

APPELLATE CIVIL.

Before Mallik and Guha JJ.

KRISHNACHANDRA BHOUMIK

v.

PABNA MODEL COMPANY, LTD.*

1931

Mar. 13, 20.

Mortgage—Purchase of one of two mortgaged properties by decree-holder, effect of—Debt—Extinguishment, proportionally—Equity of redemption—“Absolute value”—Transfer of Property Act (IV of 1882), s. 60—Code of Civil Procedure (Act V of 1908), s. 47.

A decree-holder cannot be allowed to proceed against one of two mortgaged properties for the whole of the decretal dues, when he had in execution of his decree on his second mortgage already purchased the other of the said two properties mortgaged to him.

Bisheshur Dial v. Ram Sarup (1) followed.

When the mortgagee decree-holder purchased at the auction sale one of two mortgaged properties and, therefore, the equity of redemption in a part of the mortgaged property, such purchase had the effect of discharging and extinguishing a portion of the mortgage debt, which is chargeable to the property purchased by him.

Such a decree-holder, in the subsequent execution of his decree on his first mortgage, can proceed against the other of the said mortgaged properties only to the extent of the decretal dues, which bears the same proportion to the total decretal due as the absolute value of the other of the said properties bears to the absolute value of the two properties comprised in the mortgage.

By “absolute value” is meant the value of the property free from any charge.

APPEAL FROM APPELLATE ORDER by the auction purchaser, objector.

The facts of the case, out of which this appeal arose, appear fully in the judgment under report herein.

Radhabinode Pal and *Nagendranath Basu* for the appellant.

Krishnakamal Maitra and *Jatindranath Sanyal* for the respondent.

Cur. adv. vult.

*Appeal from Appellate Order, No. 483 of 1930, against the order of N. G. Mukherji, District Judge of Pabna and Bogra, dated Sep. 12, 1930, reversing the order of S. K. Sen, Subordinate Judge of Pabna, dated Nov. 24, 1928.

MALLIK AND GUHA JJ. The facts that have given rise to the present appeal were briefly these:—

One Baradaprasad Basu mortgaged two of his properties to the Pabna Model Company on the 25th June, 1918. He again mortgaged, on 1st February, 1919, to the same company those two properties together with another. The Model Company obtained two decrees on the two mortgages and after obtaining them put them both into execution at the same time. The execution case in respect of the second mortgage decree was No. 65, while that in respect of the first mortgage decree was No. 66. In an order passed under Order XXI, rule 66, of the Code of Civil Procedure, the court ascertained the values of the three properties to be sold. Property No. 1 was valued at Rs. 1,250, property No. 2 at Rs. 2,000 and property No. 3 at Rs. 1,650. The sales were held first in Execution Case No. 65. Property No. 1 was purchased at this sale by the decree-holder for Rs. 1,250 and property No. 2 was purchased by one Krishnachandra Bhoumik, a stranger, for Rs. 2,350. As the sale proceeds from these two properties were more than sufficient to discharge the debt due in Execution Case No. 65, property No. 3 was not put up to sale in this execution case. The decree-holder, moreover, did not proceed any further with the other execution case, *viz.*, case No. 66, and so no sale was held in that execution case. Later on, the decree-holder bank filed a petition for execution against properties Nos. 1 and 2 to realise their dues on the first mortgage. Thereupon, Krishnachandra Bhoumik, who had purchased property No. 2 at the sale in the Execution Case No. 65, filed a petition under section 47, Civil Procedure Code, resisting the right of the decree-holder to sell property No. 2 again. The court of first instance gave effect to the objection of Krishnachandra and held that the decree-holder was not entitled to bring property No. 2 to sale. On appeal, the learned District Judge reversed this decision of the court of first instance

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and allowed the decree-holder to proceed against property No. 2 in execution of his first mortgage decree in accordance with law.

Krishnachandra Bhoumik has come up to this Court in Second Appeal.

On behalf of the appellant, Dr. Pal first of all contended that the decree-holder was not entitled to proceed against the property No. 2, inasmuch as, when property No. 2 was put up to sale in execution of the second decree and Krishnachandra purchased it for Rs. 2,350, the purchase was of the property without any charge on it, *viz.*, the charge on account of the first mortgage decree. This is a contention which we are unable to accept. The sale proclamation in Execution Case No. 65, on the basis of which the sale took place, and on the basis of which Krishnachandra Bhoumik must be held to have purchased it, clearly stated that the property was put up to sale subject to the charge of the first mortgage decree. It was said that, inasmuch as the same value was given of property No. 2 in the two sale proclamations in Execution Case No. 65 and Execution Case No. 66, Krishnachandra thought that property No. 2 was being sold free from charge. But this he had no reasonable grounds to think in view of the facts that the basis of his purchase, *viz.*, the sale proclamation in Execution Case No. 65 clearly stated that property No. 2 was being put up for sale subject to the earlier mortgage decree. The contention that the decree-holder could not proceed against property No. 2 must, therefore, fail.

In his second contention, Dr. Pal seemed to stand on a somewhat firmer ground. That contention was that the decree-holder in his application for execution of the first mortgage decree must not be allowed to proceed against property No. 2 for the whole extent of the decretal dues. This contention must, in our opinion, be given effect to, remembering that one of the two mortgaged properties had been purchased by the mortgagee decree-holder. In view of the

principle underlying the provisions of section 60 of the Transfer of Property Act and the Full Bench decision of the Allahabad High Court in *Bisheshur Dial v. Ram Sarup* (1), it must be held that, when the mortgagee decree-holder purchased at the auction sale in Execution Case No. 65 property No. 2 and, therefore, the equity of redemption in a part of the mortgaged property, such purchase had the effect of discharging and extinguishing a portion of the mortgage debt which is chargeable to the property purchased by him, *i.e.*, a portion of the debt, which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the properties comprised in the mortgage. On behalf of the respondent it was urged that this contention of Dr. Pal ought not to be allowed to be raised in this Court for the first time, the point not having been raised by Krishnachandra Bhoumik before. The petition of objection filed by Krishnachandra, however, shows that such a point was taken by him. In paragraph 2 of the petition he did raise the point of a rateable liability.

We would, therefore, dismiss this appeal and uphold the order passed by the lower appellate court allowing the decree-holder to proceed against property No. 2, with this direction that he will be allowed to proceed against it only to that extent of the decretal dues which bears the same proportion to the total decretal due as the absolute value of property No. 2 bears to the absolute value of the two properties comprised in the mortgage. By "absolute value" we mean the value of the property free from any charge.

In the circumstances of the case we make no order as to costs.

Appeal dismissed.

G. S.

(1) (1900) I. L. R. 22 All. 284.

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