
(1864) 12 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 2809 of 1863

Sheo Sahay Sing

APPELLANT

Vs

Gupinath Sing

RESPONDENT

Date of Decision: Dec. 14, 1864

Judgement

Norman, J.

This case has been referred to a Full Bench, owing to an apparent discrepancy in two decisions of the late Sudder Court, dated respectively the 22nd June 1857 and 30th April 1861, and to obtain an authoritative ruling on the point. On a consideration of the two decisions of the Sudder Court referred to above, we find that they are not in reality in conflict. In the case of *Mirza Abid Hossein v. Brij Beharee Lall* S.D.A. Rep., 1861, 185, decided on the 30th April 1861, one Ajeetnarain, by an ikrarnamah written in 1846, agreed that, upon a certain possible, future, and contingent event, which in effect did not happen before the 22nd June 1850, he would execute a bill of sale of Mouzah Sadoobpoor to the plaintiff Brij Beharee Lall. On the 6th May 1850, he sold the mouzah in question, by a bona fide conveyance, for a valuable consideration, to the defendant Abid Hossein. On the 16th June 1855, the plaintiff suing on the ikrarnamah, obtained a simple money-decree against Ajeetnarain. The Court having refused to execute this decree against the property in the possession of the defendant, the plaintiff brought a suit to set aside the sale to the defendant, and to reverse the proceedings in the execution department staying the sale of the property. It was held that having elected to take this course, he could not be allowed to realize the amount of his decree from the property mentioned in the ikrarnamah; in fact the agreement contained in that instrument was simply that, upon the happening of the event provided for, Ajeetnarain bound himself to execute, on being requested to do so, a mortgage of the property. No such request was made within a reasonable time. Before any such request was made, in ignorance of Ajeetnarain's contract, the defendant acquired his title. The Court, therefore, held, and rightly held, without entering into the difficult question as to what might have been the equities of the parties had plaintiff called on Ajeetnarain to execute a mortgage to him on or immediately after 22nd June 1850, that the right was lost or waived as against the

defendant by the course which the plaintiff had chosen to adopt.

2. From the decision of the 22nd June 1857, *Durgungeer Sunnassee v. Gourmohun Shah* S.D.A., Rep., 1857, 1063, it appears that one Sheopershad, the owner of the property, had pledged it first to Gourmohun, then to Durgungeer. The former got a money-decree, which he sought to enforce against the property then in the possession of Durgungeer, who had foreclosed and taken possession of the property under a decree. It was held that, where property is specifically mentioned in a bond as security for the sum borrowed, such debt becomes a lien on that property, and the absence of any mention in a decree of the mode in which that decree is to be executed does not interfere with the lien existing on the property; but that in execution, the plaintiff in the suit is entitled to have the property on which the lien clearly exists sold, and consequently that any mortgage effected subsequently to the date of the creation of the lien on the property is subject to the outstanding lien on the property; and in case the mortgagee obtained possession after foreclosure, he takes it with all incumbrances on it prior in point of time to the date of his mortgage. It is evident, therefore, from a comparison of the two cases, that the facts were different, and the decisions are not conflicting.

3. On the question in regard to which the decision of the Full Bench has been sought, we are of opinion that, when a person to whom property is pledged for a debt obtains a simple money-decree against his debtor, he cannot execute that decree against the property pledged, to the prejudice of a subsequent bona fide purchaser. He is simply in the position of an ordinary judgment creditor in respect to his decree, and can only seize the rights and interests of his debtor. He may enforce his lien by separate action against the party in possession of the property pledged to him, but he is not entitled to execute the money-decree against the property in the hands of the subsequent purchaser. With these observations we remit the case to the Bench by which it was referred to us, that final orders may be passed in the appeal.