

APPELLATE CIVIL

Before Kapur and Soni JJ.

1952

July 31st

PALA SINGH,—*Plaintiff-Appellant**versus*ATTAR SINGH AND OTHERS,—*Defendants-Respondents.*

Letters Patent Appeal No. 97 of 1948.

Mortgage—Redemption—Integrity of the mortgage broken—Whether each of the co-mortgagors entitled to redeem his share alone or should redeem the shares of his co-mortgagors as well—Transfer of Property Act Sections 60, 91 and 95.

Held, that the co-mortgagor can redeem the entire mortgage including the share of his co-mortgagors even though the integrity of the mortgage is gone and his right of redemption is not merely restricted to his own share.

Letters Patent Appeal under Clause 10 of the Letters Patent from the decree of Mr. Justice Falshaw, dated the 13th October, 1948, affirming that of Shri P. S. Bindra, Senior Subordinate Judge, with enhanced appellate powers, Amritsar, dated the 27th February, 1947, which affirmed that of Khan Mohammad Afzal Khan, Subordinate Judge, 1st Class, Amritsar, dated the 25th July, 1946, dismissing the plaintiffs' suit, subject to the proviso that they are entitled to 1/48th share of the land as owners.

SHAMAIR CHAND, for Appellant.

H. S. DOABIA, for Respondents.

JUDGMENT

KAPUR, J. This is a plaintiff's appeal directed against a judgment of a learned single Judge of this Court, dated the 13th October 1948, dismissing the plaintiff's appeal against an appellate decree of the Senior Subordinate Judge of Amritsar.

Kapur, J.

The facts of the case are that Lehna Singh on the 12th March 1887, mortgaged to Dewa Singh and Vir Singh with possession 76 Kanals 16 Marlas of land. On the 2nd December 1889, Dewa Singh and Vir Singh transferred their mortgagee rights to the ancestors of the present plaintiffs, Hazara Singh, Teju, Pala Singh, Ganda Singh and Harnam Singh. Lehna Singh died childless and the present plaintiffs and defendants Nos. 1 to 27 succeeded to his estate. Thus the plaintiffs obtained full rights of ownership in 1/48th share of the land and remained in possession as mortgagees of the rest.

Pala Singh
v.
Attar Singh
and others

Kapur, J.

In 1929, the present defendants 1, 4 to 7, the father of defendant No. 8, the father of defendant No. 9 and the father of defendant No. 17 filed a suit against the present plaintiff and others for possession by redemption of the whole of the 76 Kanals 16 Marlas of land. On the 6th of May 1930, a compromise was entered into by which the then plaintiffs, who are some of the defendants now, were granted a decree for possession of 28 Kanals 1 Marla on payment of Rs. 82 to Hazara Singh and a provision was made for Attar Singh, plaintiff, getting land from Hazara Singh etc. In 1945, Attar Singh, Harnam Singh and Indar Singh, present defendants 1 to 3, applied under the Restitution of Mortgaged Lands Act for restitution of the whole of the mortgaged land and the Collector by an order, dated the 3rd March 1945, ordered the mortgage to be extinguished without payment of any compensation and restitution of the land to the applicants.

On the 7th of January 1946, the present suit was brought by five plaintiffs to whose ancestor mortgagee rights had been transferred by Dewa Singh and Vir Singh on the 12th December 1889. The suit was for a declaration that the order of the Special Collector is *ultra vires* and illegal and that they are entitled to remain in possession of 49 Kanals of land, alleging that application for the redemption of the whole of 76 Kanals 16 Marlas was incompetent, that the defendants 1 to 3 were entitled to 3/32nd of the mortgaged land, and that as a result of the compromise of 1930 and the decree passed thereon they had become owners of 49 Kanals of land.

The defence was that the integrity of the mortgage had been broken on the death of Lehna Singh and therefore each of the co-sharers who was a mortgagor had become entitled to redeem, that they could redeem the whole of the remaining portion of the land, and if not the whole they could redeem their own share. For various reasons given by the Subordinate Judge the suit was dismissed except that the plaintiffs were held entitled to 1/48th share. The plaintiffs took an appeal to the Senior Subordinate Judge who upheld the

decree and this decree was confirmed by Mr. Justice Falshaw, who held that the defendants 1 to 3, after the integrity of the mortgage had been broken, could redeem the whole of the land if no objection is raised by the mortgagee and in this case no objection is proved to have been taken by the mortgagee in regard to the right of three of the mortgagors to redeem the whole of the land.

Pala Singh
v.
Attar Singh
and others
Kapur, J.

