

Before Mr. Justice Banerji and Mr. Justice Aikman.

MUHAMMAD MAHMUD ALI (DEFENDANT) *v.* KALYAN DAS (PLAINTIFF).
 Act No. IV of 1882 (*Transfer of Property Act*) s. 74.—*Mortgage—Prior and subsequent incumbrancers—Right of subsequent mortgagees to redeem prior mortgage—Manner in which subsequent mortgagee's right of redemption is affected by partial destruction of the prior mortgage.*

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One M. R. was a co-mortgagee under mortgages of the years 1867, 1868 and 1870 of a village called Ahak and shares in certain other villages Surajpur, Raipur, Bamoti and Khera Buzurg. K. D. the plaintiff was the representative of a subsequent mortgagee of the share in Khera Buzurg. K. D. in 1874 brought the share comprised in his mortgage to sale and purchased it himself; but without making M. R. or his representatives parties to his suit for sale. Subsequently, in 1879, M. R. sued for a decree for sale of all the properties mentioned above, but the decree which he obtained was limited to the village Ahak and the share in Khera Buzurg. K. D. was not made a party to this suit. In 1882 one M. M. A. purchased the share in Surajpur which had been subject to the mortgage sued upon by M. R. in 1879, but had been exempted from the decree obtained by M. R. in 1879. In 1892 K. D. sued for redemption of M. R.'s prior mortgage of 1867 and for a declaration of his right, upon such redemption, to bring to sale the property comprised in the mortgage.

Held that, inasmuch as M. R.'s interest in the mortgaged property had been limited by the decree of 1879 to the village of Ahak and the share in Khera Buzurg, the plaintiff was not entitled to a decree for the sale of the share purchased by M. M. A. in Surajpur.

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

Mr. *Abdul Majid*, for the appellant.

Pandit, *Sundar Lal*, for the respondent.

BANERJI and AIKMAN, JJ.—The suit in which this appeal has arisen was brought by a second mortgagee to redeem a prior mortgage and to foreclose the right of redemption of the legal representatives of the mortgagors and of subsequent incumbrancers and alienees of the mortgaged property.

The facts are these. Some of the defendants first party and the ancestor of others of those defendants were owners of the village Ahak and of shares in four other villages, namely, Surajpur, Raipur, Bamoti and Khera Buzurg. They mortgaged the aforesaid property to Brij Lal, the predecessor in title of the defendants

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second party, by three instruments dated respectively, the 18th April, 1867, the 23rd August, 1868, and the 29th December, 1870, and they mortgaged the share in Khera Buzurg only to the plaintiff's father on the 18th April, 1868; so that the plaintiff became the second mortgagee of the share in Khera Buzurg, the first mortgage being that created in favor of Brij Lal by the instrument of the 18th April, 1867.

On the 9th April, 1879, Maya Ram, who is now represented by the defendants second party, brought a suit upon the three mortgage deeds in favor of Brij Lal mentioned above, and claiming what he declared to be his share of the mortgage money prayed for the sale of the five villages mortgaged under those deeds. The Subordinate Judge of Aligarh made a decree in his favour on the 16th December, 1879, for sale of two only out of the five villages, namely, of Ahak and Khera Buzurg. The plaintiff was not joined as a party to that suit.

The appellant is the purchaser of a portion of the share in Surajpur mortgaged to Brij Lal. The date of his purchase is the 11th of January, 1882.

On the 18th of September, 1874, the plaintiff obtained a decree on his mortgage of the 18th of April, 1868, for the sale of Khera Buzurg, and in execution of that decree he has purchased that village. Neither Maya Ram nor his representatives were parties to the plaintiff's suit for sale.

The plaintiff's case is that, as he was not a party to Maya Ram's suit, the decree obtained by Maya Ram is not binding on him, and he has still the right to redeem the prior mortgage of the 18th of April, 1867. He claimed the following reliefs in his plaint.

“(1) That out of the balance of the principal amount of the bond, dated the 18th of April, 1867, comprised in the decree dated the 16th of December, 1879, the rateable sum chargeable on the 10 biswas share of *mauza* Khera Buzurg may be ordered to be paid by the plaintiff to the defendants second party, and the aforesaid property may be declared on such payment to be free from their lien.

“(2) That, if the Court should consider the rateable distribution of liability to be unfair, the whole amount may be ordered to be paid by the plaintiff to the defendants.

