1961

M/s. Nand Lal Raj Kishan v. Commissioner of Sales Tax, Delhi & Another

S. K. Das J.

to furnish security for the proper realisation of the tax levied or leviable under the Act. We agree with the Chief Commissioner that there was no violation of the principles of natural justice in the present case.

For the reasons given above we hold that there is no merit in the petition which is accordingly dismissed with costs.

Petition dismissed.

1961

March 14.

MRITUNJOY PANI AND ANOTHER

v.

NARMANDA BALA SASMAL AND ANOTHER

(K. SUBBA RAO and RAGHUBAR DAYAL, JJ.)

Mortgage—Right of redemption—Suit, when maintainable—Mortgagor and Mortgagee—Legal position—Indian Trusts Act, 1882 (II of 1882), s. 90.

Usufructuary mortgage bond was executed in favour of the father of the appellant who was put in possession of the mortgaged property. One of the terms of the usufructuary mortgage was that in case of failure of payment of rent by the mortgagor, the mortgagee was to pay off the arrears of rent to the landlord, which obligation the mortgagee did not honour as a result of which the property was brought to sale and ultimately purchased by the mortgagee.

The mortgagor filed a suit against the mortgagee, the appellant's father, for redemption of the mortgage and for possession. The defence inter alia was that the mortgagee had purchased equity of redemption in execution of the rent decree and that the mortgagor had no longer any right to sue him for redemption and their remedy, if any, was to sue for setting aside the sale on the ground of fraud or otherwise.

Held, that s. 90 of the Trusts Act read with the illustration (c) lays down the principle that no one can be allowed to benefit for his own wrongful act.

Held, further, that the legal position with regard to mortgagor and mortgagee was that:—

(1) the governing principle is that "once mortgagee

always a mortgagee" till the mortgage is terminated by the act of the parties themselves, by merger or by order of the Court;

(2) where a mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of court or in execution of a mortgage or money decree obtained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue for redemption without getting the sale set aside; and

(3) where a mortgagee purchases the mortgaged property by reason of a default committed by him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the equity of redemption is only in trust for the mortgagor.

In the instant case the right to redeem the mortgage was not extinguished and in the eyes of law, the purchase in the rent sale was deemed to have been made in trust for the mortgagor and the suit for redemption was maintainable.

Sidhakamal Nayan v. *Bira Naik*, A.I.R. 1954 S.C. 336, relied on.

Malkarjun Bin Shidramappa Pasare v. *Narhari Bin Shivappa*, (1900) L.R. 27 I.A. 216, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 119 of 1957.

Appeal by special leave from the judgment and decree dated March 3, 1955, of the Orissa High Court in Appeal No. 593 of 1950.

R. Patnaik, for the appellants.

D. N. Mukherjee, for the respondents.

1961. March 14. The Judgment of the Court was delivered by

Subba Rao J.

SUBBA RAO, J.—This is an appeal by special leave against the judgment of the High Court of Judicature for Orissa dated March 3, 1955, setting aside the judgment of the Court of the District Judge, Mayurbhanj, and restoring that of the Subordinate Judge, Balasore.

The facts leading up to this appeal may be briefly stated. The land in dispute originally belonged to one Bhagaban Parida. On July 16, 1924, he executed a registered *kabala* for a consideration of Rs. 2,000 in favour of one Priyanath Sasmal. On June 2, 1928, Priyanath Sasmal executed a usufructuary mortgage bond (Ex. B) for Rs. 1,500 in favour of

1961

Mritunjoy Pani & Another
v.
Narmanda Bala Sasmal & Another

Subba Rao J.

