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Benarsi Vs. Bhullu and ors.

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SooperKanoon Citation : sooperkanoon.com/483489

Court : Allahabad

Decided On : Feb-26-1923

Reported in : AIR1923All423; 73Ind.Cas.227

Judge : Gokul Prasad, J.

Appellant : Benarsi

Respondent : Bhullu and ors.

Judgement :

Gokul Prasad, J.

1. The question raised in this appeal is a very short one, namely, whether the puisne mortgagee can sue successfully for a decree for sale of the mortgaged property without impleading a prior mortgagee who has already purchased the mortgaged property in execution of a decree for sale on his mortgage without impleading the puisne mortgagee.

2. The Courts below have answered this question in the negative and have dismissed the plaintiff's puisne mortgagee's suit for sale.

3. He comes here in second appeal and contends that, under the new Code of Civil Procedure, the puisne mortgagee can bring the mortgaged property into sale without impleading a prior mortgagee. That Rule would, of course, apply in an

ordinary case in which the property belongs to the mortgagor, but here the relief claimed by the puisne mortgagee is against the mortgaged property which has been sold in satisfaction of a decree on a prior mortgage to which he was not a party. The ordinary Rule of a property being sold in execution of a prior mortgage is that the property is sold free of all puisne incumbrances and the only right which a puisne mortgagee has, is the right to redeem the prior mortgage and bring the property to sale, but because of his not being so impleaded he cannot get rid of his liability to redeem the prior mortgage. In the present case, as I have already stated above, the proprietary rights in the property have vested in the prior mortgagee and the puisne mortgagee cannot have those rights sold without paying up the prior mortgage. What the plaintiff wants really is to have the property purchased by the prior mortgagee sold to satisfy the later debt without redeeming the prior mortgage. This cannot be allowed. He could only redeem the prior mortgage by making the prior mortgagee a party to the suit. He did not intend to do so and he must suffer the consequences. He cannot sell the property in the absence of the owner thereof. In my opinion the Courts below were right. I, therefore, dismiss this appeal with costs including in this Court fees on the higher sacale.

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