

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gopi Narain Khanna and others v. Babu Bansidhar, from the High Court of Judicature for the North - Western Provinces, Allahabad; delivered the 16th March 1905.*

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Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

This is an Appeal from a decree of the High Court at Allahabad, dated the 10th of December 1901, by which the previous decree of the Subordinate Judge of Mainpuri was reversed. The Appellants are the representatives of the original Plaintiff, Gaya Prasad, who died during the pendency of the suit. The case involves the consideration of some complicated mortgage transactions.

On the 20th July 1889 Chaudhri Fateh Chand executed a mortgage by conditional sale in favour of the Respondent Bansidhar and Kunj Bihari Lal for Rs. 7,101. The mortgaged property consisted of two villages Patara and Bhatpura.

On the 22nd of October 1889 the same mortgagor executed a second mortgage by conditional sale in favour of Anant Ram and the Respondent for Rs. 10,000 and interest. This mortgage comprised Patara and eight other villages, not including Bhatpura. On the 1st

October 1891 Anant Ram sold his moiety of this mortgage to Gaya Prasad. The situation, therefore, as regards Patara was that the Respondent and Kunj Bibari Lal were first mortgagees and the Respondent and Gaya Prasad were second mortgagees.

On the 17th September 1893 a suit (No. 123 of 1893) was commenced in the Court of the Subordinate Judge of Mainpuri for foreclosure of the first mortgage. As ultimately constituted this suit was by the Respondent and Kunj Bihari Lal, the first mortgagees on Patara, against Chaudhri Raj Kunwar, son and heir of Chaudhri Fateh Chand, then deceased, Gaya Prasad, and one Munshi Nawal Kishore, who appears to have held a third mortgage on the same property. Bhatpura had been disposed of under a prior hypothecation and was excluded from the suit by order.

On the 27th September 1893 another suit (No. 122 of 1893) was commenced in the same Court for foreclosure of the second mortgage. This suit, as finally constituted, was one by the Respondent and Gaya Prasad against Chaudhri Raj Kunwar and Munshi Nawal Kishore.

On the 22nd December 1894 decrees were made in both these suits. By the decrees in the first suit it was ordered that on the Defendant (*sic*) paying to the Plaintiff (*sic*) or into Court on the 22nd of April 1895 the sum of Rs. 14,211. 7. 9, with future interest at the rate of 8 annas per cent. per mensem, the Plaintiff should deliver up to the Defendant all documents in his possession relating to the mortgaged property, and should transfer the property to the Defendant free from incumbrances created by the Plaintiff, but if such payment were not made on the 22nd April 1895 it was ordered that the Defendant should be absolutely debarred of all right to redeem the mortgaged property. The

decree in the second suit was in the same form *mutatis mutandis*.

Their Lordships will here observe that the decree in the first suit does not seem to be adapted to a suit by a first mortgagee against subsequent incumbrancers and mortgagor. It appears to be a transcript of the form of order given in Section 86 of the Transfer of Property Act, 1882. That form contemplates a suit between one mortgagee and the mortgagor only and should be treated as a common form not to be literally followed in every suit for foreclosure, but to be adapted to the particular circumstances of each case. The decree does not provide for the exercise by the puisne incumbrancers of their successive rights of redemption or for working out the rights of the parties in the event of any puisne incumbrancer in front of the mortgagor redeeming the mortgaged property so as to make a complete decree. An appropriate decree for that purpose is well known in the Chancery Division of the High Court in England, and a form of it will be found in *Seton on Decrees*, 6th edition, Vol. III., p. 1979. Probably it is considered that the rights of the puisne incumbrancers are sufficiently protected by the provisions of Sections 74 and 83 of the Transfer of Property Act. But it deserves consideration whether a form of order suitable for use in the Indian Courts might not be adopted in which those rights would be recognised and provision made for the event of their being exercised. The "Defendant" in the decree before their Lordships apparently means the mortgagor only.

The time for redemption on the decree was from time to time enlarged, but the money was not paid by the mortgagor. On the 3rd January 1896, when the enlarged time was about to expire, Gaya Prasad paid into Court the sum of Rs. 15,003, and that sum was

taken out by the Plaintiffs, the first mortgagees, in discharge of their mortgage.

On the 3rd August 1897 Gaya Prasad made an application to the Court that a decree for absolute foreclosure of the mortgaged property might be prepared in his favour. This was successfully opposed by the present Respondent. The Subordinate Judge was of opinion that as Gaya Prasad, Defendant, paid up the amount due under the decree and complied with the order embodied in the decree, that decree no longer remained capable of execution. He held that Gaya Prasad had become the representative of the prior mortgagee under Section 74 of the Transfer of Property Act, and was entitled to bring a suit for foreclosure, but that he had not acquired the status of a decree-holder, and that while he was Defendant he could not execute the decree as decree-holder. The application was therefore by an Order dated the 6th November 1897 dismissed with costs.

Gaya Prasad, therefore, on the 3rd February 1898, commenced the present suit against Bansidhar, Kunj Bihari Lal, the widow and heir of Chaudhri Raj Kunwar then deceased, and the representative of Munshi Nawal Kishore, then deceased. The plaint contains a statement of all the material circumstances, but the prayer of it is inartificially framed. In the opinion of their Lordships however it was sufficient, with the aid of the prayer for further relief, to enable the Court to give the Plaintiff the appropriate relief if he was otherwise entitled to it.

