Privy Council Appeal No. 25 *of* 1938
(*Patna Appeal No.* 8 *of* 1937)

Rai Bahadur Madhoram Sand and others - - - *Appellants*

v.

Raja Bahadur Kirtya Nand Sinha (since deceased) and others - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JUNE, 1944

Present at the Hearing:

LORD THANKERTON
LORD WRIGHT
SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree of the High Court of Judicature at Patna dated 19th March, 1937, which affirmed granting additional relief to the plaintiffs (respondents before the Board) the decree dated 28th March, 1933, passed in their favour by the Subordinate Judge of Purnea.

The appeal is by defendants 1st party.

The plaintiffs-respondents claimed the suit property which consists of a 2 annas 8 pies share of a certain mahal bearing tauzi No. 1298 in the District of Purnea, as purchasers in execution of a mortgage decree.

The facts are somewhat complicated, but are not in dispute and may be summarised as follows:—The suit property was originally part of an estate known as the Srinagar Raj, and the lands in tauzi No. 1298 were originally in an estate which bore the No. 1273. The proprietors of the tauzi were three brothers, two of whom Kalikanand and Kamalanand, the sons of Rani Jagrama, held a two-third share of it jointly, while the third share was owned separately by their step-brother, Nityanand Singh. In 1894, the estate was partitioned by the collector under the Bengal Estates Partition Act. This resulted in the estate being split up into two tauzis, one of a two-third share—the property of Kalikanand and Kamalanand, bearing the old tauzi No., 1273, and the other of a third share, the property of Nityanand bearing a new number tauzi, No. 1298. Rani Jagrama was given a maintenance of Rs.1000 a month charged upon the entire property, the three brothers being bound to contribute equally to the payment of this allowance. Kalikanand and Kamalanand subsequently purchased the share of Nityanand.

On 15th August, 1905, Kalikanand and Kamalanand executed a simple mortgage for Rs.1,000,00 of certain of their properties including the 2 annas 8 pies share of the estate bearing tauzi No. 1298 (the suit property) in favour of one Ramsuram Prasad. The mortgagors are now represented by their descendants, defendants 6 to 13, referred to in the pleadings as defendants 2nd party. They are respondents 12 to 19 before the Board.

On 13th November, 1907, Kalikanand and Kamalanand executed in favour of the appellants a simple mortgage for Rs.112000 of their properties mentioned in the deed (Ex. A_2) which included tauzi No. 1273. It was described in the deed as follows:—

Tauzi No.	Name of Taluka	Pargana	District	Extent of share
1273.	Tirakandah	Tirakandah	Purnea	16 annas.

Sadr-Jama.
Rs. As. Ps.
7500. 7. 7.

The deed did not specify in the schedule tauzi No. 1298. One of the questions arising in the appeal is, whether this mortgage covered tauzi No. 1298. The Subordinate Judge held that it did, but the High Court held that it did not. The bearing of this question on the decision of the appeal with be explained later.

On 29th April, 1910, Kalikanand and Kamalanand executed a mortgage of tauzi Nos. 1273 and 1298 and other properties in favour of the plaintiffs-respondents for over Rs. 6 lakhs.

On 16th September, 1912, Ramsuram Prasad, the mortgagee under the bond of 1905 brought suit No. 546/1912 against the mortgagors impleading the plaintiffs-respondents as mortgagees under the above-mentioned subsequent mortgage of 1910, but not impleading the appellants, the mortgagees under the bond of 1907. He obtained a preliminary decree on 17th December, 1914, and a final decree on 17th August, 1915. On 26th September, 1921, Ramsuram filed his execution petition E.P.113/1921 and the properties were brought to sale on 23rd April, 1921. At the said sale the suit property was purchased by the plaintiffs-respondents. When they attempted to take possession of it, they were resisted by the appellants, and then, the suit out of which this appeal arises, was brought by them for possession of the same and for mesne profits.

Their Lordships will presently refer to the claim of the appellants to resist the plaintiffs-respondents, but to appreciate it, it is necessary that they should mention certain other events.

