(1899) 08 CAL CK 0027

In the Calcutta High Court

Case No : Appeal From Order No. 422 of 1898

Surya Bibi and Another — APPELLANT

Vs

Monindra Nath Roy and Another — RESPONDENT

Date of Decision : 21-08-1899

Acts Referred:

Citation : (1899) 08 CAL CK 0027

Judgement

1. If we had to consider in this case the abstract question, whether one of several mortgagors is entitled to redeem his share of the mortgaged property, we should be inclined to hold, with the Subordinate Judge, that he is not so entitled, and that he must redeem the entire property on payment of the entire mortgage debt, but in the circumstances of this case, we think that the Plaintiffs are entitled to redeem their share of the mortgaged property upon payment of a proportionate share of the mortgage debt. The mortgagee, though he brought his suit against the original mortgagor, did not, upon his death, which took place during the pendency of the suit, bring upon the record all his legal representatives. Two were omitted; they are the Plaintiffs in this suit; and they contend that the decree, as made against the other heirs of the mortgagor, and the sale in execution thereof, do not preclude them from redeeming their share of the mortgaged property. At the sale which took place in execution of the mortgage decree, the mortgaged property was sold, and was purchased by the mortgagee himself; and the questions which now arise between the Plaintiffs on the one hand, and the purchasers (the mortgagees) on the other, are, first, whether the Plaintiffs are entitled to redeem their share of the mortgaged property, and, secondly, upon what terms.

2. We are of opinion, however, having regard to the circumstances of this case, that the Plaintiffs are entitled to redeem their share of the property; and in this respect we think we are supported by the principle which underlies the last paragraph of sec 60 of the Transfer of Property Act.

3. As to the other question, it seems to us that the Plaintiffs can only redeem

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upon payment of their share of the mortgage debt, without any reference to the amount that was decreed in favour of the mortgagee in the mortgage suit.

4. The Court of first instance gave the Plaintiffs a decree for their two-ninths share of the property, subject to the payment of Rs. 233 within a certain time appointed. As regards this amount, there does not seem to have been any objection raised on the part of the mortgagee in the lower Appellate Court. However that may be, we are of opinion that the Plaintiffs ought to pay to the Defendants whatever may be found due on account of the mortgage debt in respect of their share up to the date when, in execution of decree, the Defendants took possession (inclusive of the Plaintiffs share) of the mortgaged property. We think in the circumstances of this case, that the Defendants having taken possession of the Plaintiffs share of the property should not receive any interest upon the Plaintiffs'' share of the debt from the date of such possession--nor should they (the Defendants) be called upon to account to the Plaintiffs for their share of the mesne profits. We have made a rough calculation as to how the account would stand upon the basis we have just indicated; and it seems to be quite plain that the amount payable by the Plaintiffs to the Defendants would not exceed Rs. 233, the amounts decreed by the first Court. And we think that, in this view of the matter, all that we need do, having regard to the equities between the parties, is to set aside the decree of the Appellate Court, and restore that of the Court of first instance. Under the circumstances, we think that each party should bear his own costs both in this Court and in the Lower Appellate Court.

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