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Court : Kolkata

Decided On : Jul-31-1895

Reported in : (1895)ILR22Cal931

Judge : Norris and ;Gordon, JJ.

Appellant : Tara Prosad Roy

Respondent : Bhobodeb Roy

Judgement :

Norris and Gordon, JJ.

1. This is an appeal from an order of the District Judge of Nuddia, reversing an order of the Munsif of that District. It appears that the appellant sued the respondent to enforce a mortgage security. The case was referred to arbitration, and a decree was passed declaring that the mortgagor's share was liable on the mortgage. Execution was taken out, and a proclamation of sale was issued. Thereupon the judgment-debtor objected that the properties could not be sold,, because the decree had not been made absolute. The Munsif was of opinion that in the case of a simple mortgage no decree absolute is necessary. On appeal, the District Judge held that a decree absolute is necessary, and accordingly he allowed the objection of the judgment-debtor, and set aside the execution proceedings as premature. On second appeal by the decree-holder it is contended (1) that under the provisions of the Transfer of Property Act a decree absolute is

unnecessary in the case of a simple mortgage; and (2) the objection taken is. of a highly technical character, and ought not to be allowed.

2. We think the District Judge's view is correct. The decree has been read to us, and it appears to be substantially a decree under Section 88 of the Transfer of Property Act, that is to say, it is a conditional decree or decree nisi, and we think it is clear from the provisions of Section 89 of the Act that, until an order absolute for sale of the mortgaged property has been made, the judgment-debtor has a right to redeem. The objection taken by him to the execution of the decree is, therefore, in our opinion a substantial one, and not merely one of a technical character, as is argued by the learned pleader for the appellant.

3. He relied on Siva Pershad Maity v. Nundo Lall Kar Mahapatra I.L.R. 18 Cal. 139, but we think that it is not on all fours with the present case. On the other hand, there is a case, Ram Lal v. Narain I.L.R. 12. All. 539, which is exactly in point; and is, we think, a clear authority for the view we take. In another case Poresh Nath Mojumdar v. Ram Jodu Mojumdar I.L.R. 16 Cal. 246, it was held that in a foreclosure suit the mortgagor can redeem at any time until the order absolute is made under Section 87 of the Transfer of Property Act, and similarly we think that in a suit for sale the mortgagor can under Section 89 redeem at any time before an order absolute for sale has been made. The appeal fails and must be dismissed with costs.

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