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[737] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mitra.

RAM NARAIN SAHOO v. BANDI PERSHAD.*

[22nd April, 1904.]

Mortgage—Appeal—Civil Procedure Code (Act XIV of 1882) ss. 344 and 235—Sale—Auction-purchaser—Decree-holder—Puisne Mortgagee—Mortgage decree.

On the 3rd December 1887 *B* obtained a mortgage of 5 annas odd gundas share of a village *L*. On the 18th November 1890 *R* obtained a mortgage of a 4 annas out of the aforesaid share of the same village. On the 7th March 1894 *B* obtained a decree for sale on his mortgage, but omitted to make *R* a party to his suit. On the 17th December 1897 *R* instituted a suit on his mortgage, making *B* a party to the suit.

In the meantime *B* caused the property to be sold and himself purchased it, and, the sale being confirmed, got delivery of possession on the 14th November 1898. *R* got a decree for sale on the 18th December 1898 and himself purchased the 4 annas of the property. Subsequently *R* was put in possession by ousting *B*, then *B* applied to the Court executing the decree, both under ss. 244, 335 of the Civil Procedure Code, to restore him to possession, and the Court passed an order in his favour.

R appealed to the District Judge, who having allowed *B* to withdraw his application so far as it referred to and asked for interference of the Court under s. 244 of the Code, dismissed the appeal on the ground that no appeal lay.

Held, that the case came under s. 244 of the Civil Procedure Code and an appeal lay to the Court below. In order to decide under which section of the Code the case came, the Court should look into the true nature of the application with reference to the relief sought and the parties before it. A party could not be permitted to oust the jurisdiction of the Court by a mere statement that this case was under one section of the Code of Civil Procedure and not another, and thereby defeat the just rights of the other party, when in fact the matter ought to be dealt with under the other section.

[738] *Prosumo Kumar Sanyal v. Kabi Das Sanyal* (1) and *Madhusudan Das v. Govinda Pria Chowdhurani* (2) referred to.

Held, also, that, inasmuch as *B* had no direct notice of the mortgage in favour of *R*, the decree for sale obtained by the former and the proceedings based thereunder were valid, subject to the rights of the latter as puisne mortgagee, who was not bound by the decree and the sale under it, and had the right to reopen the proceedings and redeem the first mortgage.

Umesh Chandra Sircar v. Zahur Fatima (3) referred to.

A first mortgagee in possession under a prior sale may always shield himself under his mortgage and his purchase, though his right to possession may be defective.

The puisne mortgagee's right, when he was not a party to the first mortgagee's suit, is limited to a right of redemption or sale of the mortgage premises, subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter.

He cannot compel the first mortgagee to part with possession without redeeming the first mortgage.

Cheit Narain Singh v. Gunga Pershad (4), *Desai Lalubhai v. Mundas Kuberdas* (5), *Bonwari Jha v. Ramjee Thakur* (6) followed.

* Appeal from Appellate Order No. 60 of 1904, against the order of A. E. Staley, District Judge of Mozufferpore, dated the 9th of February 1904 confirming the order of P. C. Dey, Officiating Subordinate Judge of Mozufferpore, dated the 5th December, 1903.

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| (1) (1892) I. L. R. 19 Cal. 688 ; L. R. 17 I. A. 201. | (4) (1876) 25 W. R. 216. |
| 19 I. A. 166. | (5) (1895) I. L. R. 20 Bom. 390. |
| (2) (1899) I. L. R. 27 Cal. 84. | (6) (1902) 7 C. W. N. 11. |
| (3) (1890) I. L. R. 18 Cal. 164. L. R. | |

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Debenāra Narain Roy v. Ramsaran Banerjee (1) referred to.

Held, further, that, inasmuch as the right to possession depends upon the purchase of the outstanding equity of redemption and is ordinarily determined by the priority of the respective sales at the instance of the different mortgagees, B, the purchaser at the prior sale, was entitled to retain possession as against R, the purchaser at the subsequent sale.

