Privy Council Appeal No. 90 of 1939

Appeal No. 39 of 1936

Shah Ram Chand - - - - - - - - *Appellant*

v.

Pandit Parbhu Dayal and Others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH APRIL, 1942

Present at the Hearing:

LORD THANKERTON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

This appeal is by the plaintiff in a redemption suit which was brought in the Court of the Subordinate Judge of Agra in 1924. It has reference to a village called Muthamai in the district of Agra, which at one time belonged to a zemindar called Nawal Singh. In this village the plaintiff inherited the interest of the mortgagee under a mortgage of 1893 granted by Nawal Singh to the plaintiff's grandfather: having brought a suit (No. 50 of 1911) to enforce that mortgage the plaintiff purchased Muthumai at the judicial sale in 1923 and thus became vested with the right and title which Nawal Singh had possessed in 1893. The question now raised is as to the amount which he must pay to free Muthamai from the prior charge created by a mortgage granted by Nawal Singh in 1882 over three other villages as well as Muthamai. Is it the whole sum outstanding upon the mortgage of 1882? Or is he, in the events which have happened, entitled to redeem Muthamai on payment of a part thereof, and if so how much must he pay? Both Courts in India have held that he must pay the whole sum outstanding, which is Rs.30,000.

Section 60 of the Transfer of Property Act (IV of 1882) is a statement of the right to redeem. It requires payment or tender of "the mortgage money" which has been defined by clause (*a*) of section 58 as "the principal money and interest of which payment is secured for the time being." Section 60 as it stood until 1929 concludes as follows:—

> 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 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.

Four mortgages are involved in the case—the first three being granted by Nawal Singh in his lifetime and the fourth after his widow's death by his reversionary heirs.

> (*a*) *6th January*, 1882: to Bast Ram and Ram Kishen: for Rs.25,000 with interest at 6¾ per cent. with yearly rests: a simple mortgage of four villages—Muthamai, Phulaechi, Sherpur and Salempur.

(*b*) *13th January*, 1893: to plaintiff's grandfather Shah Bhagirath: for Rs.10,000: of two villages—Muthamai and Larhipur.

(*c*) *24th June*, 1893: to Bast Ram and Ghasi Ram, son of Ram Kishen: for Rs.40,000 with interest at 6 per cent. with half-yearly rests: a simple mortgage of five villages—Muthamai, Phulaechi, Sherpur, Salempur and Undni. The first four of these villages had been comprised in mortgage (*a*) and Rs.27,000 out of this mortgage money went to pay off mortgage (*a*).

(*d*) *31st March*, 1905: usufructuary mortgage: to Ghasi Ram successor of Bast Ram and Ram Kishen: for Rs.1,03,200: of four villages—viz., Muthamai, Undni, Phulaechi and Matsena. Rs.68,097 of this mortgage money went to pay off mortgage (*c*). It was stipulated that Phulaechi and Matsena might be first redeemed for Rs.43,700 and Muthamai and Undni thereafter for Rs.59.500.

In his mortgage suit of 1911 it was determined against the plaintiff that the mortgage of 1882 is extant as a charge for the original advance having priority to the plaintiff's interest in Muthamai and this is the basis of his present claim to redeem. Their Lordships will accept the plaintiff's view that the amount due thereon at 31st March, 1905, when the usufructuary mortgage was executed, was Rs.45,967. No question of subsequent interest arises: since that date the profits of the property have been enjoyed by way of interest as provided in the usufructuary mortgage. But the plaintiff relies upon certain transactions which have since taken place with reference to that mortgage and which may now be stated.

In 1909 the successors in interest of Ghasi Ram were sued to judgment by certain creditors, and their security upon the villages Muthamai and Phulaechi under the usufructuary mortgage was in 1910 sold in execution to two persons called Panna Lal and Peare Lal (original defendants 1 and 2 to the present suit). The sale was confirmed in 1911 but no copy of the sale certificate is before the Board. The security upon the villages Undni and Matsena remained with Ghasi Ram's successors and in due course came to Madan Mohan (original defendant 4) and to a cousin of his called Bhowani Ram (original defendant 3). On the latter's death, Madan Mohan has become solely entitled.

