

decisions of the Calcutta High Court in *Christiana Sens Law v. Proshad Chowdhury* (1) and *Lokenath Singh v. Guja Singh* (2), time would begin to run from the date of the decree of the High Court.

The order of the Court below is right and this appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Mullick and Macpherson, J.J.

AULAD ALI

v.

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Mortgage Decree—Right of decree-holder to choose order of sale—mortgage of several items of property—equity of redemption in one item purchased by mortgagee—decree on the mortgage—liability of the other items—sale of the items purchased by the mortgagee, right of latter to apply to set aside—order setting aside sale, appeal from order reversing; whether second appeal lies from—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 89, and section 115.

The holder of a mortgage decree, in the absence of any direction in the decree to the contrary, and of any equities created against himself, is entitled to sell the mortgaged properties in whatever order he chooses.

But when one of the properties has been put up for sale and purchased *bona fide* by a third person the sale cannot be set aside merely on the ground that the executing court declined to put the properties up to sale in the order required by the decree-holder.

*Appeal from Appellate Order No. 156 of 1922, from an order of Rai Bahadur Jadunandar Prasad, District Judge of Purnea, dated the 16th March, 1922, confirming an order of Babu Harihar Prasad, Subordinate Judge of Purnea, dated the 11th December, 1920.

(1) (1914-15) 19 Cal. W. N. 287. (2) (1915-16) 20 Cal. W. N. 178.

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When a mortgage covers several items of property and the mortgagee purchases the equity of redemption in one of the items, he is entitled, in execution of a decree on the mortgage, to recover only a proportionate share of the mortgage money from the other items, and, therefore, he is entitled to put those items up to sale only for the reduced amount and not for the entire mortgage debt. When a mortgagee has purchased the equity of redemption in one of several items of property covered by a mortgage and that item is subsequently sold in execution of a decree on the mortgage, the mortgagee decree-holder is entitled to apply under Order XXI, rule 89, for leave to deposit the decretal amount and interest in order to have the sale set aside.

No second appeal lies from an appellate order reversing an order granting leave for the deposit of the decretal amount and interest under Order XXI, rule 89, Civil Procedure Code.

It is the settled practice of the Patna High Court to treat a refusal to accept a deposit under Order XXI, rule 89, as a refusal to exercise jurisdiction, and, therefore, an application in revision is maintainable against such refusal.

Appeal by the decree-holder.

The facts of the case material to this report were as follows :—

A mortgagee whose bond covered four lots of property obtained a preliminary decree on his mortgage on the 28th July, 1918. On the 16th April, 1918, he purchased the equity of redemption in plot No. 1 in execution of a money decree which he had obtained against the mortgagor. The final decree in the mortgage suit was passed on the 13th July, 1919, and on the 4th August, 1920, the decree-holder took out execution and applied for sale of lots 2, 3 and 4 only. The judgment-debtor objected and the execution case was dismissed. In a subsequent application for execution the decree-holder entered in the list of properties to be sold all the four lots but he requested that lot No. 1 should be sold last on the ground that he had purchased the equity of redemption. The judgment-debtor opposed this application and on the 11th December, 1920, lot No. 1 was put up to sale

and sold to Latifur Rahman, and the whole decretal amount was realized therefrom. The decree-holder appealed to the District Judge who dismissed the appeal. The decree-holder then preferred second appeal No. 156 of 1922 to the High Court on the ground that, in the absence of any direction in the decree to the contrary and of any equities created against himself, he was entitled to sell the mortgaged properties in whatever order he chose.

After Latifur Rahman had purchased the properties the decree-holder applied under Order XXI, rule 89, for leave to deposit the purchase money with interest and to have the sale set aside. The executing Court granted the application but this decision was reversed by the District Judge, on appeal, on the ground that the decree-holder had created an equitable estoppel against himself by not stating in the sale proclamation that he had purchased the equity of redemption. Against this order the decree-holder preferred appeal No. 156 of 1922 to the High Court.

Syed Mohamad Tahir, for the appellant.

S. N. Dutt, for the respondent.

MULLICK, J.—*Appeal No. 156 of 1922* is preferred by a mortgagee whose mortgage lien covered four lots of property and who obtained a preliminary decree against the respondent on the 28th July, 1918, and a final decree on the 13th July, 1919. Meanwhile, on the 16th April, 1918, the appellant had bought the equity of redemption in lot No. 1 in execution of a money decree which he had obtained against the respondent. Then on the 4th August, 1920, the appellant took out execution of his mortgage decree and applied for the sale of lots 2, 3 and 4 only, but to this course the judgment-debtor objected and the execution case was dismissed. In his next application for execution the appellant entered in the list of the properties to be sold all the four lots but he requested that lot No. 1 should be sold last because he had purchased the equity of redemption in it. The

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judgment-debtor opposed this prayer and on the 11th December, 1920, lot No. 1 was put up to sale and the whole decretal debt realized therefrom.

