

(1921) 05 PAT CK 0006

In the Patna High Court

Maharaja Kesho Prosad Singh

APPELLANT

Vs

Musammat Paranjota Koer

RESPONDENT

Date of Decision : 12-05-1921

Acts Referred:

Transfer of Property Act, 1882 — Section 100

Citation : AIR 1921 Patna 84 : 62 Ind. Cas. 532

Hon'ble Judges : Ross, J; Das, J

Bench : Division Bench

Judgement

Das, J.—I am unable to agree with the view taken in the Courts below. It may be conceded that "if a person has two mortgages on the same property, he cannot foreclose only one of them and then sue the mortgagor upon the covenant in the other mortgage. In other words, a mortgagee cannot foreclose so as to vest the property absolutely in himself without treating the whole of the debts secured on it as satisfied or re opening the foreclosure." (See Ghose on Mortgage, Volume I, page 593 and the cases cited therein.) But the position of a landlord in regard to the rent due to him is not analogous to that of a mortgagee to whom money is due on the mortgage. A rent-decree is in no sense a mortgage-decree and does not compel the landlord to proceed against the holding. It is true that the rent is a first charge on the holding, but, as was pointed out in *Fotick Chunder Dey Sircar v. Foley* 15 C. 492 : 7 Ind. Dec. (N.S.) 912 the "charge" referred to in Section 65 of the Bengal Tenancy Act is not such a "charge" as is defined by Section 100 of the Transfer of Property Act. As was said in the case just cited, "Section 65 of the Bengal Tenancy Act, 1885, is an enactment for the benefit of the landlord. It gives him rights which are denied to the other creditors. The effect of acceding to Dr. Banerjee's argument would be to deprive the landlord, at any rate for a time, of one of the rights and remedies which an ordinary judgment-creditor enjoys." In my view, all the provisions contained in the Transfer of Property Act, as to a mortgagee instituting a suit for the sale of the mortgaged property, would only apply in the case of a landlord instituting a suit for rent, if such a suit could in substance be looked upon as a suit for the sale of

the holding. But a suit for rent is not a suit for the sale of the holding, and I do not think that there is anything to prevent the landlord, in execution of a rent-decree, from proceeding against the properties of the judgment debtor other than the holding.

2. But it was argued that the case of Sailoja Prosad v. Gyani Das 16 Ind. Cas. 355 : 18 C.L.J. 29 is directly in point. As I read the decision of Mookerjee, J., all that he decides is that a landlord who purchases the defaulting tenure in execution of his money decree, but purchases it subject to the rent charge enforceable against the tenure, cannot execute his decree for rent, as the judgment debt in his favour is deemed to be extinguished. There is no difficulty in understanding the principle on which Mookerji, J., proceeded. If you have a decree for rent, you may proceed against the holding or you may proceed against the properties of the judgment debtor other than the holding. But if, subsequent to the decree for rent, you obtain a money-decree against the tenant, and, in executing your money-decree against the holding, which you are perfectly entitled to do, you notify to the world that you are selling the holding subject to the rent charge in your favour, then clearly you have elected to hold the holding responsible for your rent, and cannot proceed against the properties of the judgment-debtor other than the holding, if you have yourself purchased the holding in execution of your money-decree. By virtue of the notification, the purchaser purchases the holding subject to the rent charge, and the holder of the charge cannot be heard to say, "Now that I have purchased the holding, I will waive the charge and proceed against the properties other than the holding." The obvious answer is that, in putting up the holding for sale subject to the rent charge, he has made the election once for all, and, as he presumably paid all the less for the holding, it is the holding which he has purchased that must satisfy the rent decree. In the case before us, the landlord did not purchase the holding subject to any rent charge. He did not notify, at the time of the sale, that the holding was being sold subject to a rent charge in his favour. In my view, he did not elect to hold the holding responsible for his rent, and can now proceed to execute the rent-decree against the properties of the judgment-debtor other than the holding. To hold otherwise would be to say that a landlord, when he obtains a decree for rent, is obliged to proceed, in the first instance, against the holding. That, in my view, is not the true position, and I must allow the appeal, set aside the judgments and decrees passed by the Courts below, and direct that the execution do proceed. The decree-holder will be entitled to costs throughout. Hearing fee in this Court rupees thirty two.

Ross, J.

3. I agree.