

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

BEPIN BEHARY SHAHA

v.

MOKUNDA LAL GHOSH.*

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Nov. 18.

Transfer of Property Act (IV of 1882) s. 93—Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of.

A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under section 93 of the Transfer of Property Act.

APPEAL by the plaintiff (opposite party), Bepin Behary Shaha.

A decree was passed by the Subordinate Judge of Suri in a contested suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as also to redeem certain prior encumbrances, on the 31st May 1906, allowing the plaintiff to redeem the prior mortgages within six months from the date of the decree. The defendants, who were the prior mortgagees, appealed against the said decree, and the appeal was dismissed. On the 16th April 1907, the plaintiff deposited the money due under the prior mortgages. On the 14th May 1907 the Court recorded the following order:—

“The plaintiff has deposited the money due to the 1st and 2nd mortgagees as directed in the decree. He now prays that the mortgaged properties be sold free of the prior charges for recovery of the money due to the plaintiff on account of his own mortgage money together with the amounts deposited by him to redeem the prior charges. The pleader of the other parties has declined to appear. I accordingly order that the prior charges of defendants 2, 3 and 4 be hereby declared redeemed and that the mortgaged properties be free of the said mortgages as prayed for.”

The plaintiff then applied to make the decree absolute and a notice was issued upon the defendants to shew cause on the 12th July 1907, why the decree should not be made absolute.

* Appeal from Appellate Order No. 70 of 1908, against the order of K. N. Roy, District Judge of Beerbhoom, dated Nov. 25, 1907, reversing the order of Umesh-Chandra Sen, Subordinate Judge of Beerbhoom, dated July 27, 1907.

In the meantime, on the 14th June 1907 the defendants Nos. 3 and 4 applied for reconsideration of the order of the 14th May 1907. The plaintiff opposed the application on the grounds that the order for redemption having been once passed could not be set aside on this petition and that he was entitled to deposit the decretal amount within six months from the date of the final decree, that is, the date of the decree of the Appellate Court. The learned Subordinate Judge gave effect to these objections and rejected the petition for reconsideration by the defendants on the 27th July 1907. Against this order the defendants (objectors) appealed to the learned District Judge, who set aside the decision of the Court of first instance.

The plaintiff (opposite party) then preferred this appeal to the High Court.

Babu Nil Madhab Bose (*Babu Hari Bhusan Mookerjee*, with him) for the appellant. The question is, whether a person can redeem a mortgage after the period of grace allowed by the law, and before an order absolute is made. I submit he can. In the present case the Court accepted the money with notice to the opposite party. Section 93 of the Transfer of Property Act clearly shows that the plaintiff's right to redeem exists until such right is extinguished by an order absolute. The cases of *Nandram v. Babaji* (1), *Sitaram v. Madholal* (2), *Somesh v. Ram Krishna Chowdhry* (3), *Poresh Nath Mojumdar v. Ram Jodu Mojumdar* (4) and *Vedapuratti v. Vallabha Valiya Raja* (5) support my contention. The Court has ample jurisdiction to extend the time, and in this case did so.

Babu Nalini Ranjan Chatterjee, for the respondent. The case of *Vedapuratti v. Vallabha Valiya Raja* (5) lays down, where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mort-

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(1) (1897) I. L. R. 22 Bom. 771.

(3) (1900) I. L. R. 27 Calc. 705.

(2) (1901) I. L. R. 24 All 44.

(4) (1889) I. L. R. 16 Calc. 246.

(5) (1901) I. L. R. 25 Mad. 300.

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gage. If a second suit for redemption is barred, the question still remains whether even after the time allowed to redeem, the mortgagee can redeem. I submit he cannot. The Calcutta cases cited by the other side are all cases in foreclosure suits. In a suit for foreclosure time can be enlarged; but in a suit for redemption it cannot be done—see *Novosielaski v. Wakefield* (1). It can only be done, if the application is made before the expiration of time granted to redeem. In the present case no such application was made. In the case of *Ramlal v. Tulsa Kuar* (2) it has been held that in a case of decree for redemption of foreclosure no extension of the time limited by the decree for payment of the decretal amount can be made except for good cause shown; and that case dissents from the case of *Poresh Nath Mojumdar v. Ram Jodu Mojumdar* (3). Section 93 of the Transfer of Property Act says that the Court may postpone the date fixed for payment, upon good cause shown. It clearly shows that it can only be done before the expiration of the time. It is not a case governed by the Transfer of Property Act. The rights of the parties must be decided by the decree made in the suit. The present case is covered by the case of *Faijuddi Sardar v. Asimuddi Biswas* (4), in which it has been held that a party has no right to deposit money after expiry of the time allowed. If the proposition of law laid down in that case is not accepted, the present case should be referred to the Full Bench.

