

possession of the Court, and he cannot be interfered with except with the leave of the Court: see *Ex-parte Cochrane* (1).

The Receiver can neither sue nor be sued without the leave of the Court: see *Miller v. Ram Ranjan Chackravarti* (2). He is the officer through whom the Court exercises its powers of management. In our opinion such an officer cannot be correctly described as a "party interested in a dispute likely to cause a breach of the peace."

But even if the officer of the Court could be so described, we think there would be no jurisdiction in the Magistrate to make any order on him under section 145 without the sanction of the Court. The order directs that the Receiver shall not disturb the possession of the second party; in other words, the Magistrate is assuming a jurisdiction to interfere with the officer of this Court, as such, without the sanction of this Court, and it is well settled law that the Court will not, without its leave, permit its officer to be interfered with: see *William Russell v. The East Anglian Railway Company* (3) and *Ames v. The Trustees of the Birkenhead Docks* (4).

For these reasons the order under section 145 must be set aside. The Rule is made absolute.

*Rule absolute.*

30 C. 599 (=7 C. W. N. 766.)

[599] FULL BENCH.

DEBENDRA NARAIN ROY v. RAMTARAN BANERJEE.\*

[13th, 16th February & 3rd March, 1903.]

*Mortgage—Suit by puisne mortgagee—Right of sale by puisne mortgagee—Decree on first mortgage to which puisne mortgagee was not a party—Transfer of Property Act (IV of 1882) s. 85—Civil Procedure Code (Act XIV of 1882) s. 287—Indian Registration Act (III of 1877) s. 17.*

A puisne mortgagee is entitled to a sale of the property secured by his mortgage, subject to the rights of the first mortgagee, even after the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party.

*Durga Churn Mukhopadhyaya v. Chandra Nath Gupta Chowdry* (5) overruled.

[Cons. 28 B. 153=5 Bom. L. R. 892; Ref. 31 C. 737; 1 C. L. J. 531; (F. B.) 29 A. 385=4 A. L. J. 278=A. W. N. (1907) 97; 27 I. C. 960. 7 C. L. J. 1; 8 C. L. J. 478; 37 C. 796; 62 I. C. 445; 25 C. W. N. 253 F. B. Dist. 31 M. 425=18 M. L. J. 298; 3 M. L. T. 897; 21 M. L. J. 213=9 M. L. T. 481=(1911) 1 M. W. N. 165=9 I. C. 513; Doub. 24 A. 323; Foll. 88 B. 24.]

REFERENCE to a Full Bench in Second Appeal by the defendants, Debendra Narain Roy and others.

The suit was instituted by the plaintiffs, Ramtaran Banerjee and others, for the recovery of Rs. 779-15 on a mortgage bond executed by the defendant No. 1, dated the 7th September 1887, hypothecating the mortgagor's interest in properties A and B described in the schedule to the plaint. The plaintiffs alleged that they were informed on inquiry that property A had been purchased by one Narendra Narain Roy Chowdhry deceased, that father of the defendants Nos. 2 to 6, and by the defendant

\* Reference to Full Bench in Appeal from Appellate Decree No. 2245 of 1899.

*Full Bench*: Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Sale, Mr. Justice Stevens and Mr. Justice Gait.

(1) (1875) L. R. 20 Eq. 292.

(2) (1884) I. L. R. 10 Cal. 1014.

(3) (1850) 3 Mac. & G. 104.

(4) (1855) 20 Beav. 332.

(5) (1899) 4 C. W. N. 541.

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No. 7 at an auction sale, in execution of a decree under a prior mortgage, comprising the interests of the defendant No. 1 and his brother, one Nural Hossein, the mortgagors, in respect of the said mortgage, and that the defendants Nos. 8 to 10 had taken a settlement of the said property from the said auction-purchasers. The plaintiffs prayed (i) that a decree be made for the amount claimed, (ii) that an order be passed for the sale of the mortgaged properties A and B, (iii) that if the prior mortgage be found to [600] be true, the property A may be sold free from the prior mortgage lien of the purchasers in respect of the half share of the defendant No. 1, or that an order be passed for the sale of the said property A, subject to the said prior mortgage lien, and for other reliefs.

The plaintiffs also alleged that as they had not been made parties to the decree obtained under the said prior mortgage, they were not bound thereby.

