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Calcutta High Court

Case No: None

Bhojohari Maiti and Another		APPELLANT
	Vs	
Gajendra Narain Maiti		RESPONDENT

Date of Decision: Dec. 10, 1909

Judgement

1. The present appeal is against an order of the District Judge of Midnapur, setting aside on appeal an order passed by the Munsif first Court, of Contain in an application made by the present, appellants in a proceeding in execution of a decree on a mortgage bond obtained by a second mortgagee. It appears that the. respondent who was the second mortgagee brought a suit on his mortgage making the present appellants, the are alleged to be the transferees of the prior mortgagee, parties defendants. A decree was obtained by the respondent, and execution was sought by sale of the mortgage property. The appellants applied to be allowed to deposit the full amount of the mortgage debt in payment of the decree and so to save the property from sale. They alleged that they had purchased the entire rights of the mortgagor in the mortgaged property and they claimed as such purchases to be entitled to pay off the full mortgage, debt due to the decree-holder. The Court of first instance held that, the appellants were entitled to deposit the money in payment of the decree and that Court went on to explain that this was in order to prevent multiplicity of litigation. The learned Judge has set aside that order and we are unable to say-that his judgment is very clear or that it show''s that he has quite grasped the position of the parties and the rights claimed by the appellants. So far as we can gather, there was no real dispute that the present appellants had purchased the rights of the original mortgagor bat, whether they had purchased be not, we think that the view of the law which the learned Judge has taken is not correct. Even supposing that the appellants Were held to occupy the position of prior mortgagees, we are of opinion that there is nothing in the law to prevent them in a case like the present, where they have been made parties to the suit by the second mortgagee, from claiming their right to pay off the second mortgage and so save from sale the property which stands as security for their mortgage debt. It has been contended on behalf of the respondent that a prior

mortgagee has he right, even when he is made a party to the suit brought by the puisne mortgagee on his mortgage, to pay off the second mortgage, in order to save the property from sale. If he has hot that right, it is difficult to understand what is the use or necessity of making him a party to the suit at all. In our opinion, he is made a party to the suit in order to give him an opportunity, if he wishes, to pay off the second mortgage if the mortgagor refuses to pay it Off and so to save the property which stands as security for his mortgage from being sold. The learned pleader for the respondent contends that, under the law a prior mortgagee must stand by the suit brought by a puisne mortgagee and allow the property to be sold subject to his mortgage lien and then, when this is done, he must bring a fresh suit on his own mortgage, re-sell the property and so recover his own mortgage debt. We do hot think that under the law this is necessary and, in several cases, it has been held by this Court that a prior mortgagee in an application u/s 244 of the CPC in execution is entitled to have his fights settled without being put to the extra expense and unnecessary trouble of bringing a fresh suit. This was the view which was taken by us only recently in the case of Govind Prosad Misser v. Luchmi Charan Marwari S.A. No. 2088 of 1906 and we think that this is the view which we should adopt in the present case. In our opinion, the present appellants, certainly as purchasers, if they are entitled to that position which seems to us to have been conceded in the Court of first instance, though it was questioned in the lower, appellate Court and equally so, if they are prior mortgagees, are entitled to pay off the mortgage debt due on the second mortgage in order to save from sale the property which they (appellants), if they are the purchasers, have purchased or which if they are the prior mortgagees, has been hypothecated to them as security for their mortgage debt. The result, therefore, is that we decree the appeal, set aside the judgment and order of the lower appellate. Court and restore those of the Court of first instance with costs in all Courts. As the Court of first instance has not fixed the time within which the deposit is to be made by the present appellants, we think that the order should run as follows: That the present appellants are entitled to deposit within one month from the date of the arrival of the record in the Court of first instance the sum which shall be found on an account being taken by that Court to be due to the second mortgagee is discharge of his mortgage debt with costs and interest up to the date of payment. On their failure to do so, execution of the decree of the opposite party will proceed. We assess this hearing fee in this Court at two gold mohurs.

2. Let the record be sent down to the lower Court without delay.