

1928

KWAI TONG
KEE
v.
LIM CHAUNG
GHEE.

RUTLEDGE,
C.J., AND
BROWN, J.

and that of the Small Cause Court. In this view of the matter, it does not seem to us to be an undue stretching of the meaning of the words "made application to the Court" in section 73 to hold that the Court in such a case includes not only the Court which actually holds the assets, but also any other Court by which attachment has been made and on account of which the assets are therefore in part held under section 63 by the Court which holds the assets.

We are therefore of opinion that it was not necessary for the decree-holders in the Small Cause Court to make application for execution in this Court before the receipt of such assets in order to entitle them to rateable distribution. They sufficiently complied with the requirements of the section by applying to the Court in which they obtained their decrees and by obtaining attachments therein. We are therefore of opinion that the case has been rightly decided and we dismiss this appeal with costs, advocate's fee five gold mohurs.

ORIGINAL CIVIL.

Before Mr. Justice Chari.

MATAPRASAD UPADHYA

v.

KUNNON DEVI AND ANOTHER.*

1928

Jan. 20.

Power of sale by mortgagee—Power to be conferred in express terms—What is not sufficient conveyance—Transfer of Property Act (IV of 1882), s. 69.

Held, that section 69 of the Transfer of Property Act does not purport to confer any powers on mortgagees but it is intended, when a power is expressly conferred by the mortgage deed, to prescribe the procedure, to curtail the unfettered exercise of the power and to determine the rights of the purchaser at such a sale.

* Civil Regular No. 597 of 1927.

Held, accordingly that a sentence in the mortgage deed to the effect that "the mortgagee, his heirs, representatives and assigns shall have all the powers, remedies and privileges conferred upon the mortgagee by Act IV of 1882" does not authorise a sale out of Court by the mortgagee.

Bogi Ram for the plaintiff.

Basu for the defendants.

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MATAPRASAD
UPADHYA

v.

KUNNON
DEVI AND
ANOTHER.

CHARI, J.

CHARI, J.—The plaintiff in this case files the suit for possession of a house in Suburban Road, Ahlone, and for a sum of money as mesne profits.

The house was mortgaged by a mortgage deed dated the 10th December 1925, and the mortgagee brought the house to sale under an alleged power of sale conferred on him, and at that sale the plaintiff is alleged to have been the purchaser.

It is contended on behalf of the defendant that the purchaser is merely a benamidar of the mortgagee, but that question does not arise in the view I have taken of the law applicable.

To confer title upon the plaintiff the mortgagee must have the power to sell the property. He is not the owner and can confer title only if he is especially empowered to do so. In the absence of such a power the sale by the auctioneer and the conveyance by the mortgagee confer no title on the purchaser.

The learned advocate for the plaintiff admits that the mortgage deed does not contain an express power of sale, but he contends that that power is implied from a sentence in the mortgage deed which is to the effect that "the mortgagee, his heirs, representatives, and assigns shall have all the rights, powers, remedies and privileges conferred upon the mortgagee by Act IV of 1882." He contends that, as the Transfer of Property Act confers on mortgagees a power of sale, the mortgagee of the suit house had

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CHARL. J.

ample power to bring the house to sale. This argument proceeds upon a fallacious conception of the provisions of Transfer of Property Act. Section 69 does not purport to confer any power upon mortgagees but, as its wording clearly shows, it is intended, when a power is actually conferred by a mortgage deed, to prescribe the procedure, to curtail unfettered exercise of the power, and to determine the rights of the purchaser at such a sale. The section, moreover, is of limited application, applying only to certain towns in British India, and it is not generally applicable to all mortgagees. The provision in Section 69 of the Transfer of Property Act which is intended to protect the purchaser in the event of an unauthorised exercise of the power of sale does not affect the question because, though the exercise of a power actually conferred in the circumstances not warranted by the statute may not affect the purchaser, still the existence of the power itself is essential since it is the root of the purchaser's title. Obviously no one can exercise a power which does not exist, nor can the purported exercise of such a non-existent power affect the mortgagor's right in the property mortgaged. In my opinion, therefore, the sentence in the mortgage deed relied upon by the plaintiff does not confer on the mortgagee a power to bring the mortgaged property to sale, and the plaintiff gets no title by his purchase at the sale.

For these reasons the plaintiff's suit is dismissed with costs.