Dirigopal Lal v. Eolakee (2), *Jugal Kissors v. Kartic Chunder* (3) and *Nanock Chand v. Telockdye Koer* (4) referred to.

[Rel. on : 9 C. L. J. 358 ; 1 Bur. L. J. 217. Ref. 31 All. 82=6 A. L. J. 71=5 M. L. T. 185 ; 1 S. L. R. 172 ; 17 M. L. J. 821 ; 32 Cal. 891=1 C. L. J. 371=9 C. W. N. 728. Foll. 35 Bom. 452 ; 12 C. W. N. 107 ; 4 I. C. 121 ; 20 I. C. 874 ; 25 I. C. 267=19 C. W. N. 885.]

APPEAL by the objector Ram Narain Sahoo.

One Bandi Persad obtained a mortgage of a 5 annas odd gundas share of a village called Lalwar, together with other properties on the 3rd December 1887. The same mortgagor hypothecated a four annas out of 5 annas odd gundas share of the said village to one Ram Narain Sahoo, on the 18th November 1890. Bandi Persad obtained a decree for sale of the mortgaged properties on the 7th March 1894, but as he was not aware of the mortgage in favour of Ram Narain Sahoo, he omitted to make [739] Ram Narain Sahoo, the puisne mortgagee, a party to his suit. On the 17th December 1897, Ram Narain instituted a suit on his mortgage bond making Bandi Persad, the first mortgagee, a party to the suit. In the meantime the first mortgagee took out execution of his decree, sold the property, and purchased it himself. The sale was confirmed in November 1898, and he was put in possession of the properties purchased by him on the 14th November, 1898. Ram Narain the puisne mortgagee, got a decree for sale on the 18th December 1898, and purchased 4 annas share of the aforesaid village after the first mortgagee had got into possession. After the confirmation of the sale, Ram Narain applied for possession, and he was put into possession by ousting Bandi Persad. Bandi Persad then applied under sections 244-335 of the Civil Procedure Code to the Court executing the decree, to be restored to possession, and the Court on the 5th December 1903 passed an order in his favour. Ram Narain appealed to the District Judge of Muzafferpore. The respondent before the District Judge formally withdrew his application so far as it referred to and asked for interference under section 244 of the Civil Procedure Code, and the learned Judge allowed the withdrawal. The Court then dismissed the appeal on the ground that none lay under the Civil Procedure Code.

Babu *Umakali Mookerjee* (with him *Babu Joy Gopal Ghosal*,) for the appellant. The appellant not having been made a party to the suit brought by the respondent was not bound by the decree obtained by the latter and the proceedings held thereunder. The appellant as a puisne mortgagee had the right to possession, inasmuch as he was not a party to the suit by the first mortgagee. Before the sale the mortgagor had an equity of redemption, and having the equity of redemption he was entitled to remain in possession. After the sale the equity of redemption having passed from the mortgagor to the first mortgagee, the puisne mortgagee, who was not made a party to the suit, can claim to be in possession of the property.

Babu *Lakshmi Narain Singh* for the respondent. The equity of redemption which the mortgagor had merged, in the security of the

(1) (1903) I. L. R. 30 Cal. 599.
(2) (1879) I. L. R. 5 Cal. 269.

(3) (1892) I. L. R. 21 Cal. 116.
(4) (1879) I. L. R. 5 Cal. 265.

prior mortgagee, and as the prior mortgagee was rightfully [740] in possession of the property he cannot be ousted. The object of joining a prior mortgagee in a suit by a puisne mortgagee is to redeem him. The case of *Bonwari Jha v. Ramjee Thakur* (1) is on all fours with the present case. The respondent is not merely a first mortgagee, but he is also the first purchaser under his decree, which was obtained before the decree in favor of the appellant was passed. The respondent being the first purchaser is entitled to remain in possession: see Dr. Rash Behary Ghosh's *Tagore Law Lectures*, 3rd edition, page 737, and the cases cited therein. A puisne encumbrancer, who not having been made a party by the prior mortgagee to his action, is afterwards allowed to redeem, redeems not the premises strictly speaking, but only the prior incumbrance, and is entitled merely to an assignment of the security.

