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Then, again, the lady asserts that the compromise was obtained from her by pressure and by mistatement of facts.

Looking then at the whole case, we think that, even if it were one in which specific performance should be given, which we are far from saying, the defendant Ramessur Malia must seek such performance in a regular suit.

We are, therefore, of opinion that the decree of the lower Court must be set aside, and the case must be remanded for retrial upon the original issues.

Decree set aside and case remanded.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

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February 3.

LALA DILAWAR SAHAI AND OTHERS (DEFENDANTS) v. DEWAN BOLAKIRAM AND ANOTHER (PLAINTIFFS).*

Mortgagor and Mortgagee—Priority—Marshalling of Securities—Purchaser for value.

Where the owner of certain property mortgages it to *A*, and afterwards sells a portion of the mortgaged property to *B*, it is not incumbent on *A* in suing to enforce his mortgage to proceed first against that portion of the property which has not been sold by the mortgagor.

IN this case the plaint stated that the defendants No. 1, Lala Dilawar Sahai and others, by two deeds, bearing date the 18th of April 1876 and the 5th of January 1877 respectively mortgaged to the plaintiffs a two annas share in eighteen villages; that, on the 19th of July 1878, the plaintiff obtained a mortgage decree on their mortgage, and in execution of this decree they attached the mortgaged properties. The defendants filed various objections, but the only one material for the purposes of this report were those filed by the defendants No. 2, the Panray defendants, who claimed as purchasers of two of the 18 villages under a deed of sale, dated the 30th of April 1878; and they claimed to have priority over the plaintiffs on the ground that their purchase-money was applied in payment of a prior mortgage on those villages which had been executed in the year 1871. The plaintiffs' claim was disallowed, and they

* Appeal from Appellate Decree No. 2837 of 1883, against the decree of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 27th of August 1883, affirming the decree of E. G. Lillingston, Esq., Deputy Commissioner and Sub-Judge of Hazaribagh, dated 23rd of November 1882.

then brought the present suit for a declaration that the two annas share of the defendants No. 1 in the 18 villages were liable to be sold under the decree of the 19th of July 1878, for an order for attachment and sale of the said two annas, and for general relief. The defendants raised the same defences as in the previous claim, but the Court of first instance found that the Panray's purchase was unconnected with any previous mortgage, and gave the plaintiffs a decree. It was contended by the Panrays, on the authority of *Bishonath Mookerjee* v. *Kisto Mohun Mookerjee* (1), that the plaintiffs were bound to proceed first against the villages, other than the two which they had purchased on the 30th of April 1878, but the Judge held that that case did not apply. The defendants appealed to the Judicial Commissioner, who affirmed the decree of the Court of first instance. The defendants appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Koruna Sindhu Mookerjee* for the appellants.

Baboo *Kali Mohun Doss* and Baboo *Bussunt Koomar Bose* for the respondents.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

This is a suit in which the plaintiffs as mortgagees sue to have it declared that certain properties in possession of the defendants are liable to attachment and sale as the property of their judgment-debtors. The defendants have raised several issues; *first*, they contend that they are in a position to claim the benefit of a prior mortgage; *secondly*, they say that, even if that be not the case, still they are entitled to throw the mortgagees on other properties to save the property in their own possession.

Now, in regard to the first point, we think that the defendants are not entitled to the benefit of the first security; for there is nothing on the record to show the relative dates of the conveyance and the payment of the money; nor is there any finding by the lower Court that they paid the money to the original mortgagee. We do not think, therefore, that they have shown they are entitled to take the benefit of the first mortgage.

(1) 7 W. R., 483.

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Then, as to the second point, the defendants contend that the plaintiff is not entitled to a declaration that the property is liable to attachment and sale, unless he has shown that he has exhausted the other property.

Reliance has been placed on two cases referred to in Story's Equity and Jurisprudence. One is the case of *Hartly* v. *O'Flaherty* (1). This was a suit to determine whether a mortgagee of a portion of an estate, having paid a Crown debt overriding the entire estate, the mortgagee was entitled to contribution from the purchasers of the other portions. It was not a case of the present kind. In one portion of the judgment, page 216, it is said: "If a mortgagor sells a portion of his equity of redemption for valuable or good consideration, the entire residue, if undisposed of by him, is applicable in the first instance to the discharge of the mortgage, and in ease of a *bonâ fide* purchaser." This case came under the consideration of the Lord Chancellor in the case of *Averall* v. *Wade* (2), and there the Lord Chancellor said: "The general doctrine is this, where one creditor has a demand against two estates, and another demand against one only, the latter is entitled to throw the former on the fund that is not common to them both. This is a narrow doctrine, and cannot generally be enforced against an incumbrancer, who is a mortgagee. Whatever may be the equity of the creditor with only one security, the mortgagee of both estates has a right to compel the debtor to redeem, or he may foreclose. In Ireland, indeed, there would be a decree for sale, and the mortgagee would be entitled to no more than his money, and the Court would deal with the surplus in such manner as it might think fit, so that the equity might be worked out, but not so in England." So far, therefore, as we can see, there is no support for the contention now put forward that in this suit by a mortgagee we should declare that the mortgagees must proceed against the property not in the hands of the defendants who hold the equity of redemption of a portion only.

We therefore think that the plaintiff is entitled to a decree, and dismiss the appeal with costs.

Appeal dismissed.

(1) L. & G. *temp.* Plunkett, p. 208; 1 Beat. 61.

(2) L. & G. *temp.* Sugden, p 252.