

## APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

MUTHORA NATH PAL (PLAINTIFF) v. CHUNDERMONEY DABIA  
(DEFENDANT).\*

1878  
Sept. 14.

*Mortgagor—Mortgagee—Purchaser of Property mortgaged from Grantee of Mortgagor—Decree and Sale by Mortgagee—Auction-purchaser—Priority of latter over Purchaser from Grantee of Mortgagor.*

In the year 1869 *A* mortgaged her share in a zemindari to *B*. In 1870 she granted a patni lease of the property to *C*, who transferred it to *D*. Subsequently, *A* made a gift of the property to *E*, and in 1872 *E* sold the land so given to *F*, who thus became the owner of the patni and zemindari rights of the property formerly belonging to *A*.

In 1873 *B* brought a suit against *E* (to which *F* was not a party) on his mortgage-bond, and obtained a decree for the sale of the mortgaged property. At the sale the property was purchased by *G* (the son of *D*). *F* then brought a suit for rent against *G*, and obtained a decree. *G* then brought this suit against *F* to have it declared that he was no longer liable to pay rent, and to establish his zemindari rights, claiming a refund of the money paid under the rent-decree.

*Held*, that *G* had bought the entire interest which *A* and *B* could jointly sell, and not merely the right and interests of *A* as they stood at the time of the sale, and that he was, therefore, entitled to a decree declaring that he was no longer liable to pay rent to *F*.

*Syud Emam Montazuddeen Mahomed v. Rajcoomar Doss* (1) discussed.

In the year 1869, one Omamoyi, the zemindar of a certain property, mortgaged her property to one Hurridoyal Roy under a simple mortgage-bond. In the year 1870 she gave a patni lease of the same property to one Boydonath Mookerjee, and the latter conveyed his rights to one Sourup Chunder Pal (the father of the plaintiff). Subsequently to these proceedings, Omamoyi made a gift of her zemindari rights to her son Gourmohun Roy, who, on the 21st August 1872, sold the property

\* Special Appeal, No. 1665 of 1877, against the decree of R. Towers, Esq., Officiating Judge of Nuddea, dated the 7th May 1877, affirming the decree of Baboo Ketter Mohun Mookerjee, Sudder Munsif of that District, dated the 22nd December 1875.

(1) 23 W. R., 187; S. C., 14 B. L. R., 408.

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to one Chundermoney Dabia, who thus became the owner of the patni and zemindari rights of the property formerly belonging to Omamoyi. On the death of Omamoyi, Hurridoyal Roy (the mortgagee), in the year 1873, brought a suit against Gourmohun Roy on his mortgage-bond, and obtained a decree in the District Court of Hooghly, ordering the money due to be realized by the sale of the mortgaged property. This decree was transferred to the District Court of Nuddea for execution, and, on the 9th March 1874, the property comprised in the mortgage-bond was put up for sale and purchased by the plaintiff Mothura Nath Pal, the son of Sourup Chunder Pal. Chundermoney Dabia, however, claimed the patni rent from Mothura Nath Pal, and on his refusing to pay the same instituted a suit against him, and obtained a decree for the rent due.

Mothura Nath Pal then brought this present suit to have it declared that he was not liable to pay any future rent, inasmuch as the effect of his purchase in execution of the decree obtained upon the mortgage-bond was to give him a good title to the zemindari as against the defendant. He further asked to have the rent paid by him under the decree obtained by Chundermoney, refunded to him.

The defendant contended that Gourmohun Roy had no right to, or possession of, the property now in dispute at the time of the auction-sale, and that, under the certificate of sale, nothing else than the right and title of the judgment-debtor passed. She further stated that she was not made a party in the suit brought by the mortgagee, and that, therefore, she could not be affected by the decree in that suit. She also stated that the decree passed in the Court of Hooghly was passed without jurisdiction, as the property was situated in the Zilla of Nuddea.

The Munsif found that the defendant was not bound by Hurridayal's decree on the mortgage, and the subsequent sale, on the authority of the case of *Ram Yad Singh v. Lalla Saligram Singh* (1) and the case of *Soobuns Singh v. Ishur Dutt Mitter* (2); that the defendant was a purchaser without notice of the mortgage, and at a time prior to the institution of the suit

(1) 16 W. R., 98.

