

**CIVIL RULE.***Before Sharfuddin and Teunon JJ.*

1914  
 Nov. 23.

TARAK NATH ADHIKARI

v.

BHUBANESHWAR MITRA.\*

*Mortgage—Sale of mortgaged property for any claim of mortgagee unconnected with mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Transfer of Property Act (IV of 1882), s. 99.*

A mortgagee is competent, under the Civil Procedure Code of 1908, to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor, though the claim may be unconnected with the mortgage.

CIVIL RULE obtained by Tarak Nath Adhikari and others, the judgment-debtors.

The decree-holder (opposite party in this Rule) brought a suit against the judgment-debtors (petitioners hereof) in the first Court of the Subordinate Judge of Midnapore on a note of hand and obtained a decree on the 6th of January, 1913. The decree-holder brought another suit in the said Court against the petitioners and other persons for the recovery of Rs. 11,000 and odd due to him on several mortgages and prayed for sale of the mortgaged properties. While the said mortgage-suit was pending, the decree-holder caused some of the mortgaged properties to be attached and sold on the 21st July, 1913, in execution of the said money decree obtained by him on the 6th of January 1913, against the petitioners, and purchased those properties, it was alleged, in the

\* Civil Rule No. 881 of 1914, against the order of W. N. Delevingne, District Judge of Midnapore, dated May 29, 1914, reversing the order of Behari Lal Sarkar, Munsif of that District, dated March 17, 1914.

*benami* of one Tinkarhi Basu, one of the opposite party in this Rule, for Rs. 1,002. The petitioners, thereupon, made an application to set aside the sale on the grounds, *inter alia*, that there was fraud and material irregularity in publishing and conducting the sale and that there was substantial injury by reason thereof. The learned Munsif of Midnapore set aside the sale on the grounds alleged. On appeal, the learned District Judge reversed the decision of the Munsif, holding that the petitioners had failed to establish substantial injury by reason of the fraud or material irregularities complained of. Thereupon, the petitioners applied to the High Court mainly on the ground that the sale was contrary to the provisions of Order XXXIV, rule 14 of the Code.

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*Dr. Rashbehary Ghose* (with him *Babu Mohini Mohan Chatterji*), for the petitioner, contended that under the old law, as contained in s. 99 of the Transfer of Property Act, it was not competent to a mortgagee to sell mortgaged property in satisfaction of any claim, whether arising under the mortgage or not, except by institution of a suit under s. 67 of that Act. Though s. 99 of the Transfer of Property Act is now replaced by Order XXXIV, rule 14, Civil Procedure Code, there has not been any material change in the law. Moreover, the finding of the Munsif is that the mortgagee himself purchased the properties in the *benami* of the auction-purchaser, opposite party, and that finding has not been reversed by the District Judge. We must therefore take it that the mortgagee himself purchased the mortgaged property, and he must consequently be regarded as holding the property as a trustee for the mortgagor: *Pacham Lal Chowdhury v. Kishun Pershad Misser* (1). The sale therefore is not binding

(1) (1910) 14 C. W. N. 579.

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on the petitioners mortgagors and they are entitled to avoid it.

*Babu Baidyanath Dutt* (with him *Babu Mohini Nath Bose*), for the opposite party. Order XXXIV, r. 14 of the Civil Procedure Code, has changed the law by restricting the operation of rule 14 to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. There is therefore no bar now to the mortgagee bringing the mortgaged property to sale for a debt unconnected with the mortgage. The point raised by Dr. Ghose does not arise in the present proceeding, but it might arise in any subsequent proceeding.

*Babu Mohini Mohan Chatterji*, in reply. The language of Order XXXIV r. 14, does not support the view contended for by the opposite party.

SHARFUDDIN AND TEUNON JJ. This is a Rule on the opposite party to show cause why the order passed by the learned Judge in appeal should not be set aside on the ground that the sale was contrary to the provisions of Order XXXIV, rule 14, and also on the ground that the sale was made without taking the permission of the Court which appointed a receiver.

The second point (in the Rule) has not been argued by Dr. Ghose who appeared on behalf of the petitioner.

The petitioner is the judgment-debtor. Some of his properties have been sold and he complains against the sale. It appears that the opposite party had obtained a money-decree against the judgment-debtor and in execution of that money-decree, he sold and purchased certain properties which were mortgaged to him by the petitioner judgment-debtor under a certain mortgage deed. The opposite party had also instituted a mortgage suit for the recovery of his

mortgage money under his mortgage deed and while this mortgage suit was pending, he executed his money-decree and in execution of the decree purchased some of the mortgaged properties himself. The case for the petitioner is that notwithstanding the fact that an alteration in the law has been made by the provisions of Order XXXIV, rule 14, of the present Civil Procedure Code, section 99 of the Transfer of Property Act should be given effect to. We find, however, that under the provisions of section 99 of the Transfer of Property Act a mortgagee could not bring the mortgaged property to sale in satisfaction of any claim whether arising under the mortgage or not, except by institution of a suit under section 67 of that Act. Order XXXIV, rule 14 has introduced a change, limiting the restriction on the mortgagee's right to sell the mortgaged properties to claims arising under the mortgage. It is clear, therefore, that the Code has repealed section 99 of the Transfer of Property Act and in its place this present rule has been enacted. The first part of the section provided that a mortgagee should not bring the mortgaged property to sale otherwise than by instituting a suit under section 67 of the Transfer of Property Act. In so far as it precluded the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage debt, the restriction has been considered inexpedient and has been removed. It follows, therefore, that a mortgagee is competent to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage.

For the above reasons, we discharge this Rule with costs.

S. M.

*Rule discharged.*

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