

Srinath Das and ors. Vs. Shurnomoyee Dasi and anr.

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Court : Kolkata

Decided On : Nov-18-1885

Reported in : (1885)ILR12Cal614

Judge : Pigot and; O'Kinealy, JJ.

Appellant : Srinath Das and ors.

Respondent : Shurnomoyee Dasi and anr.

Judgement :

Pigot, J.

1. The first portion of the judgment is not material for the purposes of this report.
2. The principal ground discussed before us, and upon which we have also come to the conclusion that this appeal must be allowed, is upon the question of limitation.
3. The parties to the mortgage of the 17th November 1865 were Hindus. The mortgage was a mortgage in English form, giving a power of sale and entry, and the due date was 17th February 1866.
4. So far as the form of the mortgage is concerned, it is clear that a mortgage in English form between Hindus of lands in the mofussil, outside Calcutta, is always treated by the Courts as a mortgage by conditional sale.
5. In the case of *Khelat Chunder Ghose v. Tara Charan Coondoo Chowdhry* 6 W.R. 270 Sir Baenes Peacock said in regard to the rights of the parties under a deed of this kind: 'The mortgagee was entitled to possession before foreclosure immediately default was made, and he would hold possession subject to his own right to foreclose and the mortgagor's right to redeem. His right to sue for possession did not depend upon his obtaining a decree for foreclosure. The defendant might have been sued for possession immediately default was made.'
6. And in the suit of *Srimati Sarashibala Dabi v. Hand Lal Sen* 5 B.L.R. 389 it was decided that no suit would lie by the mortgagee as purchaser after breach of the condition, for possession of property on a mortgage in the English form, unless foreclosure proceedings had been taken under Regulation XVII of 1806.
7. This case shows that under an English deed of mortgage, the mortgagee had no better right than he would have under an ordinary mortgage by conditional sale, except that a mortgagee with a power of entry on default could sue for possession of property without foreclosure.

8. Now the next point we come to is, what were the rights of a mortgagee in Bengal, holding a mortgage by conditional sale? This has been the subject of discussion before their Lordships of the Judicial Committee in the case of *Thumbusammy Moodelly v. Hossain Rowthen* I.L.R. 1 Mad. 1. In that case their Lordships decided that before the passing of Regulation XVII of 1806, one of the essential characteristics of a mortgage by conditional sale was that on the breach of the condition of repayment, the contract executed itself, and the transaction was closed, and became one of absolute sale without any further act of the parties or accountability between them. They also held that this was the law in force in Bengal, until Regulation XVII of 1806 made provisions for redemption and foreclosure by the procedure in that Regulation. The effect of that enactment was this, that it put a stop to the mortgage contract executing itself until the year of grace prescribed by Section 7 of that Regulation had passed. But after the year had passed, the contract, as before, executed itself, and the mortgagee was entitled to have possession given him.

9. There is a wide, distinction between the rights existing under a mortgage by conditional sale in the mofussil under the Regulations and those enforced by suit on the Original Side of the High Court in Calcutta. In the Supreme Court, a mortgagee might bring a suit for foreclosure, but no such suit was known outside Calcutta. There the foreclosure proceedings took place before the Judge as a ministerial officer, and at the end of the year of grace the mortgagee sued, not for foreclosure but for possession of the property as owner. This Regulation XVII of 1806 was repealed by the Transfer of Property Act, which came into force in 1882; and the only conclusion which can be arrived at is that up to the passing of the Transfer of Property Act at least, no present holder of an English mortgage in the mofussil could sue for foreclosure properly so called: but must foreclose in the manner prescribed by Regulation XVII of 1806. In the case of *Khelat Chunder Ghose v. Tara Charan Coondoo Chowdry* 6 W.R. 270 to which we have already referred, it was held by this Court that under an English deed of mortgage a suit to recover possession of land under the mortgage deed was barred, unless brought within twelve years from the date of default. That case was taken on appeal before the Privy Council, and the decision was confirmed. But their Lordships seem to think that the judgment of this Court had laid down a wider rule than was absolutely necessary, and were inclined to hold that if the mortgagor was allowed to hold by permission of the mortgagee after default, a suit might be brought more than twelve years from that date. They said 14 Moore's I.A. 150: 'No such question, however, arises in the present case, for it is impossible to hold that the defendant, the purchaser, was holding, or supposed that he was holding, by the permission of the mortgagee; and when both things concur--possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old--it is impossible to say that such a possession is not protected by the law of limitation.' This was followed in the case of *Dinonath Ganguli v. Nursing Prosad Dass* 14 B.L.R. 87 and there it was decided that a mortgagee's cause of action arose when default was made in payment of the mortgage debt, and that no new cause of action arose by reason of the foreclosure proceedings after the expiry of the year of grace, and that such a suit was barred as against an action-purchaser within twelve years from the due date.

10. The other branch of this case may be illustrated by the case of *Mankee Koer v. Sheikh Munnoo* 14 B.L.R. 315. In that case it was decided that where the mortgagor was shown to have paid interest after the date of default, it was held that his possession being thus shown to have been permissive, might be sued more than twelve years after the date of default.