After the present suit had been filed, namely on 30th June, 1925, Madan Mohan and his cousin accepted the sum of Rs.29,500 from one Laik Singh who had purchased in execution the interest in village Undni of the mortgagors under the usufructuary mortgage, and who desired to redeem it. Possession was given to him of this village and it was released from the mortgage.

In 1924 one Ram Chand (not the plaintiff) purchased in execution the mortgagors' rights in Phulaechi and Matsena and in 1925 he applied for redemption of these villages under section 83 of the Transfer of Property Act against both sets of mortgagees. By their consent he obtained possession of these two villages and their release from the usufructuary mortgage upon payment of Rs.21,500 to Panna Lal and Peare Lal, and Rs.22,200 to Madan Mohan and his cousin.

Thus of the principal sum due upon the usufructuary mortgage—viz. Rs.1,03,200—sums appropriated to the release of three villages other than Muthamai were paid to the amount of Rs.73,200. Rs.30,000 is the amount outstanding and is in respect of principal alone. There having been no appropriation of any payment to the original advance of 1882 or in relief of Muthamai, the High Court held that as the sum of Rs.45,967 which in 1905 was due upon the mortgage of 1882 could have been realised out of village Muthamai, any lesser sum now outstanding must be paid by the plaintiff in order to redeem that village.

The plaintiff does not dispute that the figure of Rs.30,000 would be correct upon the footing that he must pay the total amount outstanding in respect of the advance of 1882. But he claims to redeem Muthamai upon payment of a proportionate part of the amount (Rs.45,967) due in 1905 in respect of that advance. He says that the total annual value of the four

villages mortgaged in 1882 was at that time Rs.3418, of which that of Muthamai was Rs.577, and that Muthamai's proportion of Rs.45,967 is only Rs.8025. He has previously admitted liability for Rs.12,894 and is willing to be bound by his admission, but he defends himself from being required to pay more by contending that this sum is too much.

The particular facts upon which he claims to redeem Muthamai upon payment of a proportionate part of the advance of 1882 are thus set out in the third reason given at the end of his Case before the Board:

> Because the integrity of the mortgage has been broken by the mortgagees themselves, *firstly,* by dividing the liability of the several villages in the mortgage of 1905, *secondly,* by dividing possession of the villages in 1911, and *lastly,* by allowing separate redemption of three out of the four villages.

The first of these grounds their Lordships understand to refer to the provision in the usufructuary mortgage that two of the villages might be first redeemed for a specific sum and the other two redeemed for the balance later on. The second refers apparently to the execution sale of 1910-11.

The Bench which certified that the plantiff's case was fit to be taken on appeal to His Majesty in Council understood his claim to be based on the fact that redemption had already been permitted of part of the property which was the subject of the mortgage of 1882. The mortgage of 1882 cannot be split up by reason of anything done under the mortgage of 1905 to villages which were not comprised in the former mortgage. But this ground of claim applies clearly to the village of Phulaechi and the villages of Sherpur and Salempur need not be separately discussed.

The provision in the usufructuary mortgage that two villages might be first redeemed for a specific part of the new debt affords of itself no reason why the plaintiff should be allowed to redeem the mortgage of 1882 piece-meal. He is not redeeming the usufructuary mortgage nor fulfilling its conditions. It left untouched his right to redeem the mortgage of 1882 by paying off the loan of 1882. Nor does the execution sale in 1910-1 of the mortgagees' interests in Muthamai and Phulaechi provide any such reason. If A owes B Rs.1000 on the security of two villages X and Y and in execution of a judgment against B the security of B in one of the two villages is sold to C, the respective rights of B and of C as against each other are by no means clear. But the plaintiff had no concern with any such difficulty: at worst he had only to deal with two sets of persons instead of one as mortgagees under the deed of 1882. It affords no reason why he should not be required to redeem the mortgage as a whole.

