

If the plaintiffs succeed in showing that she did not, that would be a circumstance to be taken into consideration in determining whether the suit brought by Mahar Singh against Jeoni was a collusive suit or not. The result is that we must set aside the decrees below and remand the case under section 562 of Code of Civil Procedure to the Court of first instance, which we hereby do, with directions to readmit it under its original number in the register and to try it on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DIP NARAIN SINGH (DEFENDANT) v. HIRA SINGH AND ANOTHER
(PLAINTIFFS).*

Mortgage—Prior and subsequent mortgages—Redemption—Price to be paid by a subsequent mortgagee redeeming after the mortgaged property has been brought to sale and purchased by the prior mortgagee.

A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction sale held in execution of a decree obtained by him without joining the subsequent mortgagee as a party; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on his mortgage. *Ganga Pershad Sahu v. The Land Mortgage Bank* (1) and *Dadoba Arjunji v. Damodar Raghunath* (2) referred to. *Baldeo Bharthi v. Hushiar Singh* (3) distinguished.

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

Mr. T. Conlan, Pandit *Sundar Lal* and *Munshi Ram Prasad*, for the appellant.

Munshi Jwala Prasad and *Pandit Madan Mohan Malaviya*, for the respondents.

BANERJI and AIKMAN, JJ.—The facts which gave rise to the suit out of which this appeal has arisen were these:—

On the 6th of January 1883 *Shib Chandra Singh*, *Batak* and *Mahadeo* executed a mortgage of a four annas share of zamindari

* First Appeal No. 58 of 1895 from a decree of Pandit Rai Indar Narain, Subordinate Judge of Mirzapur, dated the 21st March 1895.

(1) I. L. R., 21 Calc., 366.

(2) I. L. R., 16 Bom., 436.

(3) Weekly Notes, 1895, p. 45.

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property in favour of Babu Dip Narain Singh, the defendant appellant. On the following day, that is, the 7th of January 1883, they granted to Thakur Hira Singh, respondent, and to Bharat Singh, the father of the other respondent, a mortgage over a similar share. It has been found by the Court below that the same share formed the subject matter of both the mortgages, and this finding has not been challenged in the memorandum of appeal before us. With the amounts borrowed under the two mortgage deeds a prior usufructuary mortgage of the same property was discharged.

The defendant, Babu Dip Narain Singh, brought a suit for sale under his mortgage and obtained a decree on the 11th of May 1889. The other mortgagees obtained a decree upon their mortgage on the 15th of October 1890. Neither mortgagee made the other a party to his suit as required by section 85 of the Transfer of Property Act, 1882.

Dip Narain Singh caused a 2 annas 8 pies share to be sold in execution of his decree on the 20th of December 1890, and on the 28th of November 1891 he caused the remaining 1 anna 4 pies share to be sold. He himself purchased both the shares for a consideration of Rs. 2,100 and has obtained possession.

On the 20th July 1893 the plaintiffs caused the same property to be sold in execution of their decree and themselves became the purchasers. As they did not obtain possession, they brought the present suit and prayed for absolute possession on the allegation that they had priority of title. In the alternative they asked for a decree for redemption of the mortgage of the defendant in their character as subsequent mortgagees, and they offered to pay to the defendant Rs. 2,100, the amount of purchase money paid by him for the property, or such other amount as the Court might declare to be payable to him.

The Court below has made a decree in favour of the plaintiffs for redemption upon payment of the sale consideration, and has disallowed the first prayer of the plaintiff. The defendant has preferred this appeal.

The first contention raised on his behalf is that upon the allegations of the plaintiffs themselves they are not entitled to sue for redemption. This contention has in our opinion no force. The mortgage in favour of the defendant is of a date prior to that of the plaintiffs. The plaintiffs therefore are manifestly subsequent mortgagees, and as they were not made parties to the suit in which the defendant obtained his decree, they have not lost the right of redemption which they had as subsequent mortgagees. It is true they stated in the plaint that the mortgages in favour of both the parties were made on the same date and that the rights of the parties as mortgagees were equal. That allegation could not be supported. Even if both the mortgage deeds were executed on the same date, both of them could not have been executed simultaneously and one deed must have been signed after the other. The plaintiffs' mortgage deed purports to be of a later date than that of the defendant's deed, and the plaintiffs have in a subsequent portion of their plaint accepted the status of puisne mortgagees. They are therefore entitled under section 74 of Act No. IV of 1882 to redeem the defendant's prior mortgage.

The next contention of the appellant, which raises the real question in the case, is that the Court below has erred in allowing redemption upon payment only of the sale price paid by the defendant. We are of opinion that this contention must prevail.