It appeared that the prior mortgage mentioned in the plaint was executed on the 12th August 1881 by the defendant No. 1 in favour of one Ganga Narain Sen, whereby the share of the defendant No. 1 in property A was hypothecated, and that subsequently to the plaintiff's mortgage, Deboki Nandan Sen and others, the heirs of the said Ganga Narain Sen, brought a suit on their mortgage and obtained a decree. In execution of that decree, the interest of the defendant No. 1 in property A was sold in 1888, and purchased by the father of the defendants Nos. 2 to 6 and the defendant No. 7. It does not appear, however, that Deboki Nandan and his brothers were aware of the plaintiff's mortgage when they brought their suit, or that the auction-purchasers were aware of it at the time of their purchase.

The Court of First Instance at first dismissed the plaintiffs' suit on the following amongst other grounds: (i) that it having transpired in the course of the trial that the property A had been mortgaged by the defendant No. 1 and his brother to several persons before the mortgage of 1881, which mortgage debts were alleged by the defendants Nos. 2 to 6 to have been all paid off by their father, as well as after the mortgage of 1881, some of which subsequent mortgage debts had not yet been paid off, the suit was defective on account of the non-joinder of these several mortgagees as parties, and (ii) as the plaintiffs, as puisne mortgagees, had only the right of redemption against the defendants, their prayer for the sale of the property A must fail.

On appeal the Subordinate Judge held that the defect of parties, if any, should be cured by adding all mortgagees prior and subsequent to the mortgage of 1881 as parties to the suit, and upon other grounds also, not necessary to specify here, remanded the case to the first Court for trial on the merits. On remand the Munsif passed the usual mortgage decree, declaring [601] however, that if the plaintiffs wanted to sell the mortgaged property A, it could only be sold subject to the prior mortgage; or, in other words, that the plaintiffs could sell only the equity of redemption of the defendant No. 1 in that property.

The Subordinate Judge affirmed this Judgment of the first Court on appeal, holding that the order for the sale of the property A, subject to the prior mortgage of 1881, was a proper order.

The defendants Nos. 1, 6, 7, 8 and 9 appealed to the High Court. The appeal came on for hearing before a Division Bench (MACLEAN C.J. and STEVENS J.) on the 15th August, 1902.

Their Lordships entertaining a doubt as to the soundness of the

decision in the case of *Durga Churn Mukhopadhya v. Chandra Nath Gupta Chowdry* (1), referred the case to a Full Bench, with the following opinions :—

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MACLEAN, C. J. As we entertain a serious doubt as to the soundness of the decision in the case of *Durga Churn Mukhopadhya v. Chandra Nath Gupta Chowdry* (1) and, as the point is one of considerable importance, we think the matter must go to a Full Bench. My present view is that the present plaintiff is entitled, as against the present defendants, in whom are now vested the interests of the first mortgagee and of the mortgagor to a sale of the property mortgaged to him, as second mortgagee, subject, of course, to the rights of the prior mortgagee. That originally would have been one of his rights, as is conceded in the case I have cited, and I do not see how that right can be affected or taken away from him by reason of the suit which the first mortgagee brought to enforce his security, not making the second mortgagee, the present plaintiff, a party. If the decision in the case of *Durga Churn Mukhopadhya v. Chandra Nath Gupta Chowdry* (1) be sound, he is deprived of this original right. It seems to me we ought to look, not at what his rights would have been, had he been made a party to the first mortgagee's suit, but what his rights as second mortgagee are as he was not made a party. I take it that it would have been open to him, if there had been nothing else in the case, to have [602] brought a suit, as second mortgagee, against his mortgagor, who is the only person with whom he contracted to realize his security, subject, of course, to the superior rights of the first mortgagee. The cases of *Narayanasami Naidu v. Narayana Rau* (2) and of *Rangayya Chettiar v. Parthasarathi Naickar* (3) lend colour to this view, and I do not think that these decisions are displaced by the later decision in the case of *Muhammad Usan Rowthan v. Abdulla* (4). In this view I think the decision of the Court below is right.

With these observations, as the matter is of importance, and we entertain considerable doubt as to the soundness of the decision in the case of *Durga Churn Mukhopadhya v. Chandra Nath Gupta Chowdry* (1), we refer the case to a Full Bench.

The question referred is whether the plaintiff is entitled to a sale of the property secured by his mortgagee, subject to the rights of the first mortgagee, or whether he is only entitled to redeem the first mortgage.

STEVENS, J. I concur.

