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of Civil Procedure. The present claim is in effect such a claim as I have referred to, although not so in form. The last point we need refer to is that of limitation. The Subordinate Judge held that this suit was barred by limitation, because the defendants in the suit of 1860 had denied the plaintiff's right of partition and set up an adverse possession. He overlooked the fact that those issues were decided by the decree in that suit adversely to the defendants there. The question of limitation does not arise on the point suggested by the Subordinate Judge. It may be that some question of limitation arises from circumstances subsequent to 1860 and may have to be decided in this suit. We have not got the materials before us to express any opinion as to whether a question of limitation does arise. The Subordinate Judge in truth did not try the rest of the case, but he disposed of it on those preliminary points to which we have referred. That being so, we set aside his decree, and, under s. 562 of the Code of Civil Procedure, remand the case for trial on the merits and on such points of law as really arise. The costs here and hitherto will abide the result.

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

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February 3.

NAMDAR CHAUDHRI (PLAINTIFF) *v.* KARAM RAJI AND OTHERS (DEFENDANTS).*

Mortgage—Prior and puisne incumbrancers—Puisne incumbrancer not made a party to suit upon prior incumbrance—His right to redeem not thereby affected.

If a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage into suit, join the puisne incumbrancer as a party, that puisne incumbrancer's right to redeem will not thereby be affected.

Mohan Manor v. *Togu Uka* (1); *Muhammad Sami-ud-din* v. *Man Singh* (2); and *Gajadhar* v. *Mul Chand* (3) referred to.

THE facts of this case are fully stated in the judgment of Straight, J.

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* First appeal No. 200 of 1889 from a decree of Maulvi Ahmad Hasan, Subordinate Judge of Gorakhpur, dated the 8th July 1889.

(1) I. L. R., 10 Bom. 224. (2) I. L. R., 9 All. 125.
(3) I. L. R., 10 All. 520.

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NAMDAR CHAUDHRI v. KARAM RAJI.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba* for the appellant.

Munshi *Jwala Prasad* and Munshi *Kashi Prasad*, for the respondents.

STRAIGHT, J.—This is a suit for possession brought under the following circumstances :—On the 9th July 1873, one Bhaiya Agar Singh executed a simple mortgage in favor of two persons named Beni Madho and Achambit Singh, for a sum of Rs. 22,000. Interests in 19 villages belonging to the mortgagor were charged, and among them were 6 as. 4 p. of a village called Sirsia. This mortgage may conveniently be termed mortgage No. I. On the 5th August 1874, the same mortgagor and others made a usufructuary mortgage of their property, including the whole of Sirsia, for a sum of Rs. 4,500 in favor of Pir Ghulam and Jurai; and there seems to be no doubt or question that those mortgagees obtained possession under their mortgage. To this latter mortgage, by a further advance about October 1874, a charge was tacked on, on the 9th October 1874. This may be conveniently called mortgage No. II.

With regard to mortgage No. I, of which, as I have stated, Beni Madho and Achambit Singh were the mortgagees, it appears that the proportions of the mortgage-money advanced were divided between them to the extent of two-thirds to Beni Madho and one-third to Achambit Singh. Some time prior to March 1880, the mortgagee, Achambit Singh, and his mortgagors came to a settlement to the extent of one-third of the mortgaged property, and to that extent the mortgage was apparently discharged and satisfied. Subsequently, on the 15th March 1880, Beni Madho put the remaining interest under the mortgage in suit, and obtained a decree against the mortgagor for Rs. 14,875. On the 24th December 1883, Beni Madho transferred his interests as decree-holder to two persons of the name of Sharif and Dular, who as assignees thereof took steps in execution, and in those execution-proceedings they came to an arrangement with their judgment debtor, mortgagor, to purchase the 6-annas 4-pies of the village of Sirsia for a sum of Rs. 5,684. That transaction was perfected by a private

sale, and it must be taken that that interest has now disappeared from and is no longer subject to the mortgage of 1873. The interest which those two persons had so acquired was on the 4th September 1887, assigned over to the plaintiff and that is his title. He, therefore, "*primâ facie*" is the holder of a title acquired at a sale under a prior incumbrance to that under which, as I will in a moment show, the defendants acquired their interests.

The mortgage No. II has never been put in suit, and it appears that Pir Ghulam and Jurai, the original mortgagees, are both dead, each of them leaving numerous heirs behind him. With regard to the heirs of Pir Ghulam, they, on the 20th September 1886, sold their one-half mortgagee interest under the mortgage of the 5th August 1874, to Musammat Karam Raji Kuari, the wife of Bhaiya Agar Singh, the mortgagor. The consideration for that sale was a sum of Rs. 2,750, which was paid by an assignment to Vazir and others of the interests of Bhaiya Agar Singh along with a number of other persons in a village known as Sehri Sidhi, representing a sum of Rs. 1,751 accompanied by a bond of Bhaiya Agar Singh alone, mortgaging a zamindári interest of his for the payment of Rs. 999.

As to the share of Jurai of the mortgage of the 5th August 1874, that was, on the 18th October 1886, sold by the sons of Jurai also to Musammat Karam Raji for a sum of Rs. 2,750. In this case also the consideration for the sale was represented by a cross-conveyance, by Bhaiya Agar Singh along with several other persons, of their interests in the village of Midai, representing a value of Rs. 2,450, and by a bond of Bhaiya Agar Singh alone for Rs. 300, mortgaging a zamindári share of his own. This represents the title of the defendants.

Now I have stated exactly the mode in which this litigation presents itself and how it comes about that the plaintiff, who represents mortgage No. I, seeks to have possession as against the holder of the interest under mortgage No. II. There can be no doubt, I think, that at the time of the suit which was brought upon the mortgage No. I, the mortgagee had notice of the mortgage No. II.

