

accordance with the terms of the notification 34 I. B., dated the 14th of January, 1937, and therefore legal. I would therefore discharge the rule.

AGARWALA, J.—I agree.

Rule discharged.

S. A. K.

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PATNAIK
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KING-
EMPEROR.
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APPELLATE CIVIL.

Before Harries, C. J. and Agarwala, J.

FEKUA MAHTO

v.

BABU LAL SAHU.*

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November,
17.

Mortgage—mortgagee under an obligation to pay rent—default by mortgagee resulting in rent decree—property sold in execution to third party—subsequent purchase by mortgagee—absence of fraud—equity of redemption, whether extinguished.

Where a property subject to a mortgage is sold in execution of a rent decree and at some period later purchased by the mortgagee, whose failure to pay rent had resulted in the rent decree, such purchase by the mortgagee does not, in the absence of fraud, revive the equity of redemption which is extinguished by the sale.

Gauri Shanker Sahu v. Sheotahal Gir(1), followed.

Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan(2), *Deonandan Prashad v. Janki Singh*(3) and *Jaikaran Singh v. Sheo Kumar Singh*(4), distinguished.

* Appeal from appellate decree no. 155 of 1937, from a decision of Rai Sahib Bhuvaneshwar Prasad Pande, Judicial Commissioner of Chota Nagpur, dated the 30th September, 1936, reversing a decision of Babu Baidyanath Das, Special Subordinate Judge of Ranchi, dated the 23rd January, 1936.

(1) (1936) A. I. R. (Pat.) 434.

(2) (1866) 10 Moo. Ind. App. 540.

(3) (1916) I. L. R. 44 Cal. 573, P. C.

(4) (1927) I. L. R. 50 All. 36.

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Appeals by the plaintiffs.

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The facts of the case material to this report are set out in the judgment of Harries, C.J.

B. C. De and *K. K. Banarji*, for the appellants.

Ray Guru Saran Prasad (with him *N. K. Prasad II*, *L. K. Chaudhuri* and *Ray Paras Nath*), for the respondents.

HARRIES, C. J.—This is a plaintiffs' second appeal against a decree of the lower appellate Court dismissing their suit for redemption.

The facts which gave rise to this litigation are somewhat complicated and it is necessary to set them out in some detail. In the year 1886 the ancestors of plaintiffs nos. 1 and 3 and defendants nos. 8 to 10 mortgaged their tenure in village Haratu to one Musammat Sundar Kuer. In 1892 the mortgagors sold their rights to Braj Lal who paid up the money due on the mortgage and thus redeemed it. Later Braj Lal mortgaged the property to Nawal Kishore.

In the year 1898 the ancestors of plaintiffs nos. 1 and 3 and defendants nos. 8 to 10 again mortgaged the same village to defendants nos. 1 to 7 and by the terms of this mortgage the latter who were given possession were bound to pay the rent due in respect of the tenure and were made liable in damages for any loss occasioned by their default. After this mortgage litigation ensued between Nawal Kishore, who was the mortgagee under Braj Lal's mortgage and defendants nos. 1 to 7 and others and eventually Nawal Kishore actually obtained a decree for possession of this village. However, he never executed the decree and never obtained possession of the village. Defendants nos. 1 to 7 appear to have been heavily engaged in this litigation and fell in arrear with their rent. On the 18th of July, 1904, an eight-annas share in this village was sold to Ram Sewak Sahu in execution of a rent decree which the owners

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of the village had obtained. On the 12th of November, 1904, the remaining eight-annas-share in this village was sold to A. T. Peppee in execution of another rent decree obtained by other owners. Therefore, by the end of 1904 the whole of this village had been sold in execution of rent decrees to Ram Sewak Sahu and A. T. Peppee. These two purchasers entered into possession of the property and remained in such possession until the year 1919. On the 22nd of May, 1919, defendants nos. 1 to 3 purchased eight-annas share held by Ram Sewak Sahu and on the 10th of August, 1919, they purchased the other eight-annas share held by A. T. Peppee. By the end of 1919, therefore, defendants nos. 1 to 3 who were the mortgagees under the mortgage executed in the year 1898 had become the owners of the sixteen annas in this village. On the 9th of February, 1933, the original mortgagors, namely, plaintiffs nos. 1 to 3 and defendants nos. 8 to 10, sold twelve-annas of their alleged mortgagor rights to plaintiffs nos. 4 and 5. The plaintiffs contended that they still held the equity of redemption in this mortgage and brought the present suit claiming redemption.

