

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Rowland, JJ.

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February,
14, 17.

v.

SAGARMAL.*

Limitation Act, 1908 (Act IX of 1908), Article 47—suit by person who acquires title before an order under section 145 of the Code of Criminal Procedure, if barred under Article 47—Bengal Tenancy Act, 1885 (Act VIII of 1885), section 171—owner of half of the holding, if entitled to redeem the statutory mortgage under section 171 on payment of his share—Transfer of Property Act, 1882 (Act IV of 1882), section 60.

Article 47 of the Limitation Act prescribes three years' period of limitation for suit "by any person bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1898, or by any person claiming under such person, to recover the property comprised in such order".

Held, therefore, that the plaintiff who claimed to be a purchaser in execution of a decree on the basis of a simple mortgage of a date prior to the passing of the order under section 145 was not a person bound by the order.

Held also that the words "claiming under such person" referred to those persons who claim from the person bound by the order under a title created subsequent to the order and not those who claim under a title created prior to the order.

Bapu bin Mahadaji v. Mahadaji Vasudeo(1), distinguished.

Amu Dada v. Dhondo Raghunath(2), followed.

Section 171 of the Bengal Tenancy Act only provides that the payment of money to save a holding or tenure from sale will create a mortgage by operation of the law in favour of the person who pays it. But the right and liabilities of

* Appeal from Appellate Decree no. 1520 of 1932, from a decision of Ram Chandra Chaudhry, Esq., District Judge of Monghyr, dated the 3rd August, 1932, confirming a decision of Babu Krishna Sahay, Subordinate Judge of Monghyr, dated the 31st March, 1931.

(1) (1893) I. L. R. 18 Bom. 348, 354.

(2) (1904) 6 Bom. L. R. 305.

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the mortgagor and mortgagee will have to be governed by the law which applies to mortgagors in general.

Held, that by operation of section 60 of the Transfer of Property Act the mortgagee having purchased half of the holding the mortgage security had been split up and the plaintiff was entitled to redeem on payment of his quota only.

Appeal by the defendant.

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

P. C. Manuk and Phulan Prasad Varma, for the appellant.

P. R. Das (with him *K. Husnain* and *K. N. Lal*), for the respondents.

KHAJA MOHAMAD NOOR, J.—The suit out of which this appeal has arisen was instituted by the plaintiff respondents for recovery of one-half share in about fifty bighas of land comprised in khata no. 419 of village Murar. In the settlement record of 1904 this khata was recorded in the name of two tenants, Sri Lal and Devi Prasad. Sri Lal is represented by the defendants third party and Devi Prasad and his son are the defendants second party. The plaintiffs are the purchasers of half of this khata in execution of their mortgage decree, dated the 14th March, 1925, based upon a mortgage executed by Devi Prasad on the 10th February, 1920. The sale took place on the 13th November, 1926, and a writ of delivery of possession was formally served on the 9th August, 1927. But the plaintiffs were not allowed to take possession of the land by the defendants first party who claimed to have purchased on the 27th August, 1920, the entire land of the khata in execution of their own mortgage decree based upon a mortgage executed by Sri Lal alone on the 28th July, 1911. A preliminary decree for sale in favour of the defendants first party was passed on the 9th November, 1919, and made final on the 27th August, 1920. The plaintiffs have, therefore, instituted the present suit for recovery of possession on the basis of their title,

It is clear from what I have stated that the main controversy between the parties was whether the earlier purchase of the entire holding by the defendants first party should prevail against the later purchase of half of the holding by the plaintiffs. The question depended upon the fact whether Sri Lal who mortgaged the entire holding to the defendants first party was entitled to do so, or whether in fact half of it belonged to Devi Prasad who mortgaged it to the plaintiffs. Now in the suit instituted by the defendants first party to enforce their mortgage Devi Prasad was impleaded as defendant and it was alleged by the defendants first party, plaintiffs of that suit, that Devi Prasad had attested the mortgage which Sri Lal executed in their favour. The question whether Devi Prasad had any interest in the mortgaged property or whether the whole of it belonged to Sri Lal was left undecided at the time of the passing of the preliminary decree, but the suit was dismissed against Devi Prasad. It was after the dismissal of the suit against him that Devi Prasad created the mortgage in favour of the plaintiffs. The date of the dismissal of the suit was the 9th November, 1918, and the date of the mortgage as already stated was the 10th February, 1920.

On the main issue of fact both the courts below have held that Devi Prasad was the owner of half of the holding and that Sri Lal was not entitled to mortgage the whole of it to the defendants first party. It, however, transpired in the course of the trial of the suit that the defendants first party after their mortgage and before the institution of their suit to enforce it had to pay up a decree for rent against the holding, and by virtue of section 171 of the Bengal Tenancy Act (now Bihar Tenancy Act) had acquired another mortgage on the entire holding in respect of the money so paid for the satisfaction of the rent decree and that in fact they had included this amount of Rs. 280-3-0 in their mortgage suit. The courts below decreed the plaintiffs' suit for possession subject

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to the payment of half of the money paid by the defendants first party for saving the holding from sale together with interest at 12 per cent per annum from the date of the payment. The defendants first party have preferred this second appeal.

