

(1880) 02 AHC CK 0016

Allahabad High Court

Case No: None

Badri Nath

APPELLANT

Vs

Janki Das

RESPONDENT

Date of Decision: Feb. 11, 1880

Citation: (1880) ILR (All) 698

Hon'ble Judges: Straight, J; Spankie, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Spankie, J.

In dealing with the pleas in appeal it is necessary to see what was the defence set up. It was briefly as follows:--That Chotay Lal, the judgment-debtor and original owner of the house in dispute, was indebted to several creditors, and, to defraud them and secure his house from attachment, he dishonestly executed a bond hypothecating the house to Munni Bibi, his sister, without any consideration, the transaction being altogether fraudulent. He retained possession of the bond, but, when pressed by his creditors, he borrowed from Ram Prasad, the brother of defendant, Rs. 1,000, through Munni Bibi, and executed a bond for that sum. The bond is dated 24th June 1867. Before the bond fell due, the judgment-debtor caused Munni Bibi to bring a suit against him founded upon the bond which he had given her, and on the 9th March 1872 a decree was given against him.

2. Now the plaintiff's case is that the bond under which the decree was executed and sale in his favour was had is dated 14th November 1864. Both plaintiff and defendant are auction-purchasers upon the same day in execution of decrees. The decrees are of two different Courts. The plaintiff purchased in execution of the decree of the Munsif upon the bond dated 14th November 1864, and the defendant purchased in execution of the decree of the Subordinate Judge upon the bond executed on the 24th June 1867. In both bonds there was an hypothecation of the house as security for the payment of the debt.

3. The Subordinate Judge on the 28th November 1878, laid down the following issue, " Which of the two decrees confers a prior right upon the purchaser." On the 18th December he added this issue, "Was the decree passed by the Munsif of Allahabad on the 9th March 1872 one within the jurisdiction of that Court." The second issue was added because in the first instance the property was valued at Rs. 1,200 by the Munsif, and the plaint was returned by him on the ground that the claim was beyond his jurisdiction. The Subordinate Judge found that there was no evidence to show that there was any priority in the time in favour of one auction-purchaser over the other. But Janki Das, defendant, obtained possession first, under his sale, and, therefore, as Janki Das was a purchaser with title, the plaintiff was bound to show a better title, if he desired to secure the property for himself. In coming to a conclusion upon this point the Subordinate Judge appears to have made a mistake in assuming that in the decree of the 9th March 1872, there had been no decree against the property hypothecated as security in the bond dated the 14th November 1864. He seems to hold that the plaintiff failed to prove any priority of lien, and, as defendant had obtained possession in execution as auction-purchaser, his possession could not be disturbed. The Subordinate Judge did not think it necessary to express his reason for holding that the Munsif of Allahabad had jurisdiction in the suit in which he made the decree of the 9th March 1872, at the same time he held that there had been jurisdiction. The first Court then dismissed the suit on the ground that plaintiff had established no title as against defendant. In appeal, the Judge reversed the decision of the Subordinate Judge, and decreed the claim in favour of plaintiff. The lower Appellate Court held that the decrees were not money decrees, but both had been made in suits to recover money by enforcing the security hypothecated in the bonds upon which the claims were based, and that priority would be found according to the dates of the respective bonds. The plaintiff as auction-purchaser in execution of a decree against person and property hypothecated in a bond dated 14th November 1864 would thus have a prior title against an auction-purchaser in execution similarly situated in execution of a decree under a bond dated 14th June 1867, the sale to satisfy a prior incumbrance being preferred to that satisfying a subsequent incumbrance.

4. The first plea for determination is the fifth in the memorandum of appeal, that of jurisdiction. There can be no doubt (assuming that we could go behind the decree of the 9th March 1872) that the Munsif had jurisdiction. The claim was for money and to enforce the security, the property hypothecated being within the jurisdiction of the Court. The cases cited by defendant appellant's counsel do not apply. The Calcutta Court (Petition of S.J. Leslie 9 B.L.R. 171) has ruled that a suit brought upon a mortgage praying for a decree for the amount due under it, and also that in default of payment the land might be sold, was a suit for land within the meaning of Section 15, Act VIII of 1859, and was rightly brought in the Court of the district within which the land is situate. The question there was one of territorial jurisdiction; no such difficulty arises in this case. So, again, the Full Bench decision of

the Presidency Court in *Surwar Hossein Khan v. Shahzada Gholam Mahomed* B.L.R. F.B.R. 879 does not affect this case, for in that suit the question was one of limitation which does not arise here. Admitting that the suit is one to enforce a charge upon Immovable property, and is therefore one for the recovery of an interest in Immovable property, still the claim is to enforce that charge only to the extent of the debt due, and no further. The property could have been preserved from attachment and sale by payment of the debt due, which with interest was within the pecuniary jurisdiction of the Munsif's Court. The plea, therefore, that the suit upon which the decree on the bond dated 14th November 1864, was given, and in execution of which the plaintiff became the auction-purchaser, is barred, because the value of the property exceeded Rs. 1,000, fails.