During the pendency of suit No. 546/1912, on 30th October, 1912, and 20th June, 1915, Kalikanand Singh for himself and as karta of the joint family consisting of himself, his sons and nephews executed two further mortgages of properties including tauzi No. 1298 in favour of one Raja P. C. Lal Choudhary for Rs.7 lakhs and Rs.1,30,000 respectively. On 7th December, 1916, he brought 2 suits for sale Nos. 765 and 766/1916 on those 2 mortgages; preliminary decrees were passed on 23rd January, 1918, and final decrees on 8th April, 1919. In 1920 T.S. No. 1097 was filed by certain members of the mortgagors' family to set-aside the decrees obtained by the Raja, and while it was pending he executed his decrees (Execution Cases 78/79 of 1921) and purchased the properties on 7th February, 1922, subject to the prior charges of the appellants on their mortgage of 1907, and subject also to the prior charge of the plaintiffs-respondents founded on their mortgage of 1910. It may be mentioned that some of the defendants filed objection cases, Nos. 26 to 29, to set aside the sales:

On 29th March, 1920, Rani Jagrama filed suit No. 225 for Rs.1,61,194 for arrears of maintenance charged on the properties, joining as parties, her son Kalikanand and the representatives of Kamalanand (deceased), the present appellants, Raja P. C. Lal Choudhary and the plaintiffs-respondents. As the defendants 2nd party (defendants 6 to 13) now respondents 12 to 19, are the representatives of Kalikanand and Kamalanand the mortgagors, it will be noticed that all the parties to the present suit were included amongst the defendants in suit No. 225/1920 brought by the Rani.

Thus, at the time when Raja P. C. Lal purchased the properties in execution of his decrees, there were pending the Rani's suit, T.S. No. 1907 brought to set aside the mortgage decrees obtained by him; and also miscellaneous cases 26 to 29 brought to set aside the sales which he had

obtained in execution of his decrees. In the circumstances, the Rani, Raja P. C. Lal, the appellants, and the mortgagors compromised their disputes. The compromise was entered into on 17th September, 1922, and was embodied in a decree passed on 5th October, 1923. The present plaintiffs-respondents who were also parties to the Rani's suit were not parties to the compromise. It is not explained why they were left out; however, not being parties to it, they will not be bound by its terms.

At the time of the compromise it was found that a sum of Rs.85,000 was due to the Rani for her maintenance. The terms of the compromise have been well summarised by the High Court as follows:—

> " Certain of the properties purchased by Raja P. C. Lal were released from all claims on behalf of the mortgagors and from all claims by Rani Jagrama. These are the items of property 47 in all contained in schedule A of the compromise in the decree Ext. J(4). To discharge the balance of his claim under his mortgage, the properties set forth in schedule D were conveyed to him by the mortgagors and Rani Jagrama also released these properties from any claim by her. He also received a handnote for Rs.1,30,000 executed by the defendants first party on behalf of the defendants second party, and his decree was deemed to be satisfied and he released from his mortgage charge, in favour of the mortgagors, certain items of property including tauzis 1273 and 1298; the result being that he got Rs.1,30,000 and a clear title to a considerable part of the property which he had purchased. The Rani released certain properties including tauzis 1273 and 1298 from her charge, in favour of the defendants first party and obtained a life tenure in respect of certain other properties and got 11 items set forth in schedule B with an absolute title. Finally the defendants second party executed on the 18th September, 1922, a usufructuary mortgage in respect of the properties released in their favour including the two tauzis in question in favour of the defendants first party for Rs.5,00,000, a part of which was made up by the handnote for Rs.1,30,000 which was in effect borrowed from the defendants first party and the balance by the amounts due to defendants first party from defendants second party on the mortgage bond of 1907 and certain handnotes and a hundi after adjustment. As to the Rani's suit, the amount of Rs.89,000 due on this was reduced in proportion to the property which she had released in favour of Raja P. C. Lal and the defendants first party and a decree was passed against the mortgagors and the other defendants for sums aggregating about Rs.60,000 ".