Mr Shamair Chand for the appellant has submitted that after the integrity was broken each co-sharer in the mortgaged land could redeem his portion and could not redeem the share of the other co-mortgagors. He has relied on several cases which I shall deal with presently. The right of a mortgagor to redeem is given in section 60 of the Transfer of Property Act and redemption of a portion of mortgaged property is provided for in the following words—

“Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees has or have acquired, in whole or in part, the share of a mortgagor.”

This section before the amendment of 1929 was interpreted by their Lordships of the Privy Council firstly in *Nawab Azimut Ali v. Jowahir Singh* (1). In this case the estate consisting of 16 villages had been mortgaged to the predecessors in title of the Nawab. The villages were then sold in execution of a money decree against the mortgagors and one of them was purchased by the plaintiffs, one village by A, one by B, a portion of a third by C, and the rest by the mortgagee himself. The plaintiff sued to redeem his village on payment of a rateable proportion of the debt without making the purchasers of the other

(1) 13 M. I. A. 404

Pala Singh
v.
Attar Singh
and others
Kapur, J.

villages A, B and C as parties. The suit was dismissed on the ground that the plaintiff should have offered to redeem the villages of A, B and C also. A fresh suit was then brought by the plaintiff claiming to redeem all the villages sold to A, B and C excepting those purchased by the mortgagee himself. The mortgagee objected that the plaintiff was not entitled to redeem his own village, but the suit was decreed and on an appeal being taken to the Judicial Committee the decree was varied and the plaintiff was allowed to redeem his own village on payment of rateable proportion of the debt. The Privy Council did not approve of the Sadar Court's finding that the plaintiff should have offered to redeem the villages of A, B and C as well as his own. According to Mulla all that was necessary was that A, B and C should have been parties to the suit in which the account of the respective values of the villages would have to be taken. Their Lordships did apparently hold that a sharer in the residue left after a mortgagee's purchase of part of the property cannot redeem the whole of that residue without the consent of the mortgagee.

In a later case their Lordship of the Privy Council have taken a different view to that taken in the previous case. This case is *Yadalli Beg v. Tukaram* (1). The facts of that case were these :—

In 1893 one Laxmansa Balkrishnasa executed a mortgage in favour of Yadali in respect of sixteen fields in five villages authorising the mortgagee to take possession of the mortgaged premises if the mortgage money was not paid by a certain date. It also authorised the mortgagee to sell the mortgaged property for realization of the mortgage money. The mortgagor subsequently in the year 1896, sold one of the fields to the respondent Tukaram. In 1899, the mortgagee Yadali sued on the mortgage to recover the principal amount with interest due under it. In this suit the subsequent purchaser of one of the fields Tukaram was

(1) I. L. R. 48 Cal. 22 (P.C.)

not made a party. The suit was decreed by consent of the mortgagor whereby it was agreed that unless the mortgagor paid a certain sum of money within a year, nine of the fields including the one purchased by Tukaram should be foreclosed and the plaintiff mortgagee should be put in possession thereof. No payment was made and the final decree for foreclosure in respect of the nine fields was passed in favour of Yadali on the 17th of December 1900, and he was put in possession of the fields including the one purchased by Tukaram in January 1901. Tukaram then brought his suit which went to the Privy Council claiming to be entitled to redeem all the nine fields. The Subordinate Judge held that he was entitled to redeem only the field purchased by him on payment of the proportionate amount of the mortgage money. On appeal the Judicial Commissioner held that the plaintiff Tukaram was entitled to redeem the entire mortgage, but, as he had confined his suit to the nine fields covered by the consent decree, a decree was made for redemption of these nine fields on payment of the entire mortgage-debt.

Pala Singh
v.
Attar Singh
and others
Kapur, J.

The Privy Council upheld the decision of the Judicial Commissioner. The only question in that case was whether respondents had the right to redeem the whole of the nine fields or only the field conveyed to them subject to the mortgage. It was held—

“Subject to the safeguarding of the equal title to redeem of any other person who had a right of redemption, the respondents were entitled to redeem the entire mortgage unless something had happened to extinguish the mortgage in whole or in part, or the conduct of the respondents had estopped them from asserting what would normally have been their rights.”

It was also held that—

“It was not the law in India, any more than in England, that one of several mortgagors cannot redeem more than his

Pala Singh
 v.
 Attar Singh
 and others

 Kapur, J.

own share unless the owners of the other shares consent or make no objection, subject to the pro-safeguarding of the rights which these owners might possess."

This judgment of their Lordships clearly shows that the mortgagor of a share can redeem the share of other co-mortgagors in the residuary left after the mortgagee's purchase in spite of the opposition of the mortgagee.

