

Kamini Debi v. Ram Lochan Sirkar (1); Brajanath Kundu Chowdhry v. S. M. Gobindmani Dasi (2).

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The plaintiffs may, if they please, raise the question of the priority of their mortgage in a suit properly framed for the purpose, but in this suit that question has not been, and could not properly have been, tried.

The appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

DIRGOPAL LAL AND OTHERS (DEFENDANTS) v. BOLAKEE
(PLAINTIFF)*

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May 19. ~

Several Mortgages of the same Property—Decrees on the Mortgage-bonds—Suit for Possession—Priority of Purchase—Priority of Possession.

A, on the 11th March 1868, took a mortgage-bond of certain property, and obtained a money-decree on the bond on the 23rd January 1869. Under this decree the mortgagor's interest was put up for sale and purchased by *A* on the 29th April 1870. *B*, on the 3rd November 1868, took a mortgage-bond on the same property, and obtained a decree thereon on the 31st May 1869. Under this decree the mortgagor's interest was sold, and purchased by *B* on the 22nd April 1870. *B* took possession of the property on the 18th May 1872. In a suit by *A* for recovery of possession,—

Held, that *B* was entitled to retain possession as against *A*, although his own interest might be merely that of a trustee for the mortgagor, and might be subject to *A*'s mortgage lien, if he took proper proceedings to enforce it.

ON the 11th March 1868, one Chemnarain executed, in favor of one Bolakee, a mortgage-bond, pledging certain landed properties belonging to him as security for an advance of Rs. 500. This bond was specially registered under s. 53 of Act XX of 1866.

* Appeal from Appellate Decree, No. 695 of 1878, against the decree of Baboo Kedarnath Mozoomdar, Officiating Additional Subordinate Judge of Gya, dated the 23rd of February 1878, reversing the decree of Moulvie Syed Shah Golam Sharuf, Second Munsif of the Sudder Station of that District, dated the 14th of May 1877.

(1) 5 B. L. R., O. C., 461.

(2) 4 B. L. R., O. C., 83.

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On the 3rd November 1868, Chemnarain further mortgaged the same property to one Dirgopal Lal under another mortgage-bond, which was also registered under s. 53 of Act XX of 1866.

On the 23rd January 1869, Bolakee brought a suit on his mortgage-bond, and obtained a money-decree. In execution of this decree the property was put up for sale and was purchased on the 29th April 1870 by the decree-holder himself, who obtained a certificate of purchase from the Court on the 7th June 1870.

On the 31st May 1869, Dirgopal Lal brought a suit on his mortgage-bond, and obtained a decree for the sale of the mortgaged property, and, in execution of such decree, he at the auction-sale, on the 22nd April 1870, became himself the purchaser. On the 18th May 1872, Dirgopal Lal took possession of the property, whereupon Bolakee brought this present suit to recover possession, on the ground that he had purchased the property at an execution-sale, and had been put into possession by the Court; also on the ground that his mortgage was prior in point of time to the mortgage of the defendant.

The defendant Dirgopal Lal denied the possession of the plaintiff, stating that he was in possession under an order of Court, he having purchased the property at an execution-sale, the decree under which he had so purchased being a decree ordering the sale of the mortgaged property, whilst the decree under which the plaintiff alleged his possession, was a simple money-decree ordering the property to be sold to recover the amount secured under his mortgage-bond, and that, therefore, his (the defendant's) purchase was entitled to priority.

The Munsif was of opinion that, irrespective of the fact that the attachment, sale, and purchase by the defendant was prior in point of time to the attachment, sale, and purchase by the plaintiff, the plaintiff having only obtained a simple money-decree against the property, whilst the defendant had obtained a decree for sale, the purchase by the plaintiff was not entitled to any preference over the purchase by the defendant; that even supposing the decree obtained by the defendant to have been also a simple money-decree, he would still be entitled to priority, inasmuch as the defendant's sale being of prior date to the

plaintiff's, the debtor had no right in the property to sell at any subsequent sale, he therefore dismissed the plaintiff's suit. The plaintiff appealed to the Subordinate Judge, who, on the authority of the case of *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (1), reversed the decree of the Munsif.

The defendants appealed to the High Court.