The Respondent alone appeared and defended. By his written statement he contended that the suit was barred by Section 244 of the Civil Procedure Code, or (in other words) that the questions in issue should have been determined by Order of the Court executing the previous decree, and not by separate suit. This

contention was in direct opposition to that which he had successfully put forward before the Subordinate Judge.

On the 22nd June 1898 a minute was filed in the suit in which it was stated that a decree absolute for foreclosure had been made in the suit of the second mortgagees (No. 122 of 1893) on the 7th May 1898. It was not thought necessary to make the mortgagor and third mortgagee (Defendants 3 and 4 in the suit) Respondents to this Appeal, and both Appellant and Respondent seem to be agreed that the effect of the Order for foreclosure absolute in the circumstances of the case was (as stated in paragraph 7 of the Respondent's case) that the mortgagor and third mortgagee disappeared from the title, but the Respondent retained a right to redeem a moiety of the mortgaged estate by paying to the Appellants a moiety of his deposit in Court in suit No. 123 of 1893, with, of course, subsequent interest on the principal of such moiety.

In these circumstances the Subordinate Judge made a decree, dated the 23rd June 1898, but this decree was not framed in a manner to work out the rights of the Appellants and Respondent who had become the only parties interested in the property.

On appeal by the Respondent against this decree the learned Judges in the High Court held that the application of Gaya Prasad to the Subordinate Judge in the execution department for an order for foreclosure absolute, was the proper and only application he could have made, and ought to have been granted. In the result they held that the present suit was barred by the provisions of Section 244 of the Civil Procedure Code, and that the Plaintiff had mistaken his remedy, and should have appealed against the Order of the 6th of November 1897 instead of

instituting a separate suit. And by their decree, dated the 10th December 1901, it was ordered that the decree of the Subordinate Judge be set aside, and the suit be dismissed, but no order was made as to costs.

Their Lordships cannot agree with the learned Judges of the High Court that the respective rights of Gaya Prasad and the Respondent, consequent on the redemption by the former of the first mortgage on Patara, could have been worked out in execution of the decree of the 22nd December 1894, made in Suit No. 123 of 1893, and they are of opinion that the Order of the 6th November 1897, made by the Subordinate Judge on Gaya Prasad's application to execute that decree was correct. Foreclosure is by the decree directed only in the event of the sum named not being paid into Court on or before the prescribed date. And their Lordships think that on payment by Gaya Prasad of the sum into Court before the expiry of the enlarged time, and acceptance of that sum by the Plaintiffs, the decree was spent and became discharged and satisfied. There was therefore nothing left to be done in the execution department. It is true that Gaya Prasad, having made that payment (as he had the right to do), acquired under Section 74 of the Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged. Even if that were not so, their Lordships fail to see how the respective rights of Gaya Prasad, as owner of the first mortgage and half owner of the second mortgage, and the Respondent as owner of the other moiety of the second mortgage, could have been worked out without additions to the decree which the Court in executing

the decree had no power to make. They are therefore of opinion that a new decree was required for the purpose, and Section 244 of the Civil Procedure Code was not a bar to the present suit.

The learned Counsel for the Respondent no doubt was conscious of this difficulty, and he contended alternatively that Gaya Prasad might have obtained the relief to which he was entitled in the suit of the second mortgagees (No. 122 of 1893). But Bansidhar and Gaya Prasad were co-Plaintiffs in that suit, and it is equally difficult to see how the rights of the Plaintiffs *inter se* in respect of the first mortgage on Patara (which was not in question in that suit) could have been worked out in the decree in suit No. 122 of 1893.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be allowed, and that both the decree of the High Court, dated the 10th December 1901, and the decree of the Subordinate Judge, dated the 23rd June 1898, should be discharged, and that it should be declared that it appearing that in the events which have happened the Appellants as representatives of Babu Gaya Prasad, the late Plaintiff, and the Respondent, Babu Bansidhar, Defendant No. 1, as between themselves have become the owners in equal shares of the village Patara, with the hamlets (naglas) appertaining thereto in the plaint mentioned, subject to a charge thereon vested in the Appellants for Rs. 15,093, being the sum paid into Court by Babu Gaya Prasad on the 3rd January 1896 in Suit No. 123 of 1893, together with subsequent interest from the last-mentioned date on the principal money comprised in that sum, the Appellants are entitled to a decree in this suit, that upon the Respondent Babu Bansidhar on or before a day to be fixed by the Court, paying to the Appellants, or into Court, the sum of Rs. 7,546. 8, being one moiety of

Rs. 15,093, together with future interest at the rate of 8 annas per cent. per mensem on Rs. 3,550. 8, being one moiety of the principal sum of Rs. 7,101 in the plaint mentioned, from the 3rd January 1896 to the date fixed for such payment, together with the costs incurred by the late Plaintiff and the Appellants in the Court of the Subordinate Judge of Mainpuri, including any future costs (the aggregate amount of such sums to be ascertained by the Court), the Appellants shall accept the sum so paid in satisfaction of their said charge on the said property mentioned in the plaint so far as affects the Respondent or his share in the said property, but if payment be not made on or before the said day to be fixed by the Court the Respondent shall be absolutely debarred of all right to redeem his said share of the said property, and that each party should bear his own costs of the Appeal to the High Court, and the case be remitted to the Court of the Subordinate Judge of Mainpuri, to proceed in accordance with the above declaration. The Respondent will pay the costs of this Appeal.

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