

(1868) 08 CAL CK 0020
In the Calcutta High Court
Case No : Special Appeal No. 2940 of 1867

Prahlad Misser

APPELLANT

Vs

Udit Narayan Sing

RESPONDENT

Date of Decision : 21-08-1868

Acts Referred:

Citation : (1868) 08 CAL CK 0020

Judgement

Sir Barnes Peacock, Kt., C.J.—The appellants, the plaintiffs, purchased the land on the 28th of September 1864, under a decree of the 25th of March 1864. That decree was obtained on a mortgage bond dated the 7th November 1863, and declared that the premises were liable to be sold in satisfaction of that mortgage bond. The mortgage bond of the 7th November 1863 was duly registered. The defendant purchased on the 30th of March 1865, under a decree in his own favour dated the 30th of July 1864. That decree was on a mortgage bond dated the 7th of June 1859, which was not registered. The defendant's title, therefore, depends Upon a purchase under a decree later in date than the decree under which the plaintiff purchased; but that decree, though later in date than the other decree, was for the enforcement of a mortgage bond of earlier date than the mortgage bond which was the subject of the suit under which the plaintiff purchased. But the mortgage bond which was the subject of the suit under which the defendant purchased, though of a date earlier than that of the other bond, was not registered. Now it appears to us, that a purchaser under a decree obtained upon a mortgage bond ordering the mortgaged property to be sold in satisfaction of the mortgage debt does not purchase merely the rights and interests of the debtor, but he obtains the right which the mortgagee brings to sale by virtue of the decree. The question is, whether the purchaser under a decree for sale in satisfaction of a registered mortgage of a later date is, or is not, entitled to priority over the purchaser under a decree enforcing an unregistered mortgage of an earlier date. It appears to us, that the rights of the purchasers under such decrees must depend upon the priority of the rights of the mortgagees in satisfaction of whose charges the sales are made.

2. A Full Bench Ruling, Maharaja Maheswar Singh v. Bhikha Chowdry Case No. 645 of 1865, 5th February 1866, has been referred to for the purpose of showing that a registered deed of sale does not, by virtue of the provisions of Act XIX of 1843, invalidate a prior unregistered mortgage. But that decision depended upon the very peculiar wording of Act XIX of 1843, and the circumstances under which that Act was passed repealing Act I of 1843 which was differently worded. That decision was, that a registered deed of sale did not invalidate a prior unregistered mortgage, not that a registered deed of sale would not have priority over an earlier unregistered deed of sale, or that a registered mortgage would not take priority of an earlier unregistered mortgage. We have no doubt that, notwithstanding that decision, a registered mortgage does take priority of an unregistered mortgage. The question turns upon Section 2, Act XIX of 1843,² which was the section on which the Full Bench Ruling was founded. These mortgages were made subsequent to the 1st May 1843: the one on the 7th November 1863, and the other on the 7th of June 1859. It is, therefore, clear that the registered mortgage took priority over the prior unregistered mortgage, and that the purchaser, under the decree which ordered a sale in satisfaction of the mortgage which had priority, has a preferable right to the purchaser under the execution of the decree of the other mortgage. Under these circumstances, the plaintiffs are entitled to priority, the second mortgage having priority over the unregistered mortgage of earlier date. The decision of the Lower Appellate Court is reversed, and the decree of the first Court upheld, with costs of this appeal, and costs of the Lower Appellate Court.

1[Sec. 246:--In the event of any claim being preferred to, or objection offered against the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree or under any order for, attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in Section 220. And if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was not in the possession of the party against whom execution is sought, or of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him at the time when the property was attached, or that, being the possession of the party himself at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, the Court shall pass an order for releasing the said property from attachment. But if it shall appear to the satisfaction of the Court that the land or other immoveable or moveable property was in possession of the party against whom execution is sought, as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to

him at the time when the property was attached, the Court shall disallow the claim. The order which may be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order.]

Haw claims and objections to the sale of attached property are to be investigated.

2Section 2 of Act XIX of 1843 enacts, that "from the 1st day of May, then last past, every deed of sale or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed; and that from the said day every deed of mortgage on land, houses, and other real property a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property, which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."