

APPELLATE CIVIL.

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December 6.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*LACHMI NARAIN AND OTHERS (DEFENDANTS) v. MUHAMMAD YUSUF
(PLAINTIFF).**Mortgage—Act No. IV of 1832 (Transfer of Property Act), s. 60—Breaking up of security—Mortgagee allowing mortgagor to pay a portion of the mortgage debt and releasing part of the mortgaged property.*

A mortgagee by allowing his mortgagor to pay a portion of the mortgage-debt and releasing a proportionate part of the mortgaged property does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piece-meal. *Marana Amamma v. Pendyalu Perubotulu* (1) and *Subramanyan v. Mandayan* (2) not followed.

THE facts of this case as stated in the judgment of the Court of first instance are as follows :—

One Mukand Singh was owner of $2\frac{1}{2}$ biswas in mauza Chhalesar and of shares in a large number of other villages.

He first, on the 12th of February 1878, jointly with his nephews, Jawahar Singh and Karan Singh, mortgaged the $2\frac{1}{2}$ biswas in mauza Chhalesar, together with shares in other villages, to Lachmi Narain and others for Rs. 40,000 and executed a mortgage-deed. Again on the 31st of May 1878, Mukand Singh mortgaged the same $2\frac{1}{2}$ biswa share in mauza Chhalesar with shares in other villages to Sukh Ram for Rs. 4,480, and executed a mortgage-deed. Subsequently, on the 20th of March 1880, Mukand Singh mortgaged for the third time the $2\frac{1}{2}$ biswas in mauza Chhalesar to the plaintiff, Muhammad Yusuf, the mortgage-deed being written in the name of Jani Bijai Shankar. The first and second mortgagees sued for sale on their mortgages and obtained decrees in their favor on their respective mortgages. The plaintiff sued for redemption of the share in mauza Chhalesar above mentioned upon payment by him of the proportionate amount which might be considered to have been decreed in respect thereof in the prior mortgagees' suits, and for sale of the

* First Appeal No. 47 of 1893, from a decree of Maulvi Muhammad Mazhar Husain, Additional Subordinate Judge of Aligarh, dated the 8th November 1892.

(1) I.L.R., 3 Mad., 230.

(2) I.L.R., 9 Mad., 453.

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share in satisfaction of the amount due to him and the sums which he would have to pay to the first and second mortgagees. The plaintiff also impleaded certain subsequent mortgagees of the same property.

The first set of mortgagees pleaded that the plaintiff's mortgage was fictitious and collusive and without consideration. They alleged that Mukand Singh, Kharan Singh, Jawahar Singh, Sher Singh and Naubat Singh had mortgaged 10 biswas of mauza Chhalesar to them, and that Sher Singh and Naubat Singh had paid half of the mortgage money and redeemed half the property, and that in consequence of this transaction the claim to redeem by payment only of a proportionate share of the mortgage money, and not a moiety thereof and interest, was improper. They also pleaded that the account and the proportionate shares of the mortgage money had been wrongly calculated by the plaintiff; that the claim was bad for misjoinder of defendants, and that the claim for interest after due date was bad in law.

The representatives of the second mortgagee pleaded that his claim was prior to that of the plaintiff; that as the mortgage was a joint mortgage the whole amount due under it should be paid by the plaintiff; and that the amount of the proportionate share stated by the plaintiff was incorrect.

The remaining defendants did not appear.

The Court of first instance (Additional Subordinate Judge of Aligarh) found on the various issues as to the genuineness of the plaintiff's mortgage that the bond sued on was a genuine bond executed by Mukand Singh in the name of Jani Bijai Shankar, but in reality for the benefit of the plaintiff; and, as to the issue whether the plaintiff was entitled to redeem upon payment of a proportionate part of the mortgage money, that, as to the first mortgage, Sher Singh and Naubat Singh had in fact, as alleged, paid half the mortgage money and redeemed half the property, and, as to the second mortgage, that Sukhram, the original mortgagee, had in execution of his decree on the mortgage brought

to sale a part of the mortgaged property only and purchased it himself. The Court therefore came to the conclusion that both the prior mortgages had been broken up so as to admit of the plaintiff claiming redemption on payment of a proportionate share only of the mortgage money.

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On the question of the proportionate amounts due on the two mortgages, the Court found that Rs. 1,447-8-0 was due on the first mortgage and Rs. 6,445 on the second mortgage and passed a decree in favor of the plaintiff.

The first set of mortgagees appealed to the High Court.

Pandit *Sundar Lal* and Babu *Ratan Chand*, for the appellants.

Mr. *Hameed-ullah* and Mr. *Abdul Majid*, for the respondent.

