

## BASMATI DEVI

v,

## CHAMROO SAO AND ORS.

1964

April 3

[K. SUBBA RAO, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.]

*Mortgage—Execution of mortgage bonds—Liability to pay rent to both mortgagor and mortgagees—Mortgaged lands sold for default of payment of rent—Purchase by mortgagees—If the right to redeem exists—If the principle of s. 90 Trusts Act applies—Trusts Act, s. 90.*

The plaintiff brought a suit for redemption of a large number of usufructuary mortgages in favour of the defendants. The case of the plaintiff was that under the terms of the mortgage bonds the mortgagees were liable to pay rent to the land lord. The mortgagees, however, defaulted in the payment of rent for some years. A suit for arrears of rent was brought by the land lord and a decree obtained. In execution of the decree the lands were sold. According to the plaintiff, the purchasers of the mortgaged lands were only benamidars of defendants 1 and 2 and other mortgagees. The plaintiff claimed that the right of redemption was not affected by the Court sale because the purchase was for the benefit of the plaintiff. The suit was contested by defendants 1 and 2 only. Their case was that the right of redemption had been extinguished by the court sale; that the purchasers were not the benamidars of the defendants. The Trial Court dismissed the suit. On appeal, the Additional District Judge set aside the judgment of the Trial Court and passed a preliminary decree for redemption.

Against this decree the two defendants appealed to the High Court. The appeal was heard by the Division Bench.

The High Court held that in the present case s. 90 of the Trusts Act did not apply because the court sale took place due to the default of the mortgagor as well as the mortgagees. In this view the High Court set aside the decree of the first Appellate Court and restored the decree of the trial court.

*Held:* The fact that the mortgagor had made a default, does not alter the position that the mortgagee had also defaulted in paying the rent he was liable to pay. By his default he has contributed to the position that a suit had to be brought for arrears of rent and ultimately to the position that the property was put to sale in execution of the decree obtained in the suit. This contribution to the bringing about of the sale was a direct result of his position as a mortgagee. When therefore he purchased the property himself at the sale in execution of the rent decree he clearly gained an advantage by availing himself of his position as a mortgagee. This is the position of law even if the mortgagee's liability was to pay less than the major portion of the rent of the holdings. In this view s. 90 of the Trusts Act applies to the facts of this case.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 241 of 1961. Appeal from the judgment and decree dated March 4, 1958, of the Patna High Court in Appeal from Appellate Decree No. 1335 of 1952.

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*R.S. Sinha and R.C. Prasad*, for the appellants.

*Sarjoo Prasad and B. P. Jha*, for the respondents nos. 1 and 2.

April 3, 1964. The judgment of the Court was delivered by

DAS GUPTA, J.—This appeal arises out of a suit for redemption of a large number of usufructuary mortgages in favour of the defendants. The plaintiff who owned 1.67 acres of lands which were recorded in Khata 56 and 10.56 acres in Khata 57 in village Sarifabad gave 1.27 acres out of Khata 56 and 8.24 acres out of Khata 57 lands in mortgage to the several defendants by separate mortgage bonds. Part of the remaining land was sold by him and the rest settled by him with the first defendant on Batai terms.

The plaintiff's case is that under the terms of the mortgage bonds the mortgagees were liable to pay rent to the landlord. The mortgagees however defaulted in the payment of rent for some years. A suit for the arrears of rent was brought by the landlord and a decree obtained. In execution of the decree the lands were sold. The purchasers were one Besolal and Mst. Kirti Kuer, who according to the plaintiff, were only benamidars of defendants 1 and 2 and other mortgagees. It is his case that this purchase enured for the benefit of the mortgagor, that is, the plaintiff, and so the right of redemption of the mortgagees has not been affected. The prayers were for a declaration that the purchase was for the benefit of the plaintiff and for redemption of the mortgagees.

The suit was contested by defendants 1 and 2 only. Of these defendants, Chamroo Sao is the purchaser, and Besolal, defendant 2 is the son of the other purchaser Mst. Kirti Kuer. They denied the allegation that Besolal and Mst. Kirti Kuer were their benamidars and contended that the right of redemption has been extinguished by the court sale.

The Trial Court held that the plaintiff had failed to show that the auction purchasers were benamidars of the mortgagees and in that view dismissed the suit.

On appeal, the Additional District Judge, Patna, came to a contrary conclusion. He held that the purchase, though in the name of Besolal and Mst. Kirti Kuer was really by the first and the second defendants. He also accepted the plaintiff's case that under the terms of the mortgage bonds the mortgagees were liable to pay the rent and the rent sale having been brought about due to the default of the mortgagor and the mortgagee they could not be allowed to take advantage of the sale. So, according to the learned Judge, the equity of

redemption in favour of the plaintiff still subsisted and that he was entitled to redeem the mortgaged property. Accordingly, he set aside the judgment of the Trial Court and passed a preliminary decree for redemption.

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Against this decree the two defendants appealed to the High Court of Patna. The appeal came up for hearing in the first instance before a Single Judge (Mr. Justice Sahai). On a consideration of the evidence, he was of opinion that the liability of rent of 2.67 acres was upon defendant 1 and that payment of rent of .87 acres which was purchased and 1.76 acres which was taken in ijra, the total being 2.43 acres, was upon defendant 2, that for payment of rent of 3.83 acres was upon the other defendants, and the plaintiff was liable to pay the rent of only about 3.39 acres out of the entire area of 1.67 acres of Khata no. 56 and 10.65 acres of Khata no. 57. The question which therefore arose was whether s. 90 of the Trusts Act would operate to keep the equity of redemption alive in cases where the sale took place due to the default of the mortgagor as well as the mortgagees, the default on the part of the mortgagees, who purchased the properties at the sale being also substantial. The learned Judge referred this point for decision to a Division Bench.

