

(1868) 12 CAL CK 0024
In the Calcutta High Court
Case No : Special Appeal No. 1200 of 1868

Hurannissa Bibi

APPELLANT

Vs

Kasimunnissa Bibi and Others

RESPONDENT

Date of Decision : 17-12-1868

Acts Referred:

Citation : (1868) 12 CAL CK 0024

Judgement

Macpherson, J.—We think this appeal ought to be dismissed with costs. We do not, however, concur in all that is said by the lower Appellate Court, because we think that if the appellants really held a simple mortgage of this property as alleged, they might have obtained a decree declaring their right as mortgagees, and their right to have the lands sold in execution of the decree free from all incumbrances accruing subsequent to the date of the mortgage. But the mortgagees got no such decree. They got a simple decree for money; and in execution of that decree they had the property sold, and themselves became the purchasers of it. Thereupon they ejected the plaintiffs (respondents) who were entire strangers to their decree ; and when the plaintiffs sued to recover possession, the appellants opposed them upon the ground that although they (the appellants) had not got a decree establishing their Hen or declaring the property to be subject to it at the time that the property was sold in execution, still in fact they had a lien on it by reason of its being hypothecated to them by a simple mortgage, and, therefore, the plaintiff ought not to be allowed to recover possession.

2. We have no doubt that if a mortgagee who holds a single mortgage bond wishes to sell the property so as to get the full benefit of his mortgage, he must get a distinct declaration from the Court of his rights over the property as mortgagee, as well as a decree for its sale. This was decided by a Full Bench in the case of Gopeenath Singh v. Sheo Sahoy Singh (Case No. 2809 of 1863, 14th December, 1864). If a mortgagee sells the property without having obtained such a declaration, he cannot get the full benefit of his mortgage, by setting up a plea of lien, if he has become the purchaser under his own decree, and has contrived

to get himself put into actual possession. If the course contended for could be followed, a third party, such as the plaintiffs in the present case, would be exposed to what might be a very great hardship. For he would be deprived of what is otherwise his undoubted right, i.e., the option of satisfying the decree rather than having the property sold in execution. The view we now express accords with the decision of the Full Bench I have already referred to, and also with a decision, *Golakmani Debi v. Ramsundar Chuckerbutty* (9 W.R., 82). We think the appeal ought to be dismissed with costs.