

(1880) 05 CAL CK 0019

Calcutta High Court

Case No: None

Bolakee Lall

APPELLANT

Vs

Thakoor Pertam Singh
and Others

RESPONDENT

Date of Decision: May 14, 1880

Citation: (1880) ILR (Cal) 928

Hon'ble Judges: Richard Garth, C.J; Mitter, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

We are unable in this case to agree with the Court below. The plaintiff was the mortgagee under a bond of certain property, part of which was situate in the Bhagalpore District, and part in the Patna District. Upon this bond, he brought a suit against his mortgagor, Sheonundun Pershad, in the Bhagalpore Court, and obtained a decree for the mortgage-money and interest, with a declaration that the decree should be satisfied by sale of the whole mortgaged property.

2. The permission of the High Court had not been obtained in that suit by the plaintiff to proceed against the Patna property, and the omission appears to have arisen from a mistaken supposition on the part of the Subordinate Judge that it was not necessary to obtain it.

3. The plaintiff then brought a certificate to the Patna Court from Bhagalpore, and attached the Patna property situate in that district under the decree so obtained.

4. The present defendant then intervened, upon the ground that he had previously purchased the same property in execution of another decree of the Patna Court against the same judgment-debtor; and at his instance, the property was released from attachment.

5. The plaintiff then brought this suit to enforce his mortgage lien against the property in the Patna District, upon the ground that his mortgage was prior in date

to the defendant's purchase; and consequently that notwithstanding that purchase, the property was subject to the plaintiff's charge in the hands of the defendant.

6. There is no doubt that the plaintiff's mortgage was in fact prior in date to the purchase by the defendant; but the Subordinate Judge seems to have considered that, as the permission of the High Court was not obtained in the former suit to proceed against the Patna property, and that as consequently the decree in that Court could not avail the plaintiff to charge that property his present suit ought also to be dismissed.

7. But this appears to us to be a mistake. The Bhagalpore Court had jurisdiction, without the permission of the High Court, to give the plaintiff a decree for the amount of the mortgage-money and interest, although it had no power to enforce the decree against the Patna property. So far, therefore, as regards the latter portion of the Bhagalpore Court's judgment, the decree was ultra vires; but it was perfectly valid in other respects, and the only effect which it had as regards the money-decree was, that it changed the nature of the original debt, which was a bond-debt, into that of a judgment-debt for the mortgage-money and interest.

8. It is true that the plaintiff, for the reason which we have just given, could not enforce his lien against the Patna property under the Bhagalpore decree; but as that property had been sold to a third person, the plaintiff was at liberty to bring his suit against that third person to establish his lien for the mortgage debt and interest; and this was in fact the only way in which he could enforce it against the Patna property.

9. It will be found that this view which we take is quite in accordance with the judgment of the Court in the case of *Nadir Hossein v. Pearoo Thovil Darinee* (14 B.L.R. 425: S.C. 19 W.R. 255), and we think that it does not conflict with the Full Bench judgment in the case of *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (14 B.L.R. 408), or with the judgment of the Court in *Doss Money Dossee v. Jonmenjoy Mullick* (I.L.R. 3 Cal. 363), in both which cases it seems to have been taken for granted, that when the mortgaged property has come into the possession of a third person, as it has done in this instance, the mortgagee having obtained a money-decree for the mortgage-debt, has a right to proceed against such third party to enforce his lien upon the mortgaged property.

10. The decree of the lower Court will therefore be reversed, and the plaintiff will be entitled to enforce his charge for the mortgage-money and interest by sale of the mortgaged property in the possession of the defendant.

11. The appellant will be entitled to the costs of both Courts.