

APPELLATE CIVIL

Before Mr. Justice Harrison and Mr. Justice Zafar Ali.

JHUMAN AND OTHERS (PLAINTIFFS)

Appellants,

versus

DULIA AND OTHERS (DEFENDANTS)

Respondents.

1923

May 5.

Civil Appeal No. 1744 of 1920.

Mortgage—mortgagee alleging the existence of a claim of conditional sale and taking proceedings under Regulation XVII of 1806, and later obtaining a decree for possession as owner—Extinguishment of mortgage by the decree, although the mortgage was not really one by way of conditional sale—Transfer of Property Act, IV of 1882, only applicable in the Punjab when principles are involved.

In 1882 the mortgagees took action under Regulation XVII of 1806, alleging that the deed contained a clause of conditional sale and a notice was duly issued and the year of grace expired on the 13th of May 1883. As a matter of fact the mortgage contained no such clause and the words used therein did not create a mortgage by way of conditional sale. In the same year the mortgagees brought a suit for possession as owners and were given a decree "*baihat*", in accordance with which they were formally put in possession as owners by the Tahsildar. The mortgagor now sues for redemption and it is contended that as the proceedings under the Regulation were irregular and as the words used in the final decree were not those contained in Order XXXIV of the Code of Civil Procedure and the Transfer of Property Act, the mortgage was still alive and the mortgagor has still a right to redeem.

Held, that in order to take advantage in the Punjab of the provisions of the Transfer of Property Act it is necessary to show that a principle has been transgressed as opposed to the non-observance of prescribed formalities. It was clearly the practice at the time the suit by the mortgagees was instituted to bring such a suit for possession as an owner and the decree passed was quite clear. In accordance with that decree the mortgagees became owners. The mortgage was therefore extinguished and no rights survive in the mortgagor.

1923

JHUMAN

v.

DULIA.

Alimea Chowdhuri v. Roshun Ali (1), *Somesh v. Ram Krishna* (2), *Narayana Reddi v. Papayya* (3) and *Salig Ram v. Muradan* (4), distinguished.

Bhag Singh v. Basawa Singh (5), referred to.

Second appeal from the decree of Rai Bahadur Lala Sri Bam, Poplai, Additional Judge, Rohtak, at Hissar, dated the 5th May 1920, reversing that of Muhammad Fida Ullah, Subordinate Judge, 2nd Class, Rohtak, dated the 14th October 1919, and dismissing the plaintiffs' suit.

MANOHAR LAL, for Appellants.

C. L. GULATI, for Respondents.

The judgment of the Court was delivered by.—

HARRISON J.—The facts of this case are that in the year 1878 the land in suit was mortgaged to the predecessors-in-title of the defendants by the father of the plaintiff. The mortgage was without possession, but in 1879 the mortgagees were put in possession by the Judicial Assistant Commissioner. In 1882 the mortgagees took action under Regulation XVII of 1803 alleging that the deed contained a clause of conditional sale, and a notice was duly issued and the year of grace expired on the 13th of May 1883. As a matter of fact the mortgage contained no such clause and it is established by *Bhag Singh v. Basawa Singh* (5) that the words used therein did not create a mortgage by way of conditional sale. In the same year the mortgagees brought a suit for possession and were given a decree 'baibat' in accordance with which they were formally put in possession as owners by the Tahsildar. It is now contended that inasmuch as the proceedings under the Regulation were irregular and the form of the final decree was not that prescribed in Order XXXIV, rule 3 of the present Code of Civil Procedure and in the Transfer of Property Act the mortgage is still alive and the mortgagor has a right to redeem, which he can now enforce. Counsel has quoted ample authority for his contention, more especially *Alimea Chowdhuri v. Roshun Ali* (1), *Somesh v. Ram Krishna* (2), *Narayana Reddi v.*

(1) (1905) 3 Cal. L. J. 533.

(2) (1900) I. L. R. 27 Cal. 705.

(3) (1898) I. L. R. 22 Mad. 133.

(4) (1903) I. L. R. 25 All. 231.

(5) 50 P. R. 1906.

Papayya (1) and *Salig Ram v. Muradan* (2) and it is clear that had the suit been brought where the Transfer of Property Act was in force at the time of its institution the decree obtained would not debar the mortgagor from pursuing his remedy and redeeming the property. In the Punjab, however, the position is quite different. The principles of the Transfer of Property Act certainly apply but in order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to the non-observance of prescribed formalities. It was clearly the practice at the time the suit in question was instituted to bring such a suit for possession as owner. It is true that the judgment speaks of a decree for possession being given in lieu of the sum due on the mortgage deed but the decree itself which is very brief merely states that a decree 'baibat' is given. These words mean a decree for possession as owner. The fact that the clause of conditional sale was not really present is immaterial for the decree was quite clear and in accordance therewith the mortgagees became owners and were put in possession, as such, and have been in possession ever since, and cannot now be disturbed. The mortgage was extinguished and no rights survive in the mortgagor.

The appeal is dismissed with costs.

A. N. C.

Appeal dismissed.

(1) (1898) I.L.R. 22 Mad. 133.

(2) (1903) I.L.R. 25 All. 231.