(1880) 08 CAL CK 0009

Calcutta High Court

Case No: None

Soobhul Chunder Paul		APPELLANT
	Vs	
Nitye Churn Bysack		RESPONDENT

Date of Decision: Aug. 21, 1880

Citation: (1881) ILR (Cal) 663

Hon'ble Judges: Wilson, J

Bench: Single Bench

Judgement

Wilson, J.

The plaintiff obtained a decree against one Kristo Chunder Chowdry; and, in execution of that decree, he attached a house of his judgment-debtor. The defendant held a mortgage of the house. The plaintiff in this suit claims to redeem that mortgage.

The case came on for settlement of issues. The first question that arises is, whether an attaching-creditor is entitled, as such, to redeem a mortgage subsisting prior to his attachment. If this question be answered in the negative, it is unnecessary to consider any of the other questions of law or of fact which have been raised.

The position of an attaching-creditor and his rights with respect to the land are dependent entirely upon certain Sections of the Civil Procedure Code. The governing Section is Section 276: "When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached whether by sale, gift, mortgage or otherwise, and any payment the debt or dividend, or a delivery of the share to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment." The attaching-creditor may follow up his attachment by sale. And in that case, he and all other creditors who obtain Orders of attachment before realization will share the proceeds rateably; Section 295.

Under English law, as a general rule, any person interested in the equity of redemption may redeem. The interest may be limited in time, as an estate for life or perpetual. It may be limited to a portion of the land, or affect the whole of it. The person so interested is entitled to redeem, subject of course to the equities of all other persons interested--Pearce v. Morris (L.R. 5 Ch. 227). I do not think that the interest of an attaching-creditor is an interest at all closely similar to those which have been held to give a right to redeem There is no analogy between the position of an attaching creditor here and that of an execution-creditor in England. Under English law, in case of a legal interest in real property, the creditor takes under his elegit an actual legal estate in the land as tenant by elegit, and receives satisfaction out of the rents and profits. An equity of redemption being, not a legal but an equitable interest, is not affected by an elegit and the intervention of a Court of Equity is requisite to make it available in execution. But when an order of Court has been obtained, the interest taken by the execution-creditor is closely analogous to that of the tenant by elegit. In this country the attaching-creditor [665] neither has, nor can ever as such acquire ,any beneficial interest in the property attached.

But the Code has not left the matter to rest upon general principles. If has dealt expressly with the attaching-creditor''s rights in relation to mortgages, and an examination of the clauses bearing upon the matter makes it, I think, tolerably clear, that the Legislature did not intend to give an attaching-creditor the right to redeem a mortgage.

Mortgages are dealt with in two Sections. Section 282 is one of a group of Sections which deal with claims raised adversely to the attaching-creditor. It says,-" If the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien." If it had been intended that the attaching-creditor should have the alternative right to redeem the mortgage, it must, I think, have been so stated.

Mortgages are again dealt with in Section 295, a Section whose subject is the sale of properties attached. It says,- "provided that, when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale." " Provided also that when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold." Here again, if it were intended that the attaching-creditor should have a right to redeem, I think it must have been so said.

The first paragraph of the same Section confirms this view. It prescribes, how the proceeds of an execution are to be applied: " Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting costs of the realization, shall be divided [666] rateably among all such persons." It cannot be supposed that the attaching-creditor is to be at liberty to take an assignment of the mortgage, and then sell, subject to the mortgage, retaining the mortgage for his own benefit. But if he is to sell the property discharged from the mortgage, how is he to get credit for what he has paid to discharge, it ? It would, I think, be a strained construction of the words " costs of realization" occurring in the context in which they do, to make them include a, mortgage debt paid off.

I am of opinion that an attaching-creditor has not, as such, any right to redeem a mortgage.

This suit will, therefore, be dismissed with costs on scale No. 2.