

## APPELLATE CIVIL.

Before Edgley J.

MURARI RAM DAS

v.

RASIK LAL BHADRA.\*

1939  
July 3.

**Mortgage**—*Execution of decree—Decree-holder, if entitled to take out execution against only a part of the properties covered by the mortgage—Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 5(3).*

Rule 5(3) of O. XXXIV of the Code of Civil Procedure confers a right upon the mortgagee ordinarily to realise his security by including in the sale-proclamation and bringing to sale only a part of the mortgaged property, provided he is satisfied that the sale of a portion of such property would be sufficient to enable him to realise his dues. This right, however, would be subject to certain exceptions in the case of a *bona fide* purchaser of the mortgaged properties.

*Amir Chand v. Bukshi Sheo Pershad Singh* (1); *Nobin Chandra Bhattacharyya Chowdhuri v. Debendra Sen* (2) and *Khiroddhar Singh v. Gajadhar Lal Mahto* (3) relied on.

*Mahomed Saddik v. Saudagar Mian Lahari* (4) not followed.

APPEAL from APPELLATE ORDER preferred by the judgment-debtor.

The facts of the case are sufficiently stated in the judgment.

*Nripendra Chandra Das* for the appellant. The decree-holder cannot determine the order in which the properties covered by a mortgage decree should be sold. This is the business of the executing Court alone. All that the decree-holder is to do is to include all the mortgaged properties under the decree in the sale-proclamation, and, then, at the time of the sale,

\*Appeal from Appellate Order, No. 109 of 1938, against the order of H. C. Mitra, First Subordinate Judge of Sylhet, dated Mar. 7, 1938, reversing the order of Ashutosh Das Gupta, Munsif of Sunamganj, dated Nov. 30, 1937.

(1) (1906) I. L. R. 34 Cal. 13.

(2) (1927) 31 C. W. N. 521.

(3) [1925] A. I. R. (Pat.) 484.

(4) (1910) 15 C. W. N. 80.

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he will be competent to proceed against any of the properties, provided such properties satisfy his claim fully. *Mahomed Saddik v. Saudagar Mian Lahari* (1).

*Hemendra Kumar Das* for the respondents. Under O. XXXIV, r. 5(3) of the Code, the decree-holder has the option to proceed against only a portion of the mortgaged properties to realise his dues. The correctness of the decision in *Mahomed Saddik's* case (1) has become doubtful in the light of the later decisions in *Nobin Chandra Bhattacharyya Chowdhuri v. Debendra Sen* (2) and *Khirodhar Singh v. Gajadhar Lal Mahto* (3), and the earlier decision in *Amir Chand v. Bukshi Sheo Pershad Singh* (4).

*Nripendra Chandra Das*, in reply.

EDGLEY J. The judgment-debtor No. 1, Murari Ram Das, is the appellant in this case. It appears that the decree-holder obtained a final mortgage-decree against the appellant on December 5, 1935. This decree was put into execution by the decree-holder on December 3, 1936, in Execution Case No. 126 of 1936. These particular execution-proceedings were dismissed for default on April 7, 1937, but a further application for execution was filed on October 27, 1937, and, in his application, the decree-holder asked that execution might be taken only in respect of some of the mortgaged properties which were covered by his decree. On an objection filed on behalf of the appellant, the first Court directed that all the mortgaged properties should be included in the sale-proclamation. An appeal was taken against this order to the lower appellate Court and the learned Subordinate Judge directed that execution should proceed in respect of the properties mentioned in the decree-holder's application and dismissed the application filed under s. 47 of the Code of Civil Procedure on behalf of the judgment-debtor.

(1) (1910) 15 C. W. N. 80.

(2) [1927] 31 C. W. N. 521.

(3) [1925] A. I. R. (Pat.) 484.

(4) (1906) I. L. R. 34 Cal. 13.

The main point urged by the learned advocate for the appellant in this case is that the order of the first Court should be restored, as it is the business of the executing Court alone to decide the order in which properties covered by a mortgage-decree should be put up to sale. In support of his contention he relies upon a decision of this Court in the case of *Mahomed Saddik v. Saudagar Mian Lahari* (1). In that case the learned Judges did not accept the view taken in a previous decision of this Court in the case of *Amir Chand v. Bukshi Sheo Pershad Singh* (2) to the effect that—

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The decree-holders are entitled to execute their decree against any of the mortgaged properties they please.

It was, however, pointed out by Mukerji J. in the case of *Nobin Chandra Bhattacharyya Chowdhuri v. Debendra Sen* (3) that the learned Judges in *Mahomed Saddik's* case (*supra*) adopted a somewhat extreme view. His Lordship in *Nobin Chandra Bhattacharyya Chowdhuri's* case (*supra*) was of opinion that the law had been correctly stated by the Patna High Court in the case of *Khirodhar Singh v. Gajadhar Lal Mahto* (4) in which it had been held on a consideration of a large number of authorities that the executing Court ought not ordinarily to fetter the discretion of the mortgagee decree-holder to put to sale whatever property he wished to sell first.

I am further of opinion that the view which has been adopted by the lower appellate Court also finds support in the language of O. XXXIV, r. 5(g) of the Code of Civil Procedure which states:—

Where payment in accordance with sub-r. (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-r. (1) of r. 4.

To my mind the intention of the legislature by this provision of the law was to confer a right upon

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the mortgagee ordinarily to realise his security by bringing only a part of the mortgaged property to sale, provided he was satisfied that the sale of a portion of such property would be sufficient for the purpose of enabling him to realise his dues. This right, however, as pointed out by Mukerji J. would be subject to certain exceptions in the case of a *bona fide* purchaser of the mortgaged properties, with which we are not concerned in the present case.

Having regard to the considerations mentioned above, I am of opinion that the decision of the lower appellate Court is correct. It is, therefore, affirmed and this appeal is dismissed with costs. The hearing fee is assessed at two gold *mohurs*.

*Appeal dismissed.*

A. A.