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BHAIRO SING
v.
UDIKARAN
SING.

to the words above mentioned ;" and another case, *Araikun Dey v. Golam Hossein* (1), is exactly in point with this, and rules that a Collector's judgment as to the genuineness of a patta cannot be pleaded as an estoppel in the Civil Court in an action for ejectment.

There appears to be no difference as to the principle involved between an action for ejectment and one for declaration of title, and we therefore think that the Judge's decision was wrong.

The appeal is allowed with costs, and the case remanded to the lower Appellate Court for trial on the merits.

Def re Mr. Justice Macpherson and Mr. Justice Glover.

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FISWANATH MUKHOPADHYA AND ANOTHER (TWO OF THE
DEFENDANT) v. GOSAIN DAS BARA MADAK (PLAINTIFF)*

Suit to enforce a Lien on Land—Sale of Mortgaged Premises.

SEE ALSO
14 B. L. R.,
41.

A suit to enforce a lien on land which has been mortgaged will lie, and the land as it stood at the time of the mortgage free from subsequent incumbrances may be sold, although a decree for money due upon the mortgage has been obtained, and the right, title, and interest of the mortgagor thereto has under such been once sold.

Baboo *Krishna Sukha Mookerjee* and *Nilmadhab Sen* for appellants.

Baboo *Hem Chandra Banerjee* and *Mahesh Chandra Bose* for respondent.

THE facts of the case sufficiently appear in the judgment of

MACPHERSON, J.—The facts are these: The defendants, Kanto and Radha Sayam Madak, on the 4th of Falgun 1263 (1856), gave the defendant, Krishna Mohan Mookerjee, a bond, to secure the repayment of a certain sum of money. By that bond they hypothecated or mortgaged the lands which are now in suit, by way of further security.

On the 21st Baisakh 1268 (1861), Kanto and Radha Sayam Madak sold those same lands to the defendants, Biswanath and Bholanath.

In 1269 (1862) Krishna Mohan Mookerjee brought a suit on the bond, for the money due to him, and got a decree, no allusion being made to the lands or the existence of a mortgage. This decree is dated the 21st May 1863.

In execution of the decree Krishna Mohan attached the lands covered by his bond, and applied to have them sold. He was opposed by Biswanath and Bholanath, who claimed under their purchase of 21st Baisakh 1268 (1861).

Their claim was disallowed, the lands were actually sold in June 1866, and Krishna Mohan himself purchased them at the sale in execution of his own decree.

* Special Appeal, No. 890 of 1869, from a decree of the Judge of West Burdwan, dated the 19th January 1869, affirming a decree of the Subordinate Judge of that district, dated the 29th October 1868.

Biswanath and Bholanath thereupon sued to establish their title under their purchase of 21st Baisakh 1268 (1861) and to set aside the sale at which Krishna Mohan had purchased. In this suit they were successful, and got a decree on the 21st August 1867, by which it was declared that the lands were not liable to be sold (as against Biswanath and Bholanath) in execution of the decree of the 12th May 1863. The decree of August 21st, 1867, is said to have contained a reservation of Krishna Mohan's right to bring a suit to have it declared that the lands were mortgaged to him, and as such were liable to be sold, and to have them sold.

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After that, in Sraban 1275 (1868), the plaintiff purchased from Krishna Mohan Mookerjee, his rights under the decree of the 12th May 1863, and thereupon (on the 20th August 1868) instituted the present suit, praying to have the lands sold in execution of that decree, on the ground of their having been mortgaged by the bond of the 4th of Falgun 1263 (1856).

Both the lower Courts have decided in favor of the plaintiff, and it appears to me that they are substantially right in so deciding. Applying the principle laid down and acted on by the Full Bench in the case of *Gopeenath Singh v. Sheo Sahoy Singh* (1) it seems to me impossible to say that the plaintiff is not entitled to have these lands sold in execution of the decree which he has purchased.

It was contended before us that the present suit will not lie, because all that the plaintiff purchased was the *decree* of the 12th May 1863, and he did not purchase (it is alleged) the rights of Krishna Mohan as mortgagee. But this objection was not raised in either of the lower Courts, and seeing that Krishna Mohan, the mortgagee, who assigned to the plaintiff, is a party defendant, and has not suggested even that he did not mean to assign to the plaintiff his rights both under the decree and the bond, it is too late now to raise this issue. I may add that it is quite clear that it could not at any stage have been raised with success, so long as Krishna Mohan supported the plaintiff's case.

Then it was argued, as it had been in the Courts below, that as in execution of the decree of the 12th of May 1863, the rights, &c., of the judgment-debtor in these lands have been already once sold, they cannot be again sold. But the rights then sold were the rights such as they were on the date of the attachment under which the sale took place; whereas the rights which the plaintiff now seeks to sell are the rights of the mortgagor as they stood on the 4th of Falgun 1263. What is now sought to be sold is very different indeed from that which was sold. There is consequently nothing in this ground of appeal.

I think the appeal ought to be dismissed with costs.

GLOVER, J.—I am of the same opinion.

(1) Case No 2809 of 1863; December 14th, 1864.