On this reference :—

Babu *Karuna Sindhu Mukerjee*, for the appellants. I submit (i) that if the first mortgagee brings a suit on his mortgage and sells the mortgaged property without making the second mortgagee a party, a third party auction-purchaser acquires the equity of redemption with the lien of the first mortgagee; (ii) that if so, all the right that the second mortgagee has, is to redeem; and (iii) that it is only when the first mortgagee has not already sold the property that the second mortgagee can bring it to sale, subject to the first mortgage.

As to what passed at the sale by the first mortgagee, I refer to *Mohan Manor v. Toqu Uka* (5), *Gajadhar v. Mulchand* (6), *Dadoba*

(1) (1899) 4 C. W. N. 541.

(2) (1893) I. L. R. 17 Mad. 62.

(3) (1896) I. L. R. 20 Mad. 120.

(4) (1900) I. L. R. 24 Mad. 171.

(5) (1885) I. L. R. 10 Bom. 221.

(6) (1889) I. L. R. 10 All. 520.

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*Arjunji v. Damodar Raghunath* (1), *Bunwari Jha v. Ramjee Thakur* (2) and *Emam Momtazuddeen Mahomed v. Raj Coomar Dass* (3).

[603] If the second mortgagee sues first, he can sell.

[MACLEAN, C. J. If so, is he deprived of that right by a suit to which he was not a party?]

I refer to *Kanti Ram v. Kutubuddin Mahomed* (4). After sale by the first mortgagee, the second mortgagee has nothing to sell. His lien only remains. He cannot sell his own lien. He can redeem and then sue for his money and apply for sale.

[SALE, J. I can't understand why he should not be able to sell, if he can redeem.]

I refer to *Muhammad Usan Rowthan v. Abdulla* (5) and *Matadin Kasodhan v. Kazim Husain* (6). The question is whether possession of the auction-purchaser can be disturbed at the instance of the second mortgagee: see *Desai Lallubhai Jethabai v. Mundas Kuberdas* (7). The second mortgagee can ask for surplus sale-proceeds. [MACLEAN, C. J. The second mortgagee has also a right to call upon the mortgagor to redeem him.] I refer to *Dorasami v. Venkateshayer* (8).

The cases of *Rangayya Chettiar v. Parthasarathi Naicker* (9) and *Narayanasami Naidu v. Narayana Rau* (10) have been considered and explained in *Muhammad Usan Rowthan v. Abdulla* (5).

There is a distinct finding that my client was a *bona fide* purchaser; and that is sufficient. The proceedings were all good. The auction-purchaser paid off prior mortgages.

[SALE J. If your contention that the auction-purchaser acquired an absolute property be correct, why should the second mortgagee have any right at all, even a right to redeem?]

[MACLEAN C. J. What do you say to the case of *Umes Chunder Sircar v. Zahur Fatima* (11)? In none of the cases has it been held that to redeem was the only remedy.]

Yes. But in the Privy Council case, this question was not before their Lordships. The second mortgagee must first bring a suit for redemption. I represent the first mortgagee. The suit against me must be under s. 92 of the Transfer of Property Act [604] to redeem and then to sell: see also *Dhapi v. Barham Deo Pershad* (12).

Moulvie *Serajul Islam*, for the appellant-defendants Nos. 8 to 10, contended that they being third parties, their settlement remained unaffected.

Babu *Lalmohan Das* (Babu *Nalini Ranjan Chatterjee* with him) for the respondents. The second mortgagee has two rights, namely, (a) to sell the property to realise the money, and (b) a right to redeem. What has he done to forfeit either right? The rights of the first mortgagee remain unaffected by the sale by the second mortgagee. Besides, s. 85 of the Transfer of Property Act is a part of adjective law and cannot affect the rights of parties. The cases of *Gobind Lal Roy v. Ramjanam Misser* (13) and *Umes Chunder Sircar v. Zahur Fatima* (11) are conclusive with

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| (1) (1891) I. L. R. 16 Bom. 486, 491.          | (8) (1901) I. L. R. 25 Mad. 103, 114.                 |
| (2) (1902) 7 C. W. N. 11.                      | (9) (1836) I. L. R. 20 Mad. 120.                      |
| (3) (1875) 14 B. L. R. 403; 23 W. R. 187, 190. | (10) (1898) I. L. R. 17 Mad. 62.                      |
| (4) (1894) I. L. R. 22 Cal. 93.                | (11) (1890) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201. |
| (5) (1900) I. L. R. 24 Mad. 171.               | (12) (1899) 4 C. W. N. 297, 302.                      |
| (6) (1891) I. L. R. 13 All. 432, 464.          | (13) (1893) I. L. R. 21 Cal. 70; L. R. 20 I. A. 165.  |
| (7) (1895) I. L. R. 20 Bom. 390.               |   |

regard to the point now under reference. The case of *Vencatachella Kandian v. Panjanadien* (1) was relied upon by the lower Court. I also rely upon *Narayanasami Naidu v. Narayana Rau* (2). Reference was also made to *Moti Lal v. Karrabuldin* (3).