As the first advance was included in the sum for which the mortgage of 1905 was taken, the release of Phulaechi in 1925 from the whole debt Rs.1,03,200, released it from all claim in respect of that part which represented the advance of 1882. It does not appear that the sums paid for the release of this village and of Matsena represented exactly their proportion of the mortgage debt, though there is no reason to doubt that they were the result of a genuine bargain between the parties. It may be assumed that in 1925 all parties concerned knew of the plaintiff's interest in Muthamai. What, then, is the effect of this transaction?

Where the property mortgaged belongs to, or after the mortgage becomes the property of, several persons as owners of different parts, the decisions in India have not been uniform as to the effect of a release of one part by the mortgagee or of his having permitted the owner of one part to redeem his part separately upon payment of a portion of the mortgage debt. It is not doubted that where several properties are comprised in one mortgage each is liable as between mortgagor and mortgagee for the whole of the debt: nor that as between co-mortgagors or persons claiming under the mortgagor if they have separate rights of ownership in different parts, such parts are liable to contribute rateably to the debt. But a view has

been taken which found expression in the third and subsequent editions of the well-known work of Sir Rashbehary Ghose on the Law of Mortgage in India (cf. 3rd ed. 1902 at p. 380: 5th ed. 1922 at pp. 336-7) as follows:—

> The general rule on the subject is that the rights of persons who have acquired an interest in the mortgaged estate since the making of the mortgage, of which the mortgagee has notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If therefore a mortgagee with notice that the equity of redemption on a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser.

Decisions have carried this principle further: holding that the effect of the release of a part by the mortgagee is to allow the owner of any other part to redeem by payment of a part of the debt proportionate to the value which his part bears to the total value of the mortgaged property. It is said that the mortgagee has no right to diminish his own security and at the same time require any co-owner to pay more than his share since the latter's right to contribution has been impaired by the release. This seems to be the result of such Calcutta cases as *Imam Ali* v. *Baijnath Ram Sahu*, 1906 I.L.R. 33 C. 613; *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*, 1910 15 C.W.N. 800; *Pranballabh Shaha* v. *Bhagaban Chandra Seal*, 1934 I.L.R. 61 C. 894. The view taken in Calcutta is not without support in certain other High Courts: cf. *Krishna Ayyar* v. *Muthukumaraswamiya Pillai*, 1905 I.L.R. 29 M. 217, 224; *Ponnusami Mudaliar* v. *Srinivasa Naickan*, 1908 I.L.R. 31 M. 333; *Budhmal Kevalchand* v. *Rama valad Yesu*, 1920 I.L.R. 44 B. 223; *Mayashankar* v. *Burjorji*, 1925 27 Bom. L.R. 1449.

It has also been considered that where the mortgagee has allowed the owner of one part of the mortgaged property to redeem his part, the result is that any separate owner of a portion of what remains can redeem his part on payment of its proportion of the debt. It is said that there has been a severance of the interest of the mortgagors with the consent of the mortgagee (Ghose: Law of Mortgage in India, 5th ed. 1922 p. 262). In Allahabad this doctrine has been rejected and it has been held since *Lachmi Narain* v. *Muhamad Yusuf*, 1894 I.L.R. 17 A. 63, that if the mortgagee allows one part to be redeemed, the balance due remains charged as a whole upon all the rest of the mortgaged property.

In 1914 doubt was thrown upon the correctness of the principles which had been thought to entitle each owner of a separate part of the mortgaged property to redeem his part on payment of a proportionate amount. Napier J. in *Venkata Sudba Reddi* v. *Bagiammal*, 1914 I.L.R. 39 M. 419, held that the previous release of one part had no such effect. He doubted whether such release impaired the right of contribution which existed between persons interested in the equity of redemption and pointed out that the matter is in India governed by a statutory Code. He recalled the observations of the Board in the judgment delivered by Lord Davey in *Webb* v. *Macpherson*, 1903 L.R. 30 I.A. 238, 245, upon the difference between the statutory charge given to a vendor by section 55, sub-section 4, of the Transfer of Property Act for the unpaid purchase money and the vendor's lien given by Courts of Equity. "That lien was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge."