In pursuance of the above compromise, on 18th September, 1922, the mortgagors executed in favour of the appellants a usufructuary mortgage which included tauzi No. 1298 amongst other properties. In 1923, the plaintiffs-respondents sued the mortgagors on the mortgage bond of 1910, and obtained a preliminary decree on 18th September, 1926.

The appellants took possession of the suit property on the strength of the usufructuary mortgage dated 18th September, 1922, as it included tauzi No. 1298 amongst other properties; and resisted the plaintiffs-respondents when they sought to take possession of it as purchasers in execution of the decree in suit No. 546/1912.

The plaintiffs-respondents contended that the usufructuary mortgage could not affect their rights acquired during the pendency of suit No. 546/1912 to which the mortgagors were parties; in other words, that the doctrine of *lis pendens* affected the mortgage and that the appellants derived no rights under it as against them. Amongst other matters, it was contended by the appellants that the principle of *lis pendens* could not be invoked by the plaintiffs-respondents in the circumstances of the case, that the usufructuary mortgage of 1922 was executed to pay off the mortgage of 1907 which included the suit property and that their right to redeem it on the strength of that mortgage was not affected by the decree in suit No. 546/1912 as they had not been made parties to it as subsequent mortgagees. It was also their contention, that they were subrogated to the charge which Rani Jagrama had over the suit property under the partition decree of 1894 and in consequence, their rights had priority over the mortgage of 5th August, 1905.

On the above contentions, the following questions arise for determination:—

1. Is the usufructuary mortgage dated 18th September, 1922, affected by the doctrine of *lis pendens* as alleged by the plaintiffs-respondents?

2. Are the appellants entitled to redeem the suit property as holders of the mortgage of 1907?

3. Are the appellants entitled to any right of subrogation?

The Courts in India decided all these questions in favour of the plaintiffs-respondents. The Subordinate Judge gave them a decree for possession of the property and for mesne profits from date of suit till recovery of possession; but he gave them no decree for mesne profits anterior to the institution of the suit. The appellants appealed from the decree, and the plaintiffs-respondents filed a memorandum of cross-objections. The High Court dismissed the appeal, and allowed the memorandum of objections. Their Lordships will now consider the questions in order:—

It appears to their Lordships that the plea of *lis pendens* is well founded. The usufructuary mortgage in question was executed by the mortgagors who were parties to suit No. 546/1912 before it ended on the 23rd April by the purchase of the suit property by the plaintiffs-respondents. It cannot therefore affect their rights; on the other hand, the mortgage bond is affected by the doctrine of *lis pendens*. The doctrine applicable to the case is that enacted in section 52 of the Indian Transfer of Property Act (Act IV of 1882) before it was amended by Act 20 of 1929, as the mortgage came into existence before the amendment came into force. The section limits the applicability of the doctrine so far as concerns the present appeal to purchases made during the " active prosecution " in any Court of a " Contentious Suit or Proceeding." It was argued by Mr. Wallach that in this case it could not be said that there was a " Contentious Suit," nor could it be said that there was an " active prosecution " of the same. It is to the credit of the learned Counsel that he did not appear to their Lordships to overstress the point as the proceedings in the case amply show that the suit was contentious, that it was kept alive and that the proceedings in execution were carried on actively as may be judged from the various entries in the " order sheet ". A mortgage executed after a mortgage decree and during the course of execution proceedings is undoubtedly subject to *lis pendens*. No useful purpose will be served by discussing the words referred to by Mr. Wallach as the section has now been amended by substituting the words " pendency " for the words " active prosecution "; and the words " any Suit or Proceeding which is not Collusive " for the words " a Contentious Suit or Proceeding ".

