

Privy Council Appeal No. 2 of 1931.

K. B. Seth Sorabjee - - - - - *Appellant*

v.

Seth Dwarkadas Ranchhoddas and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL
PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 24TH MAY, 1932.

Present at the Hearing :

LORD THANKERTON.

SIR JOHN WALLIS.

SIR GEORGE LOWNDES.

[*Delivered by* SIR JOHN WALLIS.]

This appeal was originally before the Board on the 12th February, 1932, when, upon a preliminary objection taken by the appearing respondents, their Lordships agreed humbly to advise His Majesty that the certificate of the Court of the Judicial Commissioner of the Central Provinces admitting the appeal was wrongly granted but that special leave to appeal ought to be granted to the appellant upon lodging a petition for that purpose. This petition was duly lodged, and their Lordships' report was approved by Order in Council of the 17th March, 1932.

The case, which comes here on appeal from a judgment and decree in second appeal, raises a question of some importance as to the right under the existing law in India of a mortgagor of proprietary rights to recover on redemption subordinate tenures acquired by the mortgagee during the subsistence of the mortgage. This question came before this Board in *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan*, 6 I.A. 145, before the enactment in 1882 of the Indian Trusts Act and the Transfer of Property Act. In that case the mortgagee of the proprietary rights of a talookdar had acquired during the continuance of the mortgage certain subordinate tenures in the taluq known as *birts*, and their Lordships found on the facts of that case that the mortgagee taking advantage of his position as *de facto* talookdar had acquired the *birts* on very favourable terms and had allowed them to merge in the taluq, and that it would be inequitable to allow him on redemption to revive the *birts* for

his own benefit. They accordingly held that the mortgagor was entitled to redeem the estate as then enjoyed by the mortgagee on paying the original mortgage money plus the purchase money of the *birts*. They at the same time made it clear that they were not prepared to affirm the proposition that every purchase of a sub-tenure by the mortgagee must be held to have been made for the benefit of the mortgagor. The judgment reads :—

“ Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

“ It may well be that when the estate mortgaged is a zemindary in lower Bengal, out of which a putnee tenure has been granted, or one within the ambit of which there is an ancient mokurreree istimrari tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that putnee or mokurreree. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the putnee, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and the zemindary would always have been held subject to the mokurreree.”

At the close of their judgment their Lordships referred to the English decisions which they observed were only applicable because they were agreeable to general equity and good conscience, and said :—

“ It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, viz., that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security ; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw v. Brewer* [2 P. Wms. 511] as to the renewal of a term obtained by the mortgagee of the expired term, being, ‘ as coming from the same root,’ subject to the same equity, has never been impeached.”

The equitable principles applied by their Lordships in that case to acquisitions by a mortgagee have now been embodied by section 90 of the Indian Trusts Act, 1882, in a wider rule dealing with acquisitions by tenants for life, co-owners, mortgagees and other qualified owners. The section is as follows :—

“ 90. 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 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.

Illustrations.

- (a) A, the tenant for life of leasehold property renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.
- (b) A village belongs to a Hindu family. A, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. A holds the village for the benefit of himself and the other members.
- (c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear 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 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."

It has, however, been suggested in an Indian case, *Ram Brich Narain Singh v. Ambika Prasad Singh*, 17 C.W.N. 586, which was cited for the appellant both below and here, that section 63 of the Transfer of Property Act goes further than section 90 of the Indian Trusts Act, and entitles the mortgagor on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. It would be strange indeed if these two measures, which were drafted by the Indian Law Commission in England and passed into law in the same session of the Indian Legislature, should be found to contain inconsistent provisions as to the same state of facts, but in their Lordships' opinion no such inconsistency is to be found. Sections 63 and 64 of the Transfer of Property Act are as follows:—

" 63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

" Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

" In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

" Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

" 64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease."

Section 64 may be said to give statutory effect to the rule in *Rakestraw v. Brewer*, 2 P.Wms. 511, which was referred to

by their Lordships in the passage already cited, as it was apparently thought better to provide expressly for this particular acquisition by a mortgagee instead of leaving it to be governed by the general provisions of section 90 of the Indian Trusts Act, but in their Lordships' opinion there is nothing inconsistent with that section in the provisions of section 63 of the Transfer of Property Act as to accessions to mortgaged property and the terms on which the mortgagor may upon redemption obtain the benefit of them. The word accession is not defined in the Act, but the section deals expressly with accessions which have been acquired at the expense of the mortgagee and would appear to be clearly applicable to cases in which a subordinate tenure has admittedly been acquired by the mortgagee as an accession to the mortgaged property. Whether the term accession as used in this section should also be held to cover acquisitions which the mortgagee has made for his own benefit but is bound under section 90 of the Indian Trusts Act to hold for the benefit of the mortgagor need not be decided. Section 90 itself provides for the mortgagor bearing the cost of the acquisition in such a case, but section 63 goes somewhat further and contains as well an express provision as to profits arising from the accession where the mortgage is usufructuary. In the present case it is sufficient to say that their Lordships are clearly of opinion that section 63 of the Transfer of Property Act cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within section 90 of the Indian Trusts Act.

Their Lordships have thought right to make these observations because there would appear to have been much misconception on this subject in the present case with which they will now proceed to deal.

In November, 1908, one Rajaram mortgaged with possession his four annas proprietary share in mauza Khandwa Tarf Kunbi, together with numerous other properties to the predecessors of defendants 1 to 4. Two of these four one anna shares in this mauza were subsequently sold to the mortgagees in 1912; another was brought to sale in court auction and purchased by the fifth defendant, and the remaining one anna share was also brought to sale and acquired in 1918 from the auction purchaser by the plaintiff, who instituted the present suit for redemption in the Court of the Subordinate Judge of Khandwa on the 23rd December, 1921.