BRETT AND MITRA, JJ. The facts of this case are a little complicated, but there is no doubt as to what they are, and the main question before us is whether upon the facts, the appellant is entitled to possession of the land covered by the litigation by ejecting the respondent.

On December 3rd, 1887, the respondent obtained a mortgage for Rs. 3,450 of a 5 annas and odd gundas share of a village called Lalwar. On November 18th, 1890, the same mortgagor hypothecated a 4 annas out of the aforesaid 5 annas and odd gundas share of the property to the appellant. On March 7th, 1894, the respondent obtained a decree for sale on his mortgage, but he omitted to make the appellant, the puisne mortgagee, a party to his suit. It does not, however, appear that the respondent had notice of such encumbrance in favour of the appellant. On December 17th, 1897, the appellant instituted a suit on the mortgage to him making the respondent, the first mortgagee, a party. The suit was commenced after the respondent had applied for sale under the decree for sale obtained by him. The respondent was himself the purchaser at the sale held at his instance. The sale was confirmed early in November 1898, and on November 14th, the respondent was put in possession of the property. The appellant [741] got a decree for sale on December 18th, 1898, caused a sale of the 4 annas mortgaged to him and became himself the purchaser long after the respondent had got into possession. After the confirmation of sale the appellant applied for possession, and was actually put into possession by ousting the respondent.

The respondent then applied to the Court executing the decree, *i. e.*, the Subordinate Judge of Muzaffarpur, to be restored to possession, and on December 5th, 1903, the Court passed an order in his favour. The present appellant appealed to the District Judge of Muzaffarpur, but his appeal was dismissed on the ground that none lay under the Code of Civil Procedure.

The Court executing the decree had dealt with the respondent's application as one either under section 244 or section 335, Civil Procedure Code; and it held that he was entitled to relief either way. But the case took a curious turn in the Appellate Court. The respondent formally withdrew his application so far as it referred to and asked for interference of the Court under section 244, Civil Procedure Code. The learned Judge accepted the application and allowed the withdrawal. The case was then taken by the learned Judge to be one simply under section 335, Civil Procedure Code, as if the statement of a party and withdrawal of a part of an application in appeal could affect the real nature

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of the application itself, the proceeding based thereon, and the rights of the parties. As a sequence of the permission to withdraw, the learned Judge came to the conclusion that, inasmuch as no appeal lay from an order under section 335, Civil Procedure Code, he could not deal with the case on its merits in appeal, and he held that the appellant must seek relief by other means, *i.e.*, by a suit.

We are of opinion that the learned Judge should have looked into the true nature of the application with reference to the relief sought and the parties before the Court. A party cannot be permitted to oust the jurisdiction of the Court by a mere statement that his case is under one section of the Code of Civil Procedure and not another, and thereby defeat the just rights of the other party, when, in fact, the matter may and ought to be dealt with under the other section. The present case might come within the purview of section 335, Civil Procedure Code, [752] but section 244 is wider in its scope in some respects, and authorises an enquiry into the question of possession, when the question arises in a proceeding between the parties to a suit and their legal representatives. Under section 244 the Court is competent to afford final relief to contending litigants cheaply, and speedily, and without the necessity of a fresh suit on the same matter. *Prosunno Kumar Sanyal v. Kalidas Sanyal* (1). The appellant was the plaintiff in the suit on his mortgage, the respondent was one of the defendants, and the question for decision related to the execution of the decree passed in it. The question should, therefore, be decided by the Court executing the decree, and not by means of a separate suit. The fact that the appellant is also the auction-purchaser does not make section 244 less applicable to the case. Proceedings for the delivery of possession to an auction-purchaser, who is himself the decree-holder, are proceedings in execution of the decree, and a question raised between him and a defendant in the suit is a question which ought to be decided under section 244, Civil Procedure Code. (*Madhusudan Das v. Govinda Pria Chowdhurani* (2)).