11. From these decisions it would appear that under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default, and was barred unless it could be shown (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after the date of default.

12. In Act IX of 1871, Article 135, it was declared that a suit instituted by a mortgagee for possession of immoveable property mortgaged must be brought within twelve years from the time when the mortgagee was first entitled to possession. And in the case of *Lal Mohun Gangopadhya v. Prossunno Chunder Bannerjee* 24 W.R. 433 it was decided that whether the possession of the mortgagor was permissive or adverse, was immaterial, and that the mortgagee having failed to bring his suit within twelve years from the date of default lost his remedy.

13. This seems to have been the received opinion, with one exception, namely, the exception referred to in *Ghinaram Dobey v. Ram Monaruth Ram Dobey* 7 C.L.R. 580 and in *Burmamoyee Dasi v. Dinobundhoo Ghose* I.L.R. 6 Cal. 564 : 7 C.L.R. 583 in which it was held that if the mortgagee could complete the foreclosure proceedings in a District Court within twelve years from the date of default, he thus became absolute owner of the property, and the foreclosure proceedings gave him a new period of limitation.

14. A distinction between the decision in this case and the other cases already referred to has been pointed out in *Modun Mohun Chowdry v. Ashad Ally Bepari* I.L.R. 10 Cal. 68 : 13 C.L.R. 53.

15. After the repeal of Act IX of 1871 the present law, Act XV of 1877, was enacted. In it a new clause is inserted, namely, Clause 147, by which a suit by a mortgagee for foreclosure or sale, can be brought within sixty years from the time when the money secured by the mortgage becomes due. But as we have already said, no suit for foreclosure could ever be brought in the mofussil. This was prohibited by the nature of the agreement and by the terms, to which we shall refer later on, of Regulation XVII of 1806. Under the contract a mortgagee was originally the absolute owner from the date of default. But by Regulation XVII of 1806 it was a condition precedent to his becoming an absolute owner, that foreclosure proceedings should be taken in the District Judge's office.

16. When this has been done, a mortgagee having become absolute owner by virtue of the contract sues, not for foreclosure, but for possession as owner of the property. It appears, therefore, impossible to hold that Clause 147 of the Limitation Act would apply to any mortgage by conditional sale executed between Hindus, and in respect of properties situated in the mofussil. If that be so, the law of limitation for a conditional sale would be that given in Clause 135, corresponding to Clause 132, of Act IX of 1871, namely, twelve years from the time when the mortgagor's right to possession determines. In this case, the mortgagor's right to possession determined on the date of default, namely, February 1866, and the suit for possession would be barred on the 17th February 1878. Does it make any difference under Act IX of 1871 what the possession was? The suit is barred against the mortgagor himself or anybody else. See *Lal Mohun Gangopadhya v. Prossunno Chunder Banerjee* 24 W.R. 433 and *Modun Mohun Chowdry v. Ashad Ally Bepari* I.L.R. 10 Cal. 68 : 13 C.L.R. 53.

17. As regards the defendant *Shurnomoyee Dasi*, her purchase from the mortgagor

must have been before the 12th September 1866, because on that day she received a pottah from the Collector of 24-Pergunnahs as owner of the property in dispute. So that as against her the suit is barred on that separate ground.

18. We think it well to refer to one argument, which led the Subordinate Judge to hold that, after the passing of the Civil Procedure Code, suits for foreclosure would lie in the mofussil of this Presidency, as distinguished from Regulation foreclosure proceedings, which of course are not, as above observed, suits in any sense of the word.

19. He held that Section 16 of the Civil Procedure Code must be taken to have that effect. It is no doubt not applicable to the Chartered High Courts, and cannot be explained by reference to their procedure.

20. We think that section had not the effect of creating, for the mofussil of Bengal, a new form of suit, wholly inconsistent with the express provisions of the Regulation of 1806, which in their terms, in Section 8, expressly exclude any other mode of relief than that provided by them. The Regulation was not repealed by the Code, expressly, and we cannot hold that from the terms of Section 16 of the Civil Procedure Code (and only because that section does not apply to the High Court) it was by implication affected. That clause may well be explained upon the supposition that it was intended to apply in other parts of India, where no such law as that of the Regulation of 1806 existed. No doubt the real origin of it, in the form it now bears, was that, when it was framed, it was intended that the Transfer of Property Act should be passed during the same session as the new Code--an intention which was not, however, carried out.

21. We are happy to think that in this case the statute of limitation operates without harshness, and for the benevolent end for which it is framed. It is certain that several of the defendants, and probably that all of them, are, or represent, bond fide purchasers. It is to save the long possession of such persons that the statute is in part intended; and so far as we can judge from this singular record, no hardship is done in the case.

22. The ground of limitation is one common to all the defendants' except No. 1, and under Section 544, the decree of the Subordinate Judge, which ought to have been in favour of all those defendants, is, as to all of them, save No. 1 reversed.

23. Appeal allowed; suit dismissed with costs throughout.