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Oct. 23.

# RAJA KAMAKSHYA NARAYAN SINGH BAHADUR

*v.*

# CHOHAN RAM AND ANOTHER

[MEHR CHAND MAHAJAN, CHANDRASEKHARA AIYAR and BHAGWATI JJ.]

*Transfer of Property Act (IV of 1882), ss. 66, 65-A—Mortgage —Mortgagor in possession—Power to lease—Law before amendment Act of 1929—Permanent lease by mortgagor—Validity.*

Under the law as it stood prior to the enactment of s. 65-A of the Transfer of Property Act, by Act XX of 1929, the question whether the mortgagor in possession had power to lease the mortgaged property has got to be determined with reference to the

authority of the mortgagor as the bailiff or agent of the mortgagee to deal with the property in the usual course of management. It has to be determined on general principles and not on the distinction between an English mortgage and a simple mortgage or on the considerations germane to s. 66 of the Transfer of Property Act, and the true position is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management; for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to him to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner, or for a purpose, different from the mode in which he himself had used it before he granted the mortgage. And it is for the lessee, if he wants to resist the claim of the mortgagee, to establish that the lease in his favour was granted on the usual terms in the ordinary course of management.

Where a mortgagor granted a permanent lease of the mortgaged property in the year 1925 and the High Court upheld the lease as against a person who had purchased the properties in a sale held in execution of a decree obtained by the mortgagee on the mortgage, on the ground that the lease did not impair the security of the mortgagee: *Held*, that the lease was not binding on the mortgagee or the auction purchaser as it was not a lease granted in the usual course of management, even though it did not impair the security.

*Madan Mohan Singh* v. *Raj Kishore Kumari* (1916) 21 C.W.N. 88, approved. *Balmukund* v. *Motilal* (1915) 20 C.W.N. 350, dissented from. *Banee Prasad* v. *Reet Bhunjun Singh* (1868) 10 W.R. 325, explained.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 73 of 1950. Appeal from the Judgment and Decree dated the 26th January, 1944, of the High Court of Judicature at Patna (Fazl Ali C. J. and Chatterji J.) in Appeal from Original Decree No. 4 of 1941, arising out of Judgment and Decree dated the 20th September, 1940, of the Court of the Additional Subordinate Judge of Hazaribagh in Title Suit No. 45 of 1939.

*S. N. Mukherjee* for the appellant.

*Gangacharan Mukherjee* and *A. N. Sinha* for the respondents.

1952. October 23. The judgment of the Court was delivered by BHAGWATI J.

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BHAGWATI J. --The question that arises for our consideration in this appeal is whether prior to the enactment of section 65-A of the Transfer of Property Act in 1929 a mortgagor in possession had the power to grant a permanent lease of the mortgaged property so as to bind the mortgagee.

One Raja Nilkanth Narain Singh was the owner of Gadi Sirampur and he executed on the 1st August, 1914, a simple mortgage of Gadi Sirampur in favour of the Chota Nagpur Banking Association Limited. In 1920 the Bank filed a suit against his son Wazir Narain Singh to enforce the mortgage security and obtained a mortgage decree on the 29th November, 1921. The Bank purchased a third share of Gadi Sirampur in execution of that decree on the 28th October, 1922. Proceedings were taken to set aside this sale. During the pendency of these proceedings it appears that on the 5th November, 1925, Wazir Narain Singh granted a permanent lease of four villages Nawadih, Koldih, Pandna and Chihutia by a registered Patta to one Hiraman Ram who was the Manager and Karta of his joint Hindu family. The permanent lease was taken by him in his own name and in the name of his son Chohan Ram. An agreement was subsequently arrived at between the Bank and Wazir Narain Singh that if Wazir Narain Singh paid to the Bank on or before the 16th August, 1926, the sum of Rs. 1,10,631-4-0 the sale would be set aside. Wazir Narain Singh executed on the 14th August, 1926, a mortgage of Gadi Sirampur in favour of the Manager of the Court of Wards in charge of the plaintiff's estate during his minority to secure repayment of a sum of Rs. 1,47,000 and out of the same satisfied the dues of the Bank and the sale in favour of the Bank was accordingly set aside. The plaintiff through the Manager of the Court of Wards filed a suit on the 4th February, 1929, to enforce this mortgage and he impleaded as co-defendants in that suit Hiraman Ram as defendant 20 and his father Dilo Ram as defendant 19. A final decree for sale was passed on the 18th September, 1931, and the

