

Calcutta High Court

Ram Kinkar Hazra vs Hareram Hazra on 25 June, 1931

Equivalent citations: AIR 1933 Cal 181, 145 Ind Cas 575

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JUDGMENT S.K. Ghose, J.

1. This appeal deals with a question of competition between two mortgages. Plaintiffs rely upon the first mortgage which was executed on 9th May 1908. There was a decree and in execution of that decree they purchased on 11th November 1916 and obtained possession through Court on 3rd June 1917. Defendants took the second mortgage in January or February 1911, obtained a decree thereon, and in execution of it purchased the property on 13th June 1922, and took possession on 18th July 1923. In neither of the two mortgage suits was the other mortgagee made a party. Plaintiffs allege that they were wrongfully dispossessed by the defendants on 18th July 1923 and so they sue to recover possession. The defence is that the plaintiffs' decree is a nullity as against the defendants who were no parties to it. Then arose the question as to which of the parties was entitled to possession and further, which was entitled to the first right to redeem. This latter question also was definitely raised. The trial Court found in favour of the plaintiffs and declared that they were entitled to get khas possession by redeeming within a certain date. On appeal the learned Judge of the Court below took the same view. Hence this second appeal by the defendants. Before the learned Judge the decision turned upon the question whether the plaintiff had the preferential right to redeem the subsequent mortgage in favour of the defendants. In discussing the point the learned Judge quotes relevant authorities and gives a summary of the law on the subject. The learned advocate in support of the second appeal has sought to distinguish the cases which are referred to in the judgment by saying that these cases did not decide that the right of the subsequent mortgagee who was not a party to the prior mortgage-decree was lost.

2. In the case of *Nanack Chand v. Taluckdye Koer* (1880) 5 Cal 265 the second, mortgagee purchased first. In the case of *Ram Narayan v. Bandi Pershad* (1904) 31 Cal 737 the first mortgagee purchased first. What these cases decide was that, quite apart from the question of the right to redeem the right to possess the property was with the prior purchaser and it did not make any difference whether he was the first or the subsequent mortgagee. It was also decided by the Full Bench in the case of *Debendra Narayan v. Ramtaran Banerjee* (1903) 30 Cal 599, that a puisne mortgagee is entitled to a sale of the property, subject to the rights of the first mortgagee, even after the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party. In the present case the plaintiffs were the first purchasers and therefore it has been correctly held that they are entitled to possess. But the parties have gone further and raised the question as to which of them has the preferential right to redeem. This depends on who had acquired the equity of redemption from the mortgagor. There is no doubt that as between the two purchasers the title to the outstanding equity of redemption is determined by priority, not of respective mortgages but of respective sales, and the person who first buys the equity of redemption, whether he be the mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire an absolute title: see *Ghose on Mortgage*, Edn. 4, p. 623. This is supported by the decision in the case of *Para-Ram Singh v. Pandohi* AIR 1922 All 135 which was followed in the case of *Ram Baran v. Bhagwati Pande*. With regard to the position

of a second mortgagee the latest Calcutta decision that I know of is in the case Kalipada Mukherji v. Basanta Kumar : see the remarks of Mukerji, J., at p. 882 (of 35 CW N). Since the question was raised, and in view of the equities of the ease, I consider that the judgment of the lower appellate Court is right, that the plaintiffs have the preferential right to redeem. The second appeal therefore fails and is dismissed with costs.