
(1876) 06 AHC CK 0002

Allahabad High Court

Case No: None

Kalian Das

APPELLANT

Vs

Khub Chand

RESPONDENT

Date of Decision: June 9, 1876

Citation: (1875) ILR (All) 240

Hon'ble Judges: Robert Stuart, C.J; Turner, J; Spankie, J; Pearson, J; Oldfield, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Robert Stuart, C.J.

My answer in this reference is that, under the circumstances stated, Khub Chand's purchase cannot prevail against or be held free of the plaintiff's claim, but that the plaintiff is entitled to a decree against the property under his foreclosure suit. Khub Chand's decree was merely a money-decree, and the condition in his bond against alienation to others was merely personal to him and Sukh Lal, and although it might give Khub Chand a claim, for damages against his debtor, it could in no way affect the right of a subsequent mortgagee in enforcing his lien. No other or further right can be allowed to Khub Chand, and he therefore cannot be permitted to contest the plaintiff's claim.

Pearson, J.

2. The rights and interest of his judgment-debtors were sold, not in virtue and pursuance of the lien created by the instrument of the 10th July 1865, but in execution of the decree of 1868, which was merely a money-decree, and were purchased by Kubh Chand subject to the rights which had been acquired by the plaintiff under the instrument of the 28th March 1869. The stipulation in the earlier instrument, by which the mortgagor was precluded from alienating the property hypothecated for the purpose of securing the debt while the debt should remain unpaid, was only intended to preserve, and fortify the lien which the hypothecation created and cannot be enforced apart from that lien. Khub Chand has never enforced that lien; he contented himself with a money-decree and

chose to buy himself the rights and interests remaining to his debtors in the property at the time of the auction-sale. The rights and interests which they had conveyed to the plaintiff by the instrument of the 28th March 1869, were not affected by that sale; and so long as Khub Chand abstains from enforcing his prior lien, he cannot plead the stipulation in the instrument executed in his favour as invalidating the transfer subsequently made to the plaintiff. That stipulation does not place him on the footing of a purchaser in virtue of the lien to which the stipulation is attached. On the contrary, the position which he holds at present is no better than would be that of any stranger who might have purchased the property which he purchased in execution of his own decree. It cannot be pretended that any stranger so purchasing it could have claimed to be protected in the purchase by reason of the stipulation in the bond. The sale did not carry with it the lien which belonged to the bond-holder, but only disposed of such rights and interests as still belonged to the bond-debtors. The foregoing remarks embody the opinion which I desire to express in answer to the question referred to the Full Bench.

Turner, J.

3. To determine the question raised in this reference it is necessary to consider the nature and incidents of a simple mortgage. A simple mortgage cannot be better defined than in the terms adopted by Mr. Justice Macpherson in his work on mortgages. It is an arrangement by which the borrower, binding himself personally for the repayment of a loan, pledges his land as a collateral security. It comprises then two contracts, a personal obligation on the part of the mortgagor to pay the debt, and a contract empowering the mortgagee to have recourse to the property pledged as a collateral security. The pledge does not directly confer on the mortgagee the power of sale. In order to make his security available he must obtain an order of a Civil Court directing a sale. The mortgagee, in the case of a simple mortgage, has, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation.

4. He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only he obtains what is known as a money-decree; if he sues on the contract of hypothecation, he obtains only an order for the sale of the property.

5. Notwithstanding the pledge the mortgagor remains the owner of the property, and may deal with it in any manner he pleases not inconsistent with the condition of the mortgage. Subject to the charge created by the mortgage, he may alienate his property in part or wholly.

6. Such being the nature and incidents of a simple mortgage, I proceed, to consider whether there is any, and if any what distinction between the interest which passes to a purchaser of the mortgaged property if it be sold under a decree pronounced in a suit brought to enforce the charge and ordering the sale, and the interest which passes to a

purchaser if the mortgaged property be sold under a money-decree obtained on the personal obligation.