In 1917 the question of the effect upon the right of redemption of a previous release of part of the mortgaged property was referred to a Full Bench of the Madras High Court in *Perumal Pillai* v. *Raman Chettiar*, 1917 I.L.R. 40 M. 968. The Full Bench considered that the right of redemption is not in India a form of relief to be given on such terms as the Court may consider equitable, but a right given by section 60 of the Transfer of Property Act upon terms therein stated; that the liability to contribute imposed by section 82 upon the various properties is not affected by the mortgagee's release of one (as indeed had been held in *Jugal*

Kishore Saku v. *Kedar Nath*, 1912 I.L.R. 34 A. 606), and that it would be contrary to a true construction of the Act to introduce other exceptions into the last clause of section 60 in addition to the one there mentioned.

When in 1929 the Act was revised and somewhat extensively amended, a new section—section 92—gave formal expression to the right of subrogation, and the right of contribution was more plainly defined by amendments made to section 82. The state of the decisions on the present subject did not pass without attention. The word "only" was inserted after the word "except" in the concluding clause of section 60—an amendment which in their Lordships' view was intended to confirm the view taken of the clause by the Full Bench of the Madras High Court. It would have been a curious amendment to make with any other object.

The present case has to be decided upon the law as it stood before the amending Act (XX of 1929) and their Lordships agree with the reasoning of the judgment of Wallis C.J. delivered on behalf of the Full Bench. They consider that the learned judges in that case made the right approach to the matter by regarding the rights of redemption and subrogation as rights conferred and defined by the Act. It would indeed be unfortunate if the right of contribution which exists as between mortgagors or persons claiming under the mortgagor were found to have been inadequately expressed in the statute. That right arises to them *inter se* because they cannot require the mortgagee to have recourse to their several properties equally or rateably, the whole debt being charged on every part of the mortgaged property. But it may be doubted whether it gives rise to any equity in them which takes away the right of a mortgagee to diminish his own security except upon condition of abating part of the debt—to say nothing of the more stringent penalty of exposing himself to piecemeal redemption. It is not a very plain requirement of good conscience that the right of the mortgagee should give way to the rights of contribution between persons who have taken interests which are subject to the mortgage. However that may be, the first question is whether the release of part of the property by the mortgagee does take away as regards that part the liability to contribute which section 82 imposes upon the different parts. Their Lordships agree with the Full Bench of the High Court of Madras that this proposition is not substantiated and that a basis for the alleged equity is not made out upon the face of the Act.

Again, where redemption has previously been permitted of a part of the mortgaged property on payment of a proportionate amount of the debt, it is difficult to find in that fact sufficient reason why the whole of the balance of the debt should not remain charged upon each and every portion of the remainder of the mortgaged property. Apart from any question of the policy of discouraging mortgagees from permitting one owner to redeem his own part separately, that the mortgagee's rights under the registered instrument of mortgage against other owners or parts of the property should be fundamentally altered by such permission, is not justified or explained by saying that he has recognised or assented to a severance. He has not *eo ipso* assented to a severance of his rights as mortgagee against the others, nor made any bargain with them varying the terms of the registered mortgage.

