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at his own risk than for the Court to instruct its amin to commit what may be an act of trespass.

We allow the objection to this extent that we hold that the Court had no authority to order the amin to build the wall and that its order in that respect was *ultra vires*: to this extent we allow this appeal with costs.

Appeal decreed in part.

Before Mr. Justice Banerji.

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December, 22.

CHUNNA LAL (PLAINTIFF) v. ANANDI LAL AND OTHERS (DEFENDANTS).
Mortgage—Sale of portion of mortgaged property under a decree not on the mortgage—Mortgage not thereby extinguished, but mortgagee bound to take into account the full value of the property so brought to sale.

When a mortgagee holding a mortgage over two distinct properties brings one of them to sale in execution of a decree against the mortgagor not being a decree on his mortgage and purchases such property himself, the whole mortgage is not necessarily thereby extinguished; but, if the mortgagee subsequently seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him under his former decree. *Sumera Kuar v. Bhagwant Singh* (1) followed, *Ahmad Wali v. Bakar Husain*, (2) and *Ballam Das v. Amar Raj* (3) referred to.

The facts of this case sufficiently appear from the judgment of Banerji, J.

Mr. *Amir-ud-din*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

BANERJI, J.—This was a suit for sale under a mortgage which comprised two items of property, namely, a piece of homestead land and a shop. The mortgagee held a simple decree for money against the mortgagor, in execution of which he caused the land and a two-thirds share in the shop to be sold by auction subject to his mortgage. He himself purchased the land, and the share in the shop was purchased by the defendant No. 5, who subsequently sold it to the defendants Nos. 3 and 4. The remaining one-third

* Second Appeal, No. 977 of 1895, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 10th May 1895, confirming a decree of Babu Bhawani Chandra Chakravati, Munsif of Sambhal, dated the 4th March 1895.

(1) *Weekly Notes*, 1895, p. 1.

(2) *Weekly Notes*, 1883, p. 61.

(3) *L. L. R.*, 12 *All.*, 537.

share was sold afterwards to the second defendant by the first defendant, the mortgagor.

In the present suit the plaintiff mortgagee has made an apportionment of the mortgage money with reference to what he alleges to be the value of the two items of property mortgaged to him, and, after making a deduction of what according to him was chargeable on the property purchased by him, has claimed the balance and has prayed for the sale of the mortgaged property for realization of the balance.

Both the Courts below have dismissed the suit on the ground that the purchase of a part of the mortgaged property by the mortgagee subject to his mortgage had the effect of discharging the whole mortgage. They have relied on several rulings, of which I need only refer to *Ahmad Wali v. Bakar Husain* (1) and *Ballam Das v. Amar Raj* (2).

There can be no doubt that a mortgagee who purchases a portion of the mortgaged property cannot be allowed to throw the whole burden of the mortgage debt on the remainder of the property. The whole of the property mortgaged being liable for the debt, the liability of each portion of it is proportionate to its value; and ordinarily the persons who purchase the different portions of the property are *inter se* liable in proportion to the part purchased by each of them. Where, however, the mortgagee himself purchases at auction a portion of the mortgaged property which is sold subject to his mortgage, the case becomes different. Such purchase has in some instances the effect of discharging the whole of the mortgage debt, but I am unable to hold that it has that effect in every case; however insignificant the portion purchased may be, and whatever value may have been paid for it. If two properties, one of very small value and the other of large value, be mortgaged to secure repayment of one debt, and the value of the property of small value be less than the amount of the mortgage, the purchase of that property by the mortgagee cannot be held to satisfy the mortgage in full. The reason is obvious. Had such property not

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been purchased by the mortgagee and were it to be sold in satisfaction of the mortgage debt, only that portion of the mortgage amount would be realized by the sale as would be represented by the value of the property; and not the whole of mortgage debt. If, for example, that property is worth Rs. 5, that amount only can be realized by the sale of it, and the mortgage money can be satisfied to the extent of Rs. 5 only. The purchase of such property by the mortgagee cannot make any difference so far as the question of the satisfaction of the mortgage debt is concerned. Where, on the other hand, the portion of the mortgaged property purchased by the mortgagee is of a value higher than the amount of the mortgage, and the difference between that value and the price paid by the mortgagee is equal to or exceeds the amount of the mortgage, the purchase has the effect of fully discharging the mortgage. For in such a case the mortgagee cannot in equity be allowed to benefit by his purchase, and, whilst retaining in his own hands so much of the actual value of the property as is represented by the amount of the mortgage, to realise that amount by a sale of the remainder of the mortgaged property. If, however, the mortgagee has paid for the property its full value, that is, the value which it would have fetched had it been sold as unincumbered property, the mortgagor or any other person holding the remainder of the mortgaged property has not at all been damnified, and the property other than that purchased by the mortgagee must be held liable for a proportionate part of the mortgage money. Similarly, if the property purchased by the mortgagee is of a value smaller than the amount of the mortgage and the mortgagee has paid for it its full value, the remainder of the mortgaged property must contribute the proportion of the mortgage debt chargeable on it. If, in the case of such property, the price paid by the mortgagee is less than the full value, the difference must be held to discharge the mortgage *pro tanto*. It is true that, when property is sold by auction subject to a mortgage, the price ordinarily paid for it is less than its real value by the amount of the mortgage, as the purchaser renders himself liable to discharge the mortgage debt.

The extent of his liability, however, cannot be greater than the amount for which the property could have been sold had it not been sold subject to the mortgage, for, as I have said above, it is to the extent of that amount only that the mortgage would have been discharged by the sale. To hold that every purchase by the mortgagee of a portion of the mortgaged property discharges the mortgage in full would lead to iniquitous results. If, as I have pointed out above, the property purchased by the mortgagee was of the value of Rs. 5 only, and only Rs. 5 out of the mortgage money could possibly be realized by the sale of that property, it cannot by any stretch of reasoning be said that, by reason of the purchase of that property by the mortgagee, the whole of the mortgage debt exceeding Rs. 5 has been discharged. In the case of *Ballam Das v. Amar Raj* and another (1), the value of the property sold was more than the amount of the two decrees held by the mortgagee purchaser. That case is therefore consistent with what I have said above. In *Ahmad Wali v. Bakar Husain* (2), the proposition was laid down somewhat broadly if the value of the property sold was less than the amount of the mortgage debt, but we have no reason to assume that such was the case. The view which I have taken of the question was adopted and acted upon in *Sumeru Kuar v. Bhagwant Singh* (3).

The Courts below have, in my judgment, dismissed the suit on insufficient grounds. The plaintiff stated that the value of the property purchased by him satisfied the mortgage to the extent of Rs. 49 only out of the principal, while the defendants averred that it was much more. These questions ought to have been gone into.

I allow the appeal, and, setting aside the decrees below, remand the case under section 562 of the Code of Civil Procedure to the Court of first instance with directions to readmit it under its original number in the register, and try it on the merits in advertence to the above remarks. Costs to abide the result.

Appeal decreed and cause remanded.

(1) I. L. R., 12 All., 537.

(2) Weekly Notes, 1888, p. 61.

(3) Weekly Notes, 1895, p. 1.