

deed as witnesses. As to that part of the case their allegation in the plaint was that they had not signed the sale-deed, and that their signatures were forgeries. The Subordinate Judge and the District Judge found that the signatures of the plaintiffs to the sale-deed were their genuine signatures. The Subordinate Judge found that the plaintiffs knew to what the sale-deed related, and he dismissed the suit. The District Judge allowed the appeal on the finding that the plaintiffs had witnessed the deed in question under pressure. There was no such issue raised on the pleadings in the case, and no such issue was before the District Judge. The simple issue on this point was—were those signatures the genuine signatures or not of the plaintiffs? The plaintiffs did not allege in their plaint that they had signed the sale-deed under pressure or that they did not know what the contents of the sale-deed were. The issue which the District Judge found in their favour was a very serious issue, and of that class of issues, which, in our opinion, the Privy Council has more than once pointed out, should not be raised by the Judge for the parties when they had not raised it themselves. In the Privy Council case referred to by the District Judge—*Rajlakhi Debi v. Gokul Chandra Chowdhry* (1), the mere proof of the signature of a witness to the document was, we think properly, if we may say so, held to be no evidence that he knew what the contents of the document were. On the findings on the issue raised by the parties by their pleadings, to which we have referred, the plaintiffs had no cause of action. The appeal is allowed, and the suit is dismissed with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

ZALIM GIR (DEFENDANT) v. RAM CHARAN SINGH (PLAINTIFF).*

Mortgage—Payment by mortgagees by conditional sale of prior mortgage—Decree obtained by intermediate simple mortgagees for sale—Mortgage by conditional sale foreclosed—Intermediate simple mortgagee not entitled to sell without paying first mortgage.

B made two mortgages, dated respectively the 10th October, 1871, and 10th October, 1872, of his zamindari property in favour of P. On 27th January, 1874, B

* Second Appeal No. 339 of 1887 from a decree of G. J. Nicholls, Esq., District Judge of Gházipur, dated the 31st January, 1887, reversing a decree of Munshi Kulwant Singh, Subordinate Judge of Gházipur, dated the 1st April, 1884.

(1) 3 B. L. R., P. C., 57; 12 W. R., P. C., 47; 13 Moo. I. A., 209.

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mortgaged 117 bighas 7 biswas and 10 dhurs of *stir* and cultivatory land belonging to his zamindari for Rs. 700 to the defendant. On 10th September, 1877, *B* made a conditional sale of his zamindari property to the plaintiff for Rs. 4,500 to pay off the two charges created in favour of *P*. On the 10th August, 1878, *B* made another mortgage to the defendant for Rs. 300 of the same 117 bighas, 7 biswas and 10 dhurs. On the 9th November, 1881, defendant obtained a decree on his two bonds of the 27th January, 1874, and 10th August, 1878, and on his application for execution of the decree the property mortgaged to him was advertised for sale on the 20th November, 1883. Meanwhile the plaintiff had taken the necessary proceedings to foreclose his conditional sale, and upon the 19th March, 1883, the sale was foreclosed. On the 19th November, 1883, plaintiff instituted this suit with the object of having it declared that defendant was not entitled to bring to sale the property mortgaged to him.

Held that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff acquired all the rights that subsisted under the two mortgages of the 10th October, 1871, and 10th October, 1872, and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him from bringing the property to sale in execution of his decree before first recouping the plaintiff the amount which the latter found to satisfy and discharge those incumbrances.

Held further that the only right which the defendant had to bring the property to sale was upon the strength of the decree obtained in the bond of 27th January, 1874, for he had no right under the instrument in his favour of the 10th August, 1878. The defendant should therefore only be permitted to bring the property to sale under his decree in respect of the mortgage of 27th January, 1874, when he had satisfied and discharged the two mortgage bonds held by the plaintiff of the 10th October, 1871, and 10th October, 1872.

The facts of this case are stated in the judgment of the Court.

Munshi *Mulho Prasad*, for the appellant.

Mr. *C. H. Hill* and Munshi *Juala Prasad*, for the respondent.

