

1904
DEC. 16.

APPEAL
FROM
ORIGINAL
CIVIL.

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C. W. N. 217.

litigation has cost the rate-payers over Rs. 8,000. I do not know who is responsible in these matters, but more supervision or more care, might apparently be exercised.

As regards the costs of the cross-objection we make no order.

The appeal will be dismissed with costs. The cross-objection will be dismissed without costs.

SALF. J. I agree and wish to associate myself with the remarks which the Chief Justice has made as regards the unfortunate nature of this litigation.

HARINGTON, J. I also agree.

Appeal dismissed.

Attorneys for the Appellants : *Sanderson and Co.*

Attorneys for the Respondent : *K. N. Mitter & Sarbadhikari.*

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[283] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Brett.

RAMSARAN DAS *v.* RAM PERGASH DAS.*

[13th January, 1905.]

Mortgage-lien—Collusive decree—Fraud—Landlord and tenant—Sale for arrears of rent—Right of suit.

When a landlord in collusion with his tenant obtained a decree for rent and in execution thereof purchased the holding, the lien of a mortgagee under the tenant of a part of the holding should be held to continue to subsist upon the land, and the mortgagee would have the same right against the landlord as he would have against the mortgagor.

SECOND APPEAL by the plaintiff, Ram Saran Das.

The allegations in the plaint material to this report are as follows :—
The defendant second party held a *jote* under the defendant first party. One bigha of land being a part of the said *jote* was mortgaged to the plaintiff by the defendant second party by way of usufructuary mortgage under which the plaintiff was in possession. The defendant first party with the dishonest motive of doing injury to the plaintiff brought a fraudulent and collusive suit for rent against the defendant second party who confessed judgment. The defendant first party took out execution and by fraudulent and collusive proceedings brought the aforesaid one bigha of land to sale and purchased it himself. The plaintiff therefore brought the present suit against the defendants first and second party for the following among other reliefs : (i) That it might be adjudicated that the aforesaid one bigha of land was mortgaged to the plaintiff as aforesaid and that he was entitled to hold it until satisfaction of the amount covered by the mortgage-bond : (ii) That it might be declared that the proceedings [284] terminating in the decree and sale aforesaid were fraudulent and collusive and that the sum due to the plaintiff under the mortgage-bond still formed a charge on the aforesaid one bigha of land. The suit was contested only by the defendant first party, the defendant second party not appearing.

* Appeal from Appellate Decree, No. 47 of 1903, against the decree of Lalit Kumar Bose, Officiating Subordinate Judge of Mozufferpore, dated July 11, 1902, reversing the decree of Mahammad Zahoor, Additional Munsif of Sitamarhi, dated Feb. 15, 1902.

The Munsif who tried the suit in the first instance found, that the decree and the execution proceedings were fraudulent and collusive, and gave the plaintiff a declaration that he was entitled to have the decree and execution-sale set aside.

On appeal preferred by the defendant first party, the Subordinate Judge found that the entire holding of the defendant second party was sold at the aforesaid execution-sale, and that the plaintiff being a transferee of a portion of the holding had no right as against the defendant first party. He accordingly dismissed the suit without going into the question of fraud and collusion. The plaintiff appealed to the High Court.

Babu *Lakshmi Narayan Singh*, for the appellant. The plaintiff's allegation is that the landlord and the tenant have colluded with each other to defeat his rights ; that gives him a right of suit against both, and the Court of Appeal below ought to have gone into the question of fraud and collusion.

[RAMPINI, J. You are not entitled to set aside the decree or sale. You are entitled to a declaration that the decree and sale if collusive have not affected your mortgage lien.]

That is so. The plaintiff has asked for more but he may have what he is entitled to.

Babu *Umakali Mukerjee*, for the respondent (defendant first party). As purchaser or mortgagee of a part of the holding the plaintiff has no right against the landlord ; the plaintiff's cause of action against me must depend on his title against me—but he has none : *Kuldip Singh v. Gillanders Arbuthnot & Co.* (1). The plaintiff has not asked for the relief to which he is entitled, why should he get it ?

