

Mst. Fahmida Begam And Ors. vs Chobey Sambho Nath And Ors. on 9 March, 1953

Equivalent citations: AIR1953ALL632, AIR 1953 ALLAHABAD 632

JUDGMENT

Malik, C.J.

1. Learned counsel for the appellants has raised a very ingenious point in the case but we do not think that the point has any force.

2. On 6-1-1908 one Zebulnissa made a simple mortgage of three houses and seven Sihams of zamindari share to Fayyaz Ali Khan and Wajid Ali Khan mortgagees for Rs. 2000/-. On 19-1-1921 she sold to Wajid Ali Khan two Sihams out of the seven Sihams and transferred to the two mortgagees Fayyaz Ali Khan and Wajid Ali Khan the three houses mortgaged for Rs. 5000/-. The only property that remained thus encumbered was five Sihams zamindari. The plaintiffs are the legal representatives of Fayyaz Ali Khan mortgagee who has died and they claim that they have acquired the equity of redemption from Wajid Ali Khan of his interest in the mortgage. No date is mentioned of this transfer of mortgagee rights and it is not necessary for us in this case to consider this matter further, though it is very doubtful whether there was any such transfer. In the year 1922 Srimati Zebulnissa is said to have gifted to Wajid Ali the remaining five Sihams of the Zamindari and Wajid Ali on the basis of the oral gift got his name mutated in the village papers and got possession of the property. He remained in possession till 1936 when he filed an application under the U. P. Encumbered Estates Act and showed these five Sihams as property belonging to him.

Neither Fayyaz Ali nor the plaintiffs made any application to be included in the list of creditors. No claim to the five Sihams having been made by anybody the property was included in the list of properties belonging to Wajid Ali and the list of properties was sent to the Collector, from which the debts due to the landlord-applicants from Wajid Ali were to be satisfied. The Collector in satisfaction of the decrees passed by the Special Judge transferred these five Sihams to, we understand, the defendants first set. The plaintiffs got a suit filed in the year 1944 for realization of Rs. 2956/- on the basis of the mortgage dated 6-1-1908 and claimed that they were entitled to sell up these five Sihams in the possession of the defendants first set in satisfaction of the amount due under the mortgage. The lower appellate court dismissed the suit on the ground that the plaintiffs not having claimed the amount under the Encumbered Estates Act, the debt must be deemed to have been satisfied.

3. Learned counsel has urged that under the U. P. Encumbered Estates Act a secured creditor has been given the option either to claim the money in the Encumbered Estates Act proceedings or to stand outside it and then to proceed to enforce his rights under the law by an independent suit. He

has drawn our attention to Sections 4, 6, 7, 8, 9 and 13 where the provision is made as regards claims against "the persons or the property of the landlord". Learned counsel has urged that while in the sections mentioned above claims against the person as also against the property are mentioned, in Section 13 claim against the person only is included and not claim against the property so that if a secured creditor has not claimed his debt under the Encumbered Estates Act proceedings, his remedy to file a suit to enforce the security is not barred. Section 13 reads as follows :

"Every claim decreed or undecreed against the landlord in respect of a private debt, other than a debt due to a Co-operative Society registered under the Co-operative Societies Act, 1912, by its members, shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged."

The section applies to all claims against the landlord in respect of a private debt. This section is differently drafted from the other sections. A reference is made in this section to claims "decreed or undecreed". Naturally it was not found necessary to repeat the words "against the property", as the decree must be against a person, though it might be confined to the property in his hands. The U. P. Encumbered Estates Act was enacted in 1934 and a large number of claims have been disposed of and liquidated under the provisions of that Act. It has always been held in this Court that the analogy of the Provincial Insolvency Act is not a true or complete analogy and the purpose underlying the Act is that the Collector should have before him a complete list of liabilities and assets of the landlord-applicant and find out the best way of satisfying the liabilities and at the same time to save as much of the property as possible.

There is no reason why secured debts should have been excluded from the purview of the Act and a mortgagee, should be given the right either to prove his claim or to stand out. This would give rise to various complications. The property included in the list sent to the Collector by the Special Judge is entirely under his control and he has the right to dispose it of either by mortgage, lease or sale as he considers desirable. We may also refer to Section 18 of the Act which provides that when a decree is passed under Section 14 on the basis of a mortgage, the effect of the decree shall be to extinguish all the rights, if any, of the claimant under that mortgage. The Act, read as a whole, leaves no doubt that the mortgagee has to prove his claim against the landlord in the proceedings under the U. P. Encumbered Estates Act and he cannot claim to stand out of it. Section 13, to our minds, was clearly applicable and the mortgagee had to prove his debt before the learned Special Judge. His failure to do so must be deemed to have discharged that debt.

4. The appeal has no force and is dismissed with costs.