The next question relates to the right of the appellants to redeem the mortgage of 1907. The learned Counsel argued that the effect of the usufructuary mortgage was merely that they were enabled to enforce their mortgage of 1907 without recourse to a suit and that their possession under the usufructuary mortgage was no more than possession under their earlier mortgage which was prior to the rights acquired by the plaintiffs-respondents under their purchase, and that they were not affected by the decree in suit No. 546/1912. It is clear that this plea cannot avail them unless their mortgage of 1907 covered tauzi No. 1298 on which point the High Court as already mentioned, differing from the Subordinate Judge, has found against them. The Subordinate Judge based his conclusion that the tauzi No. 1298 is included in the tauzi No. 1273 mentioned in the deed of 1907 mainly on the " Sadr-jama " (Revenue) of that tauzi given in the deed. It is not disputed that tauzi No. 1298 is not specifically mentioned in it. His reasoning may be given in his own words " But the revenues of that tauzi and tauzi No. 1298 appearing from the D registers [Exts. L and L1] to be Rs.4,827-8-1 and Rs.2,413-12-0 respectively, their total comes up to Rs.7,241-4-1 which approaches the revenue of Rs.7,050-7-7 mentioned in the bond [Ext. A (2)] more nearly than the revenue of tauzi No. 1273 alone." This reasoning was not accepted by the High Court for the reasons, that the number of the tauzi is 1273 which is specific, that the sadr-jama mentioned in the document itself Rs.7500, does not correspond with the actual aggregate sadr-jama of tauzis 1273 and 1298 which is admitted to be Rs.7,241, and what is more important, that the amount of the jama cannot be held to indicate the property from which it is collected as it is conceivable that it might vary from time to time, whereas

the property recorded under a particular tauzi No. cannot vary. With this reasoning of the High Court their Lordships desire to express their entire agreement. If the tauzi No. 1298 is not included in the deed of 1907, then, no further question of the appellants' right to redeem the suit property based on that mortgage can arise.

The last point raised relates to the right of subrogation claimed by the appellants. It will be remembered that the Rani had a charge over tauzi No. 1298, and various other properties of the Raj under the partition decree of 1894. Their Lordships understand the appellants' contention to be that as at the time of the compromise they advanced Rs.1,30,000, and as a result of that advance the Rani released the charge which she had over tauzi No. 1298 and other properties; they are entitled to be subrogated to the rights of the Rani over the suit property. This contention was disallowed by the High Court on the ground that partial subrogation is not permissible in law. The reasoning of the learned Judges with which their Lordships agree is that it is impossible by analysing the terms of the compromise to find out what, if any, proportion of the advance of Rs.1,30,000 is to be attributed to the release by the Rani of tauzi No. 1298. They also added that " The Rs.1,30,000 advanced by the appellants to the mortgagors was really to pay off Raja P. C. Lal and the consideration for this loan was the usufructuary mortgage of 1922. In any event on the almost impossible supposition that the defendants first party are to be subrogated to Rani Jagrama's right, Rani Jagrama had merely a right to put the property charged to sale and could not claim a right to possession; so that the defendants first party cannot claim a right to possession as against the plaintiffs." These observations are not without force.

Partial subrogation is now disallowed by paragraph 4 of section 92 of the Transfer of Property Act. This section is new and was inserted by the amending Act 20 of 1929. After explaining the nature of " subrogation " in paragraph 3, paragraph 4 of the section states that:—

" Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full." In *Raja Janaki Nath Roy* v. *Raja Pramatha Nath Malia* (67 Ind. App. 82) their Lordships approving the dictum of Mookerjee J. in *Gurdeo Sing* v. *Chandrikah Sing* in (1907) I.L.R. 36 C. 193, that " a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question " and " that payment of a portion only of the incumbrance is not sufficient ", observed that " such a qualification of the right of subrogation applies whether the right is claimed under the statute or the pre-existing law." The usufructuary mortgage in the present case which is of the year 1922 is covered by this decision.

As the appellants have not been able to establish their claim to the suit property on any of the grounds urged by them the appeal fails and should be dismissed with the costs of the plaintiffs-respondents. Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

RAI BAHADUR MADHORAM SAND AND OTHERS

v.

RAJA BAHADUR KIRTYA NAND SINHA (since deceased) AND OTHERS

DELIVERED BY SIR MADHAVAN NAIR

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