The principal defence was that the equity of redemption had been extinguished in the year 1904 when the whole of this village had been sold in execution of the two rent decrees. It was argued that once the equity of redemption had been extinguished it could not be revived thereafter by reason of any purchase of the property by the original mortgagees.

The trial Court held that the mortgagors' rights had not been extinguished and accordingly decreed the suit; but on appeal the learned District Judge held that the mortgagors' rights were extinguished by the sale in execution of the rent decrees in 1904 and, therefore, the plaintiffs had no right whatsoever to redeem the property.

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There can be no question that the defendants who were the mortgagees under the mortgage created in 1898, were bound to pay the rent due in respect of the tenure. This they failed to do and accordingly rent decrees were obtained and the whole village was sold under these two decrees. The trial Court appears to have held that the failure to pay rent was deliberate and intentional, and I am far from clear as to what the learned Subordinate Judge meant by the use of these words. The plaintiffs had attempted to show that the mortgagees had deliberately refrained from paying rent in order that the property should be sold in execution of rent decrees and purchased by their benamidars. It was hotly contended that one of the purchasers in these sales, namely, Sahu, was a benamidar for the mortgagee defendants; but the trial Court held as a fact that Sahu's purchase was a bona fide one. It was not suggested that A. T. Peppee's purchase was as benamidar for the defendants.

Though the trial Court found that the purchases were not made by benamidars, yet it came to the conclusion that these sales were fraudulent and accordingly held that the mortgagors' interest was not extinguished by them. The learned District Judge on appeal came to the conclusion that it had not been established that the defendants were guilty of any fraud. All that was established was that the mortgagees had failed to pay the rent and that the village had in consequence been put up for sale in execution of rent decrees obtained by the owners. All, therefore, that can be alleged against the mortgagees is that they failed to pay the rent due in respect of the tenure, and there is no finding whatsoever that such failure was due to collusion or fraud or anything of that nature.

It is conceded that where a sale takes place in execution of a rent decree a mortgagor's interest is in ordinary cases extinguished and the property is

sold and purchased free from all encumbrances. It is, however, contended on behalf of the appellants that where a property is sold in execution of a rent decree and at some period later purchased by the mortgagees whose failure led to the rent decrees, such purchase by the mortgagees revives the equity of redemption and thereafter the mortgagors have a right to redeem.

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Reliance is placed on two decisions of their Lordships of the Privy Council. The first case relied upon is *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*⁽¹⁾. That was a case of gross and deliberate fraud. An arrangement had been arrived at between the mortgagees and third persons that the mortgagees should allow the rent to fall into arrears so that rent decrees should be obtained and the property be put up for sale. It was further arranged that the property should be purchased and that it should come back to the mortgagees. Their Lordships of the Privy Council point out that the mortgagees in that case were guilty of a gross fraud and to allow them to hold the property free from the equity of redemption would be to allow them to gain an advantage from their own fraud. The whole decision proceeds upon the basis that mortgagees cannot gain an advantage from their own fraud and, therefore, where mortgagees in such cases have allowed rent to fall into arrear and the property to be sold in execution of rent decrees, such sale will not extinguish the equity of redemption as against the mortgagee if he subsequently acquires the property. In short, their Lordships of the Privy Council held that where fraud, such as I have indicated, exists, the sale must be treated as a private sale and not a public sale. In other words, a sale under a rent decree brought about by the fraud of the mortgagees cannot be held to defeat the rights of the mortgagors as against the mortgagees.

(1) (1866) 10 Moo. Ind. App. 540.

