

(1910) 11 CAL CK 0009

**Calcutta High Court****Case No:** Appeal from Appellate Decree No. 1238 of 1908

Ram Saran Singh

APPELLANT

Vs

Khakhan Singh and others

RESPONDENT

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**Date of Decision:** Nov. 28, 1910**Final Decision:** Dismissed

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**Judgement**

1. This appeal arises out of a suit brought by the Plaintiff-Appellant to recover a 2 courie odd share in a certain property which he alleged had been mortgaged to one Babu Nandanlal by the Defendants second party together with other properties making a 5 gunda odd share in all. It seems that the mortgage of the 5 gunda odd share was executed in favour of Babu Nandanlal on the 23rd May 1888. In 1896, Nandanlal having died his widow, Tulsa Koer, brought a suit on the mortgage bond and obtained a decree on the 28th July 1896 for recovery of the sum of Rs. 955 odd. The date fixed for the sale of the property in execution of the decree was the 15th February 1897. On that date, the present Plaintiff appears to have paid in Rs. 100 on behalf of the mortgagors and the sale was postponed to a date in March. In March the Plaintiff paid in another Rs. 175 and there was another adjournment till April. On the 24th April 1897, the Plaintiff and the mortgagors having failed to pay off the balance of the mortgage debt, the property was sold. After that, on the 25th May 1897, the Plaintiff lent to the mortgagors sums sufficient to discharge the balance of the mortgage debt and, on that date, the sale in execution of the mortgage decree was set aside. The Defendant first party had obtained a money decree against the original mortgagors on the 22nd May 1895 and, on the 9th March 1897, he attached in execution of that decree 2 courie odd share out of the 5 gundas odd share which had been mortgaged to Babu Nandanlal. On the 18th June 1897, the 2 courie odd share was put up to sale in execution of the Defendant No. 1's decree and was purchased by himself. That sale appears to have been confirmed on the 18th or 19th July 1897.

2. On the 25th June 1897, the present Plaintiff took from the original mortgagors, the Defendants second party, a mortgage of the whole 5 gundas odd share in satisfaction of the debt incurred by him in paying off the original mortgage which had been executed in favour of Babu Nandanlal. The present suit was brought by the Plaintiff on the basis of that mortgage to recover from the Defendant first party and the mortgagors, the Defendants second party, the 2 courie odd share which had been sold in satisfaction of the Defendant No. 1's money decree and had been purchased by him on the 18th June 1897.

3. Both the lower Courts held that the Plaintiff was not entitled to recover possession of the 2 courie odd share from the Defendant No. 1. The contention advanced on behalf of the Plaintiff was that the mortgage taken by him on the 25th June 1897 was not a new charge on the 5 gundas odd share but was a continuation of the old charge created in favour of Nandanlal by the mortgage executed in his favour on the 23rd May 1888. The lower Appellate Court in dealing with this question has come to the conclusion that the mortgage of the 25th June 1897 cannot be regarded as a continuation of the old mortgage of the 23rd May 1888. It notices that between the 25th May 1897 when the mortgage in favour of Nandanlal was discharged by payment of the full mortgage debt and the sale of the property was set aside and the date when the mortgage was executed in favour of the Plaintiff there was an interval of a month. It was during this interval that the property, the 2 courie share, was sold in execution of the decree obtained by the Defendant No. 2 and was purchased by him on the 18th June 1897. The learned District Judge held that during that interval there was no existing charge or mortgage on the 2 courie share and, therefore, the Plaintiff could not claim that that 2 courie share was covered by the mortgage executed in his favour on the 25th June 1897. It appears to have been suggested on behalf of the Plaintiff that the Court was bound to consider what was the intention of the Plaintiff when he paid on behalf of the mortgagors the sums necessary for obtaining the postponement of the sale in execution of Tulsi Koer's mortgage decree and finally for discharge of that mortgage and for having the sale set aside; and it was apparently suggested that the intention of the Plaintiff was to keep the original mortgage executed in favour of Nandanlal alive. The learned Judge, however, went into the evidence and said that the evidence and the conduct of the parties failed, in his opinion, to prove that the Plaintiff and the Defendants second party, the mortgagors, ever intended before the 25th June 1897 to keep alive the old charge under the mortgage which was executed in favour of Babu Nandanlal. He, therefore, held that the suit of the Plaintiff, so far as this 2 courie odd share was concerned, must fail.

4. On behalf of the Appellant, the Plaintiff in the original suit, it has been argued in this Court, first, that the lower Appellate Court erred in law in not construing the mortgage bond executed on the 25th June 1897 as one executed in continuation of Babu Nandanlal's mortgage of the 23rd May 1888 and with the intention of keeping alive the original mortgage and, secondly, that as the sale to the Defendant first

party was not confirmed till the 18th July 1897 and the mortgage in favour of the Plaintiff was executed on the 25th June 1897, therefore, the purchase of the Defendant first party of the 2 courie share must be held to be subject to the mortgage executed in favour of the Plaintiff.

