
(1872) 07 CAL CK 0006

Calcutta High Court

Case No: Regular Appeal, No. 273 of 1871

Mussamat Bind A Bibi
and Others

APPELLANT

Vs

Guru Prasad Sahu

RESPONDENT

Date of Decision: July 17, 1872

Judgement

Sir Richard Couch, K", C.J.

After stating the facts, and observing in reference to the decree of 21st May 1868--" It was said that the Court, in a suit under s. 55 of this Act (XX of 1866), had not power to order, as was done here, that the money should be paid out of the property which was mortgaged: that the decree could only be for the payment of money. However, the decree was in this form, and no objection appears to have been made to it"--proceeded, referring to the order of 16th August 1870); The effect of this was, that although the sale was made under the attachment in the suit upon the mortgage to Binda Bibi and the mortgage for Rs. 13,000 was prior to that, and would not be void as against it, yet the application of the proceeds was ordered as if the sale had really bean made under the attachment of Raghubans and Gapinath, The sale should have been under their attachment as against which the mortgage for Rs. 13,000 was void, and the sale would not have been subject to it. I doubt; whether the proceeding was a proper one, but we have not to determine that. The present defendant"s case is this:--be says, it is true I purchased under an attachment which was subsequent to the mortgage for Rs. 13,000 in respect of which the plaintiff brings this suit, but the money which was realized from my purchase was applied in satisfying the decree of Raghubans and Gapinath, and as their attachment was previous to the mortgage for Rs. 18,000, I claim to have the benefit of it, and to hare the mortgage held void as against me-Now I think the defendant is not entitled to that, The decision of this Court, which has been confirmed by the Judicial Committee of the Privy Council, upon the construction of s. 240 of the Civil Procedure Code, are that" null and void" means not null and void as against every body, but null and void as against the attaching creditor. The decision does not go beyond this, that it shall be null and void as against the attaching creditor and persons who claim under or by virtue of his attachment, persona

making title under it. Such a question, as the present, was not before the Judicial Committee or before this Court in that case, but the principle upon which they were decided would not entitle the present defendant to have the benefit of an attachment from which he does not derive his title. It is true that the Court has ordered that the proceeds of the sale should be paid to Gapinath, but that is a matter subsequent to the defendant's purchase. The mere application of the purchase-money does not make him a purchaser under that attachment. Therefore, as regards that part of the case I think the defendant is wrong. Then there is another question in the case with regard to the eight-anna share which was mortgaged to Binda Bibi. Now as I have said, the decree under Act XX of 1866 authorized the sale of the mortgaged property to satisfy the debts, although wrongly, and the property was sold. Therefore Binda Bibi, the plaintiff, is in the position of a person who has, by the process of a Court, had sold, under the mortgage, the eight-anna share. I think it must be taken that she caused to be sold all which she had a power to sell, and to give to the purchaser all which she had title to. This would give to the defendant a priority over the subsequent mortgage for the 13,000 rupees; and it is just and equitable that he should have the benefit of that, and that the present plaintiff should not be allowed; as it were, to set aside her own act in getting the property; sold under the mortgage, and set up a subsequent mortgage against the mortgage to her of the eight anna Share.

2. The result is, that the defendant is entitled to retain an eight-anna share of the property, but that the plaintiff will have a decree as prayed for in respect of the other eight-anna share. The parties will bear their own costs in both Courts".