1936.

THAKUR SINGH v. RAMGULAM SINGH.

sold in execution of a debt due to an unsecured creditor, the plaintiff Director should not be allowed to enforce his security.

I would, therefore, allow both appeals and dismiss the plaintiff's suit with costs throughout.

COURTNEY TERRELL, C. J.

JAMES, J.—I agree.

Appeals allowed.

APPELLATE CIVIL.

1936.

September, 4, 7.

Before Khaja Mohamad Noor and Madan, JJ.

PHEKU MIAN

v.

SYED ALI.*

Transfer of Property Act, 1882 (Act IV of 1882), section 54—"equity of redemption", whether tangible property—sale, whether can be effected by delivery of possession—vendee already in possession—renunciation of all rights by vendor and mutation of vendee's name in record-of-rights, whether sufficient compliance with section 54.

The "equity of redemption" left in a mortgagor, after he gives his property in usufructuary mortgage, is a tangible property and the sale of such a property (the value of which is less than one hundred rupees) may be effected by delivery of possession under section 54 of the Transfer of Property Act, 1882.

Sohan Lal v. *Mohan Lal*(1), followed.

Sheikh Hushmat v. *Sheikh Jamir*(2), dissented from.

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*Appeal from Appellate Decree no. 325 of 1933, from a decision of Babu Dwarka Prasad, Additional Subordinate Judge of Darbhanga, dated the 14th of December, 1932, reversing a decision of Babu Anjani Kumar Saran, Munsif of Samastipur, dated the 15th of September, 1931.

(1) (1928) I.L.R. 50 All. 986, F.B.

(2) (1918) 23 Cal. W. N. 513.

When the vended property is already in possession of the vendee, a renunciation by the vendor of all his rights therein and mutation of the vendee's name in the record-of-rights, made at the instance of the vendor, are sufficient compliance with the provisions of section 54 of the Act.

Santokhi Misser v. *Siro Jha*(1), *M. K. Sheikh Dawood, Saheb* v. *Moideen Batcha Saheb*(2), *Kula Chandra Ghosh* v. *Jogendra Chandra Ghosh*(3), followed.

Sohan Lal v. *Mohan Lal*(4), not followed *quoad hoc*.

Appeals by the plaintiff.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

Janak Kishore, for the appellant.

S. K. Mitter, for the respondents.

KHAJA MOHAMAD NOOR, J.—This appeal arises out of a suit to redeem two usufructuary mortgages, one dated the 29th of September, 1893, for 1 bigha 10 kathas 16 dhurs for Rs. 30 and another dated the 6th of December, 1897, for 10 kathas 15 dhurs for Rs. 15. The mortgage was created by the plaintiff's father Nabi Mian in favour of the ancestor of the defendants. The suit was resisted on the ground that in 1898 Nabi Mian, during the course of the settlement operations, the record of which was finally published on the 25th of May, 1899, orally sold his rights in the lands for Rs. 90 and got the names of the defendants recorded as full owners thereof in the record. The learned Munsif decreed redemption, but on appeal the learned Subordinate Judge has dismissed the suit holding that the case of the defendants about the oral sale was true. The plaintiff has preferred this second appeal.

(1) (1934) A. I. R. (Pat.) 301.
(2) (1925) A. I. R. (Mad.) 566.
(3) (1932) I. L. R. 60 Cal. 384.
(4) (1928) I. L. R. 50. All. 986, F. B.

1936.

PHEKU MIAN v. SYED ALI.

KHAJA MOHAMAD NOOR, J.

Three points have been urged before us: (1) that after the two usufructuary mortgages the right which was left in Nabi Mian the mortgagor (which is commonly called the equity of redemption) could not be orally transferred as it was an intangible property for which a registered deed was necessary under section 54 of the Transfer of Property Act; (2) that even if this right of the mortgagor be held to be a tangible immoveable property the oral sale was ineffective inasmuch as such a sale of a property of value of less than Rs. 100 could only be made by delivery of possession, but as the properties were already in possession of the mortgagee, it was impossible for the mortgagor to put the vendees in possession of them; and (3) that the finding of the learned Subordinate Judge was based on no evidence.

Taking up the first point, namely, whether the right left in a mortgagor after he gives his property in usufructuary mortgage is an intangible or a tangible property, the learned Advocate has referred us to a decision of the Calcutta High Court in the case of *Sheikh Hushmat* v. *Sheikh Jamir*(1) where it was held that the sale of equity of redemption which was an intangible thing could under section 54 of the Transfer of Property Act be effected only by a registered document. The conveyance was, therefore, inadmissible to prove the sale and to show when and how the mortgage was satisfied. On the other hand, there is a decision of a Full Bench of the Allahabad High Court in the case of *Sohan Lal* v. *Mohan Lal*(2) where Mukerji and Kendall, JJ. (Sulaiman, A.C.J. dissenting) held that the sale by a mortgagor of his interest in the property which he has given in usufructuary mortgage is the sale of a tangible immoveable property. Now the term "equity of redemption" is a remnant of the old doctrine of English law where the mortgagor after having mortgaged his property

(1) (1918) 23 Cal. W. N. 513.
(2) (1928) I. L. R. 50 All. 986, F.B.

lost all legal rights therein and the only right which was left to him was the equitable right of redemption which he could enforce only in equity courts. This distinction of legal and equitable rights was never recognised by the Indian Legislature where the right of both the mortgagor and the mortgagee in a mortgaged property is a legal right determined by the statute. Strictly speaking in India the term " equity of redemption " is misapplied to the right of the mortgagor. Under the Indian law mortgage is a transfer of an interest in an immoveable property and not a transfer of the property itself. There is some interest still left in the mortgagor and that interest is in the tangible property. Mukerji, J. in the Full Bench decision of the Allahabad High Court has referred to a passage in Salmond (13th Edition, 1924, page 209) which is this:

" It (ownership) may.....continue to subsist although stripped of almost every attribute which makes it valuable....."