plaintiff purchased Gadi Sirampur at the auction sale held in execution of this decree on the 6th April, 1935. Delivery of possession was obtained by the plaintiff through the Court on the 16th February, 1936. Dilo Ram died after the mortgage decree but Hiraman Ram and his son Chohan Ram continued in actual possession of the disputed villages and the plaintiff therefore filed on the 16th November, 1939, the suit, out of which this appeal arises, in the Court of the Additional Subordinate Judge of Hazaribagh against Hiraman Ram and Chohan Ram, defendants 1 and 2, for khas possession of these villages. The plaintiff contended that he was subrogated to the position of the Bank, that the decree which had been passed in the mortgage suit was binding on the defendants, that he was the auction purchaser in execution of that mortgage decree and that the Patta being subsequent to the plaintiff's mortgage thus came to an end and he was entitled to recover khas possession from the defendants. Defendant 2 filed his written statement contesting the plaintiff's claim. He denied that the plaintiff was subrogated to the position of the Bank. He contended that the decree in the mortgage suit was not binding on him as he was not a party to that suit. He further contended that the Patta could not be put an end to by the auction sale of the mortgaged property. The defendant 1 filed a separate written statement. He denied that he was the Manager and Karta of the joint Hindu family. He also contended that there was a partition amongst the members of the joint family within a year after their possession of the properties in suit and the properties had been allotted at that partition to the defendant 2.

The trial Court held that the plaintiff was subrogated to the position of the Bank. It also held that the defendant 1 was the Manager and Karta of the joint family and that the defendant 2 was fully represented in the mortgage suit, that the decree in the mortgage suit was binding on the defendants and that the plaintiff was entitled to recover possession

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of the said properties and mesne profits from the defendants. The defendants appealed against this decree to the High Court of Judicature at Patna. The High Court negatived the contention in regard to constructive *res judicata* which was urged on behalf of the plaintiff. It then considered the further contention that Wazir Narayan Singh had, after creating the mortgage in favour of the Bank no power to grant the permanent lease in question to the defendants. After considering all the authorities which were cited before it, it came to the conclusion that the question whether Wazir Narayan Singh had got such power or not had to be determined with reference to the provisions of section 66 of the Transfer of Property Act and the crucial test was whether the lease rendered the mortgagee's security insufficient. In spite of the fact that there was no allegation in the plaint that the defendant's lease had the effect of rendering the security of the Bank insufficient, the High Court went into this question and on a calculation of some figures came to the conclusion that the lease of the disputed villages in favour of the defendants did not in any way render the security of the bank insufficient. It therefore held that the lease was valid and was not affected by the plaintiff's mortgage decree or by the execution sale under that decree and accordingly dismissed the plaintiff's suit. The plaintiff obtained leave to appeal to the Privy Council from this decision of the High Court and the appeal was admitted on the 9th January, 1946.

Both the Courts below found that the plaintiff was subrogated to the position of the Bank. They also found that the defendant 2 was sufficiently represented in the mortgage suit. These findings were not challenged before us and the only question which survived for our consideration was whether Wazir Narayan Singh had the power to grant a permanent lease to the defendants so as to bind the plaintiff.

The question whether Wazir Narayan Singh had such power has got to be determined under the law as it stood prior to the enactment of section 65-A of

the Transfer of Property Act by Act XX of 1929. The mortgagor's power to lease the mortgaged property was the subject-matter of conflicting judicial decisions. Relying upon the rule of English common law under which the mortgagor had no power to lease, it was held in some cases that a mortgagor could not ordinarily without the concurrence of the mortgagee execute a lease which could be binding on the mortgagee. In other cases a distinction was drawn between English mortgages and other mortgages and it was considered that the mortgagor in India remained the owner and when in possession could *prima facie* exercise the rights of ownership inclusive of the power to grant leases of the mortgaged property. The question was decided with reference to section 66 of the Transfer of Property Act and it was held that the mortgagor could grant leases which were not wasteful in their effect on the mortgagee's security. This was the principle deduced by Jenkins C.J. in *Balmukund* v. *Motilal*(1) from the old case of *Banee Pershad* v. *Reet Bhunjun Singh*(2). This line of reasoning was not adopted in other cases which laid down a different rule, *viz.*, that a mortgagor in possession might grant a lease conformable to usage in the ordinary course of management but was not competent to grant a lease on unusual terms or authorise the use of land in a manner, or for a purpose, different from the mode in which he himself had used it before he granted the mortgage. This was laid down by Sir Ashutosh Mukherjee J. in *Madan Mohan Singh* v. *Raj Kishore Kumari*(3) and was followed in a number of cases. There was thus a conflict of decisions which was sought to be resolved by the enactment of section 65-A of the Transfer of Property Act which dealt with the mortgagor's power to lease while lawfully in possession of the mortgaged property.