But, in the end, the question is whether section 60 of the Act provides any rule upon such matters. That section as its language shows is to be regarded as conferring the right to redeem; and while the opening words of the last clause "nothing in this section" do not prevent a wider right of redemption being given by agreement, express or implied, the mortgagor in the absence of such a stipulation must, in their Lordships' view, redeem upon the terms of the Act. It is contended for the plaintiff-appellant by Sir Thomas Strangman that the Act provides the mortgagee with a shield against partial redemption, but that if he has released part of the property from his security or has previously permitted a part to be separately redeemed, he has thrown away the shield. This certainly deserves the most careful consideration—all the more that, if right, it is

equally valid under the section as amended in 1929. But has the mortgagee thrown away the shield if he has made no agreement? The single exception mentioned—the case of his having acquired in whole or in part the share of a mortgagor—shows that subsequent transactions by him as to parts of the property are within the contemplation of the clause. Indeed part of the argument for piecemeal redemption is that a release of a portion of the land is equivalent to a purchase by the mortgagee. But the exception is made in the latter case, not on the footing that it is unjust that the full burden of the security should be imposed on the other parts of the property, but because their claim to contribution has now become a claim against the mortgagee or his interest in the equity of redemption. Circuity of action is thought to be avoided if partial redemption be permitted. This principle is stated by Sir James Colvile in *Nawab Azimut Ali* v. *Jowahir Singh* (1870) 13 Moo. I.A. 404, 407, to have been affirmed by the Sudder Court at Agra in a previous case, and as it had gained acceptance the statute of 1882 recognised it as an exception to the general rule that no one is entitled to redeem a part of the mortgaged property on payment of a proportionate amount of the total debt. In 1894 Edge C.J. and Banerji J. in a case already cited (*Lachmi Narain* v. *Muhammad Yusuf*, I.L.R. 17 All 63, 65) said:

> The rule as to the redemption of a portion of mortgaged property on payment of a proportion of the mortgage debt which has been acted on in these provinces since the passing of Act No. IV of 1882 is to be deduced from the last paragraph of section 60 of that Act. We may say that before the passing of Act No. IV of 1882, the principle to be deduced from the last paragraph of section 60, to which we have referred, was the principle, so far as we are aware, which was applied in these provinces, and the right to redeem adversely a portion of the mortgaged property by payment of a proportionate part of the mortgage debt was, when not stipulated for in the contract, confined to cases in which the mortgagee or mortgagees had acquired, in whole or in part, the share of a mortgagor.

That this statement of the law as recognised in 1882 might with equal truth have been made with reference to Bengal would appear from the first edition of Sir Rashbehary Ghose's book already mentioned which was published in 1877, being the Tagore lectures for 1875-6.

> " To the general rule, however, that a mortgage must be redeemed entirely or not at all, there is one exception, and that is where the equity of redemption in a portion of the mortgaged property becomes vested in the mortgagee himself " (p. 196).

That no other exception could claim to be established by decisions may be seen also from Macpherson's " Law of Mortgage in Bengal and the North-West Provinces," 5th ed., 1868, pp. 110-4; 6th ed. 1877, pp. 143-7.

It is not unreasonable to suppose that in 1882 the legislature and its draftsmen were aware of the rule of law obtaining in these provinces and aware also of the existence of some opinion in favour of a wider right of redemption (cf. *Marana Ammanna* v. *Pendyala*, 1881 I.L.R. 3 M. 230). The Act gave to the mortgagor a right to redeem each mortgage separately so that in the absence of an agreement to that effect mortgagees cannot consolidate several mortgages so as to require them all to be redeemed together. Their Lordships consider that the extent of the right to redeem was intended to be delimited by the Act which aimed at furnishing to Indian courts a definite rule expressive of existing law; and that apart from the exception which it recognises, the last clause of section 60 was intended to preclude mortgagors or persons deriving title from them from claiming independently of agreement to have an equity to redeem their own share on payment of a proportionate part of " the mortgage money."

The High Court, in their Lordships' view, have rightly dismissed the plaintiff's appeal in this case on the ground that " under section 60 of the Transfer of Property Act the integrity of a mortgage is not broken

except where the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the property mortgaged. . . . In the present case no part of the mortgaged property has been acquired by the mortgagees or their successors." This appears to cover all the contentions that have been urged for the plaintiff or are open to him on the facts of the case.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the respondents' costs.

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