7. It appears to me there is a great difference in the two suits and a great difference in the operation of the decrees which can be obtained in the two suits. If the holder of a simple mortgage elects to enforce his pledge and that pledge he, as it usually is, a pledge of Immovable property, he must bring the suit in the district in which the property is situated, and if he sues solely on the contract of hypothecation, he can obtain only a decree ordering the sale of the pledge; he cannot have recourse to the other property of the judgment-debtor. But the sale will pass not merely the rights of the judgment-debtor existing at the time of the sale, but the rights of the judgment-debtor existing at the date of the pledge and will be binding on all persons who are parties to the suit. To a suit then to enforce the hypothecation it is advisable for the creditor, though it is not incumbent on him, to make all subsequent encumbrancers parties, and if such encumbrancers apply to be made parties, the Court should admit them u/s 73, Act VIII of 185!), and I may add, although it is not the custom in these Provinces, that in passing a decree in such a suit to which subsequent encumbrancers are made parties, the Court ought to give subsequent encumbrancers an opportunity to come in and redeem the prior encumbrance.

8. Of course, such subsequent encumbrancers, if they are not made parties, might at any time before sale come in and redeem and they will not be bound by the decree, but if they do not redeem and a sale takes place, their liens will be defeated unless they can show something more than the existence of their subsequent encumbrances, some fraud or collusion which entitled them to defeat the first encumbrance or to have it postponed to their own.

9. It appears to me doubtful whether it is necessary for the holder of a decree ordering a sale for the enforcement of a lien to proceed in execution by attachment and order for sale. If the decree is properly drawn up he has already obtained an order for sale. The Procedure Code is, I think, defective in that it contains no special provision for the execution of such decrees. They do not fall under Sections 199, 200, 201, or 202,* and the provisions of Section 232 appear to apply to such decrees as are mentioned in Section 201. In practice no doubt such decrees have been in default of special provisions executed in the same manner as money-decrees.

10. On the other hand, if the holder of a simple mortgage puts in suit merely the personal obligation of the mortgagor, he need not necessarily sue in the district in which the property which is the subject of collateral security maybe situated. To such a suit subsequent encumbrancers would not properly be made parties; the decree would be a mere money-decree conferring on the decree-holder the right to obtain its satisfaction by levying the amount for any property of the judgment-debtor. He is not confined to the estate under mortgage. He must proceed by attachment and sale, and what he attaches and sells is the property of the judgment-debtor, that is to say, the rights and interests of the judgment-debtor subsisting at the time of the sale--Mahomed Buksh v. Mahomed

Hossein G.C.R. N.W.P. 1868 p. 171. Such property passes by the sale as the judgment-debtor could convey by private sale.

11. In *Syud Nadir Hossein v. Pearoo Thovildarinee* 14 C.L.R. 425 note Mr. Justice Pontifex has ruled that a sale of the mortgaged property under a money-decree passes with it the lien; and in *Momtazooddeen Mahomed v. Rojcoomar Dass* 14 C.L.R. 408 : S.C. 23 W.R. 187, the majority of the Court declared that, where a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property it becomes absolutely vested in the purchaser. The reasons on which these rulings proceed I understand to be the following--the mere taking of a money-decree does not destroy the lien, and it continues an incident to the debt when it passes from a contract-debt into a judgment-debt--as the creditor cannot sell the property and retain the lien, it must continue in existence so far as is necessary for the protection of the purchaser. It cannot be doubted that the mere taking of a money-decree does not destroy the lien, and that it continues a collateral security for the debt when it has merged in a judgment-debt, but I fail to see on what ground it can be held that the collateral security has passed by the sale or continues in existence to protect the purchaser. The mortgagee has not in the case supposed elected to avail himself of the collateral security. The lien subsists nevertheless until the debt is discharged, when the object for which it was created fails, and it ceases.

12. We have not now to consider whether the holder of a simple mortgage, if he proceeds on the personal undertaking, and obtaining a money-decree, brings to sale the mortgaged property, can afterwards sue the auction-purchaser to enforce his lien for any sum that may not have been satisfied by the sale in execution of the money-decree. In such a case it may be that, unless he gives notice at the sale of his intention to retain the lien, it would be held he had waived it. We have to consider whether the interests of third parties and the liens of intermediate encumbrancers can be defeated by a sale of the mortgaged property under a mere money-decree. In *Ramu. Naikan v. Subbaraya Mudali* 7 M.H.C.R. 229, it was held that the purchaser under a money-decree could avail himself of the lien of the original encumbrancer as a shield and so defeat subsequent encumbrancers, and doubtless this ruling is supported by the dicta of the High Court of Calcutta to which I have referred, namely, that the collateral security passes to the auction-purchaser. The Calcutta High Court allowed that the fact that property is mortgaged to one is no bar to the mortgage or sale of the equity or right of redemption to another. Let it be assumed that the mortgagor sells his interest absolutely, then if the mortgagee sues on the personal undertaking only he must sue the original mortgagor, he cannot implead the purchaser, and if he obtains a decree he can enforce it only against the property of the mortgagor who ex hypothesi has no interest left in the mortgaged property, and if, instead of selling the mortgaged property he sells the property of the mortgagor, no interest in the collateral security can pass by such a sale to the purchaser.