5. In support of the first contention reliance has been placed on the decision of the Allahabad High Court in the case of Shyamlal v. Bashiruddin I. L. R. 28 All. 778 (1906). and on the decision of the Madras High Court in the case of Vanmikalinga v. Chidambara I. L. R. 29 Mad. 37 (1905). It is suggested that these two decisions lay down that when a payment is made by a person for the purpose of discharging a mortgage-debt it must be assumed that that payment was made with the intention of keeping the mortgage-debt and the mortgage lien alive, though at the time no document may have been executed in favour of the person making the loan creating any encumbrance whatever on the property covered by the original mortgage or in any way charging that property as security for the subsequent loan. In our opinion, the decision in those cases do not support this contention. In both of these cases what was held is that when a mortgage-debt for the payment of which a sale has been ordered is satisfied by a third party who, when he makes the advance to satisfy the debt, obtains a security over the mortgaged property, the security created by the original mortgage-debt is not extinguished and the original encumbrance in respect of which the sale was ordered enures to the benefit of the party making the payment. This conclusion is, however, very different from that which is contended for in the present case. In both those cases, so far as we understand the facts, the person advancing the money to discharge the mortgage-debt did so on taking a mortgage of the property which was covered by the original mortgage and it was, therefore, held that from such conduct of the parties, it must be inferred that, although he made the payment to discharge the original mortgage-debt, still he wished to keep the charge under that original mortgage alive for the purpose of protecting his own subsequent mortgage. Neither of these cases go so far as the learned pleader for the Appellant in this case wishes us to go, that is to say, to hold that where a person advancing money in discharge of a mortgage fails at the time to take any charge on the mortgaged property as security for his loan but subsequently takes a mortgage over the same property, he is entitled to claim that the second mortgage is a mortgage in continuation of the original mortgage which he has discharged and that he is entitled to step into the shoes of the original mortgagee for the purpose of enforcing the security under his own mortgage. In the present case the facts appear to us to be entirely distinguishable from those of the two cases on which reliance has been placed, because, in the present case, the Plaintiff neglected to take any charge over the property covered by the first mortgage at the time when he made the advances to pay off that mortgage. The result was that, between the 25th May 1897 and the 25th June 1897, the property which had been originally covered by the mortgage in favour of Nandanlal was free from all encumbrances, and it was in that condition

when it was purchased by the Defendant first party on the 18th June 1897. We are of opinion, therefore, that the lower Courts were right in the view which they took that the Plaintiff was not entitled under cover of the mortgage of the 25th June 1897 to claim to recover possession from the Defendant first party of the 2 courie odd share which he had purchased on the 18th June 1897.

6. We also consider that the second point taken in support of the appeal must fail. The contention advanced on behalf of the Appellant amounts to this that in any case in which a Court has ordered a sale and even if that sale has been held, it is open to the debtor to defeat the rights of the decree-holder or the purchaser and to go behind the Court and sell to a third person the property which has been put up to sale by the Court in execution of the decree. The decision of this Court in the case of Prem Chand v. Purmima I. L. R. 15 Cal. 546 (1888) and the decision of the Allahabad High Court in the case of Amir Kazim v. Darbari Mal I. L. R 24 All. 475 (1902).do not, in our opinion, support the contention raised on behalf of the Appellant. In the first case, all that this Court held was that where the purchase had been made by a mortgagee and there was a subsequent sale prior to the date on which the sale certificate was issued, the provisions of sec. 316 of the Code was not sufficient to destroy the rights of the mortgagee under the mortgage but that his rights as mortgagee were kept alive and remained in existence until the property vested in the mortgagee under the sale certificate. In the other case, it was held that as the right to enter into possession did not accrue to the purchaser until the sale had been confirmed, therefore he could not claim from the debtor mesne profits between the date of the sale and the date when the sale was confirmed. These two decisions, with the correctness of which we fully agree, do not in any way support the contention which has been advanced on behalf of the Appellant by his learned pleader. In the decisions of this Court in the cases of Adhur Chunder v. Aghore Nath 2 C. W. N. 589 (1898) and Bhawani Koer v. Mathura Prasad 7 C. L. J. 1(1907) this Court has pointed out that, though the title of the purchaser of a property is not completed from the date of the sale, still he has from that date a good, equitable and inchoate title to the property which is perfected at the time when the sale is confirmed. Such title certainly cannot be affected or defeated by any alienation or transfer made by the judgment-debtor between the date of the sale and the date of the confirmation. In our opinion, the second contention raised on behalf of the Appellant must also fail. The appeal is accordingly dismissed with costs.