

tioner produced any new evidence. The objections of the petitioner have been determined by the former Subordinate Judge."

The *Junior Government Pleader* (Babu *Dwarkanath Banarji*), for the petitioner.

Pandit *Nand Lal*, for the opposite parties.

The order of the High Court was as follows :

It is obvious that the Subordinate Judge has misconceived the duty imposed on him. The circumstance that the decree, of which a review was sought, was passed by his predecessor did not discharge the Subordinate Judge from the obligation of considering whether any sufficient grounds were shown for the application. Where a subordinate Court has obviously failed to perform its duty, and there is no remedy by appeal, it appears to us within the competency of this Court, under the general powers of superintendence with which it is invested under s. 15 of the Letters Patent, to point out to the subordinate Court its error and to direct it to proceed according to law. The Subordinate Judge is therefore directed to reconsider the application presented to him, and to deal with it as if a review was sought of a decree which he had himself passed.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Oldfield.*)

BISHAN DIAL AND ANOTHER (DEFENDANTS) v. MANNI RAM (PLAINTIFF)*

Mortgage—Foreclosure—Regulation XVII of 1806.

Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person, entitled only to one moiety of the debt, foreclosed the mortgage as to that moiety, and sued the different mortgagors for possession of a moiety of their interests in the mortgaged property, in virtue of the mortgage and foreclosure, *held* that the foreclosure was invalid and the suits were not maintainable.

This was a suit in which the plaintiff claimed from Gulab Rai and Bishan Dial possession of a 4-anna share in a certain zemindari estate, in virtue of a deed of conditional sale dated the 13th December, 1864, and an order foreclosing the mortgage dated the 11th April, 1874. The facts of the case are sufficiently

* Special Appeal, No. 1320 of 1875, against a decree of the Judge of Cawnpore, dated the 16th September, 1875, affirming a decree of the Subordinate Judge, dated the 30th January, 1875.

1876

IN THE MAT-
TER OF THE
PETITION OF
MATHRA
PARSHAD.

1876
August 24.

1876

BISHAN DIAL
v.
MANNI RAM.

stated for the purposes of this report in the judgment of the High Court.

Pandit *Ajudhia Nath* and Munshi *Hanuman Parshad*, for the appellants.

Lala Lalta Parshad and Shah *Assad Ali*, for the respondent.

The judgment of the High Court was as follows :

Sarab Sukh Rai, the original proprietor of mauza Barauli, died in 1844, leaving a widow, Ram Kuar, and three sons, Sheo Dial, Gulab Rai, and Bishan Dial. In 1864 Sheo Dial, who appears to have managed the business of the family in the absence of his brothers, of whom one, Bishan Dial, was residing at Lucknow, and the other, Gulab Rai, at Cawnpore, desired to raise a loan of Rs. 13,000, in order to pay off the sums due to Daula Kuar and others, decree-holders, who were in possession of mauza Barauli and mauza Darjanpur, and for other necessary purposes; and in order to raise the sum required, Bishan Dial, on the 23rd August, 1864, executed a power of attorney authorizing Sheo Dial to take a loan from any person he pleased, and to execute and register in the name and on behalf of Bishan Dial "a mortgage deed" for Rs. 13,000 in respect of mauza Barauli. On the 13th September, 1864, Sheo Dial, on his own behalf and as attorney for Bishan Dial, executed a deed of mortgage of mauza Barauli for the sum above-mentioned in favour of Gobind Parshad, Swami Lal, and Kashi Parshad, for a term of seven years, subject to the following condition, *viz.*, that the mortgagors should, at the expiry of the term named, redeem the mortgage by re-payment of the Rs. 13,000, and the interest left unpaid. After this mortgage was registered, and the money paid to Sheo Dial, the mortgagees appear to have discovered that Gulab Rai had a share in the estate, and required that he also should join in the mortgage. Accordingly, on the 9th November, 1864, Gulab Rai executed a power of attorney in favour of Sheo Dial in which, after reciting that Sheo Dial had executed the mortgage of the 13th September, and had registered it, and that he had received and deposited the loan in the Government Treasury on account of all three brothers, Gulab Rai declared that he agreed and consented to the proceedings of his brother therein before-recited, and that he accordingly appointed his brother his attorney that he might execute "a deed of mortgage on his part also in