13. In the case now before the Court the mortgagor, instead of making a transfer of the whole of his interest in the property pledged, aliened it in part by the creation of a subsequent encumbrance in the nature of a conditional mortgage. He thereby conferred on the conditional mortgagee the right to redeem the first mortgage at whatever time it could have been redeemed by the mortgagor, and the right in the event of default being made in payment of the debt due to him to foreclose and hold the property subject to the first encumbrancer. The estate of the second encumbrancer having been created before the attachment and sale. in execution of the money-decree cannot be destroyed by the sale, for in my judgment the original mortgagor did not take the steps necessary to entitle him to enforce his collateral security, and the sale in execution of his decree on the personal obligation passed only the rights and interests of the mortgagor subsisting at the time of the sale, and those rights in the mortgaged property were then burdened with the charge created in favour of the conditional mortgagee.

14. It remains to be considered whether an auction-purchaser in execution of a money-decree can avail himself of a condition in the mortgage-deed prohibiting alienation. I was a party to the decision of this Court in the case of *Rajah Ram v. Baine Madho* H.C. 11 N.W.P. 1872 , in which it was held that the existence of such a condition enabled the auction-purchaser to resist the claim of a second encumbrancer. On fuller consideration I am not prepared to support that ruling. The condition is attached to the charge and not to the personal obligation of the mortgagor, and if the first mortgagee, who can only enforce the charge by suit, elects to abstain from pursuing that remedy and sues on the personal obligation only, I am of opinion that the auction-purchaser cannot plead the condition attached to the lien any more than he can plead the lien. I would reply that Khub Chandel having purchased under a mere money-decree the interest at the time of sale remaining in the judgment-debtor, stands in the place of the judgment-debtor in respect of the interest he acquired by the purchase, and that he cannot resist the claim of the plaintiff to obtain possession of the property.

Spankie, J.

15. On the case stated to us I should say that Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, and that he has not, in consideration of his bond, a further right, and cannot successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865. It seems to me that we have decided a very similar point in Full Bench in the case of *Akho Ram v. Nand Kishore* (preceding case).

Oldfield, J.

16. Looking to the course of rulings by this Court on the question raised in this reference and the rule stare decisis, I would reply to this reference that the auction-purchaser at a sale in execution of a mere money-decree acquires only the rights remaining in the

judgment-debtor at the time of sale.

Decree for immovable, property *[Section 199: If the decree be for land or other immovable property, the same shall be delivered over to the party to whom it shall have been adjudged.

Section 200: If the decree be for any specific moveable, or for the specific performance of any contract or for the performance of any other act, it shall be enforced by the seizure, if practicable, of the moveable, and the delivery thereof to the party to whom the decree is made or by imprisonment of the party against whom the decree is made or by attaching his property, and keeping the same under attachment until further order of the Court, or by imprisonment and attachment, if necessary; or if alternative damages be awarded, such damages in the mode hereinafter provided for the execution of a decree.

Section 201: If the decree be for money it shall be enforced by the imprisonment of the party against whom the decree is made, or by the sale of his property, or by both if necessary. If the party against whom the decree is made be other than a defendant, the decree may be enforced in the same manner as a decree may be enforced under the provisions of this Act against a defendant. When the decree is against Government or against any officer or servant of Government, if the officer whose duty it is to satisfy the decree, neglects to do the same, the Court shall report the case through the Sudder Court for the consideration of the Government, and execution shall not issue on the decree unless the same shall be remitted within the space of three months from the date of such report.

Section 202: If the decree be, for the execution of a conveyance or for the execution of a negotiable instrument, and the party ordered to execute the same neglects or endorses such conveyance or negotiable instrument, or neglects or refuses so to do, any party interested in the execution of the instrument executed or endorsed may prepare a conveyance or negotiable instrument in accordance with the tenor of the decree, and tender the same to the Court, for execution, and the Court may execute the same, and the signature thereof by the Judge shall have the effect as the execution or endorsement thereof by the party ordered to execute the same.