EDGE, C. J., and BANERJI, J.—The only question before us in this appeal is whether the defendants-appellants, having received from the mortgagor a moiety of the mortgage-debt, and having, on that payment, released a moiety of the mortgaged property, have thereby broken up their mortgage so as to allow the plaintiff to redeem that portion of the mortgaged property in which he is interested by payment of a proportion of the mortgage-debt still due to these defendants-appellants. The rule as to the redemption of a portion of mortgaged property on payment of a proportion of the mortgage-debt which has been acted on in these provinces since the passing of Act No. IV of 1882 is to be deduced from the last paragraph of s. 60 of that Act. We may say that before the passing of Act No. IV of 1882, the principle to be deduced from the last paragraph of s. 60, to which we have referred, was the principle, so far as we are aware, which was applied in these provinces, and the right to redeem adversely a portion of the mortgaged property by payment of a proportionate part of the mortgage-debt was, when not stipulated for in the contract, confined to cases in which the mortgagee or mortgagees had acquired, in whole or in part, the share of a mortgagor. Mr. *Abdul Majid*, for the respondent, has contended that whenever the mortgagee receives payment of a portion of the mortgage-debt, and in consideration of such payment

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releases from the mortgage part of the property mortgaged, he breaks up the contract of mortgage and the mortgagor or any person interested in the mortgaged property becomes entitled to redeem a portion or portions piece-meal by payment of a proportionate amount of the debt remaining due; and he cited as authorities for that proposition, *Marana Ammanna v. Pendyala Perubotulu* (1) and *Subramanyan v. Mandayan* (2). All we need say as to the case of *Marana Ammanna v. Pendyala Perubotulu* is that it was decided before the coming into force of Act No. IV of 1882. The decision in the case of *Subramanyan v. Mandayan* apparently followed the decision in *Marana Ammanna v. Pendyala Perubotulu*. In our opinion it would be contrary to public policy to hold that a mortgagee, by allowing a mortgagor to pay off a portion of the mortgage-debt and so release a portion of the mortgaged property, broke up the mortgage contract so as to allow the mortgagor or any one else interested to redeem the remainder of the mortgaged property piece-meal. If such were the law, a hardship would be imposed on mortgagors, for mortgagees would undoubtedly refuse to receive from mortgagors part payment of a debt on condition of releasing a part of the mortgaged property. In this case the plaintiff must redeem the mortgage of these defendants-appellants,—he is a puisne mortgagee. The Court below ascertained that on the 19th March 1892, which was the day on which the suit was instituted, the total amount remaining due to these defendants-appellants on their mortgage was Rs. 98,989 12-0, and on that basis arrived at a sum of Rs. 4,997-8-0 which was fixed as the proportionate amount to be paid by the plaintiff. The plaintiff has not challenged the correctness of those figures as ascertained by the Court below, and consequently we take them as the basis of our decree.

We vary the decree of the Court below so far as the plaintiff and these defendants-appellants are concerned by decreeing that the plaintiff shall be entitled to redeem the mortgage of the 11th February 1878, at present vested in these defendants-appellants, by

(1) I. L.R., 3 Mad., 230.

(2) I. L.R., 9 Mad., 453.

payment into Court on or before the 5th June 1895, of the sum of Rs. 98,989-12-0 with interest thereon at the rate of six per cent. per annum from the 19th March 1892 to date of payment, and that on such payment these defendants-appellants shall deliver up to the plaintiff, or to such person as he may appoint, all documents in their possession or power relating to the mortgaged property, and shall assign to the plaintiff the mortgage of the 11th February 1878, free from all incumbrances created by the defendants-appellants or any person claiming under them, or by those under whom they or any of them claim as mortgagees, and that if such payment be not made on or before the 5th June 1895, the plaintiff shall be absolutely debarred from all right to redeem these defendants-appellants or to sell any portion of the property mortgaged to them.

The defendants-appellants shall have their costs of this appeal and their costs in the Court below to be paid by the plaintiff.

Appeal decreed.

REVISIONAL CRIMINAL.

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

QUEEN-EMPRESS v. ISHRI.

Criminal Procedure Code ss 106, 423—Security to keep the peace—Appellate Court not competent to require such security—Sentence, powers of appellate Court in respect of.

The Magistrate of a district acting as an appellate Court in criminal cases cannot make an order under s. 106 of the Code of Criminal Procedure. *Aslu v. The Queen-Empress* (1), and *Queen-Empress v. Lachman* (2) referred to.

Where a District Magistrate acting as an appellate Court in a Criminal case altered a sentence of four months' rigorous imprisonment to one of three months' rigorous imprisonment, but imposed a fine of Rs. 10 or in default a further term of six weeks' rigorous imprisonment; held that as the latter sentence might involve an enhancement of the former such sentence was in excess of the powers of the Magistrate having regard to s. 423 of the Code of Criminal Procedure.

This was a reference made under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Agra. The facts of the case sufficiently appear from the judgment of the Court.

(1) I. L. R., 16 Cal., 779. (2) Weekly Notes 1890, p. 201.