

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice McDonell.

1881
June 9.

JONMENJOY MULLICK (PLAINTIFF) v. DOSSMONEY
DOSSEE (DEFENDANT).*

Mortgage-Bond—Money-Decree—Mortgage-Decree—Sale in Execution—Mortgagee's Lien.

A mortgagee who elects to take a money-decree, and becomes himself the purchaser of the property mortgaged at a sale in execution of that decree, may bring a suit to enforce his lien against a person who purchased the right, title, and interest of the same debtor in the same property, at a prior sale in execution of a prior money-decree.

Dossmoney Dossee v. Jonmenjoy Mullick (1) overruled.

THIS case was referred to a Full Bench by CUNNINGHAM and PRINSEP, JJ., on the 2nd June 1881, with the following opinions:—

This matter, in a different form, has already been before a Division Bench of this Court (Jackson and Kennedy, JJ.) The judgment delivered has been reported in I. L. R., 3 Calc., 363, where the facts are fully set out.

The parties in that and the present case are the same. In that case the plaintiff, the mortgagee, having purchased in execution of his own decree obtained under s. 53 of the Registration Act of 1866, sued the purchaser of the right, title, and interest of the mortgagor, to enforce the lien created by the mortgage-bond against the lands purchased. That suit was dismissed for reasons stated in the judgment.

The plaintiff has now sued for possession of the property itself.

Having regard to the uncertainty felt by us, and by other Judges of this Court, regarding the effect of the judgment of

* Full Bench Reference in Appeal from Original Decree, No. 9 of 1880, made by Mr. Justice Cunningham and Mr. Justice Prinsep, dated the 2nd June 1881.

(1) I. L. R., 3 Calc., 363 ; S. C., 1 C. L. R., 446.

the Full Bench in *Syud Emam Momtazooddeen Muhomed v. Raj Coomar Dass* (1), to the judgment delivered by a Division Bench of this Court in a previous suit between the parties now before us (2), and to the importance of having the law clearly and authoritatively determined, we refer this case to the Full Bench for determination of the following questions:—

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1st.—Can the purchaser under the decree obtained on the specially-registered bond sue the first purchaser for restoration of the mortgaged property?

2nd.—If he can sue for restoration of the mortgaged property, is he bound to give the first purchaser the opportunity of redeeming the property?

3rd.—In such a case are the rights of a purchaser from the mortgagor previous to the passing of a money-decree in favor of the mortgagee, different from those of a purchaser subsequent thereto but without notice of any proceedings taken?

4th.—If he has previously sued the first purchaser for a declaration that he held the property subject to the mortgage, and that suit has been dismissed, would a second suit brought for possession be barred by ss. 2 and 7 of Act VIII of 1859?

Baboo *Rashbehary Ghose* for the appellant.—The Full Bench case of *Syud Emam Momtazooddeen Mahomed v. Raj Coomar Dass* (1) is conclusive of this case. There it is laid down that a suit for a money-decree is the same as a suit for a mortgage-decree; and that being so, the doctrine of *lis pendens* applies. [MITTER, J.—The doctrine of *lis pendens* must be limited to cases in which the property is the subject-matter of the suit. PONTIFEX, J.—One effect of applying for a money-decree is to turn the debt into a judgment-debt, and interest is given only on the judgment-debt at the Court rate, 6 per cent; but the lien remains the same.]

Baboo *Srinath Dass* for the respondent.

The decision of the Full Bench was delivered by

GARTE, C. J.—We think that the first question should be answered in the affirmative.

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

(2) I. L. R., 3 Calc., 363; S. C., 1 C. L. N., 446.

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The plaintiff has clearly no right to sue for the restoration of the mortgaged property. His proper course, in our opinion, was that which he adopted in the first instance,—namely, to sue to have his lien upon the property declared.

The High Court's judgment in *Dossmoney Dossee v. Jonmenjoy Mullick* (1) appears to us to be erroneous. The learned Judges in that case seem to think that because the plaintiff had obtained a decree for his mortgage-money, he had thereby lost his lien; but this is not so. There is ample authority in this Court to show that such a proposition is unfounded. A man who has an equitable lien for a simple contract-debt does not lose his lien by turning his debt into a judgment-debt. Under certain circumstances he may be restrained from pursuing both his remedies simultaneously; but having enforced one remedy without fully realizing his debt, he may afterwards proceed to enforce the other; see *Banker v. Smart* (2).

It has been suggested to us that the judgment and decree were not properly signed; but whether they were or not, we are unable in this suit to give the plaintiff any relief. Of course it is quite open to him to make an application in the former suit to the proper Division Bench, either for a rehearing or a review, as he may be advised.

The second question referred to us, we do not think it necessary to answer.

(1) I. L. R., 3 Calc., 363; S. O., 1 C. L. R., 446.

(2) 3 Beavan, 64.