STRAIGHT, J.—It is impossible that I can allow this litigation to linger longer in the Court. The suit was instituted as far back as November, 1883, and we are now dealing with it, after a second trial in the lower appellate Court, in the month of July, 1888. The controversy between the parties was not of a specially complicated character, and if certain unnecessary elements had not been introduced into it by the lower Court, it might have been very readily and easily disposed off. Stripped of the complications that have been introduced into it, the case simply comes to this :—

On the 10th October, 1871, and the 10th October, 1872, one *Bhairo Singh* made two mortgages for money advanced to him in favour of one *Panna Lal*, and as security for those advances he

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hypothecated his zamindari property. On the 27th January, 1874, Bhairo Singh mortgaged 117 bighas 7 biswas and 10 dhurs of *str* and cultivatory land belonging to his zamindari for a sum of Rs. 700 to Zalim Gir, the defendant-appellant before us. On the 10th September, 1877, Bhairo Singh made a conditional sale in favour of Ram Charan Singh, the plaintiff-respondent before us, for a sum of Rs. 4,500. The necessity for the taking of that loan, as recited in the deed of conditional sale, was a pressing obligation upon Bhairo Singh, the borrower, to pay off the two charges created in favour of Panna Lal on the 10th October, 1871, and the 10th October, 1872. On the 10th August, 1878, Bhairo Singh made another mortgage for Rs. 300 of the same 117 bighas 7 biswas and 10 dhurs to Zalim Gir, the defendant-appellant before us.

Subsequently Zalim Gir brought a suit upon his two bonds of the 27th January, 1874, and the 10th August, 1878, against his mortgagor, and on the 9th November, 1881, he obtained a decree for Rs. 2,064-14. Zalim Gir applied for execution of his decree and the mortgaged property was advertised for sale, the 20th November, 1883, being fixed for the sale. Meanwhile Ram Charan Singh, the plaintiff-respondent, had taken the necessary proceedings to foreclose his deed of conditional sale; and upon the 19th March, 1883, the sale was foreclosed and he became the absolute proprietor of the mortgaged property, which included within it the 117 bighas 7 biswas and 10 dhurs which had been charged in favour of the defendant-appellant. The defendant-appellant having, as I have already said, notified the mortgaged property for sale, and the 20th November, 1883, having been fixed for such sale, the present suit was instituted on the 19th November, 1883, the day before the sale, with the object, to put it shortly, to have it declared that Zalim Gir was not entitled to bring the property to sale.

It is unnecessary for me to travel through the judgments delivered, first by the Court of first instance, and next by the appellate Court when it had the case first before it, and on the last occasion when it had to re-try the appeal under our order of remand. It is enough to say that, in my opinion, we must now take it as found that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff-respondent acquired all the rights that subsisted under the two mortgages of the 10th October, 1871,

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and 10th October, 1872, and he therefore is also in my opinion entitled to pray those securities in his aid as prior incumbrances to that of the defendant-appellant, for the purpose of stopping him bringing the property to sale in execution of his decree, unless he recoups the plaintiff for the amount which he (the plaintiff) found to satisfy and discharge those incumbrances.

It is clear that the only right, supposing he gets those incumbrances out of the way by satisfying and discharging them, which the defendant-appellant has is upon the strength of the decree obtained in reference to his bond of the 27th January, 1874, to bring the property to sale, because he can have no right whatever under the instrument which was made in his favour on the 10th August, 1878. It therefore seems to me that the proper course for us to pursue in this case is, while allowing this appeal, to modify the decree of the Court below by declaring that the defendant shall only be permitted to bring the property to sale under his decree in respect of his mortgage of the 27th January, 1874, when he has satisfied and discharged the two mortgage-bonds held by the plaintiff-respondent of the 10th October, 1871, and the 10th October, 1872. The order of the learned Judge will stand as to the costs of the lower Courts. In this Court each party will pay his own costs.

TYRRELL, J.—I entirely concur.

Appeal allowed.

Before Mr. Justice Straight.

GOPAL DAS (DECREE-HOLDER) v. ALI MUHAMMAD AND OTHERS (JUDGMENT-DEBTORS).*

Mortgage—Decree for sale—Decree not to be treated as a money-decree—Act IV of 1882 (Transfer of Property Act), ss. 88, 89, 90.

A decree in favour of a mortgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, ss. 88, 89 and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance.

THE appellant in this case, a mortgagee who had obtained a decree against the mortgagors for the mortgage-money, costs, and

* Second Appeal No. 1306 from an order of T. R. Wyer, Esq., District Judge of Sháhjahánpur, dated the 23rd June, 1887, reversing an order of Munshi Chandí Prasad, Munsif of East Budaun, dated the 5th February, 1867.

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