1929.

ABINASH-CHANDRA GHOSH v. NARAHARI METHAR.

MITTER J.

and we would have remanded the case to the lower appellate court, but for the circumstance that it is proved by defendant's own documents that the disputed land belonged to Lakshminarayan Goswami, through whom plaintiff claims, and the Munsif rightly points out the frivolous nature of the defence regarding title to the property in question. In these circumstances, it would be useless to send back the case for a re-hearing of the appeal on the question of title.

The result is the appeal fails and is dismissed with costs.

JACK J. I agree.

Appeal dismissed.

A. A.

APPELLATE CIVIL.

Before B. B. Ghose and Panton JJ.

1929.

Mar. 27.

HAZARIMULL BABU

v.

MANOHAR DAS MOHANTA MAHARAJ.*

Revenue Sale—Mortgage of revenue-paying properties—Decree on mortgage—Subsequent payment of revenue and cesses by mortgagee to save estate from sunset sale—Suit by mortgagee to obtain mortgage decree for monies so paid by adding same to his original lien—Whether it was necessary for plaintiff to make the payment—When can plaintiff tack amount paid for revenue to his mortgage lien—Whether plaintiff has first charge for this amount on surplus sale-proceeds left after satisfying his mortgage decree—Bengal Land Revenue Sales Act (XI of 1859), s. 9 (4).

The plaintiff, a mortgagee of two revenue paying estates, the owners of which had opened seperate accounts for their shares of the Government revenue, sued, in 1918, on his mortgage, dated 1905, obtained a final decree in 1920 and put his decree in execution in 1922, but did not proceed to sell the properties. The defendant No. 7, who held four subsequent mortgages on the same properties, also obtained four decrees, in 1917 and 1920. There being default on the part of the mortgagors in the payment of revenue and, cesses of two *touzies* out of the mortgaged estate for the March *kists* of 1923 and 1924, the plaintiff paid the same, in order to save the estate from sunset auction sale. The plaintiff brought the present suit against the mortgagors

*Appeal from Original Decree, No. 184 of 1926, against the decree of Satish Chandra Basu, Subordinate Judge of Burdwan, dated July 24, 1926.

1929.

HAZARIMULL BABU v. MANOHAR DAS MOHANTA MAHARAJ.

and the subsequent mortgagees for recovery of amounts paid by him together with damages, praying that the said amounts be added to his original lien, which had been converted into a mortgage decree and be realized by the sale of the mortgaged properties in execution of the said decree, and the amount decreed in the present suit be the first charge on the surplus sale-proceeds left over after satisfying his mortgage decree. This was opposed by defendant No. 7, principally on the grounds that there was no necessity to deposit the said amounts and the plaintiff, being a volunteer, was, if at all, entitled only to a money decree, that the plaintiff, having sued and obtained a decree on the basis of his mortgage deed, cannot bring a fresh suit claiming a lien by virtue of the same deed and that his contract, having merged into a decree, his lien no longer subsisted and he could not claim a preference over the mortgage decrees obtained by this defendant on foot of his subsequent mortgages. The Subordinate Judge passed a preliminary decree for sale in favour of the plaintiff against the mortgagors as well as the subsequent mortgagees for the amount of the revenue paid but not the cesses. On defendant No. 7 appealing,

held that the plaintiff was interested in paying the revenue of the defaulting estates, as this was necessary for protecting his lien within the meaning of section 9, clause 4, of the Bengal Land Revenue Sales Act, 1859.

Held, however, that the meaning of that provision is not to entitle the mortgagee to claim the amount thus paid as a separate debt which could have priority over all the other mortgages. These payments the mortgagee could have tacked to his original mortgage and have claimed the whole amount in one suit.

Nugenderchunder Ghose v. *Sreemutty Kaminee Dossee* (1) followed.

APPEAL by defendant No. 7, the subsequent mortgagee.

