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MURAKHSHI
BIBI CHOW-
DEBAIN
v.
WED SHIKH

as a trespasser in respect of such land, and that a suit to enhance would not lie. It is clear that when the land lies within the limits of the jote, and the zemindar sues for enhancement, on that ground, the case clearly falls within the provisions of clause 3, section 17, Act X. of 1859.

The case must go back to the Judge, in order that he may determine whether the land actually had been held by the defendant, and to assess fair and equitable rates.

Then it is contended that as this is a suit for a kabuliat, the suit ought to have been dismissed. This, however, was not purely a suit for a kabuliat, but the Court was asked to order the execution of a kabuliat after determining the rate of rent. We think, therefore, that the Court was at liberty to comply with that portion of the plaint which asked for the ascertainment of a fair and equitable rate, without granting a kabuliat.

Before Mr. Justice Bayley and Mr. Justice Macpherson.

KASIMUNNISSA BIBI AND OTHERS (DEFENDANTS) v. HURANNISSA BIBI,
(PLAINTIFF).*

Mortgage—Lien—Decree.

A executed in favor of B a simple mortgage of certain property. He afterwards executed in favor of C a mortgage by bye-bil-wafa, or conditional sale, of the same property. C obtained a decree for foreclosure, and got possession thereunder. B then obtained a money decree against A, and in execution seized and sold and became the purchaser of the said property, and was put into possession of it. On C suing B to recover possession, B claimed to be entitled to hold the property by reason of the prior lien which he had under the simple mortgage. *Held*, that as B had only got a money decree and no declaration of his rights as mortgagee, he could not set up a prior lien against C.

In 1859, one Momtaz Hossein executed a tamassook, or bond, thereby pledging certain property, the subject of the present suit, in favor of the defendants. Sometime afterwards the plaintiff, in consideration of a sum of money advanced by them, obtained from the said Momtaz Hossein a bye-bil-wafa, or bill of conditional sale, of the property so pledged to the defendants. The plaintiff obtained a decree for foreclosure against Momtaz Hossein, and obtained possession of the property.

The defendant brought a suit for recovery of the amount advanced by him to Momtaz Hossein, and obtained a decree for recovery of the debt due to him. In execution of this decree they caused the property in dispute to be sold, and, having purchased the same, was put into possession thereof.

The plaintiff instituted this suit for recovery of possession of the property.

The defendants set up that as they had a prior lien upon the property in dispute, they were entitled to hold the same against the plaintiff.

* Special Appeal, No. 1200 of 1868, from a decree of the Judge of East Burdwan, affirming a decree of the Sudder Ameen of that district.

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The Sudder Ameen passed a decree in favor of the plaintiff, which was affirmed by the Judge on appeal.

The defendants appealed to the High Court.

Mr. C. Gregory and Baboo Ambika Charan Banerjee for appellants.

Baboo Bama Charan Banerjee for respondent.

The judgment of the Court was delivered by

MACPHERSON, J.—We think this appeal ought to be dismissed with costs. We do not, however, concur in all that is said by the lower Appellate Court because we think that if the appellants really held a simple mortgage of this property as alleged, they might have obtained a decree declaring their right as mortgagees, and their right to have the lands sold in execution of the decree free from all incumbrances accruing subsequent to the date of the mortgage. But the mortgagees got no such decree. They got a simple decree for money and in execution of that decree they had the property sold, and themselves became the purchasers of it. Thereupon they ejected the plaintiffs (respondents) who were entire strangers to their decree; and when the plaintiffs sued to recover possession, the appellants opposed them upon the ground that although they (the appellants) had not got a decree establishing their lien or declaring the property to be subject to it at the time that the property was sold in execution, still in fact they had a lien on it by reason of its being hypothecated to them by a simple mortgage, and, therefore, the plaintiff ought not to be allowed to recover possession.

We have no doubt that if a mortgagee who holds a simple mortgage bond wishes to sell the property so as to get the full benefit of his mortgage, he must get a distinct declaration from the Court of his rights over the property as mortgagee, as well as a decree for its sale. This was decided by a Full Bench in the case of *Gopeenath Singh v. Sheo Sahoy Singh* (1). If a mortgagee sells the property without having obtained such a declaration, he cannot get the full benefit of his mortgage, by setting up a plea of lien, if he has become the purchaser under his own decree, and has contrived to get himself put into actual possession. If the course contended for could be followed; a third party, such as the plaintiffs in the present case, would be exposed to what might be a very great hardship. For he would be deprived of what is otherwise his undoubted right, *i. e.* the option of satisfying the decree rather than having the property sold in execution. The view we now express accords with the decision of the Full Bench I have already referred to, and also with a decision, *Golakmani Debi v. Ramsundar Chuckerbutty* (2).

We think the appeal ought to be dismissed with costs.

(1) Case No. 2809 of 1863, 14th Dec. (2) 9 W. R., 82.
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