

REVISIONAL CIVIL

Before Sir C. M. King, Knight, Chief Judge
and Mr. Justice E. M. Nanavutty

1935
December, 2

NARAIN DAS AND ANOTHER (AUCTION-PURCHASERS-APPLICANTS)
v. BULAQI AND ANOTHER, APPLICANTS AND ANOTHER
DECREE-HOLDER (OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), Order XXI, rule 89—
“Immovable property”, meaning of—House mortgaged
sold in execution of decree—Mortgagee whether can apply
under Order XXI, rule 89, to set aside sale.

The words “immovable property” in Order XXI, rule 89, C. P. C., should be interpreted to mean tangible immovable property and where the property sold in execution of a decree is a house and the house is mortgaged, the mortgagee certainly has an interest in the house and is entitled to make an application to have the sale set aside under Order XXI, rule 89, C. P. C., *Bodapati Adenna v. Bodapati Chinna Ramayya* (1), *Paresh Nath Singh v. Nabogopal Chattopadhyaya* (2), *Srinivasa Ayyangar v. Ayyathorai Pillai* (3), *Thakur Singh v. Gurdit Singh* (4), *Aulad Ali v. Abdul Hamid* (5), *Kashmiro Bibi v. Hatim Ali Khan* (6), and *Jagannath Singh v. Jagjiwan Das* (7), relied on.

Mr. M. Wasim, for the applicant.

Mr. Bishambhar Nath Srivastava, for the opposite party.

KING, C.J. and NANAVUTTY, J.:—The necessary facts may be very briefly stated. A certain house was sold in execution of a simple money decree. This house was subject to a simple mortgage. In the sale proclamation the mortgage was notified. After the house had been sold, to the applicants before us, the mortgagee made a deposit of the decretal amount and five per cent.

*Section 115 Application No. 77 of 1934, against the order of Pandit Brij Kishen Topa, Subordinate Judge, Malihabad, Lucknow, dated the 19th of February, 1934, upholding the order of M. Munir Uddin Ahmad Kirmani, Munsif (North), Lucknow, dated the 10th of November, 1933.

(1) (1928) I.L.R., 51 Mad., 770. (2) (1902) I.L.R., 29 Cal., 1.
(3) (1898) I.L.R., 21 Mad., 416. (4) (1911) 12 I.C., 733.
(5) (1923) I.L.R., 2 Pat., 715. (6) (1915) 13 A.L.J., 273.
(7) (1925) 28 O.C., 221.

of the purchase money and applied to have the sale set aside under order XXI, rule 8g of the Code of Civil Procedure. The learned Munsif granted the application and set aside the sale and his order was affirmed on appeal by the learned Subordinate Judge. The auction purchasers come to this Court in revision.

Two points were raised in this revision. The first point was whether any revision lay against the order passed by the Court below, and the second was whether a simple mortgagee can make an application under order XXI, rule 8g of the Code for setting aside the sale. The case came up for hearing originally before a learned single Judge of this Court who has referred it to a Bench.

We find it convenient to take first the question whether the simple mortgagee of the property sold was entitled to make the deposit and get the sale set aside under order XXI, rule 8g of the Code of Civil Procedure.

On this point the language of the Code seems to be clear and the rulings also appear to be unanimous. Under rule 8g it is laid down in sub-rule (1):

“Where immovable property has been sold in execution of a decree, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside, etc.”

The language of this sub-rule has been slightly altered in its application to Oudh but the alteration is of no importance for the purposes of this case. *Prima facie* the mortgagee certainly had an interest in the house which has been sold, and therefore he was entitled to make the application under rule 8g when the property had been sold in execution of a decree.