A mortgage for Rs. 27,000, the consideration of which was two registered notes of hand, was executed in favour of the plaintiff's predecessor by defendants 1 to 3, their deceased father, Sambhunath Tewari, and by Indranarayan Tewari, the deceased grandfather of defendants 5 and 6, on 17th Magh, 1311 B. S., corresponding to 30th January, 1905. The amounts of the notes of hand had been borrowed for purposes of joint properties of the defendants and for paying revenues of the mortgaged properties. The properties now hypothecated were certain lots of *touzi* No. 20 of Burdwan Collectorate and of *touzi* No. 547 of Midnapur Collectorate. The mortgage deed provided: "We shall duly pay into the Collectorate the revenues of the mortgaged properties "held in *zemindari* right and into the *rajbarhi* the "rents in respect of the properties held in *patni*

(1) (1867) 11 M. I. A. 241.

1929.

HAZARIMULL BABU v. MANOHAR DAS MOHANTA MAHARAJ.

"right. If we do not put in, you shall be competent "to put in the same into the Collectorate and the "*rajbarhi*, if you so desire, and the money so paid "shall continue to be realizable from the mortgaged "property like the money of this bond. If it is "found that there has been any default or *laches* on "our part in payment of the said rents into the "Collectorate or the *rajbarhi*, and if, in consequence "the mortgaged properties appertaining to the "*zemindari* or any portion of them be sold by auction "by the *rajbarhi* or the Collector, then you shall "without waiting for the term, forthwith bring a "suit and take the surplus sale-proceeds due to us."

Out of the above properties, there was a usufructuary mortgage of six lots appertaining to *touzi* No. 20 upto 1318 and 1343 B. S. with the predecessor in interest of defendants 7, 8, 9 and 10, 3 lots being subsequently allotted to defendant No. 7.

After the execution of the plaintiff's mortgage, the properties were hypothecated on four occasions in favour of defendant No. 7. The plaintiff's predecessor brought a suit on his mortgage (No. 90 of 1918) and obtained a final decree on the 6th January, 1920. The defendant No. 7 brought 4 suits, one in 1917 and three in 1920 on his 4 mortgages and obtained decrees. The plaintiff put his decree in execution in Execution Case No. 253 of 1922 (but did not actually bring the mortgaged properties to sale), and, while the said execution case was pending, the mortgagors defaulted payment of revenue and cesses of two of the mortgaged properties for the March *kists* of 1923 and 1924, and, in order to prevent the estates being sold in auction and the consequent destruction of his mortgagee rights, the plaintiff paid altogether the sum of Rs. 11,883-15-3 before the last day of payment.

To recover the above sum, together with Rs. 600 as damages, the plaintiff brought the present suit, No. 109 of 1924, against defendants 1 to 6 and defendants 7, 8, 9 and 10, and prayed for a decree to the effect that, in case the properties in suit be sold by

auction in execution of his own decree in suit No. 90 of 1918, he should be able to realize the amount of the decree he now seeks from the surplus sale-proceeds left over after satisfying his former decree in preference to the decrees of defendant No. 7. He also prayed that the amount of this decree may, according to the provisions of the Bengal Land Revenue Sales Act and the terms of the mortgage deed, be added to his original decree and the whole treated as first lien over the property, and, in case the same be not fully realized therefrom, the balance be ordered to be realized from other properties and persons of defendants Nos. 1 to 6.

The defendants Nos. 5 and 6 had, from long before the mortgages, opened separate accounts for revenues from defendants 1 to 4 and had been in separate ownership and possession of their shares of the properties.

The suit was resisted by defendant No. 7 principally on the grounds, among others, that after the decree on the mortgage in suit No. 90 of 1918, the plaintiff could not claim the present amounts on the basis of the terms of the bond according to law, and that the plaintiff could not claim a prior charge on the surplus sale-proceeds in preference to his decrees. The Subordinate Judge found that the plaintiff had a charge on the mortgaged properties, and that similarly to a mortgagee in possession under section 72 of the Transfer of Property Act, he was entitled to a prior charge to defendant No. 7's mortgages with respect to the revenues paid, but the payment of cesses was a voluntary payment and the plaintiff could not get a decree for the same. The defendant No. 7 appealed.

