
(1882) 07 CAL CK 0019
In the Calcutta High Court

Denaput Singh and Another	Vs	APPELLANT
Hari Ram and Another		RESPONDENT

Date of Decision : 13-07-1882

Acts Referred:

Citation : (1883) ILR (Cal) 167

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

Bench : Full Bench

Judgement

Richard Garth, C.J.—The facts of this case are briefly these: Two persons, Ram Nath and Hem Nath, took a loan of Rs. 192 from the plaintiffs, under a chitti dated the 17th Falgoon 1280 (March 1873). Hem Nath sold his share in Mauza Rizapore Damudur to Gokoola Persad, defendant No. 2, on the 24th July 1874. On the same date Hem Nath, as the guardian of his nephew Mothoora Persad, son of his deceased brother, the aforesaid Ram Nath, granted a zurpeshgi lease of Ram Nath's share in the same property also to Gokoola Persad, defendant No. 2. Out of the consideration-moneys of these two transactions, by an arrangement between the parties, Rs. 192 was left with the defendant No. 2 to be paid over to the plaintiffs in liquidation of the debt due under the chitti of the 17th Falgoon 1280 (March 1873), but this money was not paid by the defendant No. 2 to the plaintiffs, who brought a suit for its recovery; and, on the 13th September 1876, obtained a money-decree against the defendant No. 2.

2. Before this decree was passed, defendant No. 2, Gokoola Persad, mortgaged the mauza in suit, that is Rizapore Damudur, to the defendants, first party in this suit.

3. The plaintiffs, in execution of their decree, caused the property in suit to be sold, and purchased it themselves on the 2nd April 1877.

4. The defendants first party brought a suit against the defendant No. 2 to enforce their mortgage-bond dated the 10th April 1875, and obtained a decree on the 18th May 1877. The plaintiffs' decree was for a very small amount, viz.,

for Rs. 192, with costs and interest. The decree obtained by the first party defendants was for a very large amount, viz., about a lac of rupees. The defendants first party, in execution of their decree, attached the property in suit. The plaintiffs thereupon intervened, and objected to the sale, on the ground of their prior purchase dated the 2nd April 1877; their case before the execution Court was that, under their decree, they held an equitable lien upon the property in dispute, because the money for which they had obtained a decree was really part of the consideration-money which Gokoola Persad, the vendee, had to pay to Hem Nath and Ram Nath. They contended that as Hem Nath and Ram Nath could claim a lien upon the property sold for that portion of the consideration-money which the vendee Gokoola Persad had not paid, they, standing in the shoes of Hem Nath and Ram Nath, were entitled to claim the same lien.

5. The execution Court, however, on the 23rd March 1878, disallowed the claim and directed the property to be sold, unless the plaintiff's should satisfy the mortgage-decree. The value of the property in dispute being only Rs. 751, the plaintiffs, of course, did not pay the amount due upon the defendant's decree, which was for upwards of a lac of rupees, in order to save it; and it was accordingly sold in execution of the defendants' decree and purchased by the defendants on the 6th May 1878.

6. The plaintiffs then brought this suit on the 22nd March 1879, for the declaration of their title to the mauza in suit, on the ground that their purchase should prevail over the defendants' mortgage, because they had a prior lien upon the property. The Munsif tried this question only,--viz., whether the plaintiffs held a prior lien upon the property or not. This question was raised in the first and the second issues framed by the Munsif. The Munsif was of opinion that the plaintiffs' contention was not valid. The plaintiffs being only creditors of the vendors, in his opinion, could not claim the same lien upon the property sold for any unpaid portion of the purchase-money which the vendors had. He accordingly dismissed the suit.

7. On appeal, the Subordinate Judge disposed of the case on an issue which was not raised by the parties. He decreed the plaintiffs' claim, because the plaintiffs were not made parties to the defendants' suit upon their mortgage bond. The Subordinate Judge was not right in disposing of the suit by allowing the plaintiffs to alter the nature of their contention in the Appellate Court. The plaintiff's, it seems to us, purposely did not put their case on the ground upon which the Subordinate Judge has decided it, because it would have enabled them only to obtain a temporary victory. If the defendants were to bring a suit against them to enforce their lien, the property in dispute could not be saved unless they would pay the whole of the mortgage decree, which evidently they would not do because it is of small value compared with the amount of the mortgage-debt. The plaintiffs, therefore, put their case upon the only ground upon which, if they succeeded, they thought they would be able to reap a real benefit--that is, if they could establish their prior lien, they would be entitled to hold the property in

dispute free from the defendants' mortgage. The Subordinate Judge was, therefore, not right in allowing the plaintiffs to make out a new case in the Appellate Court.

8. Then, as regards the Munsif's decision, we are of opinion that it is correct in law. It is true that an unpaid vendor holds a lien upon the property sold for the consideration-money, but a creditor of that vendor cannot claim the same right. The decree of the lower Appellate Court will be reversed with costs, and the decree of the Munsif will be restored with costs.