“(3) That, if the whole amount mentioned above is made payable, it may be declared as against all the defendants, that the properties specified (namely all the five villages mortgaged in the bond of the 18th April, 1867) are liable to be sold in satisfaction of the said amount and of the balance of the plaintiff's decree dated the 18th of September, 1874.

“(4) That, if rateable payment is ordered, it may be declared as against the defendants third party, that the ten biswas share of *manza* Khera Buzurg is not liable to be sold in satisfaction of the rateable sum to be determined by the Court and the sum due on the plaintiff's decree as prior liens.”

The Court below has declared the amounts due on the mortgage bonds of the 18th of April, 1867, and the 18th of April, 1868, and it has made a decree to the effect that the plaintiff should pay to the defendants second party the amount due on the mortgage of the 18th of April 1867; that the defendants first and third parties should pay to the plaintiff the said amount, as also the amount due to the plaintiff on his mortgage of the 18th of April, 1868; that in the event of the aforesaid defendants failing to pay the amounts abovementioned the whole of the property mortgaged under the instrument of the 18th of April, 1867, should be sold for realization of the amount due upon that mortgage.

The only contention raised on behalf of the appellant is that, inasmuch as the decree obtained by Maya Ram on the 16th of December, 1879, was limited to the villages Ahak and Khara Buzurg, Maya Ram ceased to have a mortgage lien on the share in Surajpur after the date of that decree; that the appellant therefore purchased a part of that share free from any lien, and that, as there was no subsisting mortgage on that share in favor of Maya Ram for the plaintiff to redeem, the Court below has erred in making a decree for the sale of that share.

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On the other hand Mr. *Sundar Lal* has contended on behalf of the plaintiff that, as the plaintiff was not a party to the suit in which Maya Ram obtained his decree, the plaintiff was, under the provisions of section 74 of Act No. IV of 1882, entitled to redeem the prior mortgage of the 18th of April 1867; that on redeeming that mortgage he would acquire all the rights which existed in the first mortgage on the date of his mortgage and would be entirely unaffected by what might have happened in the interval in respect of the first mortgage, and that the plaintiff would therefore have the right to bring to sale all the properties comprised in that mortgage, and this notwithstanding the fact that the prior mortgagee himself had no such right by reason of the dismissal of a part of his claim.

We are unable to accede to this contention. It is beyond question that the rights of a prior mortgagee are superior to those of a puisne incumbrancer. It is also beyond doubt that a second or subsequent mortgagee cannot in the absence of fraud control the action of the first mortgagee in respect of the mortgage held by the latter. It cannot be disputed that the right of redemption presupposes the existence of a mortgage on certain property which at the time of redemption is security for the money due to the mortgagee. It therefore follows that the only property which a second or other subsequent mortgagee may redeem is the property on which the first mortgagee is entitled to enforce his security. From the very necessity of things the right of redemption can be exercised in respect of such property only as is subject to a mortgage capable of enforcement.

That being so, when a second or other subsequent mortgagee redeems a prior mortgage he relieves from liability for that mortgage such property only as is under such liability at the date of redemption, and under the provisions of section 74 of Act No. IV of 1882 "he acquires in respect of the property all the rights and powers of the prior mortgagee as such." There can be no doubt that the property referred to in the section is the property redeemed from the prior mortgage, and not property which may originally

have been comprised in the mortgage, but on which the mortgage had ceased to exist. This is evident from the fact that the section confers on the person redeeming the mortgage the rights and powers of the first mortgagee, and, as those rights and powers could not be exercised by the first mortgagee in respect of property other than that on which his mortgage subsisted, it is clear that a second or subsequent mortgagee by redeeming a prior mortgage acquires the prior mortgagee's right in respect of that property only which is redeemed by him. He cannot, in our judgment, acquire any higher right than that of the mortgagee whom he redeems, and therefore he cannot claim that he can recover the money paid by him in order to discharge the first mortgage by sale of all the property originally comprised in that mortgage, notwithstanding that portions of that property may have, at the time of redemption, ceased to be subject to that mortgage. In our opinion the position of a puisne incumbrancer who redeems a prior mortgage is not analogous to that of a surety who pays a debt due by his principal and acquires the benefit of all the security held by the creditor against the principal at the date of the contract of suretyship. There can be no doubt that a mortgagee is competent to release a portion of the mortgaged property on receipt of part payment of the mortgage money. It was held by this Court in *Lachmi Narain v. Muhammad Yusuf* (1) that such a release has not the effect of breaking up the mortgage security. Where a portion of the mortgaged property has thus been released by the mortgagee his rights and powers under his mortgage are to realise the balance due to him by sale of the remainder of the mortgaged property. As, under section 74 of Act No. IV of 1882, a puisne incumbrancer by redeeming a prior mortgage acquires only the rights and powers of the prior mortgagee, all that he becomes entitled to by virtue of the redemption is the right and power to recover the amount paid by him for redemption by sale of the property on which the prior mortgagee could enforce his mortgage. In our opinion any other view would be

