

Kaliprosonno Ghose and anr. Vs. Kamini Soonduri Chowdhrair

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Court : Kolkata

Decided On : Jul-20-1878

Reported in : (1879)ILR4Cal475

Judge : Richard Garth, C.J. and ;Mcdonell, J.

Appellant : Kaliprosonno Ghose and anr.

Respondent : Kamini Soonduri Chowdhrair

Judgement :

Richard Garth, C.J.

1. We consider that the view which the lower Court has taken of these cases is not altogether correct.

2. In the first place, the Subordinate Judge was wrong in supposing that, by taking an assignment of the mortgages bond fide in the name of a trustee, the plaintiff could not prevent the merger of the mortgagor's and mortgagee's interests, and consequently the extinguishment of the mortgage debt. The assignment was taken in the trustee's name expressly for the purpose of preventing the merger, and keeping alive the two estates; and there is ample authority that this object may properly and legally be carried out by means of an assignment of this nature--see *Watts v. Symes* (1 De. and G., M. and S., 240), and *Adams v. Angell* (L.R., 5 Ch. Div., 634).

3. The real objection to these suits, in an equitable point of view, appears to us to be this--that the plaintiff, who is the beneficial owner of Alampur, subject to the mortgages, and as such, liable, conjointly with the owners of the other mortgaged properties, to pay his proportion of the entire mortgage debts, has attempted to foreclose Alampur and the other properties comprised in the first mortgage, for a part only of the mortgage debts (that part which was due under the first mortgage), and has then sued the defendant personally for the remainder, to the payment of which he himself, as the owner of Alampur, is bound to contribute. We have great doubt whether, under such circumstances, he had any right to foreclose at all under the first mortgage. Grish Chunder, the original mortgagee, had, by accepting the second conditional sale of the properties, consented to charge them with an additional mortgage debt, and having done so, it appears to us that it would have been inequitable on his part to foreclose the property under the first mortgage and so deprive the defendant of that which both parties had agreed to look to as the primary means of satisfying the sum due upon the second mortgage.

4. But even assuming, for the sake of argument, that the plaintiff could thus have foreclosed under the first mortgage, it is clear that he had no right (being himself the

beneficial owner of Alampur, and as such, liable to contribute proportionately to the payment of both mortgages) to foreclose the first mortgage in order to satisfy the debt due under that, and then to sue the defendant personally for the debt due upon the second mortgage, as though that debt were not a charge upon the mortgaged property at all, and he himself were not liable for his proportion of it.

5. Even assuming that he could have foreclosed the first mortgage, which we much doubt, we are clearly of opinion that he had no right to bring the second suit, and that the bringing of that suit had the effect (by analogy to the English rule of Equity in such cases), &c.;, of re-opening the foreclosure or preventing the foreclosure proceedings being confirmed or sanctioned by this Court, and of enabling us to make a decree, which will at once secure to the plaintiff his just rights, and, at the same time, oblige him to do equity as regards the defendant--see 2 Fisher on Mortgages, pp. 1054 to 1059, and cases there cited.

6. We think, therefore, that under the circumstances the proper decree in both suits will be:

First.--That the first suit be dismissed, except as regards Alampur, and that the plaintiff's right to Alampur be decreed, the plaintiff Kaliprosonno and the defendant being subjected to the following conditions.

Second.--That as between the plaintiff Kaliprosonno and the defendant, the properties mortgaged by both deeds (except Chupra), be valued by the lower Court.

Third.--That the debt secured by the first mortgage be borne by the plaintiff Kaliprosonno and the defendant in the proportion of the aggregate values of the properties Katiara, Atghura, and Danapur to the value of Alampur.

Fourth.--That the debt secured by the second mortgage be borne by the plaintiff Kaliprosonno and the defendant in the proportion of the aggregate values of all the properties mortgaged by that deed (except Chupra) to the value of Alampur.

Fifth.--That the defendant be at liberty to redeem all the properties, except Alampur, upon repaying the proportion of the mortgage debts and interest due from her, corresponding with the proportionate value of the other mortgaged properties to Alampur, until fresh proceedings for foreclosure or for sale of the mortgaged properties (except Alampur) shall have been taken in due course by the plaintiff.

Sixth.--That, until the mortgaged debts and interest shall be fully satisfied, the said mortgaged properties in the hands of the defendant shall be considered as charged with the proportion of the mortgage debts, which she is hereby declared liable to pay.

Seventh.--That each of the parties do bear and pay his and her own costs of the first of these suits, and that the costs of the second suit in both Courts be paid by the plaintiff Kaliprosonno.