

## REVISIONAL CIVIL

Before R. S. Narula, C. J.

PADMA WATTI, WIDOW OF AJUDHIA DASS,—*Petitioner*

*versus*

HANS RAJ, ETC.,—*Respondents.*

*Civil Revision No. 59 of 1975.*

September 2, 1976.

*Code of Civil Procedure (Act V of 1908)—Order 1, Rule 9, Order 22, Rule 2 and Order 34, Rule 1—Transfer of Property Act (IV of 1882)—Section 91—Suit for possession by redemption of mortgaged property—Death of one of the mortgagors—Legal heirs of the deceased not brought on the record—Such suit—Whether abates.*

*Held*, that the provisions of rule 1 of Order 34 of the Code of Civil Procedure 1908 start with the expression "subject to the provisions of this Code", and inasmuch as rule 9 of Order 1 clearly states that no suit shall be defeated by reason of the non-joinder of the parties and the Court may deal with the matter in controversy so far as regards the rights and interest of the parties actually before it are concerned, the suit cannot possibly abate against the estate of a deceased mortgagor. Clause (a) of section 91 of the Transfer of Property Act 1882 implies that any person having any interest in the property mortgaged is entitled to file a suit to redeem the same. "The same" in clause (a) of section 91 refers to the "mortgaged property" to which reference is made in the opening words of the section. The expression "the same" cannot refer to the interest of the person suing. The scheme of the section is that the persons who are entitled to file a suit for redemption of the mortgage are listed therein. The first is the mortgagor himself. The second, third or the fourth categories of persons who can file the suit for redemption of the whole mortgage are listed in clauses (a), (b) and (c) of that section. Any person, therefore, who has an interest in or charge upon the property mortgaged is entitled to file the suit for the redemption of the whole of the mortgaged property. If all the persons entitled to redeem the property or some of them institute the suit for redemption and one of them dies during the pendency of the suit, the suit does not abate in the absence of the deceased even if his legal representatives are not brought on the record.

(Paras 2 and 3).

*Petition for revision of the order of Shri Madan Mohan Bhalla, Sub Judge, 1st Class, Sultanpur Lodhi dated the 11th December, 1974 rejecting the application of the defendants for dismissing of suit on the basis of abatement.*

**Claim:—**Suit for redemption.

L. M. Suri, Advocate, *for the Petitioner.*

N. K. Sodhi, Advocate for 1 & 3, *for the Respondents.*

#### JUDGMENT.

**R. S. Narula, C.J. (Oral).**

(1) One Buta Ram had mortgaged the property in dispute to Bhagwan Dass. The mortgagee died leaving behind his widow Padma Wati, defendant-petitioner. Buta Ram also died leaving behind three sons, namely, Hem Raj, Hans Raj and Ram Nath. Hans Raj filed an application for redemption which was dismissed as he had not joined his two brothers with him. Thereafter on April 20, 1972, all the three sons of Buta Ram filed the suit from which the present proceedings have arisen for possession of the mortgaged property by redemption of the mortgage. During the pendency of the suit Hem Raj plaintiff died on April 28, 1973. His legal heirs have not been brought on the record. The defendant-petitioner thereupon made an application to the trial Court claiming that the suit had abated as a whole and should accordingly be dismissed as such. Vide order under revision the trial Court dismissed the application of the defendant-petitioner on December 11, 1974. It held that one out of the three persons having the right to redeem the land having died, there were still two persons who were entitled to claim redemption of the whole mortgage under section 91 of the Transfer of Property Act, as any person having interest can apply to redeem the land and it is not necessary that all the persons having such interest should join together. Reference was also made by the trial Court to the provision of Order 22 Rule 2 of the Code of Civil Procedure which permits the surviving plaintiff to continue the suit if the right to sue survives to him. It was in this context that it was held that the suit can be continued by Hans Raj and Ram Nath in respect of the entire mortgage and the same had not abated in respect of one-third share which can be said to belong to Hem Raj. Not satisfied with the order of the trial Court the defendant-petitioner has come up in revision to this Court.