Mr. C. Gregory for the appellants.—We were prior in point of time as to the date of purchase, and as we were so, and are in possession, we ought to be preferred to the plaintiff. The question of title to possession has nothing to do with the question of priority of the mortgage. In the case of *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (2), where a mortgagee purchased, it certainly was not expressly stated that his lien was lost on his becoming a purchaser; but yet it seems clear that the decree in that case was given for possession on the ground that he had acquired possession by priority of purchase: see Tagore Lectures, p. 5, Ghose on Mortgages. [PRINSEP, J.—Mr. Justice Markby has explained in the case of *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (2) the meaning of his judgment in *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (1). GARTH, C. J.—Supposing that case to be right, a mortgagee purchasing his own rights can still be redeemed, because the mortgagor may redeem notwithstanding that the mortgagee has purchased the mortgagor's interests; but the case of *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (2) does not appear to be consistent with the Full Bench case.] The Full Bench case of *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (1), only means that if a mortgagee sells the property of his mortgagor, he simply sells his rights subject to a retransfer of the property. There is no difference between this case and the case of *Nanack Chand v. Telucl-dye Koer* (3), decided by your Lordships this morning, de-

(1) 14 B. L. R., 408; S.C., 23 W. R., 187.

(2) 23 W. R., 338.

(3) *Ante*, p. 265.

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clarifying that priority of purchase ought to decide the title to possession.

Moulvie *Mahomed Yusuff* for the respondent.—The Full Bench case does not say that if the mortgagee is the purchaser he therefore loses his lien—*Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (1). The right to the property ought to be determined by the priority of the mortgage, not by the priority of the purchase of the property. This is what Mr. Justice Markby has decided in the case of *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (2). The plaintiff in that case was left in possession, because he was the first mortgagee. In the case of *Aruth Soar v. Juggunath Mohapattur* (3) a mortgagee himself became the purchaser of the rights of the mortgagor, and it was not there held that he thereby lost his lien. [GARTH, C. J.—The first purchaser at a sale is the person who buys the rights and interests of the mortgagor. Supposing him to be a second mortgagee, he buys the property freed from his own lien, but subject to the lien of the first mortgagee. In this case you ask for possession which you are not entitled to.]

The judgment of the Court was delivered by

GARTH, C. J. (PRINSEP, J., concurring).—The plaintiff took a mortgage-bond from Chemnarain on the 11th of March 1868. He obtained a money-decree on that bond on the 23rd of January 1869; and under that decree he had the mortgagor's interest put up for sale on the 29th of April 1870, and purchased it himself. The defendants took a mortgage-bond of the same property in November 1868, upon which they obtained a decree on the 31st of May 1869; and under that decree, the mortgagor's interest was sold and purchased by the defendants on the 22nd of April 1870, a few days before the plaintiff's purchase.

Upon these facts, the lower Appellate Court has decided in favor of the plaintiff, upon the ground that his mortgage was

(1) 14 B. L. R., 408; S. C., 23 W. R., 187.

(2) 23 W. R., 338.

(3) 23 W. R., 460.

first and his decree first. But as this is a suit for possession, we consider that the party who first purchased the mortgagor's interest and obtained possession, is entitled to retain possession as against the other, although his own right may be merely that of a trustee for the mortgagor, and may be subject to the plaintiff's mortgage lien, if the latter takes proper proceedings to enforce it.

The judgment of the Court below will, therefore, be reversed, and that of the Munsif's restored with costs in all the Courts.

Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

SARAT SOONDARY DABEA (PLAINTIFF) v. ANUND MOHUN
SURMA GHUTTAOK AND OTHERS (DEFENDANTS).*

Suit for Enhancement of Rent by one of several Co-zemindars—Evidence of previous Enhancement in a Suit by another Co-zemindar—Taluk—Beng. Act VIII of 1869, s. 17.

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More than twenty years before the institution of a suit for the enhancement of the rent of a share in a dependant taluk, the zemindari under which the taluk was held was partitioned under a butwara among three zemindars. A ten-anna share was allotted to one (the present plaintiff), a four-anna share to another, and a two-anna share to a third. The taluqdars continued to hold the entire property, and paid the rent apportioned by law severally to each of the parties entitled. In 1861 the owner of the two-anna share obtained a decree against the taluqdars for enhancement of the rent of his share. In the present suit against the same taluqdars, the defendants contended that the rent of their taluk had not been changed for a period of more than twenty years before suit.

Held, that the "taluk," which was intended by s. 17 of the Rent Act, was the original taluk; and that if the defendants could show that the rent of that taluk had remained unchanged, either in its original entirety, or apportioned as it had been under the butwara, they would be entitled to the benefit of the section; but that the decree in the suit of 1861 had the effect of enhancing the rent payable for the whole taluk, and that the plaintiff could avail herself of that decree, although she was not a party to it.

Durga Pershad Myti v. Joy Narain Hazra (1) distinguished.

* Appeal from Appellate Decree, No. 201 of 1878, against the decree of E. S. Moseley, Esq., Judge of Mymensing, dated the 23rd November 1877, reversing the decree of Baboo Bidhubhussan Banerjee, First Subordinate Judge of that District, dated 10th April 1876.

(1) 2 Calo. Rep., 376; S. C., I. L. R., 4 Calo., 96.