respect of mauza Barauli in favour of the mortgagees, and under conditions similar to those recorded in his own deed." On the 13th December Sheo Dial, for himself and as the attorney of his brothers, executed another deed of mortgage in favour of the same mortgagees. The deed recites the mortgage of the 13th September, that Gulab Rai had been no party to it, and that consequently the mortgagees were not content with that deed, and declares that the deed now in recital had been executed in lieu of the deed above-mentioned. By this deed Sheo Dial mortgaged the same property for the same sum as in the former deed, but with this difference, that the mortgagors bound themselves to pay compound interest on all arrears of interest, and that whereas the former deed was a deed of simple mortgage accompanied with provisions enabling the mortgagees, in the event of default, to convert it into a mortgage with possession, in the substituted deed the mortgagees are also empowered, in the event of default, to treat the simple mortgage as a conditional sale and to obtain foreclosure. In April, 1865, Gobind Parshad, Swami Lal, and Kashi Parshad executed a sub-mortgage of the property to Girdhari Lal and Jagan Nath. Default having been made in payment of the sum due on the sub-mortgage, Chotai Lal, son of Girdhari Lal, and Jagan Nath, in May, 1872, sued the original mortgagees and obtained decrees in execution of which they brought to sale the mortgagees' rights, and became each a purchaser of one moiety. In August, 1872, Chotai Lal sold his moiety to the respondent. It appears that, on Sarab Sukh Rai's death, the estate of Barauli was recorded in the revenue registers as held by his widow and three sons in equal shares of four annas. It is alleged, nevertheless, that they remained a joint Hindu family. On the 4th December, 1859, Sheo Dial mortgaged his share described as a 5-anna 4-pie share to Har Sahai, whose son, Raj Bahadur, obtained a decree on the mortgage-deed on April 15th, 1862. In execution of the decree, and of another decree held by one Har Dial for Daula Kuar, the 4-anna share standing in his name in the revenue registers was sold on the 20th July, 1867, and purchased by Suraj Parshad. Sheo Dial died in 1866, and if the family was joint his brothers obtained his interest by survivorship. If the family was not joint it devolved on his daughter. On the 24th December, 1867, Ram Kuar, the widow of Sarab Sukh Rai, executed a deed by which she professed to divide the 4-anna share standing in her name, and to transfer

1876

 BISHAN DIAL
 v.
 MANNI RAM.

1876

BISHAN DIAL
v.
MANNI RAM.

a 2-anna share to Lalta Parshad, the son-in-law of Sheo Dial, and the remaining 2-anna share to Har Parshad, son-in-law of Gulab Rai.

The respondent having, as has been stated, acquired the one moiety in the original mortgage purchased by Chotai Lal, in April, 1873, issued notice of foreclosure in respect of one moiety of the mortgage, and on the expiry of the year of grace he has instituted four suits. In the first he claims in virtue of the mortgage and foreclosure to obtain possession of 4 annas out of the two shares of 4 annas each, which are still recorded in the names of Gulab Rai and Bishan Dial respectively. In the second, on the same title, he claims possession of a 2-anna share out of the 4-anna share purchased by Suraj Parshad. In the third, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Lalta Parshad, and in the fourth, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Har Parshad. A common objection was urged in the Courts below and in this Court that the foreclosure was invalid in that a person entitled to one moiety of a mortgage-debt cannot require the mortgagees to pay off one moiety of the mortgage-debt or to stand foreclosed of one moiety of the mortgage-money. We must allow the validity of this plea. The whole of the mortgage-debt is due to the persons claiming under the original mortgages jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid mortgage-debt, except under circumstances which do not exist in this case. The notice must declare foreclosure if the whole of the subsisting debt is not paid before the expiry of the year of grace. We are, therefore, of opinion that these suits cannot be maintained, and in that opinion we are confirmed by a ruling of the Calcutta High Court—*Bhora Roy v. Abilack Roy* (1). It is unnecessary to consider the other pleas raised in this and the connected appeals. The decrees of the Courts below are reversed and the suits dismissed with costs.

(1) 10 W. R. 476; for circumstances justifying an exception to the rule that a suit must be a suit applicable to the whole property mortgaged, and a mortgagor is not to be held liable to a variety of suits and proceedings in respect of the

different interests which the mortgagees may, as between themselves, possess, see *Hunoomanpersaud v. Kalepersaud Sahoo*, W. R. 1864, p. 25, and *Indurjeet Koonwar v. Brij Bilas Lall*, 3 W. R. 130.