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Not only was that a registered instrument, but in addition to that the mortgage was of a usufructuary character, the mortgagees were in possession; and upon this point the learned Subordinate Judge below found in terms that the plaintiff in that litigation had knowledge and notice of the usufructuary mortgage.

It is said that at that time there being no Transfer of Property Act in force, and the provisions of s. 85 not being in operation, no obligation rested upon the plaintiff to include the parties to mortgage No. II in that litigation. Section 85 of the Transfer of Property Act, which is now in force, only applies a principle which was long before recognized by the Courts of this country, and is a principle to which in justice, equity and good conscience, it seems to me those Courts were bound to give effect. The learned pleader on behalf of the plaintiff-appellant has said that, looking to the precise nature of the circumstances under which the purchasers under the second mortgage transferred their rights to the defendants, it must be taken that the payment made to them was in fact a payment made by the mortgagor himself, and therefore it must be assumed that the mortgage of 1874 was satisfied and discharged, and the defendants have no right to take their stand upon that security, and claim any rights under it. It is to be noted in regard to this contention that the conveyances which represent the more substantial portion of the transfers from Bhaiya Agar Singh to those transferees were conveyances not by himself alone, but by himself in conjunction with several other persons; and I am not aware, as I have pointed out to the learned pleader on behalf of the appellant, who has put his points so clearly and well in this case, that there is any thing to prevent a mortgagor doing what the mortgagor in this case is said to have done, namely, assisting in finding funds for his wife to purchase the mortgagee interest, which the mortgagee was desirous to transfer. It does not appear to me that this contention has force or effect, and it cannot prevail.

Then comes the main and crucial point in the case; what are the rights of the parties in respect of their several mortgages. This matter is not without authority. It has been dealt with in the case

of *Mohan Manor* v. *Togu Uka* (1). It has been dealt with by my brother Tyrrell and myself in *Muhammad Sami-ud-din* v. *Man Singh*, (2) which latter ruling has been adopted and followed by the learned Chief Justice and my brother Brodhurst in *Gajadhar* v. *Mul Chand*, (3) and has also been adopted by myself in many rulings to which I have been a party in this Court. All those rulings are to the effect that if a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage in suit, join the puisne incumbrancer as a party, that puisne incumbrancer is in no way affected or prejudiced by the decree in the rights which the Transfer of Property Act gives him to redeem the prior incumbrancer. If he has been left out of that litigation the puisne incumbrancer must be placed in the same position he would have held had he been a party to that litigation.

The defendant is the puisne incumbrancer admittedly. She is willing and ready to discharge all the obligations that the law reasonably calls upon her to discharge, and she is prepared to satisfy the amount which properly is proportioned to the 6 annas 4 pies of mauza Sirsia. It is not denied that Rs. 5,684 was the amount which, by private arrangement between the mortgagor—who must be presumed to have had the best regard for his interest, and the mortgagee, who must be presumed not to have paid more than a fair price—was paid for the purchase at the private sale of the 6 annas 4 pies. I have not heard one word that that was not a reasonable sum, and we are both agreed that that is the extent to which equity requires that the defendant should pay the plaintiff, if she is to retain possession of this particular share of mauza Sirsia. That being the view I take of this case, I think that the decree of the Court below was wrong, in that it called upon the prior incumbrancer, before getting possession, to pay out the puisne incumbrancer. I think that the position should have been reversed. I therefore decree the appeal and reverse the decision of the Court below, and declare that the plaintiff-appellant is entitled to possession of the 6 annas 4 pies share of Sirsia, subject to this condition

(1) I. L. R., 10 Bom. 224. (2) I. L. R., 9 All. 125.
(3) I. L. R., 10 All. 520.

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that if within 6 months from the date of this our decree, the defendant do pay into this Court the sum of Rs. 5,684 to the credit of the plaintiff, the plaintiff's suit will stand dismissed and the defendant will retain possession of the 6 annas 4 pies of mauza Sirsia. If the money is not paid within the stipulated period, the plaintiff's decree for possession will stand, and he will be entitled to enforce it according to law. In either event the parties will bear their own costs of this litigation.

TYRRELL, J.—I concur.

Appeal decreed.

REVISIONAL CIVIL.

1891
February 7.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

MAHABIR SINGH AND ANOTHER (PETITIONERS) *v.* BEHARI LAL AND OTHERS (OPPOSITE PARTIES). *

Act I of 1887 (*General Clauses Act*) *s.* 3, *cl.* (13)—*Act XII of* 1887 (*Bengal, N.-W. Provinces and Assam Civil Courts Act*) *s.* 21, *cl.* (*a*)—*"Value of the original suit"—"Amount or value of the subject matter of the suit"—Jurisdiction—Civil Procedure Code, s.* 2—*Decree, definition of.*

For the purpose of determining the proper appellate Court in a Civil suit what is to be looked to is the value of the original suit, that is to say, the "amount or value of the subject matter of the suit." Such "amount or value of the subject matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appear that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint.

An order of a District Judge returning a memorandum of appeal to be presented in the proper Court on the ground that the value of the suit is beyond the pecuniary limits of his jurisdiction is not a decree within the meaning of s. 2 of the Civil Procedure Code.

THE facts of this case sufficiently appear from the judgment of the Court.

Honble Mr. *Spankie* and Mr. *C. H. Hill,* for the appellants.

Munshi *Ram Prasad* and Munshi *Kashi Prasad,* for the respondents.

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*Miscellaneous application under s. 622 of the Civil Procedure Code.