

**(1909) 12 CAL CK 0029**

**Calcutta High Court**

**Case No:** None

Susilabala Dasi

APPELLANT

Vs

Dinabandhu Nandi

RESPONDENT

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**Date of Decision:** Dec. 1, 1909

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### **Judgement**

1. The present appeal is directed against an order passed by the Subordinate Judge of Burdwan on an application made by the present opposite party, decree-holder, to have a certain putni interest sold in execution of his mortgage decree. It appears that two mortgage-bonds were executed in favour of the present opposite party by the proprietor of Estate Chuk Durga, Touzi No. 17 of the Burdwan Collectorate. These bonds were executed on the 20th January 1892 and, 26th May 1896, respectively. On the 14th July 1897, the mortgagor created a putni of two mouzahs in the Touzi in favour of the present appellant and that putni was registered under the provisions of Section 40 of Act XI of 1859. The respondent, the applicant u/s 244, Code of Civil Procedure, who was the mortgagee, brought a suit on his two mortgages on the 29th August 1903 making as party defendant to the suit the present appellant who was the putnidar of the two mouzahs and obtained a decree on the 20th May 1905. The decree directed the sale of the mortgaged properties "free from all encumbrances, including the putni which had been created in favour of the present appellant. Afterwards the estate, Touzi No. 17, was sold for arrears of revenue in August 1906, and purchased by the decree-holder respondent who also withdrew the sale-proceeds. Finding that his mortgage-debt was not satisfied by the sale-proceeds of the estate as it was sold subject to the encumbrances of the putni of the two mouzahs, the decree-holder applied for an order for sale of the putni created in favour of the present appellant in satisfaction of the balance of his mortgage-debts. The present appellant thereupon put in a petition u/s 244, Code of Civil Procedure, objecting to the sale of the putni on two grounds, first, that, as the mortgage-decree did not direct sale of the putni, it could not be sold in satisfaction of the mortgage-debt and, secondly, that, as u/s 73 of the Transfer of Property Act the effect of the revenue sale was to transfer the mortgage-lien to the surplus

sale-proceeds at the sale was in satisfaction of the arrears of revenue, the mortgagee, in satisfaction of his mortgage-decree, was precluded from bringing to sale the putni created in favour of the appellant. The application was disallowed by the executing Court mainly on the ground that the entire interest in the mortgaged property, which was secured for payment of the mortgage-debtor was not sold at the sale for arrears of revenue. It was held that the entire interest must be regarded as having been divided into two portions after the creation of the putni, that of these two, One portion, being the estate as it stood after creation of the putni, was all that had been sold and that there remained the latter portion, namely, the putni interest which the mortgagee was entitled to bring to sale in satisfaction of his decree. Against that order the present appeal had been preferred and, in support of the appeal, practically the same contentions have been advanced before this Court as were urged in the lower Court. The learned pleader, who appears on behalf of the appellant, has contended that the effect of Section 73 of the Transfer of Property Act in a case where mortgaged property is sold for arrears of revenue is to transfer the mortgage-lien from the immovable property which is sold to the surplus sale-proceeds remaining over after payment of the Government revenue and, relying on three decisions of this Court, he has contended that the effect of that section is to transfer the whole of the charge to the sale-proceeds leaving the mortgaged property thereafter absolutely free from charge and that, in consequence, the mortgage-lien on the property having been transferred to the sale-proceeds the mortgagee has no right to proceed against the putni interest existing in that property. In fact, his contention is that in a case like the present, the effect of the revenue sale is to restrict the mortgage-lien to the sale-proceeds of the estate and to relieve any subordinate interest, or incumbrances existing on the estate from liability, in satisfaction of the mortgage-debt. The first case relied on is the case of *Kristodass Kundoo v. Ramkant Roy Chowdhry* 6 C. 142 : 7 C.L.R. 396, and reliance is placed on the following passage occurring in the judgment of that case. The learned Judges at page 147 say: "It is clear in fact that the money, the proceeds of sale, which had been substituted for the land mortgaged, became subject to the lien to which the land which it represented was subject". They go on to say: "Taking the surplus sale-proceeds as representing the nine mortgaged estates which have been sold for arrears of revenue, the decree obtained by the mortgagee declaring his lien on them and other estates would be the same as declaring a lien on that money". It is contended that the result of these two passages is to show that the Judges considered that, after the sale, the surplus sale-proceeds were substituted as security for the mortgage-debt in place of the original lands mortgaged. The next case referred to is the case of *Gosto Behary Pyne v. Shib Nath Dut* 20 C. 241. In the decision of that case the learned Judges say "we think that the proper view to take of the matter is to regard the surplus sale-proceeds as the shape into which the mortgage security is converted, and as before such conversion the security could not be split up into parts, and the mortgagee was entitled to realize his money out of the whole of it, its conversion by sale into money ought not to affect his rights is

