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MANGRU MAHTO & ORS.

v.

SHRI THAKUR TARAKNATHJI TARAKESHWAR MATH & ORS.

March 8, 1967

B

[K. N. WANCHOO, R. S. BACHAWAT AND V. RAMASWAMI, JJ.]

Code of Civil Procedure (Act 5 of 1908), O.XXI, rr. 58 and 63—Order on claim petition against decree-holder—No suit filed for setting aside order—Res judicata, to what extent.

C

Mortgage—Suit by mortgagee—Lessees of mortgaged property not parties—Property sold in execution of mortgage decree—Effect on lessees' right of redemption.

D

The owner of certain properties over which K had a mortgage granted leases to certain persons. The lands were sold in execution of the mortgage decree of K, and were purchased by K at the auction. The lessees allowed the property to be sold and did not apply for being joined as parties. K obtained a money decree against one of the lessees and in execution attached the lands. The lessees filed claim petitions objecting to the attachment under O.21 r. 28 C.P.C. The claim petitions were allowed and the executing court found that the leases were genuine. K did not file any suit under O.21 r. 63 C.P.C. But later, K filed a suit against the mortgagor and the lessees for recovery of possession of the lands alleging that the leases were collusive transactions and were otherwise not binding on him. The trial court dismissed the suit holding that leases were genuine, but the High Court decreed the suit holding that the leases were sham transactions and made in contravention of s. 65A of the Transfer of Property Act. In appeal to this Court, the appellants contended that (i) as K did not file any suit under Order 21 r. 63 C.P.C. the adverse Orders passed against him in the proceedings under O.21 r. 58 C.P.C. operated as *res judicata* and he was precluded from alleging that the leases were not binding on him; and (ii) the leases granted by the mortgagor were binding on K.

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HELD: In view of the orders passed against K in the claim proceedings and his failure to institute suits under O.21, r. 63 C.P.C., K was precluded from claiming that he had the right to attach the suit lands in execution of his money decree, but he was not precluded from claiming that he had the right to sell the lands in execution of his mortgage decree. [128 E]

G

A claim proceeding under O.21 r. 58 C.P.C. is not a suit or a proceeding analogous to a suit. An order in the claim proceeding does not operate as *res judicata*. It is because of O.21 r. 63 that the order becomes conclusive. The effect of r. 63 is that unless a suit is brought as provided by the rule, the party against whom the order in the claim proceeding is made or any person claiming through him cannot re-agitate in any other suit or proceeding against the other party or any person claiming through him the question whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose, but the bar of rule 63 extends no further. [129 A-C]

H

Kandadai Narasimhachariar v. Raghava Padayachi & Ors. I.L.R. 1946 Mad. 79; approved.

Subbier v. Moideen Pitchai, A.I.R. 1923 Mad. 562, and *Sarju Prasad Missir and Ors. v. Maksudan Choudhuri & Ors.* A.I.R. 1922 P.C. 341; referred to. A

(ii) The validity of the leases granted by the mortgagor was not affected by s. 65A of the Transfer of Property Act as the leases were granted before the enactment of s. 65A. [131 A-B]

The leases were not in the ordinary course of management of the mortgagor as the agent or bailiff of the mortgagee and were not binding of the mortgagee. [132 A-B] B

A lease granted by the mortgagor, out of the ordinary course of management, though not binding on the mortgagee, is binding as between the mortgagor and the lessee. Such a lessee acquires an interest in the right of redemption and is entitled to redeem. If such a lease is created before the institution of a suit relating to the mortgage, the lessee must be joined as a party to the suit under O.34, r. 1, C.P.C.; otherwise he will not be bound by the decree passed in the suit and will continue to retain his right of redemption. But in view of s. 52 of the Transfer of Property Act, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. If the property is sold in execution of the decree passed in the suit, the lessee cannot resist a claim for possession by the auction-purchaser. The lessee could apply for being joined as a party to the suit and ask for an opportunity to redeem the property. But if he allows the property to be sold in execution of the decree, he loses his right of redemption. In the present case, the lessees allowed the suit lands to be sold in execution of the mortgage decree and they have now lost the right of redemption. They cannot resist the claim of the auction-purchaser for recovery of possession of the lands. [132 D-G] C
D