The Division Bench of the High Court held that s. 90 of the Trusts Act did not apply to these circumstances. In this view the High Court allowed the appeal, set aside the decree of the first appellate court and restored the decree of the Trial Court.

The present appeal by Mst. Basmati Devi, who is the legal representative of the original plaintiff who was substituted in his place, is against the High Court's decision dismissing the suit.

In coming to a conclusion that s. 90 of the Trusts Act did not apply to cases where the sale took place due to the default of the mortgagor as well as the mortgagee, the High Court appears to have followed a number of previous decisions of the same High Court.

In support of the appeal it is urged that the view taken by the High Court in the present case as well as the previous decisions of the Patna High Court is incorrect and defeats the very object of s. 90 of the Indian Trusts Act. Section 90 of the Indian Trusts Act is in these words:—

“Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in

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derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage."

The question for consideration is whether in circumstances like the present where the decree and the sale in execution of it are brought about by the default of both the mortgagor and the mortgagee, the mortgagee can be said to have taken advantage of his position by purchasing the property at the sale. The High Court appears to think that unless the sale was brought about by the default of the mortgagee alone the mortgagee cannot be said to have taken advantage of his position in making the purchases. What seems to have weighed with the learned Judges is that even if the mortgagee had done his duty by paying the rent he was liable to pay, the sale would still have taken place as the mortgagor did not pay that portion of the rent which he was liable to pay. So, they thought that the mortgagees, though they took advantage of the fact that the property had been brought to sale, could not be said to have taken advantage of their position as mortgagees.

With this view we are unable to agree. In our opinion, the fact that the mortgagor had made a default, does not alter the position that the mortgagee had also defaulted in paying the rent he was liable to pay. By his default he has contributed to the position that a suit had to be brought for arrears of rent and ultimately to the position that the property was put to sale in execution of the decree obtained in the suit. This contribution to the bringing about of the sale was a direct result of his position as a mortgagee. When therefore he purchased the property himself at the sale in execution of the rent decree he clearly gained an advantage by availing himself of his position as a mortgagee.

This, in our opinion, is the position in law even if the mortgagee's liability was to pay less than the major portion of the rent of the holdings. Whether this would be true even where the portion which the mortgagee is liable to pay is so very small that the property is not ordinarily likely to be brought to sale for that amount, it is unnecessary for us to decide in the present case.

In the present case, the finding is that the liability of the defendants 1 and 2 was to pay a substantial portion of the rent. To say in such circumstances that they did not take

advantage of their position as mortgagees is entirely unrealistic. Such a construction would put a premium on dishonesty on the part of mortgagees whenever the entire burden of payment of rent was not left squarely on the mortgagee as under the provision of s.76 of the Transfer of Property Act.

Mr. Sarjoo Prasad, who appeared before us on behalf of the respondents, tried to persuade us that in any case the plaintiff's suit should fail as regards the lands recorded in Khata No. 57. As, according to him, these mortgagees were not at all liable to pay any portion of the rent of this holding. He drew our attention in this connection to Ex. 2, the mortgage bond executed in favour of Chamroo Sao, and to the statement made therein: "Annual rent payable to the zamindar is the concern of me, the executant". This argument proceeds on the basis that the holding recorded in Khata No. 57 continued to be separate and distinct from the Khata No. 56. It is thus in direct conflict with the plea of these very defendants in their written statement that the two holdings had been consolidated into one holding with one rental. As the oral and documentary evidence on the Paper Book prepared in the appeal did not clearly show whether or not these two holdings had become one, we called for one of the documents, Ex. B which seemed likely to throw some light on the matter. The document has now been received. It is the copy of a judgment of a suit between these parties in which this very question, viz., whether the two holdings had been consolidated into one or not, was raised. It was decided that such consolidation had taken place. It is clear that it was after such consolidation that the second rent suit was brought in respect of that consolidated holding and it was that consolidated holding which was sold in execution of the decree. It is clear therefore that the mortgage bond Ex.2 in which the mortgagor accepted liability to pay rent to the zamindar in respect of the mortgaged land in Khata No. 57 does not affect the correctness of the High Court's finding that the liability to pay rent of the holding that was sold was partly of the mortgagor and partly of the mortgagees and that it was the default of both the mortgagor and the mortgagees that brought about the sale.

Accordingly, we allow the appeal, set aside the judgment and decree of the High Court and restore the decree made by the Additional District Judge, Patna. A Pleader Commissioner shall be appointed by the trial court on a deposit of Rs. 50/- as his fees by the present appellant within two months from this date for taking accounts as to the amount due to the defendants on the date of the decree. A preliminary decree for redemption shall be passed in the usual terms.

As the suit as also the appeal before the District Judge had been brought *in forma pauperis* the High Court made an order

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directing the plaintiff to pay the court-fee on the plaint as well as on the memorandum of appeal. That order is set aside. Instead, we order the first and the second defendants in the suit to pay the court-fee payable on the plaint as also on the memorandum of appeal. The present appeal to this Court has also been brought by the appellant as a pauper. As she has succeeded in the appeal, we order the contesting respondents, i.e., the first and the second defendants, to pay the court fee payable on the memorandum of appeal to this court. The appellant will get her costs from the first and the second defendants throughout.

*Appeal allowed.*