this respect". It is contended that the effect of that decision is to show that it was the opinion of the learned Judges who decided that case that by the conversion the sale-proceeds were taken to represent the original immovable property mortgaged, as security for the mortgage-debt, and it is suggested that the sale-proceeds only were subject to the charge. The last case referred to is the case of *Kamala Kant Sen v. Abul Barkat* 27 C. 180. In that case it was held that, after there had been a sale of an estate in satisfaction of a claim for arrears of revenue, the mortgage-lien attached to the whole of the sale-proceeds and that no other person had any right to take any portion of those sale-proceeds in satisfaction of his debt and so to split up the amount which stood as security for the mortgage-debt. It is suggested that the effect of these decisions is to show that, as the lien was transferred from, the immovable property to the purchase-money, the lien on the immovable property, ceased and the mortgagee's remedy was restricted to the purchase money alone. It has further been suggested that, in view of the effect of Section 78 of the Transfer of Property Act, we should look at the duties thrown on a mortgagee by the procedure laid down in Section 41 of Act XI of 1859. It is urged that the mortgagee, on receipt of the notice which would be served on him under that section, is bound to come in within the time specified and put in his objections to the application for common registry so as to save his security from being in any way diminished in the event of a sale for arrears of revenue subject to the registered encumbrances. We are not prepared to hold that, under that section, any such duty is imposed on a mortgagee, nor are we satisfied that the objection raised by him on that account would be regarded by the revenue officer as sufficient to restrain him from granting the application. The three judgments to which, we have been referred are clearly judgments which had for their object the protection of the interest of the mortgagee and we are unable to hold, from the passages which occur in the judgments on which reliance was placed, that there was any intention in those judgments in any way to restrict the rights of the mortgagee. The interest in the immovable property, which was transferred for the purpose of securing the payment of the mortgage-debt, was the entire interest which the mortgagor had in the estate at the time of the execution of the mortgages. Up to the time of the sale for arrears of revenue the effect of the execution of the putni was not in any way to restrict or diminish the interest which the mortgagee could bring to sale in satisfaction of his decree. The only question then is whether, after the sale, that interest can be held to have been restricted or diminished by the provision of the law which protected the putni interest from sale in satisfaction of the decree for arrears of revenue. We are of opinion that it cannot. We consider that the view taken by the lower Court is substantially correct that the mortgagee was entitled, in satisfaction of his mortgage claim, to sell the entire interest of his mortgagor in the estate which was hypothecated as security for the debt. What was sold at the revenue sale was, not the entire interest which then stood as security for the mortgage. The sale was of the estate subject to the registered encumbrances and necessarily the proceeds realized at the sale were less than they would have been had the property been sold

free from all such encumbrances. We are of opinion that the sale cannot be taken to have had the effect of diminishing in any way the interest which the mortgagee was entitled to sell in, satisfaction of his mortgage decree and, as in satisfaction of the arrears of the Government revenue, only a portion of the entire interest was sold, we are of opinion that the lower Court was right in the view which it took that the mortgagee was entitled afterwards, in satisfaction of the balance of the mortgage-debt, to bring to sale that portion of the entire interest in the estate which under the provisions of the law, was protected from sale at the time of the revenue sale. We think, therefore, that the lower Court was right in disregarding the objection taken on behalf of the present appellant. The result, therefore, is that the appeal is dismissed with costs. We fix the hearing fee at ten gold mohurs.