

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

FAKIR BAKHSH (DEFENDANT) *v.* SADAT ALI AND ANOTHER (PLAINTIFFS) \*

*Mortgage—Usufructuary mortgage—Satisfaction of mortgage-debt from usufruct—Suit for whole mortgaged property by some of several mortgagors.*

In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct,—*held* that the plaintiffs could only claim their own shares, and the Court of first instance should determine the extent of the shares after making the other co-mortgagors parties.

THE claim in this suit was to redeem a usufructuary mortgage of a two annas and eight pies share in a village called Alawalpur, which share, subsequently to the mortgage, was constituted into a mahal of sixteen annas. It was alleged in the plaint that one of the two mortgagors, Ghulam Haidar, was the proprietor of an eight annas share of the mortgaged property, and that he died leaving two sons, Barkat Ali and Ali Bakhsh; that Barkat Ali, who succeeded to a four annas share of this eight annas share, sold his share to Ghisi Bibi, the wife of the defendant Fakir Bakhsh, the mortgagee; that on the death of Ali Bakhsh his son Bandhu sold the four annas share to which his father had succeeded to Sadat Ali; that the other mortgagor, Muhammad Ali, was the proprietor of the other eight annas share; that on his death his daughter, Pheki Bibi, succeeded to this share, and that on her death her daughter, Fatima Bibi, succeeded to the same. It was further alleged that the mortgage-debt had been satisfied from the usufruct of the mortgaged property. The plaintiffs in the suit were Sadat Ali and Fatima Bibi. They claimed to recover the whole estate on the allegation that Ghisi Bibi, the proprietor of a four annas share of it, refused to join in the suit. The defendant Fakir Bakhsh set up as defence to the suit, amongst other things, that the mortgage-debt had not been satisfied from the usufruct of the mortgaged property; that Bandhu had not sold his four annas share to the plaintiff Sadat Ali, but to Sadat Ali and one Amat-un-nissa Bibi jointly in equal shares; that the latter had sold her moiety to Ghisi Bibi; and that consequently Sadat Ali was not competent to claim alone that four annas share. Subsequently, on the application of the

\* Second Appeal No. 433 of 1884, from a decree of M. S. Howell, Esq., District Judge of Allahabad, dated the 4th January, 1884, modifying a decree of Babu Ram K. li Chaudhri, Subordinate Judge of Allahabad, dated the 25th June, 1883.

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plaintiff Sadat Ali, Ghisi Bibi was added as a defendant to the suit. She filed a written statement, in which she claimed to be proprietor of a nine annas share of the estate. She alleged that Barkat Ali had sold her not only his ancestral share of four annas, but three annas more which he had acquired out of the eight annas share of Muhammad Ali. This three annas, she alleged, was acquired in this way :—Pheki Bibi predeceased her father Muhammad Ali, and on the latter's death two annas of his eight annas share devolved upon his widow, three annas upon Barkat Ali, and three annas upon Bandhu. She further alleged that Amat-un-nissa Bibi had sold to her two annas of the four annas share which Bandhu had sold to Amat-un-nissa Bibi and Sadat Ali.

The Court of first instance found that the mortgage-debt had been satisfied from the usufruct of the mortgaged property, and that Sadat Ali's share was two annas and Fatima Bibi's eight annas ; and, holding that they were only entitled to recover their own shares, gave them a decree for a ten annas share of the estate.

Both the defendants appealed, contesting Fatima Bibi's right to eight annas. Fakir Bakhsh also contested the finding of the Court of first instance that the mortgage-debt had been satisfied from the usufruct of the mortgaged property. The plaintiff Sadat Ali preferred an objection to that part of the decree of the Court of first instance which reduced the share claimed by him to two annas.

The lower appellate Court held that it was not necessary to determine in this suit the question as to what the shares of the representatives of the mortgagors were, and Ghisi Bibi should therefore not have been made a defendant to the suit, because the plaintiffs were admittedly representatives of the mortgagors, and were consequently entitled to redeem the whole estate, leaving it to the other representatives to recover their shares from them. The Court accordingly, affirming the decision of the first Court as to the satisfaction of the mortgage-debt, made a decree dismissing Ghisi Bibi from the suit and giving the plaintiffs possession of the whole estate.

The defendant Fakir Bakhsh appealed to the High Court, contending that the plaintiffs were only entitled to possession of their own shares.

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The *Junior Government Pleader* (Babu *Dwarka Nath Banari*) and Pandit *Ajudhia Nath*, for the appellant.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

OLDFIELD, J.—The plaintiffs are some of several co-mortgagors, and sue to redeem the entire property mortgaged, on the ground that the mortgage-debt has been satisfied out of the usufruct. The Courts below have decreed the claim. The only point taken in appeal by the mortgagee in this appeal, and by one of the co-mortgagors who had been made a party to the suit as a defendant, is that the plaintiffs can only obtain possession of their shares of the property.

It appears to us that this contention has force. The debt having been satisfied from the usufruct, the plaintiffs can only claim their own shares, and the Court below should determine the extent of the shares after making the other co-mortgagors parties.

The case is remanded in order that the issue be tried. Ten days will be allowed for objections.

*Issues remitted.*

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

SHAHI RAM (PLAINTIFF) v. SHIB LAL (DEFENDANT). \*

*Suit for refund of proceeds of execution-sale—Small Cause Court Suit—Mortgage—First and second mortgagees—Registered and unregistered mortgages—Act III. of 1877 (Registration Act), s. 50—Civil Procedure Code, s. 295.*

S and L held mortgage-bonds executed in their favour by the same person. S's bond was dated the 16th June, 1882, and was registered, the registration being compulsory. L's bond was of prior date, the 30th December, 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May, 1883, notwithstanding that S claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument, and therefore entitled

\* Second Appeal No. 343 of 1884, from a decree of J. L. Denniston Esq., Officiating District Judge of Moradabad, dated the 9th January, 1884, affirming a decree of Maulvi Muhammad Ezid Bakhsh, Munsif of Moradabad City, dated the 31st August, 1883.

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