

the contrary, a reasonable doubt exists in my mind as to the guilt of the accused, and I do not feel it safe to convict him on the evidence before us. I would, therefore, give the accused the benefit of the doubt, and, setting aside his conviction and sentence, acquit him of the charge of which he has been convicted.

KNOX, J.—This is a case referred by the Sessions Court of Gorakhpur for confirmation of sentence of death. I agree in all that has been said by my brother Banerji. The direct evidence in the case is open to grave doubt as has been shown in the judgment just read. The accused in two statements admitted unreservedly that he was the murderer of Jugni and her boy, and that the corpses found are those of Jugni and her son. Those confessions were afterwards withdrawn and the strong evidence which they would otherwise afford against the accused becomes itself in turn open to doubt. It is true that the accused does not satisfactorily explain how he came to make these admissions and why he has resiled from them. It would have been well if the Court of Sessions had probed this matter further and got together in more detail from the accused the circumstances under which he came to make admissions so fatal to him. But the case is open to doubt. The learned Judge himself feels it in his judgment, and that being so, I agree that the proper course is to set aside the conviction and the sentence. We find Mahabir not guilty of the offence of which he was charged, namely, that on the 22nd May 1895, at Sheoraha Tal, he murdered Musammat Jugni and her son, and we direct his immediate release.

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 QUEEN-
EMPERESS
v.
MAHABIR.

APPELLATE CIVIL.

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

AKHARA PANCHAITI THROUGH HIRA GIR AND OTHERS (DEFENDANTS)

v. SUBA LAL AND OTHERS (PLAINTIFFS).*

Mortgage—Prior and subsequent mortgagees—Rights of subsequent mortgagees where prior mortgage is usufructuary.

Held that where there exists a prior usufructuary mortgage, a subsequent mortgage holding a simple mortgage over the same property cannot bring the mortgaged

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October 24.

Second Appeal No. 1172 of 1893, from a decree of Babu Brijpal Das, Subordinate Judge of Allahabad, dated the 7th August 1893, modifying a decree of Munshi Shiva Sahai, Munsif of Allahabad, dated the 13th February 1893.

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property to sale in virtue of his incumbrance until such time as the usufructuary mortgage becomes capable of redemption. *Mata Din Kasodhan v. Kasim Husain* (1) explained and followed.

THIS was a suit for sale on a mortgage. It appears that one Musammat Bhagmani was owner of certain zamindari property and houses, and she mortgaged the property on the 4th March 1884 to the Akhara Panchaiti for Rs. 600. Bhagmani died, leaving a daughter, Musammat Gujrati, her son Gajadhar and her husband Kalka. After the death of Bhagmani, Gujrati and her husband mortgaged the property in question to the plaintiff by a mortgage deed dated the 23rd January 1889. On the 21st May 1891 Gajadhar executed a sale deed of the zamindari for Rs. 2,000 to the Panchaiti Akhara, the money owing under the mortgage of the 4th of March 1884 being set off in this sale. The present suit was brought by Suba Lal on his mortgage of the 23rd January 1889, claiming to recover the money stated to be due to him by sale of the properties mortgaged as belonging to Gujrati and Kalka. Gujrati, Kalka, Gajadhar and the Panchaiti Akhara were all made parties defendants to the suit.

Gajadhar and Kalka admitted the execution of the deed, but denied the receipt of consideration except as to Rs. 20. Gajadhar and the defendants representing the Panchaiti Akhara said that Bhagmani had made a will leaving the property to Gajadhar; that Gujrati had acquired no right to it; and that she consequently had no power to mortgage it to the plaintiff.

The Court of first instance (Munsif of Allahabad) held that the alleged will in favour of Gajadhar was invalid; but at the same time it disallowed the plaintiff's claim to the property, on the ground that Gujrati by allowing the property to go to Gajadhar without asserting her right had waived her right to it; and the plaintiff, being the scribe of the alleged will, and knowing the facts connected with it, was estopped from claiming to sell the property as belonging to Gujrati. The first Court gave a decree in the suit against the person of Gujrati and against Kalka and the property mortgaged in the bond as belonging to him.