(2) Mr. Lalit Mohan Suri, learned counsel for the defendant-petitioner, has invited my attention to the provision of Order 34

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Rule 1 of the Code which requires that in a suit for redemption of a mortgage all persons having an interest either in the mortgage-security or in the right of redemption must be joined as parties thereto. He has then referred to the following provision in section 91 of the Transfer of Property Act:—

“Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

(b) \* \* \* \*

(c) \* \* \* \* ”

His construction of clause (a) of section 91 reproduced above is that any person who has any interest in the mortgaged property means the plaintiff's separate divided interest therein. It is on this basis that the learned counsel has argued that two surviving sons of Buta Ram could claim possession of only their one-third share each in the mortgaged property and not of the entire property. It is further submitted that inasmuch as the property has not been partitioned and all the three brothers were joint and the two surviving brothers could not claim possession of any specific portion as their shares had not been separated by partition. The first case on which Mr. Suri has relied is the judgment of the Madras High Court in **Pulavarthi Ammanna and others v. Bommireddipalli Ramakrishna Rao and others** (1). All that was held in that case was that where during the pendency of the mortgage suit the mortgagor is declared insolvent and his rights vest in the official receiver the mortgage suit cannot properly proceed against the mortgagor in the absence of the official receiver to whom the equity of redemption had been assigned by operation of law. There is no quarrel

(1) AIR 1949, Madras 886.

with that proposition of law. There was only one defendant in the suit. On his being declared insolvent he met with civil death. The official receiver who was the only person who could be brought on record in his place not having been given an opportunity to come on record to defend the suit, the suit could naturally not have proceeded, and any decree passed in that case could not bind the official receiver. Similarly the Full Bench judgment of the Madras High Court in **Subbaiah Goundan v. Ramasami Goundan and others** (2), does not advance the case of the petitioner any further.

On the other hand Mr. N. K. Sodhi, learned counsel for the plaintiff-respondents, has argued that the provisions of rule 1 of Order 34 start with the expression "subject to the provisions of this Code", and inasmuch as rule 9 of Order 1 clearly states that no suit shall be defeated by reason of the non-joinder of the parties and the Court may deal with the matter in controversy so far as regards the rights and interest of the parties actually before it are concerned, the suit could not possibly abate against the estate of Hem Raj. If the suit could not abate against the estate of Hem Raj, there could be no question of total abatement. Even otherwise I am unable to read clause (a) of section 91 of the Transfer of Property Act in any manner other than implying therein that any person having any interest in the property mortgaged is entitled to file a suit to redeem the same. "The same" in clause (a) of section 91 refers to the "mortgaged property" to which reference is made in the opening words of the section. I cannot imagine how the expression "the same" can refer to the interest of the person suing. The scheme of the section is that the persons who are entitled to file a suit for redemption of the mortgage are listed therein. The first is the mortgagor himself. The second, third or the fourth categories of persons who can file the suit for redemption of the whole mortgage are listed in clauses (a), (b) and (c) of that section.

(3) In the circumstances referred to above, I hold that—

- (i) any person who has an interest in or charge upon the redemption of the whole of the mortgaged property;

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(2) AIR 1954 Madras 604.

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(ii) if all the persons entitled to redeem the property or some of them institute the suit for redemption, and one of them dies during the pendency of the suit, the suit does not abate in the absence of the deceased even if his legal representatives are not brought on the record provided the conditions laid down by the Division Bench of the Patna High Court in **Mt. Raj Mohni Debi v. Harihar Mahton** (3), are satisfied. In that case it was held that the combined effect of Order 1 Rule 9 and Order 34 Rule 1 insofar as mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but that failure to add one or more such persons should not have the effect of defeating the suit, if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. It was further held that in order to decide whether a suit can proceed in the absence of certain proper parties, two tests have been laid down, namely (1) can the rights of the parties on the record be fully determined in their absence; and (2) can that determination be made necessarily affecting the rights of those absent? It was on that basis that the Patna High Court held that any one of the co-mortgagors can redeem the entire mortgage.

I am in respectful agreement with the judgment of the Division Bench of the Patna High Court to the above effect in **Mt. Raj Mohni Debi's case** (supra).

(4) In this view of the matter and for the reasons already assigned, no interference in the order of the trial Court is called for. The revision petition must, therefore, fail and is accordingly dismissed with costs.

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N.K.S.

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(3) AIR 1958 Patna 67.