Raja Kamakshya Narayan Singh Bahadur v. Chohan Ram and Anr. [1953] S.C.R. 108; followed. E

Madan Mohan Singh v. Raj Kishori Kumari, 21 C.W.N. 88, 92; *Gobinda Chandra Sahu & Ors. v. Sasadhar Mandal*, A.I.R. 1947 Cal. 73, 75 and *Rust v. Goodale*, [1957] 1 Ch. 33, 42 and 43; referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 988 and 989 of 1964. F

Appeals from the judgment and decree dated February 16, 1961 of the Patna High Court in Appeal from Original Decree No. 390 of 1953.

D. Goburdhun, for the appellants (in C.A. No. 899 of 1964).

S. C. Agarwal and *R. K. Garg*, for the appellants (in C.A. No. 989 of 1964). G

D. N. Mukherjee and *S. Mustafi*, for respondent No. 1 (in both the appeals).

The Judgment of the Court was delivered by

Bachawat, J. One Harbans Narain Singh was the proprietor of villages Seha and Dhobaha and other villages. He created several incumbrances over these villages including a mortgage H

A dated February 10, 1886 in favour of Basanti Bibi, two mortgages dated September 9, 1907 and February 5, 1910, in favour of Harprasad Das and a mortgage dated August 2, 1911 in favour of defendant No. 1 Ramanandan Lal. On June 23, 1915, Harbans Narain sold the villages to Mahabir Missir subject to the above mortgages. Mahabir Missir redeemed the mortgages in favour of Basanti Bibi and Harprasad Das and became subrogated to their rights. Ramanandan Lal instituted a suit to enforce his mortgage, obtained a final decree for sale, put the decree into execution, at the execution sale purchased villages Seha and Dhobaha and obtained possession of the villages in 1919 and 1920. In 1924, Mahabir instituted suit No. 17 of 1924 to enforce his mortgage lien praying for rateable contribution of his dues in respect of villages Seha and Dhobaha from Ramanandan Lal and obtained a final decree on August 22, 1931. Mahabir died leaving his son Kashinath as his legal representative. Kashinath put the decree in suit No. 17 of 1924 into execution. On July 13, 1934, Ramanandan Lal paid the decretal dues in respect of village Seha. On November 4, 1935, village Dhobaha was sold in execution of the decree in suit No. 17 of 1924 and was purchased by Kashinath. In June, 1934, Ramanandan Lal through his constituted attorney, Munshi Sheobaran Lal granted five leases in respect of the suit lands in the village to defendants 2 to 7. At the time when the leases were created, Ramanandan Lal was the mortgagor in possession of the suit lands over which Kashinath had a mortgage lien. One of the questions in issue in these appeals is whether the leases were binding on Kashinath.

It appears that Kashinath obtained a money decree against Ramatahal Pandey, husband of defendant No. 3 and in execution of the money decree attached the suit lands. Defendants 2 to 7 filed claim petitions objecting to the attachment under O.21, r. 58, CPC. The claim petitions were allowed and the lands were released from attachment by orders of the executing court dated November 20, 1942 and February 26, 1944. The executing court found that the leases were genuine. Kashinath did not file any suit under O.21, r. 63, CPC. One of the questions in these appeals is whether the orders passed in the claim proceedings under O.21, r. 58 precluded Kashinath from setting up his claim in the present suit.

