

(1920) 06 CAL CK 0025
In the Calcutta High Court

Kali Mahmud Talukdar and Others

APPELLANT

Vs

Dina Bandhu Dutt and Others

RESPONDENT

Date of Decision : 04-06-1920

Acts Referred:

Citation : 62 Ind. Cas. 502

Hon'ble Judges : Panton, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for redemption of a mortgage.

2. It appears that the predecessors of the defendants Nos. 3 to 10 mortgaged certain properties to the defendant No. 1 in the year 1892. the plaintiff, in execution of a money decree upon a simple bond, purchased a portion of the properties mortgaged on the 29th September 1896 and obtained delivery of possession thereof on the 23rd January 1897. Subsequently the defendant No. 1 brought a suit upon his mortgage but did not make the plaintiff a party to the suit. He obtained an ex parte decree on the mortgage on the 5th February 1897 and in execution purchased the properties on the 2nd February 19 9. He obtained delivery of possession of the properties in 1899 and the plaintiff was dispossessed by the defendant No. 1 of the properties purchased by him. The defendants Nos. 3 and 4 subsequently got the ex parte decree and sale held thereunder set aside on the 21st November 1908, and the suit was thereafter tried and a decree was passed on the 26th January 1909. In execution of the decree all the properties mortgaged were again advertised for sale, but before the sale took place, the defendants Nos. 1 and 2 purchased the properties from the defendants Nos. 3 to 10 on the 29th July 1910.

3. The plaintiff brought the present suit for redemption on the 19th September 1911. The Court of first instance gave a decree for redemption. On appeal the Court of Appeal below has held that the suit was barred by limitation, as the defendant No. 1 had been in continuous possession for 12 years since 1899. The plaintiff has appealed to this Court.

4. It is true that the defendant No. 1 as a simple mortgagee was not entitled to possession, and the possession he obtained was as purchaser and not as mortgagee. But in 1908, when the ex parte decree and sale were set aside and the suit upon the mortgage with respect to all the properties mortgaged, including the portion purchased by the plaintiff, was proceeded with, the defendant No. 1 (as appears from the judgment in that case) was treated as mortgagee in possession and made to account for the actual realisations made by him. In the circumstances we think that the possession of the defendant No. 1 must be treated as that of a mortgagee in possession. That being so, it was not adverse to the plaintiff, who was purchaser of a portion of the equity of redemption, and the suit is not, therefore, barred by limitation.

5. The decree of the lower Appellate Court must, therefore, be set aside and that of the Court of first instance restored with this variation that the period of six months will run from this date.

6. We make no order as to costs.