

The 11th January 1871.

Present:

The Hon'ble E. Jackson and Onookool
Chunder Mookerjee, *Judges*

Mortgage—Money-decree—Right of action.

Case No. 1497 of 1870.

*Special Appeal from a decision passed by
the Subordinate Judge of Sylhet, dated
the 23rd April 1870, reversing a decision
of the Moonsiff of Lushkerpore, dated
the 15th February 1870.*

Radha Gobind Surmah (Plaintiff), *Appellant,*

versus

Syud Umber Ali and others (Defendants),
Respondents.

*Baboo Debendro Narain Bose for
Appellant.*

*Moulvie Syud Murhumut Hossein for
Respondents.*

A suit can be brought for the declaration of a person's right to have a mortgaged property put up for sale, notwithstanding a money-decree has already been obtained upon the mortgage-bond, and the property has passed into other hands.

Jackson, J.—THE plaintiff in this suit is special appellant. He obtained a mortgage from one Busseerooddeen of the disputed property in December 1864. Subsequently, in April 1868, he obtained a money-decree upon that mortgage-bond against Busseerooddeen. The defendants Nos. 1 and 2 appear in the meanwhile, namely, in the year 1865, to have been engaged in litigation with the same Busseerooddeen, and to have obtained against him a decree for costs; and in execution of that decree the rights and interests of Busseerooddeen in the disputed property were sold in June 1867, and were purchased by the defendants Nos. 1 and 2.

Afterwards, when the plaintiff sought to execute his money-decree against this mortgaged property, these defendants objected to the sale on the ground that they were then

in possession of the property. Their objections were held good, and the property was released. The plaintiff has now brought this suit upon the mortgage-bond, for a declaration that this disputed property has been mortgaged to him by Busseerooddeen for the payment of the money due upon the mortgage-bond, and that it is liable to be sold to recover that amount.

The first Court came to the conclusion that the plaintiff was entitled to a decree. It looked to the allegations of the defendants that this mortgage-bond was a fraudulent and collusive transaction, and it came to the conclusion that no sufficient ground whatever existed for holding that it was fraudulent, and that the plaintiff had given evidence to prove his deed, and that he was entitled to sell this mortgaged property into whatsoever hands it may have gone.

The Appellate Court has set aside this decision. He has given a long judgment, but it is somewhat difficult to follow his argument. He holds that, as this property was sold in 1867 to the defendants, the plaintiff, though he has a prior mortgage upon it, cannot now enforce his right under that mortgage. The Subordinate Judge quotes a decision of the Court to be found in page 82, IX. Weekly Reporter, in support of this view of the law. That decision, however, distinctly states that a suit can be brought for the declaration of a person's right to have a mortgaged property put up for sale, notwithstanding a money-decree has already been obtained upon the mortgage-bond, and notwithstanding that that property has passed into other hands. The same view of the law will be found in page 316, I. Weekly Reporter, decision of a Full Bench of this Court. The question, then, for the decision of the Subordinate Judge was whether the mortgage-bond which the plaintiff put forth was a real *bond-fide* document, or whether it was, as alleged by the defendants, fraudulent and collusive. The Subordinate Judge states in his decision that, in his opinion, the defendants have been unable to prove that it was fraudulent and collusive—but he is of opinion that it was collusive; first, because there was evidence to show that, about the same time as this document was executed, another mortgage-bond was also executed by the same Busseerooddeen to another party; and because some of the witnesses to the two documents are the same; and also because the plaintiff's document was not registered. None of these reasons are any reasons what

ever for holding that the document was fraudulent. It is by no means uncommon to execute a second mortgage of the same property, and the fact that the same witnesses were present at those two transactions is no ground whatever for suggesting that either the one or the other is fraudulent. And it is hardly necessary to say that the fact that the mortgage is not registered is no reason whatever for setting it aside. The plaintiff in this case put forward his claim upon this mortgage-bond years before the defendants purchased this property as belonging to his mortgagor; years before the defendants purchased the rights and interests of the mortgagor with their eyes open, fully knowing that the plaintiff claimed to hold certain interest in that property. The defendants having failed, as far as we can see from the Lower Appellate Court's decision, to satisfy that Court that this document is in any way fraudulent, the plaintiff was entitled to the decree which he obtained from the Lower Court. We set aside the decision of the Lower Appellate Court, and restore and affirm that of the first Court. The costs of this Court and of the Lower Appellate Court will be paid by the respondents in this special appeal.

Mookerjee, J.—I concur.

The 12th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Declaratory suit—Cause of action.

Case No. 1646 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 19th July 1870, reversing a decision of the Moonsiff of Jehanabad, dated the 13th May 1870.

Ram Gopal Tewaree (Defendant),
Appellant,

versus

Gora Chand Poryal and others (Plaintiffs),
Respondents.

Baboos Kishen Succa Mookerjee and Grish Chunder Ghose for Appellant.

Baboo Rajendro Nath Bose for Respondents.

In a suit for establishment of lakheraj title to, and confirmation of, possession in land which was alleged to have been brought to sale and purchased in execution by the principal defendant, who had then sued some of the plaintiffs for a kubooleut:

HELD that there had been no invasion of plaintiffs' title even if they had a lakheraj title, and that therefore they had no cause of action.

Kemp, J.—THIS is a suit on the part of several plaintiffs, alleging that the 12 cot-tahs of land in suit formed their lakheraj holding; that the principal defendant, in execution of a decree against one Abdool Kurreem, No. 350 of 1865, attached the property in dispute with other properties, and secretly brought about a sale, and purchased the rights and interests of the aforesaid Abdool Kurreem. Subsequently the defendant sued some of the plaintiffs for a kubooleut. The names of the plaintiffs who were then sued are stated in the plaint, and it is here unnecessary to name them; and that the plaintiffs became aware of the sale from the fact of the suit for a kubooleut being brought. Then the plaint goes on to say: "Although we are, up to the present moment, *i. e.*, at the time of bringing the suit, in possession, still there are prospects in future of our title being threatened or otherwise invaded by this secret sale." Therefore, the suit is brought for confirmation of the plaintiffs' possession and for the establishment of their lakheraj title. The written statement of the defendant is to the effect that the land in dispute was held by the plaintiffs as tenants, and that they paid rent to his judgment-debtor; and that he, having purchased the rights and interests of his judgment-debtor, was entitled to receive rent from the plaintiffs.

The Lower Appellate Court, in a judgment which is very difficult to understand, states that the Court thinks "that, when the defendant was capable of adducing some witnesses as heirs of his judgment-debtor's vendors, showing that they were not opposed to his interests, he ought satisfactorily to have established with plaintiffs' kubooleuts and collection-records that plaintiffs had held as ryots, and throughout paid rent at first to Oojul, next to his heirs, and lastly to the judgment-debtor, until defendant purchased the judgment-debtor's rights; and as such has not been done, and defendant has