"It is an elementary rule that though a mortgagor may assign the mortgaged premises, the assignee can only take subject to the encumbrances, and if the

(1) (1915) 20 C. W. N. 350.
(2) (1868) 10 W.R. 325.
(3) (1916) 21 C. W. N. 88.

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property is sold or foreclosed by the mortgagee, any interest which the mortgagor may have created since the mortgage will be destroyed". (Ghosh on Mortgage, Vol. I, p. 212.) As was observed by Lord Selborne in *Corbett* v. *Plowden*(1), "If a mortgagor left in possession, grants a lease without the concurrence of the mortgagee (and for this purpose, it makes no difference whether it is an equitable lease by an agreement under which possession is taken or a legal lease by actual demise), the lessee has a precarious title, inasmuch as although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them." It does not however follow that a lessee from the mortgagor acquires no interest whatever in the property demised to him. A person taking a lease from a mortgagor after the mortgage does acquire an interest in the equity of redemption and can claim to redeem on that footing. But this right of redemption does not necessarily mean that a lease of this character is always operative against the mortgagee. Merely because a lessee acquires an interest in the mortgaged property which is sufficient to enable him to redeem the mortgage it does not follow that the interest which the lessee has thus acquired is operative against the mortgagee. The true position is somewhere in the middle of these two extremes. The mortgagee is not normally bound by the acts of the mortgagor with reference to the mortgaged property. "But if a mortgagee takes his security with knowledge of the purposes to which the land is applied and allows the mortgagor to remain in possession he will be bound by the acts done by the mortgagor in accordance with the usual course." (Ghosh on Mortgage, Vol. I, p. 212.) As indicated in the observations of Sir James Parke in *Pope* v. *Briggs*(2) the mortgagor might be considered as acting in the nature of a bailiff or agent for the mortgagee. Consequently, if the mortgagor, after he has granted the

(1) (1884) 25 Ch. D. 678 at p. 681.
(2) (1829) 9 Barn. & Cres. 245 at p. 258.

mortgage, deals with the property in the usual course of management, the interest created by him may be rightly deemed operative against the mortgagee. An illustration of this view is found in the case of *Moreland* v. *Richardson*(1) where a person took a mortgage of a burial ground and it was held that, as the object of the burial ground is to grant rights of burial, this being the mode in which such property is dealt with, the mortgagee was not entitled to disturb the graves of those who had been buried on the land, while the mortgagor continued to hold it. The mortgagor could thus in the usual course of management create a tenancy from year to year in the case of agricultural land or from month to month in the case of property consisting of houses and his dealings with the mortgaged property in the usual course of management would be operative against the mortgagee. [Per Mukherjee J. in *Madan Mohan Singh* v. *Raj Kishore Kumari*(2)].

"Whether the mortgagor possesses any larger powers of leasing is however very questionable. The only reported case in which such a power was recognised is *Banee Pershad* v. *Reet Bhunjun Singh*(3) but the report in Sutherland is very meagre. The judgment too does not give forth any certain sound (*sic.*). It is only said that a mortgagor is not restricted in the management of the property by making a mortgage and that so long as nothing takes place to impair the value of the mortgagee's security the mortgagor does not exceed his powers in making a lease for a term. The learned judges add perhaps somewhat unnecessarily that their decision should not go beyond the particular facts of the case before them." (Ghosh on Mortgage, Vol. I, p. 213.)

This case of *Banee Pershad* v. *Reet Bhunjun Singh*(3 was considered by Jenkins C. J. in *Balmukund* v. *Motilal*(4) as an authority for the proposition that as long as nothing took place which impaired the value or impeded the operation of the mortgage, the mortgagor in creating a temporary lease acted within his powers and these observations of Jenkins C.J. were

(1) (1857) 24 Beav. 33.
(2) (1916) 21 C.W.N. 88 at pp. 91, 92.
(3) (1868) 10 W.R. 325.
(4) (1915) C.W.N. 350.

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considered by the Courts as justifying the applicability of the provisions of section 66 of the Transfer of Property Act while determining the binding nature of the leases created by the mortgagor in possession on the mortgagee. Mukherjee J. had occasion to consider this very case in *Madan Mohan Singh* v. *Raj Kishore Kumari*(1) and he cited it in support of the proposition that the interest created by the mortgagor while dealing with the mortgaged property in the usual course of management could be rightly deemed operative against the mortgagee. The following observations of Mukherjee J. in this connection at page 91 are very apposite:—