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Babu *Karuna Sindhu Mukerjee*, in reply. The purchaser of the equity of redemption is entitled to retain possession till the money paid by him is repaid: see *Gokaldas Gopaldas v. Purnamal Preamsukhdas* (4). The case of *Vencatachella Kandian v. Panjanadien* (1) was distinguishable, as there was no judicial sale in that case. If this reference was decided against the appellants, there would be no confidence in judicial sales in this country.

*Cur. adv. vult.*

MACLEAN, C. J. In my opinion we ought to answer the question submitted to us by saying that the plaintiff is entitled to a sale of the property secured by his mortgage, subject to the rights of the first mortgagee, and I propose to add very little to what I have already said when referring the case.

[605] The second mortgagee was not a party to the suit instituted by the first mortgagee against the mortgagor, and he was in no way bound by those proceedings: see the case of *Umes Chunder Sircar v. Zahur Fatima* (5). It would appear that the Judges of this Court who decided that case were of opinion that in such a case the puisne mortgagee was entitled to redeem or to have the property sold (see page 172), and the Privy Council supported that view (see page 179). If, as was laid down in *Gobind Lal Roy v. Ramjanam Misser* (6), a purchaser at a sale in execution of a decree obtained by a first mortgagee, in a suit to which the puisne incumbrancer was not a party, does not displace the latter but stands only in the position of the first mortgagee, there cannot be any doubt that the puisne incumbrancer could, as against the mortgagor, sell, subject to the first mortgage. I should have thought for my own part that, under such a sale the interest of the first mortgagee and of the mortgagor passed to the purchaser, subject to the rights of the puisne incumbrancer. But taking this to be so, it would not assist the present appellant. If there had been no suit by the first mortgagee, the puisne incumbrancer could have sued the mortgagor, and, subject to the mortgagor's right to redeem, have obtained a decree for the sale of the equity of redemption, that is, of the property subject to the first mortgage. See *Kanti Ram v. Kutubuddin Mahomed* (7). This right cannot be taken away by any decree made in a suit to which he was not party, and by which he was not bound.

For these reasons I would answer the question as I have stated above.

The appeal is dismissed with costs, including the costs of this reference.

PRINSEP, J. In this case the first mortgagee, in execution of a decree obtained under the Transfer of Property Act, sold the mortgaged property and it was purchased by a third party.

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| (1) (1881) I. L. R. 4 Mad. 213.                       | (5) (1890) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201. |
| (2) (1893) I. L. R. 17 Mad. 62.                       | (6) (1893) I. L. R. 21 Cal. 70; L. R. 20 I. A. 165.  |
| (3) (1897) I. L. R. 25 Cal. 179; L. R. 24 I. A. 170.  | (7) (1894) I. L. R. 22 Cal. 33                       |
| (4) (1884) I. L. R. 10 Cal. 1035; L. R. 11 I. A. 126. |  |

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The plaintiffs who held a second mortgage were not made parties to that suit, and they now claim to enforce their right as second mortgagees, subject to the previous mortgage in the [606] case of *Umes Chunder Sircar v. Zahur Fatima* (1) their Lordships of the Privy Council have held that proceedings in a suit brought by a first mortgagee to which a puisne incumbrancer was no party are not binding on him so as to affect his right under the second mortgage. There can be no doubt, therefore, that the second mortgagee is entitled either to sell the mortgaged property, subject to the decree obtained by the first mortgagee, the terms of which are not disputed, or to redeem the first mortgage and then proceed against the entire mortgaged property. In this case the rights of the first mortgagee have passed to the auction-purchaser, who has also bought the equity of redemption so as to represent also the mortgagor, subject to any puisne incumbrance. The difficulty that I have felt in dealing with this case arises from the terms of section 85 of the Transfer of Property Act, which required a first mortgagee to make parties to his suit all persons having any interest in the mortgaged property, such as a puisne incumbrancer, *provided that he (the plaintiff) has notice of such interest*. I find it impossible satisfactorily to explain the meaning of this proviso, except to say that section 85 declares that with notice of an interest in the property a suit cannot be brought without making a party having such interest, a party to the suit. But it leaves it open what the result is, if without notice, as in this case, a suit is brought without making such person a party.

