

(1909) 08 CAL CK 0048**Calcutta High Court****Case No: None**Maharaja Parbhu Narain Singh
Bahadur

APPELLANT

Vs

Babu Beni Singh and Others

RESPONDENT

Date of Decision: Aug. 11, 1909

Judgement

1. This case arises as follows: The plaintiff and the defendants Nos. 5-8 with others held a 15 annas share in a certain mouzah. On the 30th April 1893, the defendants Nos. 5-8 mortgaged their share to defendant No. 9. Subsequently the whole 15 annas share was brought to sale on non-payment of Government revenue, and was brought by the plaintiff and defendants Nos. 1-3 or their representatives in September 1896. As the sale was of a portion only of the estate the prior incumbrance of defendant No. 9 was not avoided, and he accordingly brought a mortgage suit on the 20th September 1898. He obtained a decree which we shall have to refer to again. Under this decree the property was brought to sale and sold to the decree-holders and the sale was confirmed on the 4th of November 1902. On the 28th February 1903 the plaintiff paid Rs. 1,782-3 to the decree-holder in respect of his decree and an order was made: "On both sides" application, the sale is set aside, and the case dismissed on full satisfaction." The plaintiff now sues for contribution from defendants Nos. 1 to 4, No. 4 Being a purchaser from one of the original purchasers at the revenue sale, in respect of Rs. 1,782. The suit was decreed by the Sub-Judge on the ground that the payment was made under necessity. This decision was set aside by the District Judge on the ground that the mortgage decree affixed liability to the interest of the plaintiff only, that the other purchasers were not affected and had no interest to prevent or set aside the sale.

2. In order to determine the rights of the plaintiff in the present suit, we must first determine what was the effect of the decree in the mortgage suit. The suit was brought against the original mortgagors, with whom we are not now concerned, the present plaintiff, and defendants Nos. 1-3 with whom No. 4 is now associated. The auction sale to defendants Nos. 1-3 was set out and the relief asked for was sale of

the mortgaged premises. On appeal it was held that the then plaintiff, the mortgagee, was entitled to a decree for sale of the mortgaged property that a decree should be prepared declaring the amount due on the expiry of 3 month's from the date of the declaration for principal, interest and costs, from the present plaintiff and the executants of the mortgage deed, and ordering that in default of the defendants paying the said amount within 3 months from the date of the decree" the mortgaged property should be sold, the surplus proceeds to go to the present plaintiff. This judgment was duly embodied in a" decree of the same date, which contained a money decree against the executants of the mortgage and a mortgage decree as set out above. ? Considering these documents together we cannot but regard the decree as covering the whole of the mortgaged property, and as affecting the interests of defendants Nos. 1-3, the present respondents. Why the decree did not more explicitly refer to them and why as the case stood, a chance tore-deem and a share in the surplus sale-proceeds were not given to them, it is now impossible to say; but the decree must be taken as if it had been made in their presence and without opposition from them, and in terms it certainly applies to property in which they claim to have an interest. The result is that we consider, contrary to the view held by the lower appellate Court, that the defendants Nos. 1-3 had an interest to prevent or set aside the sale under the mortgage decree. The plaintiff thereon claims to be entitled in the first place to contribution u/s 69 of the Contract Act. The respondents, however, contend that they are not so liable, for that they were not in any way bound to pay what the plaintiff paid to get the sale set aside. Had he paid the money to prevent the sale, the case would have been very different, for he would then have discharged an obligation common to him and them: but now the result of neglecting the obligation has ensued, and the plaintiff has done no more than make a purchase which may enure to their benefit, though it is admitted by them that they have no title to the land of which they seem to be in possession. This is not a very meritorious argument, but we consider that it must prevail. The sale was in fact completed and the defendants" interests in the property sold terminated. The plaintiff then chose to pay a certain sum of money to the purchasers on which they agreed to the Court making an order that the sale should be set aside. This order seems to have been irregular, but, whatever its effect was, defendants Nos. 1-3 cannot have been bound to make any payment after the sale had satisfied the decree. The plaintiff's case u/s 69, therefore, fails. But the question remains whether he has not an equitable claim on the respondents independently of the Act. The sale to the purchasers was complete when the plaintiff made the payment to them which is the basis of this suit, and there seems not to have been any proceeding u/s 244 of the Civil Procedure Code. The order of the Court was, therefore, irregular, and cannot be taken as restoring the state of things that existed before the sale. The purchasers, no doubt, gave up their rights under the sale, but they cannot be considered to have done so in favour of the defendants Nos. 1-3. If they wish to gain any advantage from the payment made by the plaintiff, they must obviously pay for it. The plaintiff might have claimed an assignment from

the purchasers in which case he would have been entitled to claim possession and mesne profits from defendants Nos. 1-3. This he has not done but the defendants cannot be heard to say that they will remain in possession of a part of the property released by the purchasers at the expense of the plaintiff and yet pay nothing" for it. The plaintiff, no doubt, intended to procure by his payment the rights that he would have obtained from an assignment, and the purchasers intended to confer those rights on him. The transaction between them was in a form that cannot be sustained; but it certainly did not confer on defendants Nos. 1-3 the rights which they seek to set up. They are in possession of property for which the plaintiff has paid and they must either give up or pay for it. No claim is made to the property in their hands, nor do they offer to give it up. The plaintiff is, therefore, by all considerations of equity and good conscience entitled to the pecuniary relief for which he asks.

3. We accordingly allow the appeal, set aside the judgment and decree in the Court below and order that the shares of defendants Nos. 1, 2, 3 and 4 in the mortgaged property are liable to charges for the amounts claimed from them respectively by the plaintiff. The appellant is entitled to his costs in this Court and the Court below against these defendants.