(1878) 05 CAL CK 0008

Calcutta High Court

Case No: None

Syed Allaoollah and Others		APPELLANT
	Vs	
Hirdy Narain and Another		RESPONDENT

Date of Decision: May 31, 1878

Citation: (1879) ILR (Cal) 72

Hon'ble Judges: Tottenham, J; L.S. Jackson, J

Bench: Division Bench

Judgement

L.S. Jackson, J.

What the plaintiffs sought in this suit was an order that a certain mehal, or share in a mehal, in the possession of the defendants might be brought to sale in satisfaction of the balance due on a mortgage debt secured originally upon some seventeen estates of which the property now in question is one. It was stated in the plaint that all those properties, that is, all the others over which the mortgage extended, being sold, the plaintiff''s obtained Rs. 5,882 out of the said decretal amount, but that Rs. 759 still remaining unpaid, an application was made for the share in suit being sold by auction, but upon a petition of objection on behalf of the defendants, the property was released from sale.

2. The principal objection made by the defendants was, that the suit of the plaintiffs could not proceed unless an account were taken of the whole mortgaged property as it stood in the hands of different purchasers, and which property had been separately assessed in respect of its liability to satisfy the whole mortgage and the objection is made particularly in respect of the properties which Hur Prosad Chowdhry and others purchased in satisfaction of the security of the plaintiffs themselves.

3. The Munsif overruled the pleas of the defendants and gave judgment for the plaintiffs. On appeal, the Subordinate Judge, after setting out the several pleas taken

by the defendants, noticed the fourth, which is to this effect: "When the property mortgaged entered in the decree alleged by the plaintiff is seventeen kullums, and of these some are in the possession of the judgment-debtor and some in that of other purchasers, the plaintiff has no right of putting to sale the share in dispute only, leaving off all those properties." His finding upon that is to the following effect: "It is an admitted fact that the whole property mortgaged in the decree alleged by the plaintiff is mortgaged collectively. In case of its being joint, the plaintiff is at liberty to realize the amount of its decree from whatever property he likes out of the property mortgaged. This right of the plaintiff cannot be rendered null and void for the reason that the defendants'' first party have become the purchasers of one property out of the property mortgaged"; and then he takes up the fifth plea, viz., that "the plaintiff should apportion the whole of his mortgage-debt upon the whole property mortgaged and sue all the possessors of the property mortgaged for proportionate amounts," and observes that "this plea has in a manner been already decided in the finding on plea No. 4," and he overrules the plea and says: This contention would appear fully refuted on reference to Vol. IV of Wyman''s reports, p. 228, which contains the decision of the 26th August 1867." That case is also to be found in 8 W.R., 379. The learned Judges, no doubt, held, in the particular circumstances of that case that, as stated in the head-note, "where a plaintiff''s bond gives him a separate lien on each and all of several mouzas pledged as security, be is free to elect for sale whichever of the mouzas he thinks most likely to satisfy his claim." But then they go on to observe: "In the present case there was nothing to prevent the plaintiff from purchasing any of the mouzas pledged to him, and he bought them at the risk of lessening his own security. Whether in his new position as mortgagor of the three mouzas in which he has purchased the equity of redemption he is liable for contribution to the holders of the two mouzas he is now proceeding against is another question, but we know of no law which prevents a transaction of this nature between a mortgagor and a mortgagee." It appears to us, as laid down in the case of Nawab Azimut Ali Khan v. Jowahir Singh 13 Moores I.A., 404, that the defendants in this case would have been at liberty to insist that the mouza which they had purchased should be burthened with no more than a proportionate amount of the original mortgage-debt, and might claim to redeem that mouza upon payment of that quota, so that if they could have shown that the amount chargeable upon their mouza was less than Rs. 759 which the plaintiffs claimed, and brought that money into Court, they might have got their mouza redeemed. That has not been done, nor has any reason been shown to lead to the supposition that if such an account had been taken, the charge upon the mouza would have been less than Rs. 759. Under these circumstances, although we do not quite concur in the judgment of the Court below, we think that in substance that decision is right, and this appeal must be dismissed. We think also that each party should pay his own costs of this appeal.