

## FULL BENCH.

1881  
March 26.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

SHEO RA'TAN LAL (PLAINTIFF) v. CHOTEY LAL (DEPENDANT).\*

*Sale in execution of decree—Money-decree—Decree enforcing hypothecation—Act X of 1877 (Civil Procedure Code), ss. 237,316—Act VIII of 1859 (Civil Procedure Code), ss. 249,259.*

Certain immoveable property was put up for sale, under the provisions of Act X of 1877, in execution of a decree for money, and was purchased by *C*, with notice that *L* held a decree enforcing a lien on such property. Subsequently *L* applied for the sale of such property in execution of his decree, and such property was put up for sale in execution of that decree, and was purchased by *S*. *S* sued, by virtue of such purchase, to recover possession of such property from *C*. *Held* that, inasmuch as under Act X of 1877 what is sold in execution of a decree purports to be the specific property, and as *C* had purchased the property in suit with notice of the existing lien on it, and subject to its re-sale in execution of the decree in execution of which *S* had purchased it, what actually was sold in execution of that decree to *S* was such property, and *S* was entitled to possession of such property under such sale.

Sales under Act VIII of 1859 and Act X of 1877 distinguished.

THIS was a suit for possession of certain shares in two gardens. These shares belonged to one Husain Bakhsh, who on the 9th December, 1872, gave one Chamru Lal a bond in which he hypothecated them as collateral security for the payment of such bond. On the 17th September, 1875, one Manohar Das obtained a decree for money against Husain Bakhsh. On the 12th November, 1877, Chamru Lal obtained a decree against Husain Bakhsh on the bond of the 9th December, 1872, such decree enforcing the hypothecation of such shares contained in that bond. On the 5th January, 1878, the sale of such shares in execution of Manohar Das' decree being fixed for the 20th January, Chamru Lal applied to the Court executing that decree that his lien on such shares might be notified at the time of sale. On the 20th January such shares were put up for sale, Chamru Lal's lien thereon being notified, and were purchased by the defendant in the present suit. On the 6th April, 1878, Chamru Lal applied for the sale of such shares in execution

\* Second Appeal. No. 867 of 1880, from a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad with the powers of a Subordinate Judge, dated the 5th June, 1880, reversing a decree of Babu Promoda Charan Banarji, Munsif of Allahabad, dated the 15th December, 1879.

1881

IBO RATAN  
LAL  
v.  
MOTRY LAL.

of his decree of the 12th November, 1877, and they were put up to sale in execution of that decree on the 21st September, 1878, and were purchased by the plaintiff in the present suit. The present suit was subsequently instituted by the plaintiff against the defendant, in which he claimed possession of such shares by virtue of his auction-purchase, alleging that the defendant had purchased them subject to Chamru Lal's lien, and he (plaintiff) had priority over the defendant. The defendant set up as a defence that, as the plaintiff had purchased such shares after the same had been sold to him (defendant), he (plaintiff) had acquired no right thereto. The Court of first instance held, referring to *Kali Prosad v. Buli Singh* (1), that the defendant had acquired by his purchase the rights and interests of Husain Bakhsh only in such shares, that is to say, his equity of redemption, and he had not acquired such shares free from the incumbrance created thereon by Husain Bakhsh, while the plaintiff had acquired not only those rights and interests, but also the rights and interests which Husain Bakhsh and Chamru Lal could jointly pass to a purchaser of such shares, that is to say, the rights and interests which Husain Bakhsh possessed therein at the date of the mortgage to Chamru Lal; and that the plaintiff had therefore acquired such shares absolutely and was entitled to possession in preference to the defendant; and it gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held, following the decision of the High Court in S. A. No. 959 of 1878, dated the 7th May, 1879 (2), that, inasmuch as the plaintiff had purchased only the rights and interests of Husain Bakhsh, as all the proceedings in execution showed, and as at the time of his purchase no such rights and interests existed, the same having been extinguished by the previous sale to the defendant, the decision of the Court of first instance was wrong; and accordingly reversed it. On second appeal by the plaintiff it was contended on his behalf that, under the circumstances of the case, it must be taken that he had purchased the rights of Husain Bakhsh as they existed on the date of the hypothecation of the property in suit. The appeal came for hearing before Pearson, J., and Spankie, J., who, seeing some reason to doubt the correctness of the ruling in S. A. No. 959 of 1878, decided on the 7th May, 1879 (2), by which

(1) I. L. R., 4 Calc 789.

