

(1881) 03 CAL CK 0013

Calcutta High Court

Case No: None

The Land Mortgage
Bank of India, Limited

APPELLANT

Vs

Surnomoye Dassya
and Another

RESPONDENT

Date of Decision: March 4, 1881

Citation: (1881) ILR (Cal) 173

Hon'ble Judges: Richard Garth, C.J; McDonell, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

We think that the District Judge has taken an erroneous view of this case. [His Lordship then stated the facts as above and continued.]

2. Both parties complain of this decision, the plaintiffs (by way of appeal), on ground, that the defendants were not entitled to any part of the surplus proceeds; and the defendants (by way of cross objection) on the ground, that they are entitled to the whole of the Rs. 865-5-9, and that the Court below was wrong in directing them to restore Rs. 315 to the plaintiffs.

3. It is strange that, during the whole of the argument in this Court, we have been allowed to remain under a wrong impression as to a point upon which, as it seems to us, the whole case turns. We were led to suppose, that the suit brought by the defendants, in which they recovered the Rs. 865-5-9, was not brought within two months from the time, of the sale of the patni; and if that had been so, we think that the Munsif would have had no power to order that sum to be paid out of the surplus proceeds.

4. The words of clause. 5 of Section. 17 are : " It shall be competent to any one conceiving himself to possess such an interest, etc., to bring forward his claim to the price he may have paid for the same, or for a just compensation for the loss

sustained by him in consequence of the sale, by instituting a regular suit at any time within two months from the date of sale.

5. If, therefore, the suit of the defendants had not been brought within two months from the date of sale, the Munsif, although he might have given them a decree enforceable in the ordinary way, could not have decreed the amount out of the surplus proceeds.

6. It now turns out, however, that the suit was brought duly within the two months, and that, therefore, the Munsif's decree was quite regular.

7. That being so, the only question is, whether the plaintiffs, who had placed an attachment upon the surplus proceeds immediately after the sale, are entitled to recover from the defendants the whole or any part of the sum which has been awarded them out of those surplus proceeds by the Munsif.

8. It has been suggested to us, that although the plaintiffs did not bring any suit under Clause. 5 of Section. 17, yet they must be considered as having made a claim to the surplus proceeds by placing an attachment upon them. But that is a course, which appears to us not to be warranted by Clause. 5. The only claim which can be made under Clause. 5 is by a regular suit, and the decree which is to be made in that suit is of a special nature, enforceable only as against the sale-proceeds ; and if the plaintiffs in this suit had intended to proceed against those proceeds under Clause. 5, they could only have done so by instituting a regular suit.

9. This they have not done; and as the defendants have taken the proper course, and have obtained a judgment, we think, that they have secured a right to the sale-proceeds to the amount of their judgment prior to any right of the plaintiffs.

10. It may be that the plaintiffs may enforce their attachment as against the residue of the sale-proceeds; but that question does not arise in this suit.

11. The result is, that the judgment of the District Judge must be reversed, and that of the Subordinate Judge restored; and that the plaintiffs must pay the costs in all the Courts.