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The finding of fact about the title to half of the land being in Devi Prasad and therefore in the plaintiffs by virtue of their purchase in execution of their decree on the basis of the mortgage created by Devi Prasad has not been and cannot be questioned in second appeal. Mr. Manuk, however, has urged two points in support of the appeal. One is that the suit was barred by limitation under Article 47 of the Limitation Act, and the second that the mortgage of the defendants first party by virtue of section 171 of the Bengal Tenancy Act was indivisible and the courts below were wrong in ordering the payment of half of the money only. It was also mildly contended that by virtue of the sale in execution of the mortgage decree, which included the claim of the money paid towards the satisfaction of the rent decree, the right of redemption of Devi Prasad or his transferee, if any, had become barred.

In order to understand the point of limitation urged by learned Counsel it is necessary to state some more facts. After the defendants first party had purchased the property in execution of their mortgage decree there was some difficulty about the possession of the land and in a proceeding under section 145 of the Code of Criminal Procedure to which Devi Prasad, the mortgagor of the plaintiffs, was a party, the criminal court decided the question of possession in favour of the defendants first party on the 13th June, 1922. The present suit having been instituted on the 8th June, 1928, it was contended that it was barred by the special article of limitation already referred to. This plea of limitation was overruled by the courts below and in my opinion they are perfectly correct. Article 47 of the

Limitation Act prescribes three years' period of limitation for suits

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" by any person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898, or the Mamlatdars' Courts Act, 1906, or by anyone claiming under such person, to recover the property comprised in such order."

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It is obvious that the present plaintiffs were not parties to that criminal proceeding and in fact they could not have been parties to it which was instituted at a time when they had no higher right than that of a simple mortgagee and as such were not entitled to claim possession of the property. In a proceeding under section 145 the only question which a Magistrate has to decide is the possession of the disputed property on a certain date. The question of title is outside the scope of that proceeding. At that time the only person who claimed possession adversely to the defendants first party was Devi Prasad, and not the plaintiffs who were only simple mortgagees. Therefore, they are not bound by the order which was passed in that proceeding.

The next question is whether they can be taken to be claiming under Devi Prasad who was obviously bound by that order. In my opinion the words "claiming under such person" mentioned in the article refer to those persons who claim from the person bound by the order under a title created subsequent to the order and not those who claim under a title created prior to the order. Any other interpretation will lead to anomalous results. It is obvious that the plaintiffs were not entitled to institute any suit for recovery of possession of the property within three years of the order. As I have said, the order was passed on the 13th June, 1922, and the plaintiffs purchased the property in November, 1926, and the formal delivery of possession was issued in August, 1927. In my opinion, the plaintiffs are not debarred from instituting the suit for recovery of possession as their right in the property as mortgagees came into existence on the date of their mortgage and before

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the order. They cannot be said to be the persons claiming through Devi Prasad who was bound by that order. The learned Counsel for the appellants referred us to a decision in *Bapu bin Mahadaji v. Mahadaji Vasudeo*(1) where the observations are to be found at page 354. That was a case under the Mamlatdars' Courts Act, but the distinction between that case and the present one is obvious. There the plaintiff derived his title subsequent to the order from a man who was bound by the order. On the other hand, there is a clear decision of the same High Court in *Amu Dada v. Dhondo Raghunath*(2) where the facts were exactly similar and it was held that article 47 was not applicable.

The next point urged was in respect of the order of the courts below about the payment of only half of the money deposited by the defendants first party for the protection of the holding. No doubt, it is true that a mortgage is indivisible and is spread over the entire mortgaged property, but there are certain exceptions to this rule and one of these exceptions is mentioned in section 60 of the Transfer of Property Act. When a mortgagee acquires a portion of the mortgagor's interest in the mortgaged property those who are interested in the remaining portion of it are entitled to claim redemption by payment of their quota only, the principle being that to the extent the interest of the mortgagor and the mortgagee is combined in one person the mortgage must be taken to have become extinguished. Learned Counsel contended that in this case the mortgage being based not upon any contract but under the statute the provisions of section 60 of the Transfer of Property Act do not apply. Section 171 of the Bengal Tenancy Act only provides that the payment of money to save a holding or tenure from sale will create a mortgage by the

(1) (1898) I. L. R. 18 Bom. 348, 354.

(2) (1904) 6 Bom. L. R. 305.

operation of the law in favour of the man who pays it. But the rights and liabilities of the mortgagor and the mortgagees will have to be governed by the law which applies to mortgages in general and in my opinion under the circumstances of the case the plaintiffs were entitled to redemption on payment of only half of the money paid by the defendants first party. It is true that the present suit was instituted as a suit for recovery of possession pure and simple and was not a suit for redemption, but there is nothing in law which prevents a court from ordering possession on redemption if in the course of the trial it is found that the defendant is entitled to remain in possession of the property as a mortgagee till the mortgage is redeemed. Under these circumstances the courts are entitled to grant a decree for possession subject to the plaintiffs redeeming the property by payment of the mortgage money. Several cases have been referred to by learned Counsel, but none of them, in my opinion, is to the point. Under a clear provision of section 60 of the Transfer of Property Act itself the mortgage has become split up by the defendants first party purchasing half of the holding and the plaintiffs are entitled to the decree in the form in which it has been given to them by the courts below. I have said that it was mildly urged by learned Counsel that the sale having taken place by virtue of a statutory mortgage on the whole of the property the right of redemption has become barred. The obvious answer to this contention is that in the mortgage suit of the defendants first party Devi Prasad, who had the right to redeem, was exonerated and the suit was dismissed as against him. His right of redemption was not lost, and the plaintiffs are entitled to redeem.

These were the only points urged in the appeal, and none of them has any merits. I will dismiss this appeal with costs.

ROWLAND, J.—I agree.

Appeal dismissed.

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