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(1925) 06 CAL CK 0032

In the Calcutta High Court

Nil Madhab Mahapatra and Others — APPELLANT

Vs

Joy Gopal Mahanti and Others — RESPONDENT

Date of Decision : 10-06-1925

Acts Referred:

Citation : AIR 1926 Cal 560 : 91 Ind. Cas. 719

Hon'ble Judges : Graham, J;Babington Newbould, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit brought by a puisne mortgagee for redeeming a prior mortgage of the defendants and for recovery of possession of the mortgaged property. The defendant''s mortgage, is dated 21st Asar 1301. A suit was brought on that mortgage to which the plaintiffs, the puisne mortgagees, were not made parties. In execution of the decree obtained by the defendants the mortgaged property was sold and purchased by them on the 7th February 1910 and they took delivery of possession through Court on the 2nd October 1911. The date of the plaintiffs'' mortgage is 8th Aswin 1304. The plaintiffs sued on that mortgage without making the defendants parties. In execution of that decree the mortgaged property was purchased by the plaintiffs on the 22nd February 1913. This suit was brought on the 17th November 1920. Both the Courts below have dismissed the suit on the ground that it was barred by limitation. They held, and it has not been disputed by either parties before us, that the facts of this case are not distinguishable from the facts of the case of Nidhi Ram Bandopadhya v. Sarbeswar Biswas 5 Ind. Cas. 877 : 14 C.W.N. 439, and both the lower Courts after expressing their respectful doubt as to the correctness of that decision have held themselves bound thereby. In that case it was held under similar circumstances that Article 132 of the Second Schedule of the Indian Limitation Act was applicable. It was contended before us that the proper Article is Article 148 which would give the plaintiffs in a suit to redeem 60 years from the date when the right to redeem accrued. Our attention has been drawn to a decision of the Allahabad High Court in Priya Lal v. Bohra Champa Ram 79 Ind. Cas. 498 : 45 A. 268 : AIR (1923) (A) 271, in which it was held

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under somewhat similar circumstances that the Article applicable to a suit for redemption brought by a puisne mortgagee was Article 148. But that case is distinguishable on the important point that, there it was the puisne mortgagee who had first sued on his mortgage and in, execution of his decree he was put into possession of the property. It is a very different matter when a puisne mortgagee brings a mere suit for redemption being in possession of the property; in the present case he sued not only for redemption but also for recovery of possession. In suing for recovery of possession he was not seeking to recover possession as against the mortgagee since the defendants to this suit were in possession, of the property not by virtue of their mortgage but by virtue of their purchase of the property at the sale in execution of their decree. The decision of this Court which has been followed by the lower Courts was in the year 1909 and it does not appear to have been ever doubted or questioned in any subsequent case. We are not prepared to dissent from that decision and we cannot accept the contention raised on behalf of the appellants that this is a proper case for making a reference to a Full Bench with a view to having that decision overruled.

2. The cross-objection taken on behalf of the respondents was not pressed and is dismissed.

3. The appeal is dismissed with costs.

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