5. As to the other pleas, the judgment of the lower Appellate Court decreeing the claim in favour of plaintiff-respondent appears to be sound, and in accordance with the practice of the Courts. The precedents cited by the appellant, *Dyal Jairaj v. Jivaraj Ratansi* ILR 1 Bom. 237, do not seem to apply. There is no question here of notice or no notice of a prior incumbrance. The circumstances of this case, such as they are, must be looked at. Here there was in execution a sale of the same property twice over under two different decrees of two different Courts, and the question is whether the auction-purchaser, who has bought the property sold in execution of a decree charging it for the satisfaction of the debt due under a bond of much earlier date, is not to be preferred to the auction-purchaser in execution of a decree to satisfy a more recently executed bond, and on this point there was really no defence. It has already been noticed at the commencement of this judgment what was the defence to the suit. It was contended that the bond on which plaintiff relied was executed fraudulently, and that the bond upon which defendant relied was free from all taint of fraud and therefore was to be preferred to that of plaintiff. It did not appear to be denied that, if the plaintiff could show a better title, he was entitled to a decree. The first Court under a misapprehension as to the nature of the decree holds that the plaintiff had not established a better title than defendant had, and therefore the Subordinate Judge dismissed the claim. The Judge, correcting the error of the Subordinate Judge as to the nature of the decree, finds that the lien in the plaintiff's case was of a date prior to that of the lien in the defendant's case, and, as there appears to be nothing contrary to law in this finding, our interference is not required.

6. The purchaser at an auction-sale in execution of a decree against a judgment-debtor is bound to satisfy all charges on the estate purchased by him which existed at the time of the mortgage, to satisfy which the property was sold. I have not found any cases exactly analogous to the present which is somewhat peculiar, the sales being simultaneous, under different decrees, and in two different Courts. But the principle above noticed may be applied to the case, and as both parties purchased the property at auction in execution of decrees charging it, the plaintiff's title appears to be superior to that of the defendant, inasmuch as he

purchased in execution of a decree upon a bond of prior date to that which was the foundation of the claim that led to a decree in execution of which defendant purchased. The earlier possession of defendant under the auction-sale was simply an accident arising out of the simultaneous sales in two different Courts. I notice a case in the Presidency Court, *Ajoodhya Prasad v. Moracha Kooer* 25 W.R. 254, where the claims of both the parties were on bonds specially registered under Sections 52, 53, Act XX of 1866, so that neither decree could have legally imposed any lien on the property. The estate was sold by auction on two occasions in satisfaction of two distinct bonds, and the person who had proceeded on the later-dated of the two bonds, but who represented the earlier auction-purchaser, had actually taken possession of the estate. It was held that, though in a properly brought suit between the parties to declare the property liable for the amount of the first mortgage, the party in possession would have to pay to secure his possession, yet he could not be ousted by the opposite party. This case differs from the present one in so much that the decrees in the precedent cited must be regarded as money-decrees, whereas in the present case both decrees charged the property. Moreover in that case the sales were not simultaneous, but one occurred on 25th January 1869, and the other on the 9th March 1869. Here it appears to me that I ought to consider what would have been the effect, if by accident or otherwise there had been two simultaneous sales in execution of two decrees charging property by order of the same Court. In such a case effect would doubtless have been given to the auction-purchase under the decree upon the older lien, and, under the circumstances of the case, it appears to me that the plaintiff is entitled to claim possession of the property, and that the sale in favour of defendant should be considered of no effect as against that in favour of plaintiff, and his possession should be regarded as not having been acquired under any good title. Here again I should say once more that the claim was not resisted by the defendant on the ground of his title being superior to that of the plaintiff under the sale, but mainly, if not altogether, on the ground that the decree under which the plaintiff purchased was a decree obtained in a fraudulent transaction and therefore should have no force. On this point, if it be allowed that we could go behind a decree which has not been set aside, it is sufficient to say that the Judge has found that the defendant declined to give any evidence in support of the plea of fraud. As he asserted the fraud he was bound to prove it, as he did not even attempt to do so, there is an end of the plea. I would dismiss the appeal and affirm the judgment with costs.