In two Patna cases this *Azimut Ali's case* (1) was considered. In *Promotha Nath Mitter v. Ram Kishun Singh* (2), it was held that the effect of *Azimut Ali's case* (1), was that the mortgagee could insist that his security, so long as it is entire, should not be split up, but it did not lay down that where a mortgage has been split up a mortgagor cannot redeem more than his share in the equity of redemption. What it did lay down was that a mortgagee could not prevent a mortgagor from redeeming his share only instead of the entire mortgage. *Yadalli Beg's case* (3) was commented upon in *Mussamat Azizunissa v. Komal Singh* (4) At page 939 Kulwant Sahay, J., said that it appeared from the judgment of their Lordships that they were proceeding on the general principle that a mortgage is indivisible unless something had happened which would operate as a severance of the security and observed :—

"In observing that the respondents in the case before their Lordships were entitled to redeem the mortgage in its entirety subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption, their Lordships clearly recognised the right of a partial redemption."

Their Lordships clearly indicated that the right of other owners of the equity of redemption had also

(1) 13 M. I. A. 404
 (2) A. I. R. 1927 Pat. 25
 (3) I. L. R. 48 Cal 22
 (4) I. L. R. 9 Pat. 930

to be safeguarded. It is the right of the mortgagee as well as of the mortgagor to insist on the apportionment of the mortgage debt upon the several mortgaged properties and on partial redemption. In several cases it has been held that the whole of the residue, i.e. a portion of the property the equity of redemption of which has not been acquired by the mortgagee can be redeemed. These cases are *Siddeshwar Martand Hagre v. Ganpatrao Bhaurao Patil* (1), *Baikantha Nath Dey v. Mohesh Chandra Dey* (2) and *Protap Chandra Dhar v. Pearey Mohan Dhar* (3).

Pala Singa
v.
Attar Singh
and others
Kapur, J.

Mr. Shamair Chand has relied on *Ahmad Hussain v. Muhammad Qasim* (4). This judgment has been criticised by Mulla in the following words—

“This, it is submitted, is wrong, for the character of indivisibility exists both with reference to the mortgagor as well as to the mortgagee”.

and reference is made to *Huthasanan v. Parameswaran* (5).

Sections 91 and 95 of the Transfer of Property Act give to the mortgagor of a share a right to redeem the whole of the mortgage, and as has been stated by Mulla it is difficult to see why the acquisition by the mortgagee of a part of the property should affect that right as to the rest. Reliance was also placed by Mr. Shamair Chand on *Sajjan Singh v. Attar Singh* (6), where a Division Bench of the Lahore High Court had held that a mortgagor or a puisne mortgagee cannot claim to redeem the shares of other co-mortgagors against the will of the mortgagee. With very great respect so far as this judgment goes contrary to the decision of the Privy Council in *Yadalli Beg's case* (7), this judgment can not be correct,

-
- (1) I. L. R. 50 Bom. 331
(2) 22 C. W. N. 128
(3) 22 C. W. N. 800
(4) I. L. R. 48 All. 171
(5) I. L. R. 22 Mad. 209
(6) A. I. R. 1926 Lah. 601
(7) I. L. R. 48 Cal. 22

Pala Singh but the judgment of Sir Shadi Lal shows that
 v. that is not what was really decided in that case.
 Attar Singh What the learned Chief Justice there said was:—
 and others

—
 Kapur, J.

“Now in the present case the integrity of the mortgage-security has been destroyed by the circumstances that Attar Singh is the mortgagee, not of the whole of the property, but of only five-sixths thereof and he cannot therefore avail himself of the rule against partial redemption. It is, however, unnecessary to pronounce any final opinion upon this issue because the plaintiff is willing to redeem the whole of the property, and it is the mortgagee who offers resistance to his claim. It is clear that a mortgagor or a puisne mortgagee cannot claim to redeem the shares of the other co-mortgagors against the will of the mortgagee.”

If the passage given in the head-note is read in its proper context it is quite clear that this judgment does not go counter to what was laid down by their Lordships of the Privy Council.

Mr Shamair Chand has also referred to two other cases of the Allahabad High Court which are both Single Bench judgments *Durga Prasad v. Chunni* (1), where it was held that the integrity of a mortgage is necessary for the benefit of the mortgagee alone and in such a case the only right of a mortgagor is to redeem his own share. The other case is *Abdul Wahab v. Raghunandan Lal*, (2), where the same rule was laid down. In view of what I have said above I am unable to agree with the rule laid down in these two cases.

I am therefore of the opinion that the learned single Judge and the Courts below have rightly held that the defendants could redeem the whole of the residue and therefore this appeal must be dismissed with costs throughout.

SONI, J. I agree.

(1) A. I. R. 1940 All. 528
 (2) A. I. R. 1945 All. 388