"As the case is very imperfectly reported, we have examined the record and ascertained the questions in controversy. The proprietor of an estate mortgaged it on the 12th March, 1861. On the 7th July, 1862, the mortgagor granted an ijara potta of the property for a term of ten years. The mortgagee subsequently sued the mortgagor alone and got a decree; at the execution sale which followed, the property was sold on the 24th December, 1863. The purchaser sued on the 12th March, 1867, to eject the lessee, on the ground that as he had acquired the property in the condition in which it was when mortgaged, the lease, which would otherwise run till the 7th July, 1872, did not bind him. The Court of first instance overruled this contention as too broadly formulated, and held that as the mortgagor had in good faith granted the lease for a limited term on a fair and reasonable rent, the mortgagee or the purchaser in execution of his decree could not repudiate it, specially as the mortgage deed did not prohibit the grant of temporary leases to middlemen or cultivators. On appeal, the District Judge affirmed this view and declined to accept the broad contention that leases of all descriptions granted by a mortgagor were void as against the mortgagee. On second appeal to this Court, Jackson and Mitter JJ. took substantially the same view."

(1) (1916) 21 C.W.N. 88.

These observations of Mukherjee J. point out what was the *ratio decidendi* of that case. The question of the sufficiency or insufficiency of the security was not really gone into but the Court considered that the lease was granted in good faith, was for a limited term and stipulated a fair and reasonable rent and it was therefore operative against the mortgagee. The Court was really guided by the consideration that the mortgagor dealt with the property in the usual course of management and the interest which was thus created by the mortgagor in the usual course must rightly be deemed operative against the mortgagee. The case of *Banee Pershad* v. *Reet Bhunjan Singh*(1) therefore is really no authority for the wide proposition that a mortgagor was not restricted in the management of the property by making a mortgage and that so long as nothing took place to impair the value or impede the operation of the mortgage the mortgagor would be well within his powers in making a lease for a term.

In our opinion section 66 of the Transfer of Property Act has nothing to do with the mortgagor's power to lease the mortgaged property. Section 66 is a statutory enactment of the powers of the mortgagor in possession in regard to waste of mortgaged property. The mortgagor in possession is not liable for what in terms of the English Law of Real Property is known as permissive waste, *i.e.*, for omission to repair or to prevent natural deterioration. He is however liable for destructive waste, *i.e.*, acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts. This section therefore has no application to the grant of a lease by the mortgagor in possession.

The only relevant consideration is whether, the mortgagor in possession having the authority to deal with the property in the usual course of management, the lease granted by him can be rightly deemed operative against the mortgagee. The true position has been stated in the following terms by Mukherjee J., in *Madan Mohan Singh* v. *Raj Kishore Kumari*(2):

(1) (1868) 10 W.R. 325. (2) (1916) 21 C.W.N. 88 at page 92.

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"The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage."

The question whether the mortgagor in possession has power to lease the mortgaged property has got to be determined with reference to the authority of the mortgagor as the bailiff or agent for the mortgagee to deal with the property in the usual course of management. It has to be determined on general principles and not on the distinction between an English mortgage and a simple mortgage or on considerations germane to section 66 of the Transfer of Property Act. Having regard therefore to the position that section 66 has no application to leases of the mortgaged property, the decision of Jenkins C.J. in *Balmukund* v. *Motilal*(1) and the cases following that line of reasoning do not govern the question before us.

While we are on this subject we would like to emphasise that it is for the lessee if he wants to resist the claim of the mortgagee to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. Such a plea if established—and it must not be overlooked that the burden of proof in this matter is upon him—would furnish a complete answer to the claim of the mortgagee. If the lessee failed to establish this position he would have certainly no defence to an action at the instance of the mortgagee.

No allegation was made on behalf of the defendants that the grant of the permanent lease was a dealing with the mortgaged property in the usual course of management by the mortgagor. In the absence of

(1) (1915) 20 C.W.N. 350.

any such plea we are of the opinion that there was no answer to the plaintiff's claim and the permanent lease granted by Wazir Narayan to the defendants could not prevail against the plaintiff.

We have therefore come to the conclusion that Wazir Narayan Singh had no power to grant the permanent lease in question to the defendants, that the same was not binding and operative against the plaintiff, that the defendants had ample opportunity to redeem the mortgage if they so desired but did not choose to exercise their right of redemption, that the execution sale of Gadi Sirampur including the four villages in question was binding on them and that the plaintiff was entitled to khas possession of the four villages of which the defendants were in wrongful possession. The appeal is allowed. The decree passed by the High Court dismissing the plaintiff's suit is set aside and the decree passed by the trial court in favour of the plaintiff is restored with costs throughout.

*Appeal allowed.*

Agent for the appellant: *Ganpat Rai.*

Agent for respondent No. 1: *R. R. Biswas.*