
(1921) 01 PAT CK 0004
In the Patna High Court

Rai Binode Behari Bose

APPELLANT

Vs

Babu Hira Singh and Others

RESPONDENT

Date of Decision : 04-01-1921

Acts Referred:

Citation : 64 Ind. Cas. 308

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

Bench : Division Bench

Judgement

1. I am not sure whether an appeal lies against the order of the learned Subordinate Judge directing that the money in Court to the credit of the suit, But Binode Bihari Bose v. Amrita Krishna Mitra, be paid to the respondents, but I have no doubt whatever that the order of the learned Subordinate Judge is without jurisdiction and must be set aside.

2. The respondents are, with reference to the appellant, both prior mortgagees and subsequent mortgagees. The appellant instituted his suit to enforce his mortgage, obtained a decree, and in execution thereof purchased the mortgaged properties for Rs. 10,000. His decretal claim amounted to Rs. 6,286 13 9, and, deducting this amount from the purchase money, he paid into Court Rs. 3,713, 2,3. Out of this sum, Rs. 1,632 9-10 has been withdrawn by certain creditors leaving Rs. 2,080 8 4, which is the subject-matter of this appeal. The respondents then instituted a suit to enforce their mortgage bonds and cited the appellant as a defendant in their action, The matter same on appeal to this Court, which passed a comprehensive decree dealing with all the interests that were arrayed before it. It directed that the mortgaged properties should be sold and that out of the sale proceeds.

(1) Rs. 7,278 6 4 with subsequent interest should be paid to the respondents;

(2) Rs. 7,028-6-9 with subsequent interest should be paid to the appellant; and lastly

(3) Rs. 8,889 15-0 should be paid to the respondents.

3. Stopping here for a moment, it seems to me clear that the effect of this decree was to restore the appellant to the position which he occupied prior to his purchase. As between, the mortgagor and the appellant, the sale in favour of the appellant, it is true, has never been set aside. But we are concerned in this appeal with the question, not as between the mortgagor and mortgagee, but as between two mortgagees each of whom claimed a prior title in himself. If this Court intended to decide that the appellant's debt was satisfied and all that he was entitled to in the respondents' action was to redeem the mortgage of the respondents, it could hardly have directed that, out of the sale proceeds Rs. 7,028-6, 9 should be paid to him after the satisfaction of the earliest of the claims of the respondents. The Court intended to, and did in fact decide that, notwithstanding the sale of the mortgaged properties to the appellant in execution of his mortgage decree, his mortgage security still subsisted and that he was entitled to have his mortgage claim satisfied out of the sale proceeds in the respondents' action in priority to the respondents' claim on his subsequent mortgage.

4. In pursuance of the decree of this Court, the mortgaged properties were sold and were purchased by the respondents for Rs. 8,025, After deducting the money due to them on their prior mortgage, the respondents have paid Rs. 366-4- into Court which, in accordance with the decree of this Court, has been made over to the appellant.

5. The respondents then presented an application to the Subordinate Judge in their suit for an order directing the sum of Rs. 2,080-8-4 to be paid to them, It will be remembered that this sum represents the balance in Court to the credit of the appellant's suit. The Subordinate Judge came to the conclusion that so long as the sale in favour of the appellant was not cancelled, he could not claim any portion of the surplus sale proceeds to the credit of the judgment-debtor in the appellant's action. In the result he directed that the money be paid to the respondents.

6. I am quite unable to understand how the learned Subordinate Judge in (sic) of the respondents' action, for it was in that action that the application was made, gave himself jurisdiction to deal with the fund lying to the credit of another suit. The respondents were not parties to the appellant's suit. They had no right to make any application in the appellant's suit, and in their own suit, they could not make available to them a fund which was lying to the credit of another suit. Their application could not be said to be an application in execution of their decree. That decree did not either expressly or by necessary implication give them any right over the fund in question.

7. Nor do I see how the respondents could defeat the prior claim of the appellant. I cannot agree with the Subordinate Judge that, so long as the sale certificate in favour of the appellant is not cancelled, he has no right to proceed against the fund in Court. That sale certificate operates as between the mortgagor and mortgagee. As between the mortgagees inter se, this Court has

in effect held that the appellant's security is a subsisting security and that he is entitled to hold it as a shield against the subsequent mortgage of the respondents.

8. I am of opinion that the order of the Subordinate Judge cannot be supported and must be set aside. I do not think, however, that we can make any order in favour of the appellant in these proceedings. The respondents are not parties to his suit, and the question is primarily one between the appellant and the respondents, and can only be decided in a properly constituted suit between them.

9. We set aside the order of the Subordinate Judge in Civil Revision No, 7 of 1920, but dismiss Miscellaneous Appeal No. 3 of 1920. The petitioner in Civil Revision No. 7 of 1920 is entitled to his costs. Hearing fee, 2 gold mohurs.