

(1880) 12 CAL CK 0004

Calcutta High Court

Case No: None

Land Mortgage Bank  
of India, Limited, and  
Others

APPELLANT

Vs

Radhanath Kundu

RESPONDENT

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Date of Decision: Dec. 22, 1880

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2

Citation: (1881) ILR (Cal) 559

Hon'ble Judges: McDonell, J; Broughton, J

Bench: Division Bench

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### Judgement

Mc Donell, J.

The objections which are put forward in this second appeal on behalf of Radhanath Kundu are two-

1st.---That the Bank has already failed in a suit on another mortgage relating to the same property, and that as the right they now claim was then in existence, they ought to have included it in the other suit, and not having done so are barred under Act VIII of 1859, Section 7.

2nd.---That this defendant has priority under his purchase of first August 1874.

2. With regard to the first objection, it appears that the Land Mortgage Bank had obtained a decree against Doorgachurn Shaha on another mortgage, in execution of which decree the same property was put up to sale.

3. Radhanath Kundu objected to the sale, on the ground that he had purchased the property on the 1st August 1874, and on the 10th April 1875 his objection was allowed. Thereupon the Land Mortgage Bank, on the 30th of June 1876, filed a suit, which was numbered No. 39 of 1876, against Radhanath Kundu and Doorgachurn

Shaha; they succeeded in this suit only partially; they failed with regard to the property now in dispute.

4. This suit, No. 16 of 1877, was instituted when Act VIII of 1859 was in operation, and consequently expl. 4 of Section 13 of the present Code does not directly apply to it. But it is argued that that explanation merely expresses in a few words the result of the decisions upon Section 2 of Act VIII of 1859, which are to be found in the reports of Indian Appeals : the cases of Katama, Natchiar (11 Moore's I. A. 50) and Woomatara Debia v. Unnopooma Dassee (11 B. L. R. 158). These decisions were discussed in the case of Denobundhoo Chowdhry v. Kristomonee Dossee (I. L. R. 2 Cal. 152) by a Full Bench, the majority of which held that two suits for possession of the same land could not be brought, although the title set up in the first suit was not the title set up in the second. The principle, followed in Bemolasoondury Chowdhrair v. Panchanun Chowdhry (I. L. R. 3 Cal. 705), thus laid down, has been since applied to suits to recover a specific sum of money: Bheeka Lall v. Bhuggoo Lall (I. L. R. 3 Cal. 23).

5. But the suit No. 39 of 1876 was a suit brought with the object of having the property sold in execution of one decree after an order had been made on the 10th of April 1875 releasing the property u/s 246 of Act VIII of 1859 on the claim of Radhanath Kundu. The present suit, No. 16 of 1877, is a suit brought with the object of having the property sold in execution of another decree after another order had been made in separate proceedings in execution on the 4th of March 1876 under the same Section. The property to be sold is indeed the same, but in no other respect is there any identity between the suits; and we are of opinion that even the very strict interpretation put upon the decisions of the Judicial Committee by the Full Bench of this Court in the case of Denobhundho Chowdhry (I. L. R. 2 Cal. 152) does not make the principle laid down applicable to this case, so that Section 2 of Act VIII of 1859 does not, in our view of the case, bar this suit; nor do we think that it was incumbent upon the plaintiff to include both claims in one suit u/s 7.

6. We are also of opinion that the lower Court rightly held that the purchase by the defendant in 1874 was a purchase subject to the mortgage of the 14th of February 1871. The property had been attached indeed prior to that mortgage, and if the defendant had purchased under that attachment, the case would have been different. But the ex parte decree under which the property was first attached had been set aside, not only had the decree been set aside, but the attachment had been withdrawn. It was under a subsequent attachment under a subsequent decree, that the defendant purchased, and he cannot set up his purchase as against the earlier encumbrance of the 14th of February 1871.

7. We think, therefore, that the appeal must be dismissed with costs.