

(1909) 05 CAL CK 0031
In the Calcutta High Court

Shah Mosihuddin

APPELLANT

Vs

Sheo Logan Sahu

RESPONDENT

Date of Decision : 25-05-1909

Acts Referred:

Citation : (1909) 05 CAL CK 0031

Judgement

1. The facts of the suit in which the present appeal has been made are as follows. Defendant No. 10, the present appellant, sued defendants Nos. 1-9 who constitute a joint family under the Mitakshara School of law for rent. He obtained a decree which was confirmed on appeal, and attached the house the subject-matter of this suit. Before attachment, however, a second appeal had been filed, and on the 19th August 1899 by an order of this Court execution was stayed on security being given. On the 23rd of November, 1899 defendants Nos. 1-3, as managers for their family mortgaged the attached property to defendant No. 11 by whom the bond has since been transferred to the plaintiff, on terms that the principal debt should be repaid in two years and that interest due should be recoverable separately. On the 21st May 1900 the second appeal in the rent suit was dismissed, and a fresh attachment was made in September of the same year. The property was sold under the attachment in August 1902 and purchased by the appellant defendant. Afterwards the plaintiff sued for interest due under the mortgage-deed, brought the property to sale under the decree he obtained and himself became the purchaser. Claim proceedings were instituted u/s 335 of the old Code and terminated in favour of the appellant who was consequently maintained in possession. The plaintiff seeks to recover the balance of his mortgage-deeds by the sale of the mortgaged properties.

2. On these facts two questions arise for our decision. Can the mortgagee sue on his mortgage after he has recovered judgment and brought the property to sale under mortgage once already? Did the stay of execution in 1899, accompanied as it was by the giving of security, deprive the appellant of his lights under the attachment.

3. As regards the first question we have first to decide whether the plaintiff caused the property in question to be sold by proceedings in a suit instituted u/s 67 of the Transfer of Property Act, so as to avoid the application of Section 99 of the same Act, and if he did not, what is the effect of Section 99 in this case. The plaintiff's suit was based on a deed which admittedly constituted an ordinary mortgage in respect to the means provided for the recovery of the principal and interest of the sum advanced under it. It contained a clause that if the mortgagors failed to pay interest " the creditor shall be at liberty to realise the interest and compound interest due by us by instituting a suit whenever they like to do so." The suit was brought with a prayer That for the realization of interest the plaintiff may be declared entitled to sell the entire 16 annas of the mortgaged property." The decree was in the ordinary form of a mortgage-decree for sale. On this prayer and decree it seems impossible to contend that the suit was not instituted u/s 67. If this is so it is difficult to see how the plaintiff can again ask to have the property brought to sale. He has acquired all the right, title and interest of the mortgagor therein and there is nothing more left to sell.

4. Even supposing that the appellant's contention that his previous proceeding was not u/s 67 is correct, he cannot, according to the law laid down in *Ashutosh Sikdar v. Behari Lal Kirtania* 35 C. 61 (F.B.) derive, as he seeks to, any assistance for Section 99 of the Transfer of Property Act. He cannot now contend that the sale is an absolute nullity, and even if it is voidable, it is impossible to see how he can avoid it still less how he can avoid by a mere disclaimer on his part.

5. We hold, therefore, that as the plaintiff has once used his rights under his mortgage-deed to bring these properties to sale, he cannot do so again.

6. Strictly speaking this makes it unnecessary for us to decide the second question as to the effect of the order of this Court that the appellant's execution proceedings should be stayed and the case struck off, when security was given. As, however, we differ from the lower appellate Court we think we should point out that under the circumstances, this order cannot be held to have affected the appellant's right under the attachment. The effect of the order was that on the judgment-debtor asking for a privilege he got it, on the condition of giving security, but this Court cannot be taken to have deprived the decree-holder of any rights that he had already had. This view is quite consistent with that expressed in *Puddomonee Dossee v. Roy Muthoora-nath Chowdhry* 20 W.R. 133 and is in accordance with the recent decision in *Abdul Khayar Abdul Huq Chowdhry v. Reajuddin Ahmed Chowdhury* 13 C.W.N. 521 : (1909) 1 Ind. Cas. 341.

7. The result is that the appeal must be allowed, the judgment and decree in the lower appellate Court set aside and the decree of the Sub-Judge restored. The appellant is entitled to his costs in this Court and the lower appellate Court.