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inconsistent with the rights of a prior mortgagee, which are undoubtedly superior to those of a second or other subsequent mortgagee, and the provisions of section 74 of Act No. IV of 1882 negative rather than support the contention of the learned vakil for the respondent.

In this case the decree passed in favor of Maya Ram on the 16th of December, 1879, on the basis of the mortgages held by him limited his right of sale only to the two villages Ahak and Khera Buzurg. Whether that limitation was made advisedly, or was the result of an oversight on the part of the Judge who made the decree, it is not necessary for us to consider. We have the fact that the decree did not confer on Maya Ram the right to bring any other property to sale; so that after the date of the decree Maya Ram lost the right to enforce his mortgage on any of the mortgaged villages other than Ahak and Khera Buzurg. The statement contained in the plaint that the decree of the 16th of December, 1879, declared Maya Ram's lien on all the five villages comprised in his mortgage is erroneous, and the Subordinate Judge's assumption that the omission of other villages from the decree was a verbal error was wholly gratuitous. As we have said above, Maya Ram was not entitled after the date of that decree to fall back on his original mortgages and to bring to sale any of the villages excluded from the operation of the decree. The fact of the plaintiff's not being a party to the suit in which the decree was passed did not place him in a better position. The only effect of the omission to join him as a party was to preserve to him the right to redeem the prior mortgage. By such redemption he acquired, under section 74 of Act No. IV of 1882, the rights and powers of Maya Ram, and as those rights and powers did not extend beyond the right to sell up the two villages against which the decree was passed, the plaintiff cannot claim to bring to sale any of the three villages in respect of which Maya Ram's suit must be held to have been dismissed. As the share in Surajpur purchased by the appellant was a part of the property on which Maya Ram had ceased to have a mortgage lien, the plaintiff was not entitled to a decree for the sale of the

share and the decree granted to him by the Court below cannot be sustained.

It was urged by Mr. *Sundar Lal* that Rs. 913, part of the interest due on the bond of 1867, was included in Brij Lal's bond of the 23rd of August, 1868, and as the heirs of Brij Lal other than Maya Ram obtained a decree for the sale of all the mortgaged property under the bond last mentioned, the plaintiff should be granted a decree for the sale of Surajpur for the realisation of that amount at least. The simple answer to this contention is that the claim as laid in the plaint is limited in terms to what was due to Maya Ram and to the amount comprised in the decree dated the 16th of December, 1879, and it is this claim only with which we have to deal.

We may observe that we are glad that we have been able to arrive at the above conclusion. The amount of the mortgage of the 18th of April, 1867, became payable, and the plaintiff's right to redeem that mortgage accrued, on the 18th of April, 1870. For a period of twenty years he took no steps to redeem that mortgage, and even after the decree of the 16th of December, 1879, he remained silent. The appellant purchased the share of Surajpur now in question in 1882. At that time had he, like a man of ordinary prudence, made inquiries, as we must presume he did, as to the previous incumbrances on the property, he could only have discovered that the mortgages created on it by the bonds executed in favor of Brij Lal had merged in the decree of 1879, and that under that decree no liability was imposed on the share in Surajpur.

If with such information before him he purchased the property, it would, in our opinion, be a hardship to him were he to be compelled, ten years after his purchase, to discharge a mortgage which the original mortgagee was incompetent to enforce against him, and which the plaintiff did not choose to redeem for such a length of time.

We allow this appeal, and, in modification of the decree below, we dismiss that portion of the plaintiff's claim which is directed against the appellant and the share in Surajpur purchased by him, with costs here and in the Court below.

Decree modified.

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