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A later case is *Deo Nandan Prashad v. Janki Singh*⁽¹⁾. In that case the mortgagee allowed rent to fall into arrear and a sale had taken place in execution of a rent decree. The property eventually came into the hands of the mortgagee, and their Lordships of the Privy Council held that the mortgagors had a right to redeem. In that case their Lordships came to the conclusion that the mortgagee concerned who was a minor was not himself guilty of fraud, but, on the other hand, they held that his agents had engineered the whole transaction to enable the minor mortgagee to obtain the whole interest in the property. In short, it was found that the agents of the mortgagee were guilty of fraud and, that being so, the mortgagee himself could not benefit by the fraud of his agents. The only substantial difference between this case and the earlier case of *Nawab Sidhi Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*⁽²⁾ is that in this later case the mortgagee himself was not guilty of fraud but only his agents. In my view the basis for the decision of both these cases is the fraud practised by the mortgagees or their agents. Their Lordships of the Privy Council were simply applying the well-known principle that no person should be permitted to benefit from his own fraud. These cases have no application whatsoever to cases where fraud on the part of the mortgagee has not been established.

A more recent case relied upon by the appellants is the case of *Jaikaran Singh v. Sheo Kumar Singh*⁽³⁾. In that case a mortgagee of a fixed rate holding, who was under a covenant to pay the rent of the holding to the zamindar, made default in such payment, in consequence of which the holding was sold, and it was purchased by the mortgagee himself. It was held that the mortgagee could not by his own wrongful act deprive the mortgagor of his rights, and the mortgagor's equity of redemption still subsisted. It has

(1) (1916) I. L. R. 44 Cal. 573, P. C.

(2) (1866) 10 Moo. Ind. App. 540.

(3) (1927) I. L. R. 50 All. 36.

been argued that no fraud was established in this case and it is contended that this case is an authority for the proposition that a mere breach of contract will have the same result as fraud. It is to be observed that the learned Judges who decided the Allahabad case purported to follow the case of *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*(¹) to which I have already referred. That, as I have pointed out, was a case of fraud. Further it is clear that the learned Judges regarded the particular case before them as a case of fraud. It was a case where the mortgagee had failed to pay the rent and had then bought the property when it was put up for sale in execution of a rent decree. At page 40 the learned Judges after discussing various cases observed:—

“ It seems to us that these cases lay down a sound principle of law which prevents a fraud being practised on innocent parties. If property is sold owing to the wrongful act and default of the mortgagee himself, he cannot be allowed to claim it on the ground of his own wrong, for no cause of action can arise out of the wrong.”

It appears to me that the learned Judges held in that case that the facts disclosed fraud on the part of the mortgagee and accordingly they held that the mortgagor's rights as against the mortgagee had not been extinguished by the execution sale.

The point before us has been considered by a Bench of this Court in the case of *Gauri Shanker Sahu v. Sheotahal Gir*(²). In that case a tenant mortgaged his property with possession. The mortgagee in possession made default in payment of rent in consequence of which the holding was brought to sale by the landlord in execution of the rent decree and purchased upon such sale by the landlord himself. Later the property came into the hands of the original mortgagee. Thereupon the mortgagor instituted a suit for

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redemption claiming that his right to redeem the property had revived when the property came into the hands of the original mortgagees. A Bench of this Court, however, held that the rent sale which had not been set aside, had extinguished the mortgagor's equity of redemption as the rent sale had not been proved to be fraudulent. In this case the learned Judges discussed the case of *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*(¹) and stressed the point that in that case fraud was practised and accordingly distinguished that case from the case before them. In the case before the Court nothing had been proved beyond the fact that the mortgagees had defaulted in the payment of the rent and the learned Judges refused to hold that the mortgagee was guilty of fraud merely on the ground that he had failed to pay his rent. As no fraud had been proved, the Bench held that the equity of redemption was for ever extinguished by the sale in execution of the rent decree and did not revive when the mortgagee eventually obtained the property. If the equity of redemption is extinguished, I cannot see how it can possibly revive. If there is a fraudulent sale, the most that can be said is that the mortgagor's rights are suspended and revive when the property comes into the hands of the fraudulent mortgagees. In my view the facts of the present case cannot be distinguished from the facts of the case, *Gauri Shanker Sahu v. Sheotahal Gir*(²), and that case must be followed.

The result, therefore, is that the plaintiff-mortgagors have failed to show that they have a right to redeem and accordingly I would dismiss this appeal with costs. The costs will be payable to the defendants first party.

AGARWALA, J.—I agree.

Appeal dismissed.

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(1) (1866) 10 Moo. Ind. App. 540.

(2) (1936) A. I. R. (Pat.) 434.