The learned Judge while discussing how the term " equity of redemption " came to be used in England and what is the position in this country says:

" In the case of a mortgage in England, as pointed out by that erudite jurist, Holland, the mortgagee, from the date of the mortgage, becomes the ' legal ' owner of the property and nothing is left in the mortgagor except what has been called ' a bare equity of redemption '. The Indian Legislature has intentionally refused to import the expression ' equity of redemption ', and for ample good reasons. It had, however, to use the expression ' right to redeem ' (*see* section 60 of the Transfer of Property Act). But the expression has been used in an entirely different sense. A ' right to redeem ' is not the same thing as ' an equity of redemption ' in England. In India a host of people, besides the mortgagor himself, are allowed to exercise the right of redemption (*see* section 91 of

1936.

PHEKU MIAN v. SYED ALI.

KHAJA MOHAMAD NOOR, J.

the Transfer of Property Act). One of these persons is a judgment-creditor of the mortgagor. Certainly, the interest of a judgment-creditor of the mortgagor and the interest of the mortgagor himself in the property mortgaged are not identical. It would, therefore, be very wrong to substitute the expression 'right to redeem' for the English expression of 'equity of redemption', and then to say that the 'right to redeem' possessed by a mortgagor is an intangible property".

The same view seems to have been taken by the Madras High Court in the case of *M. K. Sheikh Dawood Saheb* v. *Moideen Batcha Saheb*(1) where though the question of the nature of the right of a mortgagor was not directly decided, it was held that where a usufructuary mortgagee in possession of property purchases the property, a direction by the vendor to keep the property as absolute owner amounts to delivery of possession. The position has changed even in England since the passing of the Law of Property Act, 1925. The mortgagee no longer holds a legal estate in the mortgaged property. The mortgagor is the owner at law. On the whole I am inclined to agree with the view taken by the majority of the Judges of the Full Bench of the Allahabad High Court which seems to be more in consonance with the conception of the rights of a mortgagor and a mortgagee according to the Indian law. Therefore, in my opinion, the right of a mortgagor in the property which he has given in usufructuary mortgage is a legal right in a tangible immoveable property.

The next point urged was that assuming that it was a tangible property, even then the sale of it would not be effected by means of delivery of possession. In this connection it is sufficient to say that the decision of the Madras High Court which I have

(1) (1925) A. I. R. (Mad.) 566.

just referred to clearly lays down that a delivery of possession when the property is in possession of the vendee can be made by the vendor making a declaration that henceforward whatever right he had has been transferred to the vendee. The same view was taken by James, J. in this Court in the case of *Santokhi Misser* v. *Siro Jha*(1). The learned Judge held that where the vendee of a property sold is already in possession of the property, mutation of the vendee's name in the records is sufficient to constitute delivery of possession so as to satisfy section 54 of the Transfer of Property Act. A contrary view was taken by the Full Bench of the Allahabad High Court. But the observations are obiter dicta as the case was decided on the basis of adverse possession on account of the document being unregistered. I am inclined to follow the Madras High Court and the decision of James, J. in this Court. In *Kula Chandra Ghosh* v. *Jogendra Chandra Ghosh*(2) Mukerji, J., after referring to a number of decisions, held that a change of character of possession by appropriate and deliberate act was sufficient compliance with section 54 of the Transfer of Property Act. I am, therefore, of opinion that in this case renouncing his rights by Nabi Mian and getting the name of the defendants recorded in the record-of-rights was sufficient compliance with the provisions of section 54 of the Transfer of Property Act.

The third point urged was that there was no evidence to hold that in fact there was such a delivery of possession by Nabi Mian. The evidence, however, is very clear and it is to the effect that when Nabi Mian was asked by the defendants to execute a formal deed he said that it was not necessary to do so as he would get the names of the defendants recorded in the record-of-rights. The evidence goes further and shows that at an earlier stage of the preparation of

(1) (1934) A. I. R. (Pat.) 301.
(2) (1932) I. L. R. 60 Cal. 384.

1936.

PHEKU MIAN v. SYED ALI.

KHAJA MOHAMAD NOOR, J.

the record-of-rights Nabi Mian was recorded as the owner of the holding but that at his express request the Settlement authorities recorded the names of the defendants as raiyats. It is true that the learned Subordinate Judge was not prepared to accept this oral evidence had it not been for the fact that the record-of-rights showed the defendants to be the raiyats of the holding and not only the mortgagees. Apart from the general question which has been raised the record-of-rights must be presumed to be correct and when the record-of-rights which was prepared so far back as 1899 records the defendants as raiyats, in my opinion the learned Subordinate Judge was right in dismissing the plaintiff's suit.

In view of what I have held it is not necessary to consider the other point raised that the mortgagee can never acquire a title in the mortgaged property by adverse possession. On the finding of the learned Subordinate Judge no question of adverse possession arises. The defendants have acquired good title to the land. It was, however, held in the Madras case above referred to that the principle that possession can be adverse only to the person competent to sue does not apply where the change in character of possession is by mutual consent. The Full Bench decision of the Allahabad High Court also proceeded on the same basis.

On the whole the appeal fails and I would dismiss it with costs.

MADAN, J.—I agree.

Appeal dismissed.