On June 11, 1946, Kashinath instituted the suit out of which these appeals arise against Ramanandan Lal and the lessees for recovery of possession of the suit lands and mesne profits alleging that the leases were collusive transactions and were otherwise not binding on him. The defendants contested the suit. In the meantime, in other proceedings, it was declared that Mahabir was a benamidar for Shri Thakur Taraknathji and the deity was the real owner of the villages. In view of this adjudication, Kashinath lost

all interest in the present suit. By order dated August 25, 1952, the deity was added as a coplaintiff in the suit-

The subordinate Judge, Arrah, held that the leases were genuine, were granted by Ramanandan Lal in due course of management and were binding on the plaintiffs. On this finding, he dismissed the suit. The deity preferred an appeal to the High Court of Patna. The High Court allowed the appeal and decreed the suit. It held that the leases were sham transactions were made in contravention of s. 65A of the Transfer of Property Act and were not binding upon the plaintiffs. Before the High Court, it was contended on behalf of the defendants that the plaintiffs were precluded from challenging the leases in view of the orders passed against Kashinath in the proceedings under O. 21, r. 58, CPC, but the High Court rejected this contention. Defendants Nos. 2, 6 and 7 and the widow of defendant No. 5 have filed C. A. No. 988 of 1964 and defendants 1 and 4 have filed C. A. No. 989 of 1964 under certificates granted by the High Court.

The appellants contend that as Kashinath did not file any suit under O. 21, r. 63, CPC, the adverse orders passed against him in the proceedings under O. 21, r. 58, CPC operated as *res judicata*, and he and the deity who now stands in his shoes, were precluded from alleging that the leases were not binding on them. We think that this contention should be rejected. In view of the orders passed against Kashinath in the claim proceedings and his failure to institute suits under O. 21, r. 63, CPC, Kashinath was precluded from claiming that he had the right to attach the suit lands in execution of his money decree, but he was not precluded from claiming that he had the right to sell the lands in execution of his mortgage decree. Rules 58 to 62 of Order 21, CPC, provide for a summary investigation of the claims and objections to the attachment of any property attached in execution of a decree. The issue in the proceeding is whether "such property is liable to such attachment". If the claim is allowed, the property is released from attachment (r. 60). If the claim is disallowed, the attachment continues (r. 61). If the property is subject to mortgage or charge in favour of some person not in possession, the attachment may be continued subject to such mortgage or charge (r. 62). The party against whom an order is made in the claim proceeding may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order is conclusive (r. 63). If no suit is brought under r. 63 within the prescribed period of limitation, the order in the claim proceeding is conclusive on the question whether the property was or was not liable to attachment and sale in execution of the particular decree. But the order is not conclusive for all purposes, see *Kandadai Narasimhachariar v. Raghava Padayachi*

A *and others*⁽¹⁾. A claim proceeding under r. 58 is not a suit or a proceeding analogous to a suit. An order in the claim proceeding does not operate as *res judicata*. It is because of rule 63 that the order becomes conclusive. The effect of r. 63 is that unless a suit is brought as provided by the rule, the party against whom the order in the claim proceeding is made or any person claiming through him cannot re-agitate in any other suit or proceeding against the other party or any person claiming through him the question whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose, but the bar of rule 63 extends no further

C In support of the contention that the orders in the claim proceedings operated as *res judicata*, counsel for the appellant relied on several decisions. In *Subbier v. Moideen Pitchai*⁽²⁾, the decree-holder in execution of a money decree attached a debt alleged to be due to the judgment-debtor. The garnishee objected to the attachment on the ground that the debt was not due to the judgment-debtor, it had been assigned and he had promised to pay to the assignee and the amount of the debt was Rs. 300 and not Rs. 350. The objection was disallowed. The attached debt was sold in execution of the decree and was purchased by the decree-holder. The decree-holder purchaser then sued to recover the debt. As the garnishee did not file a suit under O. 21, r. 63, the order passed against him in the claim proceeding became conclusive, and he was precluded from re-agitating his objections in the suit. In the course of his judgment, Schwabe, CJ, referred to s. 11 of the Code of Civil Procedure and his observations give some support to the contention of the appellants in the present case that the order in the proceeding under r. 58 operates as *res judicata*. But we cannot agree with those observations. The order in the summary proceeding under r. 58 does not operate as *res judicata*. The reason why the garnishee could not re-agitate his objections was that in view of r. 63 he was precluded from asserting that the decree-holder was entitled to attach and sell the particular debt on the footing that it was due to the judgment-debtor. In *Sarju Prasad Missir and others v. Maksudan Choudhuri and others*⁽³⁾, one Lalji Lal obtained a decree for sale of the property mortgaged to him. In execution of the decree, Lalji Lal attached the property. One Kamal Narain Choudhry filed a petition objecting to the attachment. By an order dated September 14, 1886 passed under s. 278, CPC of 1882, corresponding to O. 21, r. 58 CPC of 1908, the executing court directed that the property should not be sold under the decree obtained by Lalji Lal. Sarju Prasad, an assignee of the decree executed the decree, at the execution sale purchased the property and subse-

