

INDIAN LAW REPORTS. [VOL. XXXVII.  
APPELLATE CIVIL.

*Before Mr. Justice Brett and Mr. Justice Sharfuddin.*

1909.

Dec. 10

BHAJAHARI MAITI

v.

GAJENDRA NARAIN MAITI.\*

*Mortgage—Sale of mortgaged property—Prior Mortgagee, right of, to deposit in Court decretal amount in payment of puisne mortgage-debt.*

A second mortgagee brought a suit on his mortgage making the transferees of the prior mortgagee parties to the suit, and obtained a decree; and in execution thereof the transferees applied to be allowed to deposit in Court the full amount of the second mortgage-debt in order to save the property from sale. The Court of first instance allowed the application; but, on appeal, the District Judge set aside the order of the first Court:—

*Held*, that the transferees of the prior mortgagee were entitled to pay off the mortgage-debt due on the subsequent mortgage to save the mortgaged property from sale.

SECOND APPEAL by Bhajahari Maiti and another, the transferees of the prior mortgagee.

The facts are briefly these. The respondent, Gajendra Narain Maiti, a puisne mortgagee, obtained on a suit to realize his security a decree for sale of the mortgaged property. The appellants, who were the transferees of a prior mortgagee, were made parties to the suit, and in execution of the decree they applied for permission to save the sale of the mortgaged property by depositing in Court the whole of the decretal amount in full satisfaction of the debt due to the puisne mortgagee.

The Munsif allowed this application, and the sale was consequently not held. But on appeal, preferred by Gajendra Narain, the learned District Judge set aside the order of the first Court, holding that the prior mortgagee had no right to redeem.

\*Appeal from Order No. 24 of 1909 against the order of E. F. Forrester, District Judge of Midnapore, dated Nov. 4, 1908, reversing the order of Ram Dulal Deb, Munsif of Contai, dated July 17, 1908

The transferees of the prior mortgagee, thereupon, appealed to the High Court.

*Babu Kally Krishna Sen*, for the appellants.

*Babu Haribhushan Mukerjee* and *Babu Ashitaranjan Chatterjee*, for the respondent.

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BRETT AND SHARFUDDIN JJ. The present appeal is against an order of the District Judge of Midnapore setting aside on appeal an order passed by the Munsif, first Court, of Contai, on an application made by the present appellants in a proceeding in execution of a decree on a mortgage bond obtained by a second mortgagee. It appears that the respondent, who was the second mortgagee, brought a suit on his mortgage, making the present appellants, who are alleged to be the transferees of the prior mortgagee, parties defendants. A decree was obtained by the respondent, and execution was sought by sale of the mortgaged property. The appellants applied to be allowed to deposit the full amount of the mortgage-debt in payment of the decree and so to save the property from sale. They alleged that they had purchased the entire rights of the mortgagor in the mortgaged property, and they claimed, as such purchasers, to be entitled to pay off the full mortgage-debt due to the decree-holder. The Court of first instance held that the appellants were entitled to deposit the money in payment of the decree, and that Court went on to explain that this was in order to prevent multiplicity of litigation. The learned Judge has set aside that order, and we are unable to say that his judgment is very clear, or that it shows that he has quite grasped the position of the parties and the rights claimed by the appellants. So far as we can gather, there was no real dispute that the present appellants had purchased the rights of the original mortgagor; but whether they had purchased or not, we think that the view of the law which the learned Judge has taken is not correct. Even supposing that the appellants were held to occupy the position of prior mortgagees, we are of opinion that there is nothing in the law to prevent

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them, in a case like the present, where they have been made parties to the suit by the second mortgagee, from claiming their right to pay off the second mortgage and so save from sale the property which stands as security for their mortgage-debt.

It has been contended on behalf of the respondent that a prior mortgagee has no right, even when he is made a party to the suit brought by the puisne mortgagee on his mortgage, to pay off the second mortgage in order to save the property from sale. If he has not that right, it is difficult to understand what is the use or necessity of making him a party to the suit at all. In our opinion, he is made a party to the suit in order to give him an opportunity, if he wishes, to pay off the second mortgage, if the mortgagor refuses to pay it off, and so to save the property which stands as security for his mortgage from being sold. The learned pleader for the respondent contends that, under the law, a prior mortgagee must stand by the suit brought by a puisne mortgagee and allow the property to be sold subject to his mortgage lien, and then, when this is done, he must bring a fresh suit on his own mortgage, resell the property, and so recover his own mortgage debt. We do not think that, under the law, this is necessary; and in several cases it has been held by this Court that a prior mortgagee, in an application under section 244 of the Code of Civil Procedure in execution, is entitled to have his rights settled without being put to the extra expense and unnecessary trouble of bringing a fresh suit. This was the view which was taken by us only recently in the case of *Gobind Prosad Misser v. Lachmi Chandra Marwari*† (S.A. 2088 of 1906), and we think that this is the view which we should adopt in the present case. In our opinion the present appellants, certainly as purchasers, if they are entitled to that position which seems to us to have been conceded in the Court of first instance though it was questioned in the lower Appellate Court, and equally so, if they are prior mortgagees, are entitled to pay off the mortgage-debt due on the second mortgage in order to save from sale the property which they (appellants), if they are the purchasers,

† Unreported.

have purchased, or which, if they are the prior mortgagees, has been hypothecated to them as security for their mortgage-debt.

The result, therefore, is that we decree the appeal, set aside the judgment and order of the lower Appellate Court, and restore those of the Court of first instance with costs in all Courts. As the Court of first instance has not fixed the time within which the deposit is to be made by the present appellants, we think that the order should run as follows:— That the present appellants are entitled to deposit, within one month from the date of the arrival of the record in the Court of first instance, the sum which shall be found, on an account being taken by that Court, to be due to the second mortgagee in discharge of his mortgage-debt, with costs and interest up to the date of payment. On their failure to do so, execution of the decree of the opposite party will proceed.

*Appeal allowed.*

L. D. B.

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## CRIMINAL REVISION.

*Before Mr. Justice Stephen and Mr. Justice Carnduff.*

HARAN MANDAL

v.

MOHIM CHANDRA PRAMANIK\*.

1910  
Jan. 4.

*Dispute concerning land—Tenant interested in the subject of dispute—Addition of the tenant to the proceedings to show that there is no dispute likely to cause a breach of the peace—Criminal Procedure Code (Act V of 1898), s. 145, cl. (5).*

A person claiming to be interested in the subject of dispute as a tenant, who was not required to attend as a party, should be heard under s. 145 (b) of the Criminal Procedure Code in order to show that no dispute likely to cause a breach of the peace exists.

ON the report of the Sub-Inspector of Police of the Dracope thana, alleging an apprehension of a breach of the peace, the

\* Criminal Revision No. 1316 of 1909, against the order of H. P. Bhatta charjee, Deputy Magistrate of Khulna, dated Aug. 16, 1909.