As the plaintiffs were not joined as parties to the defendant's suit for sale, as required by section 85 of Act No. IV of 1882, they are, notwithstanding the sale in execution of the defendant's decree, in the same position in which they would have been, and have still the same rights which they would have had, if they had been made parties to that suit, that is to say their right to redeem the prior mortgage of the defendant is saved to them. By section 75 of Act No. IV of 1882 every second or other subsequent mortgagee has, as regards redemption, "the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees." If the mortgagor chooses

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to exercise his right of redeeming the prior mortgage, he can only do so, under section 60, on payment or tender of the prior mortgagee's mortgage money, which, according to section 58, is "the principal money and interest of which payment is secured for the time being." If a puisne mortgagee elects to redeem the prior mortgage, he, like the mortgagor, will not be entitled to redeem that mortgage save upon payment or tender of the amount due upon that mortgage. Had the puisne mortgagee been joined as a defendant in the suit of the prior mortgagee, he could have prevented the extinction of his right of redemption and redeemed the prior mortgage by paying to the prior mortgagee or into Court within the time fixed by the Court under section 88 the full amount due to the prior mortgagee. The omission to make the subsequent mortgagee a party to the prior mortgagee's suit has the effect, as we have said, of relegating the subsequent mortgagee to the position in which he was before the institution of that suit. It is therefore still open to him to redeem the first mortgage, but he cannot do so except on the terms on which he could have obtained redemption before the institution of the first mortgagee's suit or under the decree passed in that suit, namely, by payment of the whole amount due under that mortgage. A consideration of the provisions of the Transfer of Property Act, 1882, shows that, save when the integrity of a mortgage has been broken up in the manner mentioned in the last paragraph of section 60, no mortgage can be redeemed except upon payment of the full amount due under it. We are, therefore, of opinion that a subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction sale held in execution of the decree obtained by him without joining the subsequent mortgagee as a party. That the purchase money is not the criterion for determining the amount which a claimant for redemption must pay is evident from several considerations. Where the amount of the price exceeds the mortgage money, a puisne mortgagee, or other person interested in the property comprised in

the mortgage, who seeks to redeem the mortgage cannot be called upon to pay an amount in excess of the mortgage money. Under the first paragraph of section 60 a mortgagor has the right to redeem on payment or tender of the mortgage money, and sections 74 and 75 confer on a second or other subsequent mortgagee the right to redeem a prior mortgage on similar terms, so that under those sections the person entitled to redeem is not liable to pay a larger sum than the amount due upon the mortgage sought to be redeemed. Again, where the purchase money is in excess of the amount due upon the mortgage the surplus is paid to the mortgagor. Surely a subsequent mortgagee or other person having the right of redemption cannot be directed to pay an amount which has been received by the mortgagor and is not payable to the mortgagee. In our opinion the amount upon payment of which redemption can take place must, save where the integrity of the mortgage security has been broken up, be the amount payable to the mortgagee under the mortgage, and where the mortgagee himself has purchased the mortgaged property in execution of a decree for sale obtained by him without joining a subsequent mortgagee as a party, the latter must, if he wishes to exercise the right of redemption left open to him, pay to the prior mortgagee the full amount of the purchase money. It is true that if the purchase money be not equal to the amount of the mortgage, the mortgagee decree-holder would have the right to ask for a decree against the mortgagor under section 90, but if after the sale a subsequent mortgagee who has not had an opportunity to redeem the prior mortgage redeems it, a decree under section 90 cannot be passed. Similarly, if a part only of the mortgaged property has been purchased by the mortgagee under the circumstances mentioned above, the whole of his mortgage will be discharged upon redemption by a subsequent mortgagee. But in either case, where the prior mortgagee is himself the purchaser, a subsequent mortgagee must, in our opinion, in order to redeem such prior mortgage, pay him the full amount due upon his mortgage. This view is supported by rulings of the High Courts of Calcutta and Bom-

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bay, of which it will be sufficient to refer to *Ganga Pershad Sahu v. The Land Mortgage Bank* (1) and *Dadoba Arjunji v. Damodar Raghunath* (2). In the case first mentioned the learned Judges of the Calcutta High Court observed:—"It is hardly necessary to remark that the amount payable would not be the amount of the purchase money paid by the plaintiff, but the amount due under his mortgage." The case went up in appeal to the Privy Council, and their Lordships allowed to the mortgagee purchaser compound interest in accordance with the terms of his mortgage deed. In the case in the Bombay High Court the prior mortgagee purchased the mortgaged property for Rs. 13 and the lower appellate Court decreed redemption upon payment of that amount. On appeal to the High Court, Sargent, C. J., after holding that the defendants, who had not been made parties to the mortgagee's suit, "were entitled to have an opportunity to redeem the property from the plaintiff," said:—"We have only to consider whether the terms on which the Court below has allowed them to do so, against which the plaintiff appeals, are correct. Had the defendants been made parties to the mortgage suit they would have been entitled to redeem on payment of what was then due on the mortgage, and such are the terms on which they must now be allowed to redeem." A decree was made for redemption upon payment of Rs. 398.

We were much pressed with the ruling of this Court in *Baldeo Bharthi v. Hushiar Singh* (3) as supporting the contention of the plaintiffs respondents that they are entitled to redeem the defendant upon payment only of the purchase money paid by him. The Court below also has relied on this ruling. We are, however, of opinion that that case is distinguishable from the case before us. That was a suit for sale brought upon a subsequent mortgage against the representatives of the mortgagors and of one Gurdayal Jati, who had purchased the mortgaged property in execution of a simple decree for money held by himself. A lien, however, was

(1) I. L. R., 21 Calc., 366.