The learned Judge declined to exercise the jurisdiction vested in him by law, and we would have remitted the case to him for retrial, if there were any dispute as to the facts. The facts, however, being well established and practically admitted, we proceed to decide the question raised in the case.

The defect in the respondent's title as absolute owner is due to his not having made the appellant, the puisne mortgagee, a party to his suit, but as he had no direct notice of the mortgage in favour of the appellant, and as registration of the puisne encumbrance is not necessarily notice to the prior mortgagee, the decree for sale obtained by the respondent and the proceedings based thereunder are valid, subject to the rights of the appellant as puisne mortgagee. That the latter is not bound by the decree and the sale under it and has the right to reopen the proceedings and redeem the first mortgagee cannot be denied. *Umesh Chunder Sircar v. Zamur Fatima* (3). But can he, by causing a sale under his decree in the [743] presence of the first mortgagee, deprive such mortgagee in possession of the possession obtained by him in due course of law? If the property passed by the sale under the first mortgage free from all liens except that of the appellant, and if the equity of redemption that the mortgagor had, supposing the law in this country recognises the distinction between

(1) (1892) I. L. R. 19 Cal. 633; L. R. 19 I. A. 166. (3) (1890) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201.
(2) (1899) I. L. R. 27 Cal. 84.

legal and equitable estates, was also gone and passed to the first mortgagee, we do not see how the puisne mortgagee can compel him to part with possession without redeeming the first mortgage. A first mortgagee in possession under a prior sale may always shield himself under his mortgage and his purchase, although his right to possession may be defective. The puisne mortgagee's right, when he was not a party to the first mortgagee's suit, is limited to a right of redemption or sale of the mortgaged premises subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter.

In *Chait Narain Singh v. Gunga Pershad* (1) a purchaser on a sale under a decree obtained by a puisne mortgagee was not allowed to have possession as against a purchaser in possession on a sale under a prior mortgage by the same mortgagor, and it was held that the former's purchase and right to possession was subject to the latter's lien. *Desai Lallubhai v. Mudas Kuberdas* (2) is also an authority for the proposition that a prior mortgagee in possession is entitled to remain in possession until redeemed. We took the same view in *Bonwari Jha v. Ranijee Thakur* (3).

The facts of this case are very similar to those of *Debendra Narain Roy v. Ram Taran Banerjee* (4) decided by a Full Bench of this Court. It was there held that a puisne mortgagee not made a party to a suit by the first mortgagee may get a decree for sale and cause a sale of the property subject to the lien of the first mortgagee, and that his remedy is not limited to a right of redemption of a mortgage, and subsequent sale. But the precise question now before us was not before the Full Bench, and was not touched in the judgments of the learned Judges. The case had not arrived at the stage when a discussion of the rights of the purchaser on such a sale might be necessary, and there was no reference to and answer [744] by the Full Bench as to such rights. It might be that a sale under the circumstances would merely operate as an assignment of the right of the puisne mortgagee, and might not affect the purchaser under the first mortgage in his possession, until redemption.

There is another aspect of the case which under the authorities precludes the appellant from claiming possession as against the respondent. The right to possession depends upon the purchaser of the outstanding equity of redemption and is ordinarily determined by the priority of the respective sales at the instance of the different mortgagees (*Nanack Chand v. Teluckdye Koer* (5), *Dingopal Lal v. Balakes* (6) and *Jugal Kissors v. Kartic Chunder* (7)). The equity of redemption in this case had passed to the respondent long before the appellant made his purchase.

The conclusion, therefore, we have arrived at is that the Subordinate Judge was right in directing that the respondent should be restored to possession, and that this appeal should be dismissed with costs.

Appeal dismissed.

(1) (1876) 25 W. R. 216.

(2) (1895) I. L. R. 20 Bom. 390.

(3) (1902) 7 C. W. N. 11.

(4) (1908) I. L. R. 30 Cal. 599.

(5) (1879) I. L. R. 5 Cal. 265.

(6) (1879) I. L. R. 5 Cal. 269.

(7) (1892) I. L. R. 21 Cal. 116.