are the plaint, judgment and decree in the case. It also appears that Bhagwan Din was not paid his debt and he had to file a suit to recover his money, *vide* exhibits A11 copy of plaint, A12, judgment and A13, decree. It was urged that Hari Prasad's debt was not payable and that there was no pressure on the estate.

We are of opinion that the mortgagee was not bound to see that the money advanced by her was actually applied to meet the necessity. She could not be expected to control and direct the actual application of the money.

We, therefore, in agreement with the trial court, hold that the mortgage-deed was executed to pay off the antecedent debts.

With regard to the second point that the money was taken for illegal and immoral purposes, we have already stated above that the evidence produced on behalf of the appellants is wholly unreliable and we agree with the finding of the trial court that the money was not borrowed for illegal and immoral purposes.

With regard to the third point, the contention of the learned counsel is that the defendants were willing to redeem the mortgage and they should have been allowed to do so. In support of their contention they have

relied on a decision of the late Court of the Judicial Commissioner of Oudh reported in *Bakhtawar Singh and others v. Bakhtawar Singh and others* (1). This case supports the contention of the appellants. In this case the mortgage-deed provided that the mortgage money would become payable at the expiry of ten years and that if it was not paid on the expiry of that period the mortgagees would be entitled to take possession of the mortgaged property for a period of twenty years. Default was made and the mortgagees brought a suit to recover possession of the mortgaged properties and it was held that the only decree which could properly be passed in the suit would be one allowing the mortgagor to redeem the property on payment of the sum due within a time to be fixed by the court and in default to direct that possession of the mortgaged property be delivered to the plaintiffs.

The learned Judges for their decision in this case relied on a decision of their Lordships of the Privy Council in the case of *Mohammad Sher Khan v. Raja Seth Swami Dayal* (2). At the bottom of page 233 the learned Judges remarked that "we therefore see no ground for postponing redemption and for relegating the mortgagors to a subsequent and separate suit for redemption. In our opinion the decision of their Lordships of the Privy Council in the case of *Mohammad Sher Khan v. Swami Dayal* (2) covers the present suit". With all due respect to the learned Judges who decided this case, we are unable to agree with their opinion. In our opinion the learned Judges overlooked the fact that in the Privy Council case there were two cross cases—one for redemption and the other for possession. Their Lordships of the Privy Council at page 63 state "thereupon suit No. 234 of 1913 was instituted by Raja Seth Swami Dayal, the mortgagee, for possession of the mortgaged property under the terms of the mortgage" and on the top of page 64 it

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(1) (1925) 78 I.C., 232.

(2) (1922) L.R., 49 I.A., 60.

1932 is stated that "on June 18, 1915, the mortgagor instituted suit No. 93 of 1915 for redemption . . ."

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In our opinion the correct law on the subject is laid down in the case of *Bhawani Din and others v. Satrohan Singh and another* (1), which is also based on the Privy Council case reported in *Mohammad Sher Khan v. Raja Seth Swami Dayal* (2) to which we have already referred. In this case it was held by Sir LOUIS STUART, C. J. and Justice RAZA that "a mortgagor should not, if no suit for redemption has been brought, be given a decree to redeem in a suit, where he is sued for possession which he has wrongfully refused to give to the mortgagee under terms of the mortgage-deed. To adopt the course of granting such a decree would be to go against the practice which has been recognized and understood in Oudh for more than 50 years and which should not, in the absence of very good reasons, be departed from, the departure doing considerably more harm than good."

The same view was taken in the case of *Hari Ram Shah and others v. Mahin Shah and others* (3) in which it was held that "where a mortgagee brings a suit for possession in pursuance of a condition in the mortgage deed, that if principal and interest are not paid off in a certain period the mortgagee can take possession of the mortgaged property, the mortgagor or persons claiming through him cannot claim to redeem in such suit". The case reported in *Bakhtawar Singh v. Bakhtawar Singh* (4) was considered and not followed.

We are, therefore, of opinion that the defendants cannot be allowed to redeem the mortgaged property in this case. They may exercise their right of redemption in accordance with the terms of the deed in a separate suit.

With regard to the fourth contention, the rate of interest in the bond, exhibit A20, in favour of Hari Prasad is Re.1-8 per cent. per mensem with six-monthly

(1) (1926) I.L.R., 2 Luck., 213.

(2) (1927) L.R., 49 I.A., 60.

(3) (1928) A.I.R., Lah., 668.

(4) (1925) A.I.R., Oudh, 235:
78 I.C., 232.

rests and in case of default the interest was to be added to the principal and interest and compound interest. The rate of interest in the bond, exhibit A21, in favour of Bhagwan Din was Rs.2 per cent. per mensem with six-monthly rests and in case of default the interest was to be added to the principal and interest and compound interest was to continue. The rate of interest in the mortgage-deed in dispute, that is exhibit 2, is Re.1-4 per cent. per mensem with six-monthly rests of 15 per cent. per annum which is lower than the rate of interest stipulated in the bonds of Hari Prasad and Bhagwan Din. Under the circumstances we are not prepared to interfere with the rate of interest. The appellants can seek their remedy under the United Provinces Agriculturists' Relief Act.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

AUDHESH SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) v. MUSA-SAMMAT SIRTAJI KUAR AND OTHERS (DEFENDANTS-RESPONDENTS)*

1937
April 13

Family arrangement, essential elements of—Arrangement neither bona fide nor final—Person vitally concerned in dispute not party to compromise—Settlement, if valid family arrangement—Registration, if necessary for family arrangement.

The essence of a family arrangement lies in an adjustment of conflicting claims *bona fide* made and recognized on both sides with the object of putting an end to a controversy. It is not, however, essential that all members of the family need be party to a family settlement.

Where an agreement is made between some of the disputants to share the spoils or the benefits of the litigation amongst themselves in specified shares in case any of them was successful against the principal disputant who claimed exclusive right

*Second Civil Appeal No. 176 of 1935, against the decree of Pandit Kishen Lal Kaul, Civil Judge of Sultanpur, dated the 23rd of February, 1935, upholding the decree of Babu Bishambhar Nath Chaudhri, Munsif of Amethi at Sultanpur, dated the 30th of May, 1934.

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