Mr. Saratchandra Basu (with him *Mr. Apurbacharan Mukherji*), for the appellant. The plaintiff cannot get a mortgage decree for the sums paid by him after the mortgage debt had merged in a decree of the court and the same had been put in execution.

1929.

HAZARIMULL BABU v. MANOHAR DAS MOHANTA MAHARAJ.

The payments in question were not necessary for protecting his interests under the mortgage: sections 14 and 9 (*4*) of Act XI of 1859.

As a matter of fact, the mortgage decree was made absolute and put in execution. Section 14 can have no application. The payments were made voluntarily: *Anandi Ram* v. *Dur Najaf Ali Begum* (1) and section 9 of Act XI of 1859. The lien having merged into a decree, it was extinguished and no amount could now be added to the original lien. The plaintiff cannot get priority for this amount over the 4 mortgages of the appellant, because tacking is not allowed in India, and, in this case, the maximum was not fixed within meaning of section 79 of the Transfer of Property Act.

Mr. Gunadacharan Sen (with him *Mr. Narendrakrishna Basu*), for the respondents. The plaintiff was not acting as a mere volunteer when he paid the arrears of revenue: the deposit was "necessary" for protecting his lien on the estate at that time, and the fact that there were separate accounts and the defaulting shares of the estate would only be put up for sale first of all does not make any difference in the position of the plaintiff, for, in the event of the amount of the highest bid becoming insufficient, the Collector would be competent to put up the entire estate for sale free of all incumbrances under section 14 of the Revenue Sale Law, and at that time plaintiff would not be entitled as a matter of right to make the deposit and he would be completely at the mercy of the Collector, who would have unfettered discretion either to hold the sale or to stop it. So in the latter case the plaintiff would have to run great risk which he was not called upon by the law to do: *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (2).

Moreover the amount was deposited by the plaintiff in perfect good faith, believing that his interest would be endangered by the sale: Act XI of 1859, section 9, clause (3).

(1) (1890) I. L. R. 13 All. 195. (2) (1903) I. L. R. 30 Calc. 794.

The plaintiff's original lien was not extinguished by the decree: Civil Procedure Code, Order XXXIV, rule 5; Transfer of Property Act, section 89. *Abbas Ali Khan* v. *Chote Lal* (1).

The plaintiff is entitled to add the amount deposited by him for arrears of revenue to his original lien now converted into a decree, and thus to have priority for that amount over the mortgages of the defendant No. 7 on the following grounds:—

(*a*) Section 9, clause (4), Revenue Sale Law, clearly lays down that when the plaintiff proves to the court that the deposit was necessary in order to protect any lien he had on the estate or part thereof, he shall be entitled to add the amount to his original lien. This clause was added to the section for the first time in 1859 to prevent injustice being done to mortgagees; (*b*) Defendant No. 7, being a prior usufructuary mortgagee and also a subsequent mortgagee, was benefited by the plaintiff's deposit, as otherwise his liens would have been wiped out if the whole estate was sold away for arrears of revenue; and (*c*) there is a clear provision in the mortgage bond itself entitling the mortgagee to deposit the arrears of revenue and to add it to his original lien. Defendant No. 7, who is a subsequent mortgagee, had notice of this clause and as such was bound by it.

B. B. GHOSE J. This is an appeal by defendant No. 7, which arises out of a suit to enforce a charge by the plaintiff on certain properties, under the following circumstances: Defendant No. 7 had a usufructuary mortgage of the properties in question, which belonged to defendants Nos. 1 to 6. The mortgage was made by some of them and the predecessors of others. These properties, with other properties were subsequently mortgaged to the plaintiff by a deed dated the 30th January, 1905. Subsequently to that, the mortgagors executed several other mortgages in favour of defendant No. 7. The plaintiff brought a suit on his mortgage, which was numbered 90 of 1918,

(1) (1926) I. L. R. 49 All. 162.

1929.

HAZARIMULL BABU v. MANOHAR DAS MOHANTA MAHARAJ.