Babu *Lakshmi Narayan Singh*, in reply, referred to prayer (iv) in the plaint.

[285] RAMPINI AND BRETT, JJ. This is an appeal against the decision of the Subordinate Judge of Muzaffarpur. This suit out of which this appeal arises was one brought to obtain a declaration that certain proceedings between the defendant first party and the defendant second party were fraudulent and collusive, and for other reliefs. The facts of the case are that the plaintiff is a mortgagee of a portion of the defendant second party's holding. He advanced a sum of Rupees one hundred, and obtained a mortgage of one bigha of land which formed only a part of the defendant second party's holding. He alleges that the defendant first party, who is the defendant second party's landlord, collusively sued the defendant second party for his rent ; that the defendant second party confessed judgment ; and that the defendant first party put up the holding to sale in execution of his collusive decree, purchased it himself, and is now in occupation.

The plaintiff in his plaint prayed for various reliefs, among which was the following, that the decree of the 10th December, 1900, passed in favour of the defendant first party, and the execution sale of the 7th February, 1901, be set aside.

The Munsif gave him a decree to this extent, holding that the proceedings were fraudulent and collusive.

The defendant first party alone appealed to the Subordinate Judge, who held that as against the defendant first party the plaintiff had no cause of action. He abstained from deciding whether the proceedings

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which terminated in the sale of the holding were fraudulent and collusive, and dismissed the suit.

The plaintiff now appeals, making both the parties, defendants, respondents. It has been pressed before us that the Subordinate Judge is wrong in the view he took, that there was no cause of action against the defendant first party, and that he should have proceeded to decide the question whether the suit for arrears of rent and the sale of the holding in execution of the decree in that suit were fraudulent and collusive or not.

We think that the Subordinate Judge is in error in saying that the plaintiff had no cause of action as against the defendant first party. Whether the proceedings were fraudulent and collusive, is we think the main question upon which the decision of the case turns. The Subordinate Judge should have entered into [286] that question and decided it. It is perfectly clear that if the proceedings in the rent decree and the execution sale were *bona fide*, the plaintiff can certainly get no relief against either defendant. His rights are entirely gone. This is admitted by the learned pleader for the appellant. On the other hand, if the proceedings were fraudulent and collusive, we think that the plaintiff has a right to some relief. As against the defendant second party, his rights are either to be paid off or to bring the mortgaged property to sale in execution of the mortgage lien; and it appears to us that if the defendant first party entered into collusive proceedings with the defendant second party and caused a transfer of the holding to him, then the plaintiff's mortgage lien should not be held to be destroyed, but should be held to continue to subsist upon the land, although it has now passed to the hand of the defendant first party. This view of the case is in no way inconsistent with the ruling in the second appeal No. 1894 of 1887, decided on the 31st July 1888 by Wilson, J. and a member of this Bench.

Under the circumstances, we must set aside the decree of the lower Appellate Court and remand the case to that Court to be decided in accordance with these observations. If the proceedings referred to by the Subordinate Judge were *bona fide*, the plaintiff has no right: if they were not *bona fide*, then the plaintiff will have the same right against the defendant No. 1 as he would have against the defendant second party. And we may observe that this relief is covered by the fourth prayer in the plaint in which the plaintiff prays that if the sale be allowed to stand, then it may be declared that the mortgage property is not free from the liabilities and that the plaintiff's dues form a charge upon the property in suit.

The costs of this appeal will abide the result.

Appeal allowed: case remanded.

32 C. 287 (=2 Cr. L. J. 202.)

[287] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

BHOLANATH SINGH v. WOOD.*

[28th July, 1904.]

*Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145—Parties
—Manager—Title—Possession—Encroachment.*

* Criminal Revision, No. 716 of 1904, against the order of J. N. Roy, Joint Magistrate of Midnapore, dated June 16, 1904.