The plaintiff appealed on the ground that the alleged will was not a will but a gift, and was inadmissible in evidence, and that the Court of first instance was wrong in applying the principles of waiver and estoppel to the case and discharging the property.

The lower appellate Court (Subordinate Judge of Allahabad) found that the alleged will was not a will but a deed of gift, and as such invalid, it not having been registered. It found also that the mortgage to the plaintiff was valid as well as the former mortgage of the 4th March 1884 made by Bhagmani, but that the term of the earlier mortgage not having expired, it could not be redeemed by the present plaintiff. Finding also that the sale by Gajadhar was void, the lower appellate Court gave the plaintiff-appellant a decree for sale subject to the mortgage of the 4th March 1884.

The defendant, the Akhara Panchaiti, appealed to the High Court.

Munshi *Ram Prasad* and Babu *Durga Charan Banerji*, for the appellants.

Pandit *Sundar Lal* for the respondents.

EDGE, C. J., and BANERJI, J.—This appeal has arisen out of a suit for sale brought under Act No. IV of 1882, on a simple mortgage. The appellants here, who are some of the defendants, were prior mortgagees holding under a usufructuary mortgage, the period of which will not expire until 1302 Faslī. The Subordinate Judge gave the plaintiffs a decree for sale, holding that the decision of this Court in *Mata Din Kasodhan v. Kazim Husain* (1) did not apply, and that it could not apply, as the prior mortgagees were usufructuary mortgagees the period of whose mortgage had not expired when this suit was brought. The Subordinate Judge made a decree for sale subject to the prior mortgage. From that decree this appeal has been brought.

It has been contended on behalf of the plaintiffs-respondents that the decision in *Mata Din Kasodhan v. Kazim Husain* does not govern this case, and that it would be a hardship to postpone the right of the second mortgagee until the expiration of the usufructuary mortgage, it being suggested that cases might occur in which, if the decision in *Mata Din Kasodhan v. Kazim Husain*

(1) I. L. R., 13 All., 432.

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were applied to a suit by a subsequent mortgagee where the prior mortgage was a usufructuary one, the subsequent mortgagee might by reason of limitation be prevented from availing himself of the benefits of section 90 of Act No. IV of 1882, in case his decree for sale when obtained and executed did not satisfy the subsequent mortgage.

In our opinion the decision of the majority of the Court in *Mata Din Kasodhan v. Kazim Husain* governs this case, and that case appears to us to have decided that a decree for sale under Act No. IV of 1882 cannot be merely a decree for sale of what is known in England as the equity of redemption but must be a decree for sale of the mortgaged property itself. Further, it appears to us that it would be impossible for the Legislature to protect persons willing to lend their money on inadequate security from loss either by the security being inadequate or being hampered by prior mortgages which might cause a suit by a subsequent mortgagee to be barred by limitation. In the present case the plaintiffs brought their suit before the time when they could in it ask for redemption of the usufructuary mortgage. In other words their suit was premature. Following *Mata Din Kasodhan v. Kazim Husain* and on the ground that the plaintiffs' present suit has been prematurely brought, we allow this appeal and dismiss the plaintiffs' suit with costs in all Courts.

Appeal decreed.

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

THE COLLECTOR OF M'ZAFFARNAGAR (DEPONDANT) v. HUSAINI
BEGAM (PLAINTIFF).

Civil Procedure Code, sections 372, 532—Devolution of interest during pendency of suit—Assignment of decree prior to appeal—Application to substitute name of assignee as respondent to appeal—"Suit."

An application was made by an appellant to substitute for the name of the person originally named as respondent to the appeal, the name of a person to whom the decree had been assigned before the filing of the appeal, such application being made more than two years after notice of the assignment had reached the appellant. The person whose name was so sought to be substituted as respondent objected to being placed upon the record of the appeal. *Held* that the name of the proposed respondent should not be placed on the record.

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November 11,