

(1922) 11 PAT CK 0023

In the Patna High Court

Case No : A.F.O.O. Nos. 120 and 121 of 1921

Rai Saheb Sarju Lal and others

APPELLANT

Vs

Bajnath Prashad Singh and others

RESPONDENT

Date of Decision : 17-11-1922

Acts Referred:

Citation : (1922) 11 PAT CK 0023

Final Decision : Allowed

Judgement

Das, J.—This appeal is directed against an order of the learned Subordinate Judge of Gaya dated the 17th June, 1921.

2. The appellants are the decree-holders and they obtained a mortgage decree against the respondents, the contesting respondents being the subsequent purchasers or subsequent mortgagees in respect of some of the properties comprised in the mortgage.

3. The appellants obtained the preliminary decree on the 8th of April, 1915, and the final decree on the 31st June, 1918. In the present execution case the decree-holders sought to have the properties which are entered as properties 9 and 10 in the mortgage decree sold in the first instance. Now these properties, that is to say, the properties 9 and 10, were purchased subsequent to the execution of the mortgage by the respondents who are represented before us by Mr. Kulwant Sahai. It appears that some of the decree-holders have purchased properties Nos. 1, 2 and 3 from the mortgagors for the sum of Rs. 14,000; they have given credit in the account for Rs. 11,000 and it is their case that they have paid Rs. 3,000 to the mortgagors. Mr. Kulwant Sahai's clients contended before the learned Subordinate Judge that the course adopted by the decree-holders in purchasing some of the properties clearly prejudiced them and they asked the Court to direct that the properties should be sold in the order in which they are named in the mortgage decree. The learned Subordinate Judge acceded to the arguments advanced before him on behalf of Mr. Kulwant Sahai's clients and the decree-holders appeal to this Court.

4. Numerous authorities were cited on behalf of the parties before us. It is unnecessary to discuss all those authorities; it is sufficient to say that though here and there a discordant note has been struck, still the balance of authorities is clearly in favour of the view that the decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and that, if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. It is quite true that each parcel of the mortgaged properties is liable rateably to its value and that the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security but I do not think that an enquiry as to rateable distribution of the mortgage debt can be made in execution proceedings without serious complications. To take the present case, the respondents assert that the decree-holders have purchased property No. 1 at a price much below the market price and that they are now attempting to throw the burden of the entire debt on them. The decree-holders retort by saying that the respondents interested in properties 9 and 10 have purchased these properties for a nominal sum and on an express undertaking to pay the entire mortgage debt, an undertaking which they never attempted to carry out. The learned Subordinate Judge has not entered into an investigation as to the valuation of the different properties comprised in the mortgage but he thought that the action of the decree-holders in purchasing some of the properties clearly prejudiced the rights of the respondents, and that he was entitled to use his discretion in directing in what order the properties should be sold. For myself I do not understand how the act of the decree-holders could possibly have prejudiced the subsequent purchasers. The learned Subordinate Judge admits that the decree-holders have not released any of the mortgaged properties so as to throw the entire burden of the mortgage debt on the others. As purchasers of some of the mortgaged properties, they must themselves contribute to the mortgage debt, but the problem is not solved by compelling the decree-holders to sell the properties which they have themselves purchased. The course adopted by the learned Subordinate Judge has unduly favoured the respondents: and for that there is no warrant either in law or in equity. As I have said before, the equities arising as a result of the transactions that have taken place since the mortgage was executed cannot without serious inconvenience be worked out in the execution proceedings, and I must prefer the rule which gives the decree-holders complete dominion over the sale leaving the equities to be worked out in a properly constituted suit between the parties.

5. I would allow the appeal, set aside the order of the learned Subordinate Judge, and direct that the properties be sold in the order mentioned in the petition of the decree-holders.

6. The decree-holders are entitled to the costs of this appeal.

M.A. No. 121.

7. This appeal will be governed by our decision in Appeal No. 120 of 1921. There will, however, be no separate order for costs.

Adami, J.

8. I agree.