(2) 21 W. R., 150.

to enforce the mortgage; that she had no chance of redeeming the mortgage as she was not made a party to the suit; and moreover, the plaintiff purchased in execution of the decree which was without jurisdiction, inasmuch as the decree was made by the Judge of Hooghly against property situated in the District of Nuddea. He, therefore, dismissed the suit with costs.

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The plaintiff appealed to the Officiating Judge of Nuddea, who found the question in issue to be whether the plaintiff's purchase at the execution-sale was to be preferred to that of the defendant, which was prior in point of time, but long subsequent to the date of the mortgage in execution of the decree under which the sale was held; and held that the Court of Hooghly was not empowered to pass a decree against property which was situated in Nuddea, that the defendant had not been made a party to that suit, and therefore, in accordance with the case of *Syud Emam Momtazuddeen Mahomed v. Raj-coomar Doss* (1), dismissed the appeal.

The plaintiff appealed to the High Court.

*Baboo Rash Behary Ghose* for the appellant.—The Court of Hooghly had jurisdiction, inasmuch as the decree of the Court was transferred to the Court of Nuddea for execution, the plaintiff by his purchase acquired a lien on the mortgage, and the suit should not, therefore, have been dismissed, but his rights under the execution-sale should have been declared, or at all events reserved.

*Baboo Gooroodas Banerjee* for the respondent.

The judgments of the Court were:—

MARKBY, J. (after stating the facts of the case continued):—The plaintiff has appealed. One ground taken in special appeal is, that the sale by the Court of Nuddea in execution of the decree of the Court of Hooghly could not transfer more than the rights and interests of the mortgagor: and that the Court of Hooghly had no jurisdiction to make a decree which would affect the rights of Chundermoney. But the Hooghly Court had

(1) 23 W. R., 187.

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jurisdiction to give a decree for the debt due under the mortgage-bond, and it had also jurisdiction to transfer that decree to any other Court for execution. So also the sale by the Court of Nuddea, to which the decree had been transferred, was perfectly regular; and I can see no objection to our dealing with this case precisely as if the property had been sold in execution of a decree of the Nuddea Court for the debt due under the mortgage-bond. What then would have been the effect of a sale in execution of such a decree of the Nuddea Court? It would, according to the Full Bench decision referred to by the District Judge, be just as effectual as a sale in execution of a decree which expressly ordered the mortgaged property to be sold. Upon that point, the decision of the Full Bench is clear and conclusive.

The important question is, what is the effect of such a sale upon the rights of Chundermoney, who derives her title from a grant by the mortgagor posterior to the mortgage-bond?

It is I think clear law, that the mortgagor cannot, by a subsequent grant, derogate from the rights of his mortgagee to be paid his principal, interest, and costs out of the property pledged; and that the proper, and indeed the only, mode for the mortgagee to realize his money under a mortgage of this kind (*i. e.*, an ordinary Bengalee bond pledging the land) is to get a decree for it and to bring the mortgaged property to sale by process of execution. The great difficulty is to determine how such a sale by the first mortgagee affects persons claiming under grants or mortgages subsequent to the creation of the first mortgage-security.

Prior to the Full Bench decision in the case of *Syud Emam Montazuddeen Mahomed v. Rajcoomar Doss* (1) there never had I think been any substantial doubt that the first mortgagee had a right to bring to sale the mortgaged property as it stood at the date of the incumbrance. It was, however, supposed that this must be done by obtaining what was called "a decree declaring the lien," as distinguished from a "money-decree." It was also pretty well settled, or at any rate by that decision it was made clear, that upon a sale by the mortgagee, whatever

(1) 23 W. R., 187.

might be the form of his decree, all his own rights as well as those of the mortgagor in the mortgaged property passed to the execution-purchaser.

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That decision, however, contrary to a notion which had up to that time received considerable countenance, lays down that a sale upon a decree "declaring the lien" gives no rights to the purchaser in execution as against subsequent incumbrancers which he did not possess under a sale upon a "money-decree."

Of course this leaves the question as to what these rights are, undetermined. There are, however, some expressions in the judgment delivered by Sir Richard Couch, which at that time seemed to me to imply, that under a sale in execution by a mortgagee in a suit to which the mesne incumbrancers were not parties, the purchaser took subject to the rights of the mesne incumbrancers.

It was under the impression that this was the meaning of Sir Richard Couch's judgment that I gave my decision in *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (1). I may observe, however, in passing that that decision did not in reality depend at all upon any question touched upon by the Full Bench judgment. The basis of that decision is the principle laid down by Mr. Justice Macpherson in *S. M. Kamini Debi v. Ramlochan Sirkar* (2), and which has been since acted on, that a mortgagee, purchasing his own security, can still be redeemed on payment of principal, interest, and costs.