Mauza Khandwa Tarf Kunbi is more than 4,000 acres in extent, but the present appeal only relates to two Survey Numbers 451 and 452 of $5\frac{1}{2}$ and 3 acres respectively. The mortgagees were apparently anxious to acquire them on account of their proximity to the town of Khandwa, and are found to have erected a ginning press on one of them at a cost of Rs. 8,000.

As regards Survey No. 452 the mortgagees in 1906, more than two years before the execution of Rajaram's mortgage in their favour, had obtained from his brother and co-sharer Govindram, who was also the owner of a four annas share in the mauza, a sale deed in which he purported as malguzar and lambardar to sell them the whole proprietary rights in this Survey Number. Subsequently to the date of the mortgage on the 8th October, 1910, they obtained a deed from the occupancy tenants by which the latter gave up their tenancy right for ever and surrendered it to the predecessors of defendants 1 to 4 as proprietors on receipt of Rs. 2,135 on account of tenancy rights and improvements.

As regards Survey No. 451 the occupancy tenants on the 22nd May, 1915, purchased from Rajaram's uncle Totaram the remaining co-sharer in the mauza his eight annas proprietary share in this Survey Number for a consideration supplied by the predecessors of defendants 1 to 4, in whose favour they executed on the following day a sale deed of the proprietary and tenancy rights in the Survey Number. The sale deed recited that they had formerly been occupancy tenants and had subsequently purchased the malikana or proprietary rights from Totaram.

In paragraph 10 of his rejoinder the plaintiff alleged that after the execution of the mortgage deed there had been accretions to the mortgaged property as shown in Schedule K filed therewith. In Schedule K the occupancy rights acquired in these two Survey Numbers subsequent to the creation of the mortgage were claimed as accretions to the mortgage, but as half the mortgagor's proprietary rights in the mauza had been acquired by the mortgagees subsequent to the mortgage, only half of each Survey Number was claimed as an accretion to the mortgage. "The defendants' possession over half of this field at least," it was alleged as regards each of these Survey Numbers, "must be deemed to be that of mortgagees as the acquisition thereby made was that of an occupancy holding." In other words the whole occupancy rights acquired by the mortgagees in these Survey Numbers were claimed as an accretion or accession to the mortgage, although the mortgage was only of Rajaram's four annas share in the mauza, and although the mortgagees had acquired Govindram's four annas share in Survey Number 452 and Totaram's eight annas share in Survey Number 451. This claim was the subject of issues 17 and 18.

17. Whether there have been accretions to the mortgaged property as shown in the plaintiff's Schedule K ?

18. If so, are defendants 1 to 4 bound to deliver possession of the same to plaintiff on redemption and on what terms ?

In the first Court the Subordinate Judge saw no ground for holding that the mortgagees as such had acquired the occupancy rights in these Survey Numbers. He accordingly disallowed the claim, but observed that the plaintiff's claim to share in this land

would have to be determined in the partition suit which was then pending apparently between the co-sharers in the mauza, in which the plaintiff was entitled to intervene as the owner of a one anna share.

The judgment of the Subordinate Judge on this point was reversed by the District Judge of Nimar who held that defendants 1 to 4 must surrender half the land as claimed by the plaintiff and account for half the profits, but that the plaintiff would have to bear half the costs of acquisition. The suit was remanded to ascertain the amount of the profits and costs of acquisition, and when the case came back, a decree was passed ordering the plaintiff to be put in possession of half the Survey Numbers, the claims of the 5th defendant, who had also acquired a one anna share from the mortgagor but had not appeared in the suit, being apparently overlooked. The District Judge's reasons are not very clear, but he referred to *Ram Brich Narain Singh v. Ambika Prasad Singh*, 17 C.W.N. 586, and appears to have held on the authority of that decision, on which their Lordships have already commented, that, as the occupancy rights had been acquired by the predecessors of defendants 1 to 4 while they were mortgagees in possession of Rajaram's four annas share of the mauza, the mortgagor was entitled to them on redemption as an accession to the mortgaged property under section 63 of the Transfer of Property Act. On a second appeal preferred by defendants 1 to 4 this contention was again put forward and was rightly rejected by the Judicial Commissioner of the Central Provinces who allowed the appeal and restored the judgment of the Subordinate Judge, holding that the surrenders of the respondents' occupancy rights had been obtained by the predecessors of defendants 1 to 4 as an accession to the proprietary interest which they claimed to have acquired in these Survey Numbers and not as mortgagees in possession of their mortgagor's four annas share.

In their Lordships' opinion these occupancy rights were acquired by the mortgagees of Rajaram's share, who were also co-sharers with him in the mauza, for their own benefit, and to give the plaintiff any claim to them as the owner of a one anna share in the mauza it was incumbent on him to show that they were acquired under such circumstances as to bring them within the provisions of section 90 of the Indian Trusts Act. No such case was set up in paragraph 10 and Schedule K of the plaintiff's rejoinder in which these occupancy rights are claimed as accretions to the suit mortgage, no issues have been framed in regard to it and it has not been considered or decided in the lower courts.

In their Lordships' opinion the plaintiff's appeal fails and should be dismissed and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the first three respondents' costs including their costs of the proceedings of the 12th February, 1932, and of the petition for special leave to appeal.

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