(2) I. L. R., 16 Bom., 486.

(3) Weekly Notes, 1895, p. 45.

created in favour of Gurdayal Jati under a compromise for the amount of his decree. The mortgage in favour of the plaintiff to that suit was of a date subsequent to that of the creation of the lien. It was held that the representatives of Gurdayal Jati were entitled to use the lien as a shield for their protection against the claim of the plaintiff to the extent only of the price paid by him for the property and not to the full extent of the amount for which the lien was granted. The reasons for that conclusion were thus stated:—"It is obvious that if the three villages in question had been sold to three different parties, each one of such parties could not have claimed a lien to the full extent of the money due under the decree as a shield in his case. Again, it is obvious that if at the time of the sale the amount due under the decree of the 24th of September 1853 far exceeded the purchase money paid at the sale, the purchaser could only have got the protection of the lien to the extent of the money paid by him *pro tanto* in discharge of the mortgage, and that he would not be entitled to stand in the shoes of the mortgagee as to the balance remaining due. The full right of the mortgagee to recover the balance due to him would not, on the realization of part of the money due to him by sale of the mortgaged property, pass, as to the balance remaining due, to the purchaser at the sale, and the rights cannot be in two persons at the same time." Those reasons do not apply to this case. This suit is not, like the suit in that case, a suit by a subsequent mortgagee for sale, and the defendant has not been made a party *quod* purchaser, like the representatives of Gurdayal Jati. As a purchaser whose purchase money went to the partial discharge of a prior charge, Gurdayal Jati could not use that charge as a shield except to the extent to which the prior charge was satisfied by his purchase. In this case subsequent mortgagees are suing to redeem the prior mortgage, and as the property of which the plaintiffs are the subsequent mortgagees was liable for the whole amount of the prior mortgage, they cannot relieve that property from liability under the prior mortgage without paying the whole of that amount. The fact that the mortgagee himself has purchased

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the property cannot in our opinion make any difference in this respect. Had a third party purchased the property, and had his purchase money discharged the prior mortgage in full, he would undoubtedly have been entitled to claim that a subsequent mortgagee who, by reason of his not being a party to the prior mortgagee's suit, had the right to redeem him, must pay him the full amount of the prior mortgage. But if the purchase money paid by such a purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole amount of the prior mortgage. The subsequent mortgagee would in our opinion have to pay the full amount due upon the prior mortgage but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of the mortgage money is due. Where there are more purchasers than one the apportionment should be made between them *pro rata* and the balance should go to the mortgagee. But in no case can redemption be allowed except upon payment of the whole amount due under the mortgage.

In the case before us the first mortgagee himself is the purchaser. We consider that he is entitled to the whole amount due under his mortgage on the date of his auction purchase, and not simply to the purchase money paid by him. The bulk of the property was purchased by him on the 20th of December 1890. The Court below has found, on the issue referred to it under section 566 of the Code of Civil Procedure, that on that date the amount of principal and interest due was Rs. 7,164-5-0, and that nothing was realized from the debtor after that date. The correctness of the amount so found to be due has not been questioned. It has been urged that the profits realized from the property by the defendant after his purchase should be set off against the mortgage money. We are, however, of opinion that, having regard to the amount of the profits arising from the property, it would be fair not to take the profits into consideration, and at the same time not to allow interest on the mortgage money for the

period subsequent to the date of the defendant's auction purchase. In our judgment the plaintiffs should have been granted a decree for redemption on their paying to the defendant Rs. 7,164-5-0. We vary the decree below by substituting Rs. 7,164-5-0 for Rs. 2,100, as the amount upon payment of which, with the proportionate costs of the defendant-appellant here and in the Court below, the plaintiffs will obtain redemption of the property in suit. We extend the time for the payment of the said amount to the 15th of December 1897, and we award to the plaintiffs costs proportionate to their success here and in the Court below.

Decree modified.

Before Mr. Justice Banerji and Mr. Justice Aikman.

PRAG NARAIN (DEFENDANT) v. MUL CHAND AND OTHERS (PLAINTIFFS).
Act No. IX of 1872 (Indian Contract Act) section 107—Sale—Non-payment of purchase money—Resale—Right of resale to be exercised within a reasonable time of breach—Measure of damages.

In the case of a sale, if the purchaser does not perform his part of the contract, he is liable in damages to the seller, the measure of damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of contract.

If a vendor, on breach of contract by non-payment of the purchase-money, elects to exercise the right of re-sale given to him by section 107 of the Indian Contract Act, 1872, not only is the vendor bound to wait a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach.

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

Mr. D. N. Banerji, for the appellant.

Messrs. W. K. Porter and E. C. F. Greenway, for the respondents. *

BANERJI and AIKMAN, JJ.—This was a suit for damages for breach of a contract entered into with the plaintiffs respondents on the 11th of September 1891, by Munshi Nawal Kishore, the original defendant to the suit, who has died since its institution and is now represented by the appellant, whereby Munshi Nawal

* First Appeal No. 74 of 1895, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Cawnpore, dated the 16th December 1895.

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