

discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular"—Lord Mansfield in *Willkes's case* (1). The result of the refusal to exercise its discretion has been, as far as we can judge, to sacrifice the property of the debtor, one-half of which might have been saved altogether, whereas it was all sold at an inadequate price. The sale of the entire two-annas share was irregular from want of due notice, and was moreover one which the Court in the exercise of a sound discretion ought not to have held at all.

We would therefore dismiss the appeal with costs.

*Appeal dismissed.*

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

NANACK CHAND AND ANOTHER (PLAINTIFFS) v. TELUCKDYE KOER  
AND OTHERS (DEFENDANTS).\*

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April 8.

*Rival Mortgage Decree-holders—Priority of Mortgage—Priority of Possession.*

In a suit for possession between two purchasers, who had bought the same property at two several auction-sales under decrees obtained on two several mortgage-bonds,—*held*, that no question could arise as to which mortgage was prior in point of time, but that the real question to be decided was, which of the parties could prove a prior title to possession.

ONE Jhem Narain (defendant No. 2), on the 2nd July 1868, executed two separate mortgage-bonds, giving as security the same property in each, the one being in favor of the plaintiff No. 1 and defendant No. 3, the other in favor of one Luchumun Lall.

The plaintiff No. 1 and the defendant No. 3 obtained a decree on their mortgage-bond on the 29th March 1869, for the sale of the mortgaged property. On their applying for the

\* Appeal from Appellate Decree, No. 638 of 1878, against the decree of Baboo Roy Matadin Bahadour, Subordinate Judge of Gya, dated the 9th January 1878, reversing the decree of Syed Golam Sharuf, Second Sudder Munsif of that District, dated the 21st August 1877.

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execution of this decree, one Jamiat Lall, husband of the defendant No. 1, objected and alleged his own possession; this objection was overruled on the 24th September 1872, when in execution of their decree the plaintiff No. 1 and the defendant No. 3 themselves became the purchasers of the mortgaged property at the auction-sale. On the 16th June 1875, they obtained a certificate of their purchase from the Court, and a notification was issued ordering possession to be given to them. The defendant No. 3 then sold his rights and interests to the plaintiff No. 2.

On the 7th January 1869, Luchumun Lall obtained a decree on his mortgage-bond, and attached the property secured thereby on the 13th February 1869, and at the execution-sale on the 28th June 1869, the property was purchased by Jamiat Lall, and on the 14th September 1869 a notification was issued by the Court ordering him to be put in possession.

The plaintiffs, in endeavouring to obtain possession under their certificate of sale of the 16th June 1875, were opposed by the defendants, and the plaintiffs then brought this suit to recover possession against the defendant No. 1, the wife of Jamiat Lall deceased, the defendants Nos. 2 and 3 being *pro forma* defendants, and the defendant No. 4 an alleged *benamidar* of the defendant No. 1.

The defendant No. 1 contended that she had nothing to do with the property, it having been purchased at the auction-sale *benami* in her name by the defendant No. 4.

The defendant No. 4 contended that he was the real owner of the property, and that his attachment and sale, made in the name of the defendant No. 1, were prior to the attachment and sale of the plaintiffs; the decree under which he purchased having been also obtained prior to the plaintiffs' decree, and that therefore at the time of the alleged purchase by the plaintiffs, the judgment-debtor, the defendant No. 2, had no right left in him in the property which he could dispose of.

The Munsif found that both the mortgagees had brought their suits under s. 53 of Act XX of 1866, and notwithstanding the fact that these suits were brought on their mortgage-bonds asking for a money decree, the Court had ordered both

the decree-holders to realize the money due to them by the sale of the property mortgaged, and that therefore these decrees were inoperative, and they must be taken as simply having the force of money-decrees. He further found that the defendant No. 4, the alleged *benamidar*, had no right to object to the possession of the plaintiffs, inasmuch as Jamiat Lall was clearly under the certificate of sale the purchaser of the property of the judgment-debtor, defendant No. 1 having admitted that she was the representative of defendant No. 4, the transaction being a *benami* one, and the husband of defendant No. 1 having already preferred an objection to the plaintiff executing his decree, which objection had been overruled, and since that neither defendant No. 1, nor defendant No. 4, had taken any steps by bringing a regular suit to have the sale set aside within the term allowed by law for them to do so. He therefore gave the plaintiffs a decree for possession.

The defendants Nos. 1 and 4 appealed to the Subordinate Judge, who held that the Munsif's decision was erroneous, the real question which ought to have been tried being which of the parties had the best right to possession, having regard to their respective mortgage-decrees and purchases. On these points he held that the defendant who had first attached the property had a preferable right to that of the plaintiff, inasmuch as the defendant's purchase of the rights and interest of the judgment-debtor was prior in date to the purchase made by the plaintiff; he therefore dismissed the plaintiff's suit and allowed the appeal.

The plaintiffs appealed to the High Court.

Moonshee *Mahomed Yusuff* for the appellants.—The plaintiffs' title is superior to that of the defendants, inasmuch as the order of the 24th September 1872, made on the application of the defendants under s. 246 of the Civil Procedure Code, precluded the defendants from alleging that nothing passed at the auction-sale at which the plaintiffs purchased—the lower Court should have determined which mortgage was prior in point of time—and moreover, the defendants having purchased with notice of the plaintiffs'

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mortgage, they have no right now to set up their title as auction-purchasers against the plaintiffs. Priority of attachment cannot confer any right on the defendants under these circumstances.

*Baboo Chunder Madhub Ghose* for the respondents.

The judgment of the Court was delivered by

GARTH, C. J. (PRINSEP, J., concurring).—In this case both the plaintiffs and the defendants appear to have taken mortgage-bonds from the same person, pledging the same property on the same day. Both subsequently obtained decrees upon those bonds against the mortgagor.

The defendants, it is found by the Court below, got their decree first, and under that decree they bought the right, title, and interest of the mortgagor in the mortgaged property, and obtained possession of it.

The plaintiffs afterwards, under their decree, put up for sale and bought the right, title, and interest of the mortgagor; and they now bring this suit for the purpose of recovering the possession of the property from the defendants.

This suit being, therefore, only for possession, on the strength of that purchase, the question is, whether the plaintiffs can prove a better right to such possession than the defendants.

The Subordinate Judge has decided that the defendants' right is preferable, because their purchase of the mortgagor's interest was prior in date, and he accordingly dismissed the plaintiffs' suit.

It is now contended on appeal, that both the lower Courts should have tried not only the question whose purchase was first, but also whose mortgage was first.

But that question, we think, does not arise in this suit. The right to the possession of the property cannot depend upon which of the mortgages was first.

The defendants, when they purchased the interest of the mortgagor, obtained the present right to possession, although in equity they might only have acquired it as trustees for the mortgagor and subject to his right to redeem the property: see

*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)\*

1879

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.