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their possession as jotedars, even if it be accepted as true as against the owners of an undivided fractional share, could not confer upon them a right of occupancy. But the Judicial Committee on appeal were of opinion that this view was not correct. They said: "Their Lordships do not concur in the view thus expressed by the High Court to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate."

We are, therefore, of opinion that, if the plaintiff's case as stated in the plaint and supplemented by his deposition be established, he would be entitled to a decree on the ground that he has a right of occupancy in the land in suit. But the Munsiff did not take the other evidence of the plaintiff or any evidence on behalf of the defendants. We, therefore, set aside the decrees of the lower Courts and remand this case to the Court of first instance for completion of the trial.

Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

1888 *December* 19.

SHEONATH DOSS (DECREE-HOLDER) *v.* JANKI PROSAD SINGH AND OTHERS (JUDGMENT-DEBTORS.)*

Sale in execution of decree—Civil Procedure Code, 1882, *s.* 294—*Decree-holder Purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale proceeds—Leave to bid at sale in execution when granted—Permission of the Court to decree-holder to buy—Practice.*

A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor *Hart* v. *Tara Prasanna Mukherji* (1) distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.

* Appeal from Order No. 360 of 1888, against the order of J. Tweedie, Esq., Judge of Shahabad, dated the 22nd of June 1888, modifying the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 24th of January 1888.

(1) I. L. R., 11 Calc., 718.

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The permission to a mortgagee to bid should be very cautiously granted, and only when it is found, after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry as to whether the sale proclamation has been duly published.

IN execution of a mortgage decree for Rs. 5,088, obtained by one Sheonath Doss against Janki Prosad and others, four bonds (the subject of the mortgage), which had been executed in favor of the mortgagors by third persons, were put up for sale and purchased for Rs. 685 by the decree-holder, who had obtained permission to buy at such sale. On the 27th January 1888 the third persons above referred to paid into Court Rs. 5,812 to the credit of the person or persons (whoever they might be) then entitled to the money under such bonds. The exact amount payable as principal and interest on such bonds on the 7th January 1887 amounted to Rs. 5,719. The decree-holder, subsequently to the sale in execution, assigned one of such bonds, of the value of Rs. 1,000, to a stranger for Rs. 300; and subsequently applied for further issue of execution against other properties of his judgment-debtors for the unsatisfied balance of his decree, contending that he had become by his purchase in execution the absolute owner of these bonds, and was still entitled to satisfaction of the remainder of the judgment-debt from his judgment-debtors. The judgment-debtors objected to the issue of further execution.

The Subordinate Judge of Shahabad held, on the authority of *Hart* v. *Tara Prasanna Mukherji* (1) that the decree-holder having become himself the purchaser of the bonds at the sale in execution of his own decree, was bound to prove that the property purchased by him had realized a fair amount; and that this question was one which the Court was bound strictly to enquire into before the decree-holder could be allowed to take out further execution; and under the circumstances of the case he eventually directed that execution should be stayed, and that the decree-holder would be at liberty, on application made for that purpose, to take out from the Court the sum of Rs. 5,812 deposited by the third parties above referred to, after giving notice to the person to whom he had assigned one of the bonds, part of the subject of his mortgage.

(1) I L. R., 11 Calc., 718.

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The decree-holder appealed to the District Judge, who held that in common honesty all the decree-holder was entitled to was the amount due on the bonds on the 7th Feburary 1887, *viz.*, Rs. 5,719; but that as he had assigned to a stranger one of such bonds of the value of Rs. 1,000, that sum should be deducted from the Rs. 5,719, and the price for which it was so assigned, *viz.*, Rs. 300, should bo added thereto after such deduction, making the value of the bonds on the 7th February to have been Rs. 5,019; and that as the judgment-debt amounted to Rs. 5,088, there remained only a sum of Rs. 69 due by the judgment-debtors. He therefore varied the order of the lower Court and found that there was due to the decree-holder Rs. 69 plus costs and interest up to realization.

The decree-holder appealed to the High Court.

Mr. *R. E. Twidale* for the appellant.—The judgment-debtors are only entitled to be credited with Rs. 685, and for the balance of the judgment-debt the decree-holder is entitled to issue out further execution. The lower Courts have not kept in view s. 294 of the Code of Civil Procedure, which lays down that the purchase-money is to be set off against the amount due under the decree and satisfaction entered up to that extent; and also were in error in holding that the money paid into Court by third persons should be taken in satisfaction of the appellant's decree.

The case of *Hart* v. *Tara Prasanna Mukherji* (1) has no application to a case of this kind.

Moulvie *Mahomed Yusuf* for the respondents.—The decree-holder, after purchasing at the execution sale, became trustee for the mortgagors, and held the bonds only subject to satisfaction of his decree. I rely on *Hart* v. *Tara Prasanna Mukherji* (1).

The judgment of the Court (PETHERAM. C.J.. and BANERJEE. J.) was delivered by

BANERJEE, J.—The only question raised in this appeal, and the only question tried in the Courts below, is, whether the mortgagee, who has bought the mortgaged property at a sale in execution of a decree upon the mortgage bond, is at liberty to take out further execution for the balance of the amount decreed left after deducting

(1) I. L. R., 11 Calc., 718.