The appellant thereupon appealed to the District Judge but without success; and he files the present second appeal on the ground that in the absence of any direction in the decree to the contrary and of any equities created against himself he was entitled to sell the mortgaged properties in whatever order he chose. I think this contention is well founded. The purchase of the equity of redemption split up the mortgage and the appellant became entitled to recover only a proportionate share of the mortgage money by the sale of lots 2, 3 and 4. He was not entitled to sell these three lots for the entire debt and all that the execution Court could compel him to do was to sell lots 2, 3 and 4 for the reduced amount. But the Court could not compel him to sell lot No. 1 and its order was therefore bad.

But the lot having been purchased by a third party *bonâ fide* and without notice, we are unable in this appeal to set aside the sale.

It is alleged, by the appellant, that the purchaser, Latifur Rahman, is a *benamidar* for the judgment-debtor, but that has not been proved. The appellant might perhaps have been in a better position if he had, when the Court decided to sell lot No. 1, declined to proceed with the execution and preferred an appeal: but as matters stand this second appeal must be dismissed with costs.

Appeal No. 155 of 1922.—This appeal has been heard with the above appeal No. 156.

It appears that after Latifur Rahman purchased the property, the mortgagee made an application under Order XI, rule 89, for leave to deposit the purchase money with interest and to get the sale set aside. The Munsif decided in the appellant's favour, but the District Judge in appeal held that in putting the four properties up to sale without stating in the sale proclamation that he had purchased the equity of

redemption in lot No. 1 the appellant had created an equitable estoppel against himself. He accordingly reversed the Munsif's order and dismissed the appellant's application. Against this order the appellant files the present appeal.

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It is clear no appeal lies but the appellant asks that his petition may be treated as an application for revision. In the special circumstances of this case we grant his prayer and proceed to consider the merits of his case.

Far from attempting to conceal that he was the purchaser of the equity of redemption the appellant had from the moment that he filed his first execution case strenuously contended that lot No. 1 could not be sold because he was its owner by purchase and I can see no representation on his part by reason of which the auction-purchaser was induced to change his position. I think, therefore, that there was no equitable estoppel in the case.

The next question is whether the appellant was entitled to make the deposit. In my opinion his purchase of lot 1 did not extinguish the equity of redemption; the right purchased was in the first place not co-extensive with his right as mortgagee and in the second place here the presumption of an intention to keep the security alive is very strong.

Therefore he was, at the time of the mortgage sale, the owner of the property, and he was competent to make the deposit under Order XXI, rule 89, of the Civil Procedure Code; in my opinion the Munsif's order, setting aside the sale, was right and the learned District Judge was wrong in reversing it.

It is however contended by the opposite party that this is not a case in which we can interfere under section 115. The reply is that it is now the settled practice of the Court to treat a refusal to accept a deposit tendered for the purpose of setting aside

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a sale as a refusal to exercise jurisdiction and I think that the present application is maintainable under section 115.

The result is that the application is allowed with costs: the order of the District Judge is set aside and that of the Munsif restored. The appellant is entitled to his costs in the Court of the Munsif and the District Judge.

MACPHERSON, J.—I agree.

Application allowed.

APPELLATE CIVIL.

Before Mullick and Macpherson, J.J.

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JUGAL KISHORE NARAYAN SINGH

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v.

BHATU MODI.*

Rent Decree—execution of—sale subject to another rent decree—effect of—Estoppel, whether can be based on a representation as to a proposition of law.

Where a holding has been sold in execution of a rent decree it cannot ordinarily be sold again in execution of any other decree for rent due by the same tenants, except where the court has, though irregularly, allowed the holding to be sold subject to a liability to satisfy another outstanding decree, and the auction purchaser is a stranger.

When the auction-purchaser is the decree-holder the exception does not apply.

Therefore, when the holder of two rent decrees causes the holding to be sold in execution of one of the decrees subject to its liability for the other decree, and purchases the holding at the execution sale himself, he is entitled to

* Appeal from Appellate Order No. 248 of 1922, from an order of G. J. Monahan, Esq., r.c.s., District Judge of Monghyr, dated the 29th August, 1922, confirming an order of M. Ihtisham Ali Khan, Subordinate Judge of Monghyr, dated the 20th December, 1921.