(1) I.L.R. 1946 Mad. 79.

(2) A.I.R. 1923 Mad. 562.

(3) A.I.R. 1922 P.C. 341.

quently instituted a suit against the heir of Kamal Narain for recovery of possession of the property. The Privy Council held that the order dated September 14, 1886 became final and binding upon Lalji Lal and all persons claiming title under him. Sir John Edge observed :—

“The petition of objection was a petition which the Subordinate Judge had to consider and dispose of and any party to that proceeding who was dissatisfied with the order which the Subordinate Judge might make could have appealed from it. Lalji Lal was a party to that proceeding and he did not appeal, and the order became final and binding upon Lalji Lal and upon those who claim title under him.”

The observation that the party dissatisfied with the order made under s. 278 of the Code of Civil Procedure, 1882, could have appealed from the order, seems to have been made *per incuriam*. It seems that no appeal lay from such an order. The reason why Lalji Lal was precluded from contending that the property was liable to be attached and sold in execution of the decree obtained by him was that in the absence of a suit under s. 283 of CPC of 1882, he and Sarju Prasad claiming title under him, could not subsequently contend that the property was liable to be sold in execution of the decree. In the two cases discussed above, the adverse orders in the claim proceeding became conclusive on the question whether the property was liable to attachment and sale in execution of the particular decree then sought to be executed. Equally, in the absence of any suit under O. 21, r. 63, CPC, the adverse orders passed against Kashinath conclusively decided that the suit lands were not liable to be sold in execution of the money decree obtained by him against Ramtahal Pandey. But those orders were not conclusive on the question whether the lands were liable to be sold in execution of the mortgage decree obtained by Kashinath against Ramanandan Lal.

On the merits, the question is whether the leases granted by Ramanandan Lal, while he was the mortgagor, in possession of the suit lands were binding on the mortgagee Kashinath. The High Court held that the leases were in contravention of s. 65A of the Transfer of Property Act, 1882. Section 65A was inserted in the Transfer of Property Act, 1882 by s. 30 of the Transfer of Property (Amendment) Act, 1929, which came into force on April 1, 1930. Section 63 of the Transfer of Property (Amendment) Act 1929 provided that nothing in the provisions of s. 30 of the amending Act would be deemed if any to affect the “terms or incidents of any transfer of property made or effected before the 1st day of April, 1930”. Now Kashinath was entitled to the rights of the mortgagees under the mortgages dated February 10,

A 1886, September 9, 1907, February 5, 1910. All these mortgages were executed before April 1, 1930 and nothing in s. 65A affected their incidents. The power of the lessor to make leases binding on the mortgagees was an incident of the mortgages and was not affected by s. 65A. The validity of the leases granted by the mortgagor in June 1934 must be determined with reference to
 B the law as it stood before the enactment of s. 65A.