Babu Nil Madhab Bose, in reply.

Cur. adv. vult.

CASPERSZ AND COXE JJ. This appeal arises out of a composite suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as, also, to redeem certain prior encumbrances. The suit was decreed and the plaintiff was directed to deposit the amount due with respect to the prior encumbrances within six months, and it was ordered

(1) (1811) 17 Ves. 417.

(3) (1889) I. L. R. 16 Calc. 246.

(2) (1896) I. L. R. 19 All. 180.

(4) (1907) 11 C. W. N. 679.

that, if he did not do so, he should not be able to redeem. The decree was dated the 31st May 1906. An appeal was lodged by the defendants or some of them, but it was dismissed on some date, which does not appear on the papers and on the 16th April 1907, the plaintiff deposited the money, and asked that the property covered by the mortgage might be sold free of encumbrances, the prior mortgages having been redeemed by the deposit of the money due upon them. The pleader of one of the prior encumbrancers (not the present appellant) was sent for, but declined to appear, and the application was granted on the 14th May 1907.

Thereafter the plaintiff applied to have the decree made absolute. This application was contested by the prior encumbrancers, though it can hardly have had any reference to them, inasmuch as the only relief in the nature of an "order absolute" that can be given to the plaintiff in a suit for redemption is that he "shall, if necessary, be put in possession of the mortgaged property." Here, this was not necessary and the only order that could be made absolute was the order for sale, to which, if their encumbrances had been redeemed by the order of the 14th May 1907, they could not object. They, however, also asked that the order for sale and redemption should be set aside. The Subordinate Judge refused both prayers, made the decree absolute, and confirmed the order for sale and redemption. The learned District Judge set aside these orders. The plaintiff appeals, and it is urged that, in the circumstances we have stated, the orders of the First Court were wrongly set aside by the District Judge.

It appears that the defendant No. 3, respondent, purchased the property in execution of a first mortgagee's decree upon his mortgage. He has a further claim on the property, inasmuch as he also redeemed the mortgage of a second mortgagee, the plaintiff being the third mortgagee. The question is, whether the defendant No. 3 being a purchaser in execution of the decree on a prior mortgage and in possession of the property, section 93 of the Transfer of Property Act, 1882, has any application to his case. It is also urged on his behalf that, if the section

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does apply, still the fact that the plaintiff did not deposit the redemption money within six months precludes him from obtaining any benefit now from the decree for redemption.

Section 93 does not, of course, in its literal terms, apply to a case like the present, where there is no prior mortgage still in existence, but the encumbrancer is a purchaser in possession. But we think that the principles laid down in the section ought certainly to be followed in dealing with a case of this nature. It is well settled that, when a mortgagee sues on his mortgage, and, in disregard of section 85, does not make a subsequent mortgagee a party, that mortgagee is entitled to redeem the property in the hands of a purchaser in execution. There is no reason why such a purchaser should be in a better position with respect to redemption than the mortgagee under whose decree he has purchased. There are no other sections in the Transfer of Property Act dealing with redemption, except sections 91-95. In these circumstances, we are of opinion, that we should be guided by those sections in dealing with the case, whether it is covered by their precise terms or not.

Turning now to the question whether a plaintiff, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under the section, or as it is usually expressed, before the decree is made absolute, we find considerable diversity of judicial opinion. The sections, however, seem to us to indicate the intentions of the Legislature with reasonable clearness.

Section 92 requires the decree to lay down that, if the plaintiff pays within a fixed time, the defendant shall retransfer the property to him, and, if he does not pay, he shall be debarred from redeeming (unless the mortgage is simple or usufructuary), or else the property shall be sold (unless the mortgage is by conditional sale). The words in brackets show that the section does not literally apply to the present case. But, applying it as nearly as we can, we think that the position of the defendant No. 3, who is in possession of the property under an obligation to retransfer it, if the money is paid

on a fixed date, is far more analogous to that of a mortgagee by conditional sale, than to that of the holder of any other form of mortgage described in the Transfer of Property Act. The decree framed gave effect to this position, inasmuch as it directed that, if the plaintiff did not deposit the money by the fixed date, he should be debarred from redeeming.

