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Court : Kolkata

Decided On : Mar-16-1882

Reported in : (1882)ILR8Cal690

Judge : Cunningham and ;Tottenham, JJ.

Appellant : Nilakant Banerjee

Respondent : Chunder Nath Mullick and ors.

Judgement :

Cunningham, J.

1. It is conceded that, for the purposes of the present argument, the decree against Ashutosh's estate, of the 29th August 1866, did not constitute a charge on the property, and consequently that the commencement of the defendant's title cannot date earlier than 24th December 1866,--i.e., subsequent to the plaintiff's mortgage, and that consequently the interest which the defendants purchased was subject to the plaintiff's mortgage; and, therefore, that the independent title set up in the mortgage-suit, which led to its being dismissed as against them, cannot be made out.

2. The question therefore is, whether the original Court is right in considering that the defendants, having got themselves struck out of the plaintiff's mortgage suit on the strength of a title independent of the mortgagors, and not having chosen to

assort their rights as holding under the mortgagors, are at liberty in the present suit to set up those rights and to claim to retain the mortgaged-property now in their possession on payment of the plaintiff's claim against it under the mortgage. Section 13 of the Code provides, that 'no Court shall try any suit or issue in which the matter directly and substantially in issue having been directly and substantially in issue in a former suit, between the same parties, has boon fully hoard and determined'; and Explanation II provides, that 'any matter which might and ought to have been made a ground of defence or attack in such former suit, shall be deemed to have been directly and substantially in issue.' Now the rights of the defendants as holding under the mortgagors certainly constituted a matter which might and ought to have been made a ground of defence, supposing the Court not to have accepted the view that the defendants held by a title prior to, and independent of, the mortgagors, and were on this ground entitled to be discharged from the suit; and it might be contended, therefore, that this question of the defendants' right must be deemed to have been directly and substantially in issue. But it cannot be said that it was 'finally heard and decided,' the view taken by the Court of the defendants' position having rendered any such hearing and decision unnecessary. We think, therefore, that the defendants are not precluded by Section 13 from raising the question of their rights under the mortgagors, and that we are at liberty to consider what those rights amount to.

3. The order of events was as follows: The fi-fa proceedings were subsequent to the plaintiff's mortgage, but previous to the institution of the mortgage suit; and the defendants' purchase in the fi-fa proceedings was subsequent to the mortgage suit; plaintiff's purchase of the mortgaged property was last of all. It has been urged, with reference to these dates, that Khogendro having purchased subsequently to the institution of the mortgage-suit, his purchase could not withdraw any portion of the mortgaged-property from the operation of the decree in that suit, and, consequently, that plaintiff has a right to what-ever he bought in execution of the decree in that suit independent of any claim by the defendants under the fi-fa sale.

4. But against this it may be urged that the sale under the fi-fa was in virtue of an attachment-proceeding, which commenced as early as January 1867, prior to the

institution of the plaintiff's mortgage suit, and that consequently whatever could have been sold in January 1867 could be, and in fact was, sold to the defendants in July 1867, notwithstanding that the plaintiff had meanwhile instituted his suit.

5. We think that this is the right view. The doctrine of lis pendens appears to be grounded on the inconvenience which would arise, if mortgagors were able, after action brought, to alienate the mortgaged-property; but it does not follow that the rule would hold good where the alienation is not by the mortgagor, but by the Court, acting on behalf of creditors against the mortgagor, and where the process of sale, or at any rate proceedings with a view to the sale, of the property had commenced before the suit was instituted.

6. We think, therefore, that the plaintiff is not entitled, in virtue of having filed his suit previous to the defendants' fi-fa purchase, to ignore that purchase, and to hold the mortgaged property free from any right which the defendants acquired by the fi-fa sale. We think that we are bound to give effect to the well-recognized rule that the interest of a person, who has purchased the mortgagor's equity of redemption, is not affected by any decree in a suit to which he is not a party, and to hold accordingly that the defendants, having purchased the mortgagors' interest in the estate, viz., the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit, against the representatives of Ashutosh.

7. The next question is, whether the defendants having been joined in the mortgage-suit on the plaintiff's motion, and having got the suit dismissed as against them, are now precluded from setting up their claim to the mortgaged premises. We are of opinion that the orders passed in that suit, so far as regards the present defendants, had no effect beyond deciding that, whatever their claims might be, they could not conveniently be tried in that suit, and that consequently both parties remained at liberty to contest subsequently, any matter to which the plaintiff's mortgage, or the defendants' purchase, might give rise.

8. A counter objection has been taken that the defendants do not offer to redeem, but take their stand on an anterior and superior title. An objection has also been grounded on the form of the present suit, and it has been urged that the plaintiff

having sued for direct possession, the suit ought, if he be found not entitled to direct possession, to be simply dismissed.

9. We think, however, that we are at liberty to follow the course taken in a very analogous case regarding the same property by Pontifex, J. in Kasumunnissa Bibee v. Nilratna Bose ante p. 79 and to give the plaintiff a decree for possession, conditional on the defendants' failure to redeem, and that we are at liberty to decide what are the equitable terms on which the defendants may be permitted to redeem. The plaintiff has himself purchased several of the mortgaged properties, and he cannot, therefore, throw more than a proportionate share of the mortgage-charge on another portion of the mortgaged-premises: see Gossyen Luchmee Narain Poori v. Bickram Singh 4 C.L.R. 294 and Nawab Azimut Ali Khan v. Jowahir Singh 13 Moore's I.A. 404.

10. In the present instance the plaintiff paid Rs. 1,600 as the price of the mortgaged-property, and we think that the equities of the case will be met by giving the defendant six months within which to redeem by payment of this sum, together with interest at 6 per cent, from the date of the plaintiff's purchase, 27th April 1870; the plaintiff in default of such redemption within six months to be entitled to khas possession. If the defendants redeem, they will do so on the terms of paying all costs of this litigation. If they do not redeem, there will be no order as to costs, and the plaintiff will be entitled to khas possession. The decree of the Original Court will be modified accordingly.

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