Upon a reconsideration of the Full Bench judgment, I do not think it decides anything as to the position of subsequent incumbrancers after a sale in execution in a suit by the mortgagee to which they are not parties. I do not think it even decides that subsequent incumbrancers have as a general rule any rights as against the execution-purchaser. It only decides that, if they have any rights, those rights are not affected by the decree. But it seems to me by no means to follow that because the rights of third parties cannot be affected by a decree *inter alios*, that the present plaintiff's suit must be dismissed.

(1) 23 W. R., 338.

(2) 5 B. L. R., 450.

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We pressed the learned pleader who appeared for Chundermoney Dabia to state what the rights are which she now claims. This he found it extremely difficult to do. He did not go so far as to say that she held the zemindari right clear of all claims whatsoever. He seemed disposed to say that Chundermoney had a right to pay off the mortgage, and so to become absolute owner of the zemindari. But even if Chundermoney could by this means become, as against the plaintiff, the owner of the zemindari, that does not show that she is the owner of the zemindari now. The transaction by which the zemindari was brought to sale in satisfaction of the debt must be set aside, all the parties concerned must be brought before the Court, and their rights adjusted. That has not been done, and in the present state of things I think the plaintiff and not Chundermoney is the owner of the zemindari.

It is no doubt the fact that the plaintiff when he purchased had notice that Chundermoney was entitled to the zemindari rent, and it is necessary to consider how that affects him. He was in a very difficult position. If he had done nothing, and had allowed a third person to purchase, his patni title would, to say the least, have been in great jeopardy. It was necessary for him, therefore, either to purchase himself or to pay off the mortgage debt and so stop the sale. But this property being mortgaged together with other properties he must, in order to stop the sale, have paid off, not the debt upon this property alone, but the whole debt, which was probably far beyond his means. Practically, therefore, he was obliged either to allow his patni to be sacrificed, or to purchase; and I do not see why he should be in a worse position than any other purchaser. The proceedings by which the property was brought to sale were not under his control, and he seems to me to have acted *bonâ fide* for the protection of his own interest. It seems to me, therefore, that the plaintiff is entitled to a decree declaring that he is not liable to pay any rent to the defendant Chundermoney. If she can establish her right to the zemindari by any suit, properly framed for that purpose, she will be at liberty to do so. The decision of the lower Court will be reversed, and the plaintiff will get a decree

declaring that he is not liable to pay rent to the defendant. I do not think the declaration ought to go further; nor will any direction be given as to the refund, which is probably a matter of small amount. The plaintiff will get his costs in this Court and the Court below.

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PRINSEP, J.—Understanding the opinion of the majority of the Full Bench in the judgment delivered by Sir R. Couch, Chief Justice, in the case of *Syud Emam Momtazuddeen Mahomed v. Rajcoomar Doss* (1) to be, that when a mortgagee puts up mortgaged property to sale in execution of a decree “he sells the entire interest that he and the mortgagor could jointly sell,” and not merely the right and interest of the mortgagor as they stood at the time of the sale, and, feeling bound by that opinion, I agree in allowing the plaintiff’s claim in the present suit as against the third party Chundermoney who bought the rights of the mortgagor subject to the mortgage.

*Appeal allowed.*

*Before Mr. Justice Jackson and Mr. Justice McDonell.*

BADAN BEBAJEA (DECREE-HOLDER) v. KALA CHAND BEBAJEA  
(JUDGMENT-DEBTOR).\*

1879  
March 24.

*Execution of Decree of Small Cause Court—Act X of 1877, s. 648.*

A decree of a Small Cause Court can be executed by it at any place within the local limits of the District Court to which it is subordinate as defined by s. 2 of Act X of 1877 without having recourse to the procedure under s. 648 of Act X of 1877, which applies only to cases in which a decree passed in one district has to be executed in another district.

THE facts of this case sufficiently appear from the order of reference, which was as follows:—

The judgment-debtor, who was a resident of this place when the suit was instituted, is no longer here, and the decree-holder

(1) 23 W. R., 187.

\* Small Cause Court Reference, No. 356 of 1879, from an order made by W. H. Verner, Esq., Officiating Judge of Backergunge, dated Barrisal, the 17th December 1878.