In this case both the mortgages were by registered instruments. It has not been found that the first mortgagee had notice of the second mortgage, so that the suit brought by him is not open to any objection as to its form in regard to section 85.

Under rules made by this High Court for the preparation of a proclamation of sale in execution of a decree, careful enquiry has been directed to be made in the terms of section 287 of the Code of Civil Procedure to ascertain and state in that proclamation everything which the Court considers material for the purchaser to know in order to judge of the nature and value of the property. In a proclamation of sale in execution of a mortgage decree, it is most material that it should be known whether there is any incumbrance, prior or puisne to the mortgage, on account of which the property is to be [607] advertised for sale, and enquiry should be directed to ascertain this. For the purposes of such enquiry it is declared that the "Court may summon any person whom it thinks necessary and examine him in respect of any such matters." In drawing attention to these provisions of the law, I desire to impress upon the Lower Courts that it is their duty, before proceeding to sell in execution of a mortgage decree, to endeavour to ascertain whether the mortgaged property is subject to any other incumbrance, and for this purpose they should ordinarily examine both the mortgagee and the mortgagor. It is by such means only that the Court can make known to the purchaser what is material that he should know in order to judge of the nature and value of the property under sale. Without this information the purchaser may be induced to pay much more than the property is worth. He may be liable to a previous mortgage or mortgages unknown to him, or, as in the present case, there may be a puisne mortgage which must materially diminish the value of

(1) (1890) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201.

the right to redeem which he has been induced to purchase. And unless it is known that some inquiry has been held, persons will not purchase at sale in execution of a mortgage decree, or if they do bid, they will not bid beyond the amount of the decree under execution. Even that will involve considerable risk, for the decree under execution may be for a puisne mortgage and the property sold may thus be subject to prior mortgage. It is this uncertainty that prevents persons being concerned in mortgage transactions outside the Presidency towns. I should be glad to see some attempt made by the Legislature to make title, obtained by purchasers at such judicial sales and expressly at sales in execution or mortgage decrees, more certain, or, at all events, less liable to such risks.

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I may mention that the High Courts of Bombay and Allahabad have held that registration of a mortgage deed amounts to notice of a mortgage. This High Court has refused so to interpret the law. I regard this as unfortunate, because it tends to complicate all mortgage transactions. The law requires the registration of all mortgages of immoveable property "of the value of one hundred rupees or upwards" (Indian Registration Act, III of 1877, section 17), and it seems to me that by refusing [608] to recognize registration of a mortgage as notice thereof, the full benefits of registration are lost. A purchaser at a judicial sale in execution of a mortgage decree is not protected as he should be. But however that may be, I desire to impress upon the Courts that it is their duty as much as possible to inform persons, desiring to purchase in execution of decrees passed by them, of what it is material that they should know, in order to judge of the nature and value of the property under sale, by taking such steps as I have indicated in the preparation of the sale proclamation.

In answer to the question put to this Full Bench I would reply that, notwithstanding the sale under the previous mortgage in proceedings to which the plaintiff as second mortgagee was no party, he has still the right to redeem that mortgage, and he has also the right to sell the property, subject to the decree under the previous mortgage. He can thus sell the property outright, in which case the amount due under the decree on the first mortgage will be first satisfied out of the sale-proceeds, or he can, if so advised, sell only the right to redeem that mortgage, that is to say, the right still remaining in him.

SALE, J. I agree that the reference should be answered in the manner proposed by the learned Chief Justice. If it be conceded, as it has been in this case, that the plaintiffs' right to redeem remains unaffected, it follows in my opinion that the plaintiffs must also have the right to have the mortgaged property sold, subject to the obligation or charge in respect of which the right to redeem exists.

STEVENS, J. I agree in the answer which the learned Chief Justice proposes to give to the question that has been referred to us. It seems to me that any other answer would involve the proposition that the second mortgagee may be prejudicially affected by proceedings to which he was not a party, and by which, therefore, on general principles, he was not in any way bound.

GEIDT, J. I agree with my Lord the Chief Justice.

*Appeal dismissed.*