It has been argued that all that was sold in the present case was the equity of redemption, as the house was sold subject to the mortgage. Strictly speaking the house was not sold subject to the mortgage, as laid down

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in order XXI, rule 62, but the mortgage was merely notified in the sale proclamation under order XXI, rule 66. In our opinion the words "immovable property" in rule 89 should be interpreted to mean tangible immovable property. In the present case the property sold was a house and the mortgagee certainly had an interest in the house. Therefore we think that on the language of order XXI, rule 89, apart from any judicial authorities, the mortgagee should be held entitled to make the application under rule 89.

This view is supported by a number of judicial decisions. The case of *Bodapati Adenna v. Bodapati Chinna Ramayya* (1) is directly in point. In that case it was held that the word "property" in rule 89 means the tangible immovable property sold, whether or not persons other than the judgment-debtor have any interest in it, and it does not mean merely the right, title and interest of the judgment-debtor alone. It was held in that case that a lessee of the property sold was entitled under rule 89 to apply to have the sale set aside. This case is directly in point and we respectfully agree with the view taken by the learned Judges. A similar view has been taken in a number of other cases to which we need merely refer:

Paresh Nath Singh v. Nabogopal Chattopadhyaya (2); *Srinivasa Ayyangar v. Ayyathorai Pillai* (3); *Thakur Singh v. Gurdit Singh* (4) (a ruling of the Punjab Chief Court); *Aulad Ali v. Abdul Hamid* (5); *Kashmiro Bibi v. Hatim Ali Khan* (6) and *Jagannath Singh v. Jagjiwan Das* (7).

Not a single decision to the contrary has been cited by the learned counsel for the applicants. So there is unquestionably a consensus of judicial opinion. We take the same view and we accordingly hold that the

(1) (1928) I.L.R., 51 Mad., 770. (2) (1902) I.L.R., 29 Cal., 1.
(3) (1898) I.L.R., 21 Mad., 416. (4) (1911) 12 I.C., 783.
(5) (1923) I.L.R., 2 Pat., 715. (6) (1915) 13 A.L.J., 273.
(7) (1925) 28 O.C., 221.

mortgagee was entitled to make the application under rule 89.

As we take this view, the other question, whether an application for revision lies, does not arise because if the Court below was correct in holding that the mortgagee could make the application, then there is no question of any illegal or irregular exercise of jurisdiction.

We dismiss the application with costs.

Application dismissed.

APPELLATE CIVIL.

*Before Mr. Justice Bisheshwar Nath Srivastava,
and Mr. Justice G. H. Thomas*

NAND BAHADUR SINGH AND ANOTHER (DEFENDANTS-
APPELLANTS) *v.* BINDESHWARI PRASAD AND
OTHERS (PLAINTIFFS-RESPONDENTS)*

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Transfer of Property Act (IV of 1882), section 68(c)—Usufructuary mortgage—Mortgaged property allotted to another co-sharer at partition and mortgagee dispossessed—Mortgagor unable to show what property was allotted to him in lieu of mortgaged property, effect of—Mortgagee, whether entitled to money decree.

Where a usufructuary mortgage is dispossessed of a part of the mortgaged property as a result of its being allotted to another co-sharer at partition and the mortgagor fails to show what property was allotted to him in lieu of the mortgaged property, the mortgagee is entitled to a money decree under section 68(c), Transfer of Property Act, as it stood before the amendment made in 1929. *Byjnath Lall v. Ramoodeen Chowdhry* (1), and *Mohammad Afzal Khan v. Abdul Rahman* (2), distinguished. *Talek Singh v. Jalal Singh* (3), and *Janki Saran Singh v. Syed Mohammad Ismail* (4), followed.

*Second Civil Appeal No. 203 of 1934, against the decree of Pandit Kishen Lal Kaul, Subordinate Judge of Sultanpur, dated the 21st of February, 1934, modifying the decree of Babu Shubhrendra Bhushan Banerji, Munsif, Musafirkhana, Sultanpur, dated the 30th of September, 1933.

(1) (1874) L.R., 1 I.A., 106.
(3) (1909) 5 I.C., 130.

(2) (1932) L.R., 59 I.A., 405.
(4) (1932) 139 I.C., 525.