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Section 93 lays down what is to happen in the two contingencies of the money being paid and not being paid. In the latter, the defendant is permitted, in the case of a mortgage by conditional sale, to apply for an order that the plaintiff be debarred from redeeming. And the section goes on to prescribe that "on the passing of any order under this section the plaintiff's right to redeem shall be extinguished." It appears to us that this expression clearly indicates that the right to redeem continues till the order has been passed. If this were not so, it is impossible to understand for what reason a mortgagee, other than one whose mortgage was simple or usufructuary, should be specifically allowed to apply for an order to debar the plaintiff from redeeming. If the plaintiff cannot redeem after the fixed period, unless the mortgagee himself takes some action, as has been argued by the learned pleader for the respondents, it is evident that his right is altogether gone. The mortgagee is not likely to take any action, when he is already in possession of the property, in order to enable the plaintiff to exercise his right of redemption. To quote the words of the learned Chief Justice in *Vedapuratti v. Varilabha Valiya Raja* (1). "On the construction of sections 92 and 93 of the Transfer of Property Act it is perfectly clear that the equity of redemption remains unenclosed, and the relation of mortgagor and mortgagee continues, until the order absolute, which is contemplated by section 93, is made * * * * *. If the right to redeem is only extinguished when an order is made under section 93, it follows that the right is a subsisting right until the order is made." It appears to us that the Legislature intended that the defendant, if he seeks to have the plain-

(1) (1901) I. L. R. 25 Mad. 300.

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tiff's rights finally extinguished, should apply for an order to that effect, and that, if he does not do so, the right should remain in existence.

These views derive considerable support from the Madras case already cited, and from two cases decided in Bombay and Calcutta, respectively. The Bombay case of *Nandram v. Babaji* (1) was cited with approval in Madras (2) and is clear authority for the proposition that a mortgagor can apply for extension of the time for redemption after the period of grace has elapsed, but before a final order has been made under section 93. If that view is correct, it would seem, that if a deposit is accepted by the Court before the final order, but after the date fixed for payment, it becomes an effectual deposit. It makes little or no practical difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time. It is the acceptance of the deposit that is the really important matter, and, if the Court accepts a deposit after the due time has elapsed, it must be assumed, in the absence of anything to the contrary, that the Court is satisfied that there has been good cause for the delay. *In the present case it is reasonable to suppose that the Court thought it natural that the plaintiff should have hesitated to pay in a large sum of money, while the fate of his decree was still uncertain, owing to the appeal lodged by the other side. The Court sent for the pleader of the principal defendant and made the order after he had declined to come. All the probabilities point to the fact that the Court saw fit to condone the plaintiff's delay, and that being so, we think that the deposit must be regarded as being in time and upon application made to extend the original period fixed for payment.

The decision of this Court, to which we have referred, considered section 87 rather than the effect of section 93, but it is clearly applicable in principle:—see *Poresh Nath Mojumdar v. Ramjodu Mojumdar* (3), where the learned Judges

(1) (1897) I. L. R. 22 Bom. 771. (2) (1902) I. L. R. 25 Mad. 300;
 (3) (1889) I. L. R. 16 Calc. 246, 249.

remark :—“ It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi* and the mortgagor can at any time, until the order absolute is made, redeem his property.”

Reference may also be made to *Debi Prasad v. Jai Karan Singh* (1), in which the earlier case of *Ram Lall v. Tulsu Kuar* (2), which is to some extent in favour of the respondents, was not followed.

The learned pleader for the respondents relies principally on two cases, namely, *Vallabha Valiya Raja v. Vedapuratti* (3) and *Faijuddy Sardar v. Asimuddi Biswas* (4). But the authority of the first of these cases has been much weakened by the case reported in the 25th volume, already quoted, and in the words of the learned Chief Justice, in the latter case “ can not be put higher than that the learned Judges dealt with the case before them upon the assumption that a second suit would lie and that * * * * the mortgagee * * * * is not without a remedy.”

Finally all that was decided in *Faijuddi Sardar v. Asimuddi Biswas* (4) was that the period of grace runs from the date of the original decree and not from that of the appellate decree. The point whether the plaintiff could redeem after the fixed date was not raised, nor does it appear certain whether or not any final order had been made on the application of the defendant.

In these circumstances, we think that the decision of the District Judge must be set aside and that of the Subordinate Judge restored. The appeal is accordingly allowed with all costs.

Appeal allowed.

(1) (1902) I. L. R. 24 All. 479.

(3) (1895) I. L. R. 19 Mad. 40.

(2) (1896) I. L. R. 19 All. 180.

(4) (1907) 11 C. W. N. 679.