Lakshminarayan Pani, the father of the appellants herein. Under the terms of the said usufructuary mortgage, the mortgaged property was put in possession of the mortgagee. One of the terms of the mortgage deed was that the initial responsibility for the payment of rent was that of the mortgagor and that, if for any reason he did not pay the arrears of rent, the mortgagee was under an obligation to pay off the arrears to the landlord and to obtain a receipt acknowledging the payment. The mortgagee did not pay the arrears of rent, with the result that for arrears of rent the said property was brought to sale and ultimately purchased by the mortgagee for a sum of Rs. 300 on September 22, 1936. The sale was confirmed on November 4, 1936, and the mortgagee took possession through Court on December 21, 1938. The mortgagor filed a suit against the mortgagee in the Court of the Subordinate Judge, Balasore, for redemption of the mortgage and for possession. As the mortgagor died after the filing of the suit, his widow and son were brought on record as his legal representatives. The defence of the appellants to that suit was that possession was not delivered to their father, the mortgagee, under the terms of the mortgage deed, that the debt was discharged, that their father had purchased the equity of redemption in execution of the rent decree, and that the mortgagor had no longer any right to sue him for redemption. The learned Subordinate Judge and, on appeal, the District Judge concurrently found that in fact possession was delivered to the mortgagee on the basis of the mortgage deed and that the plea of discharge was not true; but, while the trial court held that after the purchase of the property by the mortgagee in execution of the decree for rent he was holding the property only on behalf of the mortgagor, the appellate court came to the conclusion that after the said purchase the relationship of mortgagor and mortgagee came to an end; with the result the trial court decreed the suit and the appellate court, setting aside that decree, dismissed the suit. The legal representatives of the mortgagor preferred a second appeal to the High Court against the judgment and

decree of the District Judge. A division bench of the High Court agreed with the conclusion of the trial court, set aside the decree of the District Court and restored that of the trial court. Hence the present appeal.

Learned counsel for the appellants i.e., the legal representatives of the mortgagee, contended that in execution of the rent decree the mortgagee became the purchaser of the equity of redemption, with the result that the relationship of mortgagor and mortgagee ceased to exist and, therefore, the respondents could not sue for redemption and their remedy, if any, was to sue for setting aside the sale on the ground of fraud or otherwise.

On the other hand, learned counsel for the respondents contended that, as the sale was the result of manifest dereliction of duty imposed upon the mortgagee by the terms of the transaction, the purchase by the mortgagee would only be in trust for the mortgagor and, therefore, the suit for redemption was maintainable.

To appreciate the rival contentions it is necessary to notice briefly the law on the subject. The relevant section governing the facts of the case is s. 90 of the Indian Trusts Act, 1882 (2 of 1882). The material portion of the section reads,

> "Where a.....mortgagee.....by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property,.....he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to the 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."

Illustration (c) to that section says,

> "A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrears with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the

1961

Mritunjoy Pani & Another v. Narmanda Bala Sasmal & Another

Subba Rao J.

repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A."

The following three conditions shall be satisfied before s. 90 of the Indian Trusts Act can be applied to a case: (1) the mortgagee shall avail himself of his position as mortgagee; (2) he shall gain an advantage; and (3) the gaining should be in derogation of the right of the other persons interested in the property. The section, read with illustration (c), clearly lays down that where an obligation is cast on the mortgagee and in breach of the said obligation he purchases the property for himself, he stands in a fiduciary relationship in respect of the property so purchased for the benefit of the owner of the property. This is only another illustration of the well settled principle that a trustee ought not to be permitted to make a profit out of the trust. The same principle is comprised in the latin maxim *commodum ex injuria sua nemo habere debet*, that is, convenience cannot accrue to a party from his own wrong. To put it in other words, no one can be allowed to benefit from his own wrongful act. This Court had occasion to deal with a similar problem in *Sidhakamal Nayan* v. *Bira Naik* (1). There, as here, a mortgagee in possession of a tenant's interest purchased the said interest in execution of a decree for arrears of rent obtained by the landlord. It was contended there, as it is contended here, that the defendant, being a mortgagee in possession, was bound to pay the rent and so cannot take advantage of his own default and deprive the mortgagors of their interest. Bose, J., speaking for the Court, observed at p. 337 thus:

"The position, in our opinion, is very clear and in the absence of any special statutory provision to the contrary is governed by s. 90, Trusts Act. The defendant is a mortgagee and, apart from special statutes, the only way in which a mortgage can be terminated as between the parties to it is by the act of the parties themselves, by merger or by an order of the Court. The maxim "once a mortgage always

(1) A.I.R. 1954 S.C. 336.

a mortgage" applies. Therefore, when the defendant entered upon possession he was there as a mortgagee and being a mortgagee the plaintiffs have a right to redeem unless there is either a contract between the parties or a merger or a special statute to debar them."

These observations must have been made on the assumption that it was the duty of the mortgagee to pay the rent and that he made a default in doing so and brought about the auction sale of the holding which ended in the purchase by him. The reference to s. 90 of the Indian Trusts Act supports this assumption.