GHOSE J.

and obtained a final decree on the 6th January, 1920. He put the decree in execution under Execution Case No. 253 of 1922, but did not proceed to sell the properties mortgaged. The mortgaged properties included two revenue-paying estates. There were separate accounts opened with regard to the estates for the shares belonging to the mortgagors. There was default in payment of revenue with regard to the shares belonging to the mortgagors of the revenue-paying estates and the plaintiff deposited certain sums of money in March, 1923 and March, 1924, which included the revenue as well as cess payable on account of the mortgagors' shares. In the meantime, defendant No. 7 obtained four decrees on the several mortgages that he had obtained from the mortgagors between the 30th of January, 1905, and the date when the money was deposited by the plaintiff for preventing the revenue sale. Those decrees were in one suit of 1917 and three suits of 1920. The plaintiff brought the suit, out of which this appeal arises, for the recovery of the money that he paid in March, 1923 and March, 1924, for preserving the properties from sale and he asked for a decree declaring a charge for the principal amount and interest according to the provisions of the Revenue Sale Law and also prayed that a decree may be passed to the effect that if the properties in suit be sold in execution of his mortgage decree obtained in Suit No. 90 of 1918, then the plaintiff will be entitled to realize the amount claimed in the present suit out of the surplus sale-proceeds to the exclusion of defendant No. 7, who had other mortgages on the properties. Defendant No. 7 objected to the claim on the ground that the plaintiff need not have deposited the revenue, as his mortgage interest would not have been affected by the sale, as the sale would have been of the separate account belonging to the mortgagors and the purchaser would get the properties subject to his mortgage. It was also urged that, under the provisions of section 9 of the Revenue Sale Law (Act XI of 1859), the amount paid by the plaintiff as mortgagee cannot be added to the

amount of the original lien, as the original lien has been perfected by the decree of the court. It was further argued that, in any case, the plaintiff cannot have priority over defendant No. 7 for these advances in the present suit. The learned Subordinate Judge has made a decree partially in terms of the prayers made by the plaintiff. He has held that the plaintiff cannot get any charge for the cess paid but that he was entitled to a charge for the amount of revenue paid in priority over the claim of defendant No. 7. It ought to be stated here that certain other persons were made defendants, *viz.*, Nos. 8 to 10, who have now no interest in the properties in question. The Subordinate Judge has made an ordinary mortgage decree in favour of the plaintiff as against all the defendants, including defendant No. 7, and has not given any direction as to how the money should be realised, whether from the surplus sale-proceeds on a sale being held in execution of the plaintiff's decree in Suit No. 90 of 1918 or not. Defendant No. 7 has preferred this appeal against that decree. The mortgagors also appear as respondents but they do not contest the appeal of defendant No. 7 who is only resisted by the plaintiff.

The grounds urged on behalf of defendant No. 7, the appellant, are the same as taken in the court below. With regard to the first ground, the Subordinate Judge has held that the interest of the plaintiff was endangered by the fact of non-payment of revenue and he paid the money in good faith for the purpose of protecting his own interest. As the Subordinate Judge puts it, that if by sale of the share of the mortgagors in the estate the arrears had not been realised, then the Collector would have proceeded under section 14 of the Act and if any co-sharer had refused to purchase the share in default, then the plaintiff would have no opportunity to make the deposit and the entire estate would have been sold by the Collector, which would have the effect of wiping out plaintiff's mortgage. The plaintiff, therefore, was interested in making the deposit and he comes

1929.

HAZARIMULL BABU v. MANOHAR DAS MOHANTA MAHARAJ.

GHOSE J.

within the description of the "person" referred to in the third and fourth paragraphs of section 9 of the Revenue Sale Law. It seems to me that the learned Subordinate Judge was right in his view. It is not necessary that the immediate effect of the sale would be such as to wipe out the mortgage. Although it is contended that, even if the co-sharers had refused to purchase the defaulting share, the Collector could under the law accept payment of the revenue in arrears from the mortgagee, still the mortgagee was not bound to run the risk of the Collector's refusal to accept any payment from the mortgagee after the sunset of the last day of payment. This point, therefore, must be decided against the appellant.

