

(1929) 12 BOM CK 0014

Bombay High Court

Case No: Civil Revision Application No. 229 of 1928

Gangadhar Dhanjishet

APPELLANT

Vs

Lakshman Mahadev Kulkarni

RESPONDENT

Date of Decision: Dec. 19, 1929

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 95
- Transfer of Property Act, 1882 - Section 10

Citation: AIR 1930 Bom 221 : (1930) 32 BOMLR 431

Hon'ble Judges: Patkar, J; Baker, J

Bench: Division Bench

Judgement

Baker, J.

The contest in this case is between the first mortgagee who purchased in execution of a decree on his mortgage and the auction-purchaser in execution of a decree on the second mortgage. One Chindu and his brother mortgaged the property in dispute to one Gangadhar on March 6, 1913. On June 8, 1915, there was a partition between the two brothers and the property fell to the share of Chindu. Gangadhar obtained a decree on his mortgage in suit No. 864 of 1918 on November 25, 1918, and in execution purchased the property himself. Gangadhar obtained possession of the property on January 17, 1928, and March 21, 1928.

2. The title of the opponent arises under the following circumstances. One Khambate was a mortgagee under a second mortgage dated June 24, 1922, and brought suit No. 4fi6 of 1925, on the mortgage and obtained a decree on November 9, 1925. In execution of the decree on the second mortgage, the opponent Lakshman Kulkarni purchased the property and applied on January 11, 1928, for being put in possession under Order XXI, Rule 95, of the Civil Procedure Code. The learned Subordinate Judge put the opponent in possession of the property and ejected the applicant from the land. This revision application has been filed by the

first mortgagee who purchased the property in execution of his mortgage decree, and was put in possession and subsequently dispossessed.

3. According to the decision in *Shankar Venkateah v. Sadashiv Mahadji* ILR (1913) 38 Bom. 24 the purchaser at an auction sale becomes the owner not only of the mortgagor's rights but also of the mortgagee's rights or in other words the purchaser becomes entitled to all the rights of the mortgagor as existing at the date of the mortgage. It would, therefore, follow that Gangadhar when he purchased the property in execution of his mortgage decree obtained not only the rights of the mortgagee but also the rights of the mortgagor at the date of his mortgage. The purchaser in execution of the second mortgage cannot be entitled to higher rights than the rights of the second mortgagee and has a right to redeem the first mortgage. The first mortgagee in possession under a prior sale may always shield himself under his mortgage and his purchase, though his right to possession may be defective. The puisne mortgagee's right, when he was not a party to first mortgagee's suit, is limited to a right of redemption or sale of the mortgaged properties subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter. He cannot compel the first mortgagee to part with possession without redeeming the first mortgage. See *Ram Narain Sahoo v. Bandi Pershad* ILR (1904) Cal. 737. This view is consistent with the decisions in the cases of *Muhammad Usan Rowthan v. Abdulla* ILR (1900) Mad. 171 *Baijanath v. Bhimappa* (1900) 3 Bom. L.R. 92 and *Desai Lallubhai Jethabhai v. Mundas Kuberdas* ILR (1895) 20 Bom. 390. As between competing auction-purchasers the principles governing priority are the same as those which regulate the claims of priority among mortgagees. The rights of the second mortgagee are regulated by Section 75 of the Transfer of Property Act which lays down that "every second or other subsequent mortgagee has, so far as regards redemption, foreclosure, and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against his subsequent mortgagees as he has against his mortgagor." It is clear, therefore, that the opponent as a purchaser in execution of the second mortgage has no higher rights than the second mortgagee and has a right to redeem the first mortgage.

4. The next question arising for decision is whether the order of the lower Court falls within the ambit of Order XXI, Rule 95. It is not contended on behalf of the opponent that the applicant is some person on behalf of the judgment-debtor or some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property, but it is contended that the applicant is a judgment-debtor within the meaning of Order XXI, Rule 95. If reference is made to the decree in suit No. 466 of 1925 it would appear that no decree was passed against the first mortgagee who was defendant No. 3 in the suit. On the other hand, his rights have been safe-guarded by the decree. It was provided by the decree that defendant No. 3 being the previous mortgagee, the property in suit should be sold subject to the rights which he established under the decree in regular suit No. 364

of 1918. No decree or order capable of execution was made against the applicant, and he cannot therefore be considered to be a judgment-debtor within the meaning of Section 2, Clause 10, of the Civil Procedure Code. It would, therefore, follow that the applicant in the present case cannot be said to be a judgment-debtor.

5. It is further urged on behalf of the opponent that the applicant was not in possession at the date of the application and that the original judgment-debtor was in possession at the time when the application was made. We have, however, to look to the circumstances as they existed not at the date of the application but at the time when the order was passed and when the applicant was ejected from possession of the property. At the date of the order the present applicant was in possession as purchaser in execution of his first mortgage, and he cannot be said to be a judgment-debtor or some person on behalf of the judgment-debtor or some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property.

6. It would, therefore, follow that the conditions necessary to confer jurisdiction on the learned Subordinate Judge under Order XXI, Rule 95, do not exist in the present case. The order, therefore, in our opinion, is passed without jurisdiction.

7. We would, therefore, make the rule absolute, set aside the order of the lower Court, and direct that the applicant should continue in possession of the property. The applicant to get the costs in this Court and the lower Court.

Baker, J.

8. I agree. So far as the question of jurisdiction is concerned, the jurisdiction conferred on the Subordinate Judge by Order XXI, Rule 95, Civil Procedure Code, only exists when immovable property is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property. Although at the date of the application the judgment-debtor himself was in occupation, at the date of the order the present applicant, the auction-purchaser under the first Court sale, was in possession.

9. It has been conceded by the learned Advocate for the opponent that he cannot maintain the position that the applicant claims that his occupation was on behalf of the judgment-debtor or that he claims under a title created by the judgment-debtor subsequently to the attachment. But he contends that the applicant is a judgment-debtor within the meaning of the definition in Section 2 of the Civil Procedure Code. That definition refers to a person against whom a decree has been passed or an order capable of execution has been made, and I am of opinion that the present applicant does not fulfil the conditions of that definition, and therefore he cannot be considered to be a judgment-debtor, and the lower Court, therefore, had no jurisdiction to oust him from his possession. The order, therefore, is without jurisdiction and is also incorrect in law for the reasons given by my learned brother.

The order must, therefore, be set aside with costs.