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the price for which the property was sold; or whether he is bound to give the mortgagor, judgment-debtor, credit, not only for such price, but for the real value of the property sold to be ascertained by the Court; in other words, whether the mortgagee, by his purchase, became the absolute owner of the property, or took it in trust for the mortgagor. Both the Courts below have answered this question in favour of the mortgagor, and the lower Appellate Court has ordered execution to issue only for the balance left after deducting from the amount of the decree what it found to be the real value of the property sold. We think the decision of the Courts below is not right.

The rule deducible from *Downes* v. *Grazebrook* (1); *In re Bloye's Trust* (2); *Tennant* v. *Trenchard* (3); *Martinson* v. *Clowes* (4); and other cases bearing on the question which are referred to in White and Tudor's Notes to *Fox* v. *Mackreth*, is thus stated in Fisher on Mortgage, and other well-known text books, that neither the mortgagee, whether he claims under an ordinary power or under a trust for sale, nor his trustee, can buy the mortgaged property, unless, when the sale is made by the Court, he has obtained leave to bid, and if the mortgagee be a trustee he will not have leave to bid where the *cestui que trust* objects, unless attempts to sell to others have failed, and that the same rule applies to a pledgee. See Fisher on Mortgage, 4th Edition, p 458; Coote on Mortgage, 4th Edition, p. 257; Dart on Vendors and Purchasers, 6th Edition, pages 35 and 41.

In the second of the above cases Lord Cottenham explains the reason of the prohibitory rule to be this, that it would be improper to place a person in a situation in which his interest, as intending purchaser, might conflict with his duty to secure the highest price for the property to be sold; and in *Tennant* v. *Trenchard* (3) Lord Hatherley points out that, if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the trustee might be allowed to make proposals and to become the purchaser.

(1) 3 Mer., 200.
(2) 1 Mac. & G., 488.
(3) L. R., 4 Ch. Ap., 537.
(4) L. R., 21 Ch. D., 857.

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The above rule is in perfect accord with reason and common sense. While it prevents the mortgagee from taking any unfair advantage of his position by prohibiting him to buy, it removes the prohibition, to prevent the very result it was meant to guard against, when that becomes necessary. But a hard and fast rule that the mortgagee can never become the purchaser is not only unnecessary but would be inexpedient, even in the interests of the mortgagor. In the case of *Warner* v. *Jacob* (1) it was held that the mortgagee selling was not in a fiduciary position towards the mortgagor, and in *Coaks* v. *Boswell* (2) under somewhat similar circumstances it was held that the leave to bid put an end to the disability to purchase under which the party may have laboured.

The decree-holder, under our Code of Civil Procedure, can only buy with leave of the Court, and when the mortgagee decree-holder has bought the mortgaged property with such leave, we do not find any reason or authority for holding that he takes the property in trust for the mortgagor.

The only authority referred to by the Court below and relied upon by the respondent in this case is the case of *Hart* v. *Tara Prasanna Mukherji* (3); but that case is clearly distinguishable from the present. There the question was not one between the decree-holder mortgagee and the judgment-debtor mortgagor, but was one between the decree-holder and other creditors of the judgment-debtor; and though in one place the rule laid down by the learned Judges is stated somewhat too broadly, the distinction pointed out above is clear from another part of the judgment where the reason of the rule is stated. "It would manifestly be inequitable," say the learned Judges, "to allow a mortgagee to buy in the mortgaged property at an auction for a sum far below its real value, and then to go on against other property of the mortgagor to the injury of the other creditors." This makes the distinction between that case and the present one perfectly clear.

Whilst we attach so much importance to the leave of the Court to the decree-holder to bid, and consider that it removes all

(1) L. R., 20 Ch. D., 220. (2) L. R., 11 Ap. Cases, 232.
(3) I. L. R., 11 Calc., 718.

disability in him to bid, we deem it our duty to observe that such leave should be very cautiously given. It should, in our opinion, be given only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given only after some enquiry, that the sale proclamation has been duly published. And if, after all, the mortgagor, judgment-debtor, is in any way injured, he has ample remedy provided for him in the Code. He can, under s. 294, question the propriety of the leave to bid, by showing, either that it was obtained by misrepresentation, or that it was granted through inadvertence and without the exercise of judicial discretion by the Court, and he can have the sale set aside under s. 311, or obtain compensation under s. 298 of the Code, according to the nature of the property sold.

The present may be a hard case; but if there was any real hardship, the respondent was not without remedy; and for aught we know he may still have his remedy. All we say at present is, that the decision of the Court below, so far as it goes, is incorrect, and that the application of the decree-holder for further execution should be granted, subject, of course, to any objections or proceedings that it may still be open to the judgment-debtor to take. The appeal must be decreed with costs.

T. A. P. *Appeal decreed.*

Before Mr. Justice Pigot and Mr. Justice Macpherson.

CHUNDER COOMAR (ONE OF THE DEFENDANTS) *v.* HURBUNS SAHAI (PLAINTIFF) AND ANOTHER (DEFENDANTS).*

1888 *June* 15.

Benami transaction—Estoppel—Misrepresentation—Heir, when bound by the acts of ancestor—Mitakshara Law—Sale by a co-parcener, Effect of.

B purchased some property from *D* (a member of a joint Mitakshara family) in the name of his wife *K* with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property, which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband, *K* obtained a certificate of guardianship of her infant son *S*, in which she did not include this property, and in

* Appeal from Original Decree No. 247 of 1886, against the decree of Baboo Koilas Chunder Mookerji, Subordinate Judge of Shahabad, dated the 11th of September 1886.