In *Madan Mohan Singh v. Raj Kishori Kumari*⁽¹⁾ Mookerjee, J, held that a mortgagor in possession may grant 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
 C he is not competent 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 before he granted the mortgage. This view of the law as it stood before the enactment of s. 65A was approved in *Raja Kamakshya Narayan Singh Bahadur v. Chohan Ram and
 D Another*⁽²⁾ and this court held that the question whether the mortgagor in possession has power to lease the mortgaged property must 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. In *Gobinda Chandra Saha and others v. Sasadhar Mandal*⁽³⁾, B. K. Mukherjea, J.,
 E pointed out that normally a permanent lease with rent fixed in perpetuity is not sanctioned by the ordinary course of management. He observed :—

“The mortgagor might be within his rights to create a lease which is from month to month or from year to year as the case might be, but he cannot grant a permanent lease with a rent fixed in perpetuity. This amounts
 F to an alienation of his right to increase the rent in future and is as good as the sale of the property itself. This is not sanctioned by the ordinary course of management as has been mentioned above nor is it warranted by the previous user of this particular
 G property.”

In the present case, defendants 2-7 were lessees under five leases granted by the mortgagor in June 1934. All these defendants claimed to be permanent lessees with rent fixed in perpetuity. Four of the leases were granted by registered pattas. In respect
 H of four leases the mortgagor received nazrana or premium. All the leases were created after the property was advertised for sale in execution of the mortgage decree. The High Court has found

(1) 21 C.W.N. 88, 92.

(2) [1953] S.C.R. 108, 118.

(3) A.I.R. 1947 Cal. 73, 75.

that the leases were created by the mortgagor in bad faith with a view to cause loss to the mortgagee-decree-holder. The leases were not in the ordinary course of management of the mortgagor as the agent or bailiff of the mortgagee, and were not binding on the mortgagee. A

On behalf of the appellants it was argued that the leases might not be binding on Kashinath while he was the mortgagee, but after he purchased the property he ceased to be a mortgagee, and he could not thereafter assert that the leases were not binding on him. This novel argument is ingenious but unsound. An auction-purchaser at a sale held in execution of a mortgage decree buys not only the interest of the mortgagor but also the interest of the mortgagee. If the lease does not bind the mortgagee, it does not equally bind the auction-purchaser. It is interesting to notice that in *Rust v. Goodale*⁽¹⁾, Harman, J. held that the right of the mortgagee to treat a tenant of the mortgagor as a trespasser was a right which passed on sale or foreclosure to his assignee. B

A lease granted by the mortgagor, out of the ordinary course of management, though not binding on the mortgagee, is binding as between the mortgagor and the lessee. Such a lessee acquires an interest in the right of redemption and is entitled to redeem. If such a lease is created before the institution of a suit relating to the mortgage, the lessee must be joined as a party to the suit under O 34, r. 1, CPC; otherwise he will not be bound by the decree passed in the suit and will continue to retain his right of redemption. But in view of s. 52 of the Transfer of Property Act, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. If the property is sold in execution of the decree passed in the suit, the lessee cannot resist a claim for possession by the auction-purchaser. The lessee could apply for being joined as a party to the suit and ask for an opportunity to redeem the property. But if he allows the property to be sold in execution of the mortgage decree and they have now lost the present case, the lessees allowed the suit lands to be sold in execution of the mortgage decree and they have now lost the right of redemption. They cannot resist the claim of the auction-purchaser of recovery of possession of the lands. C

If a mortgagor in possession of the mortgaged property executes a lease of the property in the ordinary course of management as the agent or bailiff of the mortgagee during the pendency of a suit by the mortgagee to enforce the mortgage, a question may arise whether such a lease is in the eye of the law a lease granted by the mortgagee through his agent and therefore binding on him. But in the present case, that question does not arise D

(1) [1957] 1 Ch 33, 42, 43. E

A as the leases were not granted by the mortgagor in the ordinary course of management as the bailiff or agent of the mortgagee.

The High Court held that the leases were sham transactions. We do not think it necessary to decide this question. Even assuming that the leases were not sham transactions they were not binding on Kashinath and the deity. The High Court rightly decreed the suit.

B The appeals are dismissed with costs. There will be one hearing fee.

Y. P.

Appeals dismissed.