(2) Not reported.

the lower Court had been guided in disposing of the present case, referred the appeal to the Full Bench for disposal.

1881

---

SHEO RATA  
LAL  
v.  
CHOTAY LAL

Munshi *Kashi Parsad* and Babu *Oprokash Chandar Mukarji*,  
for the appellant.

Pandit *Bishambar Nath* and Babu *Beni Prasad*, for the res-  
pondent.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J., (STUART, C. J., and PEARSON, J., concurring).—  
The facts are sufficiently detailed in the judgment of the Subordi-  
nate Judge, by whom the question of law raised in the appeal is  
very clearly stated. The simple point to be determined is, was the  
sale of the 21st September, 1878, a wholly abortive and ineffectual  
proceeding, which passed nothing to the auction-purchaser? It  
must be conceded that both the sale-notification and certificate refer-  
red to, the “right, title, and interest of the judgment-debtor,” and  
the respondent contends that under these circumstances the appellant  
acquired nothing by his purchase, because, at the time he effected  
it, the judgment-debtor had no saleable right, title or interest. In  
support of this view the judgment of a Division Bench of this Court  
in S. A. No. 959 of 1878, decided on the 7th May, 1879 (1), was  
quoted as an authority, and it appears to have been accepted and  
acted upon by the Subordinate Judge as an apposite and conclusive  
precedent. It seems, however, to have escaped his attention that  
the decision in this case was passed when the provisions of Act  
VIII. of 1859 were in force; and no doubt by them it was enacted  
that not only should the notification of sale state that the sale would  
only extend to the right, title, and interest of the judgment-debtor in  
the “property sold,” but that the sale-certificate granted to the  
auction-purchaser should be limited to like terms. Ss. 287 and 316 of  
Act X. of 1877, however, as amended by Act XII. of 1879, are very  
different in their language, and contain no reference to the “right,  
title, and interest of the judgment-debtor,” or any limitation of the  
kind to be found in the former Code. It may therefore well be that  
under these circumstances the judgment of this Court, upon which  
the Subordinate Judge relied, was an accurate one, as the law then

(1) Not reported.

1881

IREO RATAN  
LAL  
v.  
MOEY LAL.

stood. But be this as it may, it is inapplicable to the appeal at present before us. For all that we have now to consider is what could be brought to sale under the decree declaring a lien on the property in favour of the mortgagee, and what could an auction-purchaser buy, and it seems obvious that this could only be the property mortgaged. If the contention of the respondent were to hold good, it would seem that the rights of a mortgagee could in almost all cases be defeated by a purchaser of the equity of redemption, with the result that the transferee of a mortgagor's right could assert a higher title than that which his transferor could give him. The proposition of the respondent that by his purchase in January, 1878, under the sale in execution of the simple money-decree of Manohar Das, he acquired the entire rights of the judgment-debtor in the property sold, seems not only startling, but most unreasonable, and to adopt it would be obviously inequitable. The respondent had the fullest notice, not only that the appellant held a charge upon the judgment-debtor's property, but that he had instituted a suit and obtained a decree to effectuate it by enforcement of lien. That decree was against the property pledged, and any interest an auction-purchaser, with notice of it, could get at a sale subsequent to it, in execution of a simple money-decree, would necessarily be subject to the lien declared by it. Neither by private nor compulsory sale could a higher title be given. The terms of the sale-notification and certificate have in fact no bearing upon the present case, and may be dismissed as surplusage. What actually was sold on the 21st September, 1878, was the property hypothecated under the bond of the 9th December, 1872, the mortgagee's lien upon which had been declared by the decree of the 12th November, 1877. We would therefore decree the appeal with costs, reverse the decision of the lower appellate Court, and restore that of the Court of first instance decreeing the plaintiff's claim.

