
(1870) 02 CAL CK 0024

Calcutta High Court

Case No: None

Jogeswar Dutt

APPELLANT

Vs

Nitaichand
Chuckerbutty

RESPONDENT

Date of Decision: Feb. 21, 1870

Judgement

Markby, J.

In this case I give my opinion, not without very considerable doubt as to the construction of this deed. This suit is an undefended one, and the plaint sets out a deed of mortgage, and states that the sum secured by the deed became payable on 2nd November 1866, and that the defendant, although applied to, has not paid the amount. The plaintiff also claims interest on the principal sum advanced. The plaintiff does not now ask for any sale of the property secured by the mortgage, but only for a simple money-decree against the defendant. The general form of the mortgage deed is that of a Bengali simple mortgage deed, and as I understand the construction put upon those documents by this Court, the plaintiff would be entitled to a simple money-decree upon it. The difficulty to my mind arises on the following clause in the deed:--"If, by sale of the above land, the money receivable by you be not satisfied with charges, then you will realize the proper amount by selling my other landed properties, to which I will make no objection or excuse." It is contended by Mr. Phillips that when the defendant is sued upon his implied promise to repay the money expressed to be owing, I may omit all consideration of that clause, which was only intended to operate if the mortgagor came for a decree for sale under the mortgage, I can only read that clause as in effect saying, as regards my landed property, you must first take your remedy against my property mortgaged, and if there is any balance due after sale of it, you may then proceed to realise it by sale of my other landed property." On the other hand, I think that, on the right interpretation of that clause, it leaves the mortgagee all his other remedies, and the plaintiff is entitled to a simple money decree, but it must be restricted to property of the defendant other than his landed property. It will be available against his moveable property only. The defendant having entered appearance, costs will be on scale No. 2.