Learned counsel for the appellants relied upon the decision of the Judicial Committee in *Malkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa*(1) in support of his contention that a mortgagor cannot seek the relief of redemption without first getting the sale set aside. There, a mortgaged property was sold in execution of a decree against the mortgagor and the plaintiff neglected or refused to pray that it might be set aside. The Judicial Committee held that an execution sale could not be treated as a nullity if the court which sold it had jurisdiction to do so; and it could not be set aside as irregular without an issue raised for that purpose and investigation made with the judgment creditor as a party thereto. That was not a case where the mortgagee who had an obligation to discharge under the mortgage deed made a default with the result the property was sold and purchased by the mortgagee himself. The proposition enunciated by the Judicial Committee would apply to a case where the equity of redemption was extinguished by the court sale. This may apply to a case where the mortgagee, after obtaining leave to bid, purchases at a sale in execution of his decree or a decree obtained by a third party. In such a case there may be scope for the argument that the equity of redemption is extinguished and, therefore, the mortgagor cannot get relief till the sale is set aside in the manner known to law. But when the sale is

(1) (1900) L.R. 27 I.A. 216.

1961

Mritunjoy Pani & Another
v.
Narmanda Bala Sasmal & Another

Subba Rao J.

brought about by the default of the mortgagee, the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to exist and, therefore, there will not be any necessity for setting aside the sale.

The legal position may be stated thus: (1) The governing principle is "once a mortgage always a mortgage" till the mortgage is terminated by the act of the parties themselves, by merger or by order of the court. (2) Where a mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of court or in execution of a mortgage or money decree obtained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue for redemption without getting the sale set aside. (3) Where a mortgagee purchases the mortgaged property by reason of a default committed by him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the equity of redemption is only in trust for the mortgagor.

Let us now apply the aforesaid principles to the concurrent findings arrived at by the courts below. All the courts concurrently found that in fact possession was delivered to the mortgagee on the basis of the mortgage deed, Ex. B. They have also found that the plea of discharge taken by the appellants was not true. The High Court found that under the mortgage deed the mortgagee had a duty to pay the arrears of rent to the landlord, but he made a default in paying the said arrears. The High Court further held that the sale was the result of manifest dereliction of the duty imposed upon the mortgagee by the very terms of the transaction. The said findings clearly attract the provisions of s. 90 of the Indian Trusts Act. In view of the aforesaid principles, the right to redeem the mortgage is not extinguished and in the eye of law the purchase in the rent sale must be deemed to have been made in trust for the mortgagor. In the premises, the High Court was right in holding that the suit for redemption was maintainable.

No other point was raised before us. The appeal fails and is dismissed with costs.

Appeal dismissed.

1961

Mritunjoy Pani & Another
v.
Narmanda Bala Sasmal & Another

Subba Rao J.

1961

March 14.

PURSHOTTAM LAL DHAWAN

v.

DEWAN CHAMAN LAL AND ANOTHER

(K. SUBBA RAO, RAGHUBAR DAYAL and J. R. MUDHOLKAR, JJ.)

Evacuee Property—Revision application to Custodian General—Limitation for filing—Custodian General, powers of—Cancellation of allotment in revision—Administration of Evacuee Property Act, 1950 (31 of 1950), ss. 27, 56—Administration of Evacuee Property (Central) Rules, 1950, rr. 14, 31(5).

The appellant and the respondent, who were displaced persons from West Pakistan, were allotted lands in the same village. At the instance of certain persons, the first allotment was cancelled and there was a re-allotment. The respondent was aggrieved by this order and on September 27, 1950, he filed a review application before the Deputy Commissioner for restoration of the original allotment but it was dismissed on May 12, 1951. Against this order the respondent preferred a revision application to the Additional Custodian, who dismissed the same on August 25, 1952. Thereupon, the respondent filed a revision application before the Custodian General on October 30, 1952. To this revision only the Custodian was made a party; but the appellant was made a party by order of the Custodian General on August 25, 1953. After hearing the parties the Custodian General on September 29, 1954, cancelled part of the re-allotment made in favour of the appellant. The appellant contended: (i) that the revision application to the Custodian General was barred by time, and (ii) that the Custodian General had no power to cancel the allotment.

Held, that the revision application was not barred by time. Rule 31(5) provides that a revision petition to the Custodian General "shall ordinarily be made within sixty days of the