

(1913) 03 CAL CK 0029

In the Calcutta High Court

Case No : Appeal From Appellate Decree No. 3356 of 1910

Nathan sao

APPELLANT

Vs

Mrs. Annie Besant

RESPONDENT

Date of Decision : 19-03-1913

Acts Referred:

Citation : (1913) 03 CAL CK 0029

Final Decision : Allowed

Judgement

Carnduff, J.—This second appeal arises out of a suit brought by one of four successive mortgagees to recover the surplus sale-proceeds which a mortgagee subsequent to him had withdrawn from Court in satisfaction of his decree. It appears that the second mortgagee of the property mortgaged had brought a suit on his mortgage and obtained a decree, in execution of which the property, worth Rs. 7,29,000, was sold and purchased by the third mortgagee for Rs. 36,000. The decree; was fully satisfied from the sale-proceeds, and a surplus of approximately Rs. 6,000 was left in deposit.

2. The fourth mortgagee then sued on his bond, obtained a decree and, in satisfaction thereof, withdrew from Court Rs. 2,878 of the deposit there held. To this suit the third mortgagee was not made a party.

3. The third mortgagee has not so far attempted to enforce his security; but he brought the suit before us now in order to recover from the fourth mortgagee the sum that the latter had withdrawn. The Court of first instance dismissed his suit, but the lower Appellate Court has held that he is entitled to succeed, and has remanded the case for an enquiry as to the precise amount that should be decreed in his favour.

4. The learned District Judge in the Court of appeal below has relied upon Berhamdeo Pershad v. Tara Chand (I. L. R. 33 Cal. 92 (1905)), but it seems to me that that case not only is indistinguishable from the present case, but actually stands in the way of the Plaintiff instead of supporting his claim. In it, a

third mortgagee had obtained a decree on his mortgage without making a second mortgagee a party, and had withdrawn the surplus sale-proceeds held in deposit after the satisfaction of a first mortgagee's decree. The second mortgagee then sued to recover the deposit from the third mortgagee : but he put his mortgage in suit, and he succeeded on the plea that he was entitled in equity to regard the surplus sale-proceeds as part of his mortgage security and to follow them in the hands of the third mortgagee. As pointed out by Mr. Justice Sale, he could establish his right to the money, not as the owner thereof, but as part of his security. Here, however, the third mortgagee has endeavoured to do precisely what Mr. Justice Sale observed that it was not open to a person in his position to do : he has brought a simple money suit, claiming the money as his own and making no claim at all against the mortgagor. He cannot, as it seems to me, succeed on this footing.

5. The learned Vakil for the Respondent-Plaintiff has, however, further argued that his client is entitled to have the surplus sale-proceeds rateably applied to the discharge of his incumbrance by virtue of the provisions of cl. (c) of the proviso to sub-sec. (1) of sec. 73 of the Code of Civil Procedure, 1908. But those provisions operate, as the earlier part of the subsection shows, only where the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof; whereas, as has already been stated, the Respondent-Plaintiff holds no decree for the satisfaction of which by rateable distribution he could apply under the section. In my view, therefore, this appeal should be allowed, the order of the lower Appellate Court discharged, and the decree of the first Court dismissing the suit restored with costs throughout.

Harington, J.

I agree.