The next contention seems to me to be of more substance. What the fourth clause of section 9 of Act XI of 1859 provides for is that "if the party so "depositing, whose money shall have been credited, "shall prove before such a court that the deposit was "necessary in order to protect any lien he had on the "estate or share or part thereof, the amount so "credited shall be added to the amount of the original "lien." Now, what is the remedy which is given to a mortgagee under this clause? It is the same as is given under section 72 of the Transfer of Property Act to a mortgagee who spends money for the preservation of the property as provided in that section. There also it is provided that the mortgagee in the absence of a contract to the contrary is entitled to add the expenditure incurred to the principal money. The remedy in such cases given to the mortgagee is in accordance with the decision of their Lordships of the Privy Council. In the case of *Nugenderchunder Ghose* v. *Sreemutty Kamince Dossee* (1), their Lordships observed thus: "Considering that the payment "of the revenue by the mortgagee will prevent the "*taluk* from being sold, their Lordships would, if "that were the sole question for their consideration, "find it difficult to come to any other conclusion than "that the person who had such an interest in the

(1) (1867) 11 M. I. A. 241, 258.

" *taluk* as entitled him to pay the revenue due to the " Government, and did actually pay it, was thereby " entitled to a charge on the *taluk* as against all " persons interested therein for the amount of the " money so paid. But their Lordships are of opinion, " that this is not the form in which the question comes " before them, and that what they have to decide is " not whether such a charge originally existed, or " whether it does now subsist, but whether the appel- " lant can enforce such a charge in the present suit." Their Lordships next said this (and this is important for the purpose of the present case): " There were " two courses open to her (the mortgagee): she might " have instituted a suit to enforce the mortgage and to " tack to the mortgage the amount of the revenue " paid by her to save the estate, and to have the estate " sold to pay that amount; or she might proceed " under the ninth section of Act No. 1 of 1845 (now " repealed by Act XI of of 1859)." This last passage prescribes the procedure which a mortgagee is entitled to adopt when he makes any payment for the preservation of the mortgaged property, and it seems that the 4th clause of section 9 of Act XI of 1859 has been enacted in accordance with it. It cannot be said that the mortgagee can bring one suit on his mortgage and obtain a decree on it and another suit for the money which, according to the provisions either of the Revenue Sale Law or of the Transfer of Property Act, he is entitled to add to his mortgage money. He must treat the whole amount which he is entitled to get out of the mortgaged property as one entire sum. If it were otherwise, then the mortgagee, after obtaining a decree on his mortgage, may remain idle for any length of time and, by making periodical payments for the purpose of the preservation of the property, may bring any number of suits to enforce his charge and obtain priority over all intermediate mortgagees by such different suits. That does not seem to me to be the right view of the provisions under the fourth clause of Act XI of 1859. When a mortgagee obtains a decree, he should realise the

1929.

HAZARIMULL BABU v. MANOHAR DAS MOHANTA MAHARAJ.

GHOSE J.

money as soon as possible by sale of the mortgaged property and after that the surplus proceeds may be distributed among the puisne mortgagees. By the procedure that this mortgagee has adopted he cannot be allowed, in a separate suit for enforcement of his charge, to squeeze out all the intermediate mortgages. I do not think that this should be the result of the provisions of the law which entitles him to add the money paid to the original mortgage lien. It cannot be claimed under the Act as a separate debt which would have a priority over all other mortgages, but the mortgagee could tack such payments to his original mortgage in a suit brought on his mortgage.

The result, therefore, is that the decree made by the Subordinate Judge should be modified to this extent that the plaintiff would get a decree for the money as against defendants Nos. 1 to 6 and the suit as against defendant No. 7 should be dismissed. The decretal amount would be a charge on the surplus sale-proceeds of the properties, if any, after satisfying the prior mortgage decrees of the plaintiff and the defendant No. 7, and it may also be recovered against defendants 1 to 6 personally. Defendant No. 7 is entitled to his costs in this Court as well as in the court below. The other respondents will bear their own costs.

PANTON J. I agree.

Decree varied.

R. K. C.