

(1876) 05 CAL CK 0003
In the Calcutta High Court

Bhuggobutty Dossee

APPELLANT

Vs

Shamachurn Bose and Others

RESPONDENT

Date of Decision : 16-05-1876

Acts Referred:

Citation : (1876) ILR (Cal) 338

Hon'ble Judges : Richard Garth, C.J;Pontifex, J

Bench : Division Bench

Judgement

Richard Garth, C.J.—After stating the facts, delivered the judgment of the Court. The portion of the judgment relating to 14-48ths share was as follows:

With respect to the remaining 14-48ths, the defendant Anundlall claims to be a purchaser in priority to, or in exclusion of, the mortgage on the following grounds: First with respect to Nobinchunder's 6-48ths and Muttylall's 4-48ths, the defendant Anundlall proves that the right, title and interest of Nobinchunder and Muttylall in the property were sold by the Sheriff on the 7th July 1864 under a writ of execution issued on 23rd March in a suit brought by one Thomas Owen against Muttylall and Nobinchunder, such sale being made to one Gourychurn, by whose direction the purchase was transferred to Anundlall, to whom a conveyance was executed by the Sheriff" on the 10th of August 1864.

2. The plaintiff, on the other hand, insists that the alleged agreement for a mortgage of this property to her was made on the 6th of May 1863, and that the Sheriff's sale could not operate to the prejudice of such alleged agreement. We are however unable to discover sufficient evidence of this alleged agreement for a mortgage. The entries appearing in the books of Messrs. Rogers and Remfry on which the plaintiff relies (even assuming that they were properly receivable in evidence) are far too indefinite to prove that there was a binding agreement for a mortgage of this particular property on the 8th of May 1863 when the money was advanced on the bond, or prior to the actual date of the mortgage. The entries do not show what property was to be included in the mortgage, nor what were to be its terms, or that the lender of the money stipulated for the security

of a mortgage. We are therefore of opinion that the Sheriff's conveyance to Anundlall in 1864 overrides the mortgage upon which the plaintiff sues.

3. And Anundlall also relies on a further sale by the Sheriff in 1866 made under the following circumstances: On the second of February 1866, the Sheriff, under another writ of execution, issued upon the judgment entered upon the plaintiff's warrant of attorney of the 6th of May 1863, sold the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the property to one Nobongo Monjery Dabee, by whose direction the purchase was transferred to Anundlall, to whom a conveyance was executed by the Sheriff on the 18th of June 1866.

4. The plaintiff insists that this sale, though made at her own instance and without notice of her mortgage, passed only the right, title and interest of Nobinchunder, Muttylall and Gopalchunder in the equity of redemption subject to the mortgage, and did not affect the mortgage itself, so as pro tanto to discharge or annul it; and that in fact such sale must be treated precisely in the same manner as a sale upon a judgment of a person who is not a mortgagee. This argument of the plaintiff only affects Gopalchunder's share, as we have already stated that in our opinion the shares of Nobinchunder and Muttylall passed under the Sheriff's sale in 1864. But we are unable to assent to the argument as affecting Gopalchunder's share. We think that a mortgagee selling in execution the right, title and interest of his mortgagor obviously stands in a different position from a stranger selling in execution the mortgagor's right, title and interest. Take for example the case of an estate worth Rs. 2,000, but subject to a mortgage for Rs. 1,000. If the mortgagor sold by contract, or if his judgment-creditor sold in execution the equity of redemption for Rs. 1,000, the mortgagor would in each case benefit by the sale and receive in effect the full value of the estate, Rs. 2,000. But if the mortgagee could sell separately in execution the equity of redemption for Rs. 1,000, the result would be that his own debt would be discharged, and the purchaser would hold an estate worth Rs. 2,000 for the price of Rs. 1,000, and the mortgagor would lose an estate worth Rs. 2,000 having received only the mortgage money of Rs. 1,000.

5. And though we asked for authority to support the plaintiff's argument, we were not referred to any case, where under a mortgage in the English form the equity of redemption has been separately sold under a money-decree recovered by the mortgagee. The only case we can find in the English reports in which the question was approached, is *Lyster v. Dolland* 1 Ves. 431 which is very imperfectly reported, and was ultimately decided by Lord Thurlow on the ground that an equity of redemption could not be extended under the Statute of Frauds. One of Lord Redesdale's arguments in that case appears to have been that such a sale would in effect defeat the mortgagee's own agreement for a redemption. Under the present law in England, an equity of redemption can be reached by a judgment-creditor only by means of an equitable execution, as it is called, or through the decree of a Court of Equity, which would necessarily, by the proceedings in the suit, be informed of the existence of the mortgage, and the

fact that the judgment-creditor was also mortgagee.

6. We are of opinion that a mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately, because by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a Court of Equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it; to do that circuitously which he could not do directly.

7. In the present case the sale of the Sheriff in 1866 was of the right, title and interest of the mortgagors, the sale being at the instance of the mortgagee without disclosing her mortgage and without notice of the amount due to her as a charge upon the property. The purchase-money would appear, as in the case of *Lyster v. Dolland* 1 Ves. 431 to have been estimated on the value of the unencumbered shares, and it has been received by the plaintiff. This sale has not been objected to by the mortgagors who are parties to this suit, and possession was at once taken under it and has been held unchallenged ever since. Under these circumstances we are of opinion that the sale and conveyance by the Sheriff must be considered to have passed the entire equitable estate in Gopalchunder's share, and we therefore concur with Phear, J. in dismissing the plaintiff's suit, so far as respects the 14-48ths of Nobinchunder, Muttylall and Gopalchunder.

8. Under the circumstances we think the appellant must pay Anundlall's costs of this appeal, and must add her own costs of this suit and appeal to her security, and Phear, J.'s decree will be modified accordingly.