
(1874) 09 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 1206 of 1874

Bhanoomutty
Chowdhrair

APPELLANT

Vs

Premchand Neogee
and Another

RESPONDENT

Date of Decision: Sept. 15, 1874

Judgement

L.S. Jackson, J.

The special appeal in this case raised a question of some difficulty and of great importance. We are asked to decide whether upon a mortgage in the English form, relating to immoveable property, situated in the mofussil, and containing a power of sale, if the property were sold under that power and without reference to the Court, each sale could be supported as passing a valid title to the defendant. We were referred to the case of Bhuwanee Churn Mittr v. Jykishen Mittr S.D.A., 1847, 354 in which the Judges of the Sadder Court held that a person, relying upon such sale, could not eject a party holding under the Mortgagor. On the other hand, we were referred to the case of Sonatun Bysack v. Koonjo Behari Bysack Unreported, which was decided by a Division Bench of this Court in which a contrary view was affirmed, although the question there arose incidentally upon a question of costs. I confess that, if we were called upon to determine this point, we should have felt considerable difficulty; but, on calling upon the respondent's vakil, he laid before us an entirely different point upon which he submitted the plaintiff's suit ought to be dismissed. On that point we have heard the arguments of the special appellant, and the result is that in our opinion the objection thus referred to ought to prevail. It seems that the plaintiff relies upon a mortgage in the nature of a conditional-sale dated the 27th Bhadro 1271 (11th September 1864). That was a transaction between the owner of the property and one Tarasunker Rai Chowdhry, and it was stipulated that the amount advanced by him should be repaid on or before the 30th Sraban 1272 (13th August 1865). The payment was not made, and consequently it is said Tarasunker issued the notice of foreclosure on the 7th September 1865, and the notice was served on the owner Sharadhone Rai Chowdhry. The defendant's case was that

some years before the date of the transaction, that is on the 10th of December 1862, Shamdhone Rai Chowdhry borrowed Rs. 1,000 from one Mr. Cones and had executed, the mortgage deed in the English form previously mentioned, and that under the power of sale contained in that deed, the property being sold by Messrs. Mackenzie, Lyall & Co., was purchased by the defendant on the 18th August 1865, that is to say, some nineteen or twenty days before the plaintiff applied for foreclosure. This question appears to have been considered by the Subordinate Judge who first tried the suit, but he was of opinion that the objection was not good. It was also raised before the District Judge on appeal, and the District Judge says:--"No authority has been offered in support of the contention, that appellant, as purchaser from the first mortgagee) is entitled to notice of foreclosure from the second mortgagee. Possibly, looking at appellant as assignee of the mortgagor's interest in the property, he might be so entitled, but that would only have given him an equity of redemption, and I do not understand that the appellant wishes to be considered as assignee in any form whatever: and while I agree with the appellant that, if the Subordinate Judge thought it material to the case that appellant should prove his possession between March 1866 and the date on which the sale to Tarasunker Rai became absolute, an issue should have been framed, and opportunity for adducing evidence on the point should have been given, as the case now stands, it is no necessary for me to pass any order on this point or upon the appellant's objection to the order for witnesses' expenses. I am of opinion that the order of the Subordinate Judge, so far as it decrees the 4 1/2 bigas of kheraji land, sued for by the plaintiff, ought to be reversed." So that the Judge threw out the suit on a different ground, viz., the validity of the sale on the earlier mortgage deed.

2. Now the decisions upon the point which I have mentioned, and which is urged by the special respondent are (firstly) one which was referred to at the original hearing in the case of Gunga Gobind Mandal v. Bani Madhab Ghose 3 B.L.R., 172. In that case the judgment delivered by Markby, J., contains these words:--"It also appears to me to have been decided by a great preponderance of authority in this Court, although I admit that the decisions are not altogether reconcilable, that a purchaser out and out of the mortgagor's interest, whether by public or private sale, and whether he be in possession or not, must be served with notice, except where any alienation of the mortgagor's interests has been prohibited by contract between the mortgagor and mortgagee." The other case which is still stronger is that of Mohun Lall Sookool vs. Goluck Chunder Dutt Son of Dabee . In that case their Lordships in the Privy Council say:--"It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and, in the circumstances above stated, their Lordships conceive that it ought to have been served upon the decree-holder." Baboo Mohini Mohun Roy, for the special appellant, contended that a purchaser to be entitled to the benefit of these rulings must show himself to be a true legal purchaser of the mortgagor's interest. It appears to me that that is a refinement which cannot be supported out of the rulings; for even if we suppose that the defendant would have a difficulty in making out that he had completely acquired the interest of the

mortgagor; yet it cannot be denied that he had purchased an interest, and the interest which par-ported to have been conveyed to him was that of the mortgagor: in fact it was a sale of the property out and out. Certainly it was the intention of the rulings that a person so circumstanced should be entitled to a notice, and that a notice of foreclosure shall not bind any purchaser who has not been served with it. The Subordinate Judge seems to think that it was necessary to prove possession under the purchase, but, from the words used in the two cases referred to above, that does not appear to be the case. They show that the fact of the purchase alone would entitle the purchaser to a notice. We cannot but suspect, as alleged by the defendant in his written statement that the plaintiff did know perfectly well that the defendant had made this purchase, but even if she did not (and it is not necessary to express any opinion on that point), the least diligence would have enabled her to know that that was the case, and she ought to have then served notice on the purchaser. That being so, I think the plaintiff's suit might and should have been dismissed on that ground, and that this special appeal ought to be dismissed with costs.