SPANKIE, J.—The facts are admitted. In the case of which the reference makes mention (1) the right, title, and interest of the judgment-debtor were sold under s. 249, Act VIII of 1859, and the sale was limited to that right, title, and interest, and it was so proclaimed. Under the law as it stands now the property is sold and not the rights and interests only of the judgment-debtor in it. The

(1) S. A. No. 959 of 1878, decided the 7th May, 1879, not reported.

sale-proclamation, according to s. 287 of Act X. of 1877, shall specify the property to be sold, and amongst other requirements any incumbrance to which the property is liable. So again the sale certificate under the old Act declared that the purchaser had purchased the right, title, and interest of the defendants in the property sold (s. 259, Act VIII. of 1859). But now the certificate states the property sold and the name of the person who at the time of sale is declared to be the purchaser. The defendant Chotey Lal purchased the property in dispute in execution of a money-decree on the occasion of the first sale, and notice of the incumbrance under which the property was subsequently sold was given at the time of the sale, and the order of the Munsif directing the sale expressly does so subject to Chamru Lal's mortgage. So that the purchaser was fully aware of the true state of the case, and that he was buying subject to the lien held by Chamru Lal, who had also obtained a decree prior to the sale in which the sale was declared. The first sale may have extinguished the right and interest of the judgment-debtor and have placed the equity of redemption in the purchaser's hands. But that sale did not extinguish the mortgagee's lien upon the land as security for the debt due to him. The mortgagee had not surrendered his right, but still looked to the property pledged in whosoever hands it might be found; so that it is a mistake to conclude, as the second Court has done, that on the occasion of the second sale in September, 1878, there was nothing for the plaintiff to buy, because the right and interest of the judgment-debtor in the property had been lost by the first sale. Looking at all the circumstances of the case, I would reverse the decree of the lower appellate Court and restore that of the Court of first instance with costs.

OLDFIELD, J.—The plaintiff is a purchaser at auction in execution of a decree against Husain Bakhsh which ordered the sale of the property in suit in enforcement of a charge. The defendant had previously to the sale in favour of plaintiff bought the property in execution of another decree against the same Husain Bakhsh, but with notice of and subject to the charge made by the first named decree. The Court below has held that the plaintiff, having bought only the right, title, and interest of the judgment-debtor, which had

1881

---

 SURE RATA  
 LAL  
 v.  
 CHOTAY LAL

1881

TRIO RATAN  
LAL  
v.  
MOTRY LAL

passed to defendant before the sale, the plaintiff can take nothing by his purchase. This finding is, in my opinion, based on an erroneous view of the effect of the sale-proceedings in which plaintiff purchased the property and which were held under Act X of 1877. The present law of sale (s. 287) is somewhat different from that of s. 249, Act VIII of 1859, by which the proclamation declared that the sale extended only to the right, title, and interest of the defendant in the property specified therein. The sale now purports to be of specific property as saleable in execution of the decree against the judgment-debtor, and the certificate of sale given under s. 316 states the property sold and the name of the person declared to be the purchaser, and differs from the certificate given under s. 259, Act VIII of 1859, which gave only a declaration that the purchaser had purchased the right, title, and interest of the defendant in the property sold, and that the certificate should be taken and deemed a valid transfer of such right, title, and interest. The purchaser now obtains a *prima facie* title to the specific property sold, but it is in the power of any one other than the judgment-debtor, if dispossessed of any property in execution of a decree, to put in objections under s. 332, when the question arising under that section would be decided, subject to the result of a suit; or if the purchaser finds himself obstructed by any one claiming the property under an independent title, he is at liberty to sue to establish his right by purchase, when the title of the parties would be determined on the merits. In the case before us the notification of sale was not made in strict accordance with the present law, but the sale-certificate shows that what was sold was the property liable to sale under the decree against Husain Bakhsh, and if it be found that the property was liable to be sold, the plaintiff's title as purchaser is good notwithstanding the previous sale to the defendant; and this is shown to be the case, for the defendant bought the property with notice of the existing charges and subject to its re-sale under the decree in execution of which the plaintiff became the purchaser; the property was therefore rightly saleable and the plaintiff's title by purchase is valid. I would reply to the reference that the lower appellate Court's decree should be reversed and that of the Court of first instance restored.

*Appeal allowed.*