

(1881) 03 CAL CK 0033

Calcutta High Court

Case No: None

Rajkishore Shaha

APPELLANT

Vs

Bhadoo Noshoo and
Others

RESPONDENT

Date of Decision: March 11, 1881

Citation: (1881) ILR (Cal) 78

Hon'ble Judges: Tottenham, J; Morris, J

Bench: Division Bench

Judgement

Morris, J.

The plaintiff, appellant, lent money, in December 1875, to one Asman Singh, who, as security for the repayment of the loan, mortgaged an elephant to the plaintiff, retaining possession of the animal.

2. Asman Singh having died without paying off the debt, the plaintiff sued his representatives in 1877, and obtained a money-decree on the 8th May 1877. Subsequently, one Kenaram Oswal, who held another decree against Asman Singh, caused the mortgaged elephant to be sold in execution of that decree. The present plaintiff objected to the sale, on the ground of his own lien upon the elephant, and the sale was effected with notice to the purchaser of the plaintiff's claim. The present suit was brought against the auction-purchaser and against the debtors to obtain an order for the sale of the elephant in satisfaction of the debt.

3. The purchaser, the defendant No. 1, represented that the elephant had passed into the hands of the third parties, who intended to buy it from him.

4. Thereupon these parties were made defendants. It does not appear, however, even in the statement of the defendant No. 1, that they have acquired any interest in the elephant. As, therefore, they are not properly parties to the suit or the appeal, the appeal against them must be dismissed with costs. The point in dispute is, whether or not the plaintiff, having once obtained a decree for the money due to

him, can bring another suit of the present kind to recover the money from the property that was pledged to him.

5. The lower Court has held that such suit is not barred, but that the plaintiff is entitled to a declaratory decree only, affirming that his lien on the pledged elephant still exists. It has refused him the full relief sought, because he has not demonstrated his inability to execute the decree of the 8th May 1879, by proceeding against other property of the debtors before seeking to follow the pledged property in the hands of another party.

6. We may note that no objection has been taken by the respondent, the defendant No. 1, to the judge's findings, so far as they are in favour of the plaintiff; we think that those findings ought to have been followed up by a decree for the relief sought, it being of course left to the option of the defendant No. 1 to pay off the claim and retain the elephant. Had he bought it at the execution-sale without notice of the plaintiff's lien, we might have been disposed to hold that the plaintiff was bound to exhaust all other property of his debtors if it could be shown they had any, before attaching what had been sold to another, although that was the very property pledged to him. But we are not aware of any principle of law or equity which should compel a creditor to abstain from executing his decree against the property pledged, and to harass himself with endeavours to find other property to attach, merely because a third party has chosen to buy the pledged property with full knowledge of the lien existing upon it. It is admitted by the lower Court that the plaintiff must have ultimately had recourse to such a suit as the present one, on failure to recover the amount of his decree by other means. We think that he was entitled to bring his suit in the first instance as he has done, and was not bound to avail himself of this remedy only as a last resource. In the Full Bench case of *Haran Chunder Ghose v. Dinobundhoo Bose* (23 W. R. 187), the Judges expressly lay down that, notwithstanding a previous money-decree against the mortgagor, there is a right of suit against a third party to enforce the lien against the property pledged. Mr. Justice Markby observed, that the right to sell the very thing pledged is inherent to the pledgee, and, as a general rule, no claimants upon the property posterior to the first pledgee can interfere with this right, though of course they may have a right to redeem before sale.

7. Entirely concurring in this opinion, we think that the appellant has established his right to the relief sought for in his plaint against the defendant No. 1.

8. We accordingly amend the decree of the lower Court by adding to the declaration therein contained an order that, subject to the right of the defendant No. 1 to redeem the elephant, the amount of the plaintiff's claim, or as much of it as possible, be realised by the sale of the said elephant, any surplus sale-proceeds being returned to the defendant; and we effect that the defendant No. 1 do pay the plaintiff's cost in both Courts.