1898

BANDHU PRASAD v. DHIRAJI KUAR.

Singh v. *Ganga Bishen* (1). See also *Gurja* v. *Moher Singh* (2) and also certain cases of the Calcutta and Bombay High Courts cited in *Jhabbu Singh* v. *Ganga Bishen*. We set aside the order passed relating to the grant of a certificate of guardianship of the property of the minor Shambhu Nath, and we cancel the certificate in that respect. If the certificate purports to constitute the appellant guardian of the person of the minor we refrain from interfering as to that matter. We allow this appeal.

Appeal decreed.

1898

May 6.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Banerji.

IMDAD HASAN KHAN (DEFENDANT) *v.* BADRI PRASAD AND ANOTHER (PLAINTIFFS).*

Act No. IV of 1882 *(Transfer of Property Act) section* 72*—Mortgagee compelled to pay Government revenue which should have been paid by the mortgagor—Remedies of the mortgagee.*

Where a mortgagee has been compelled to pay Government revenue which should have been paid by the mortgagor, the mortgagee may either add the amount which he has so been made to pay to the amount of the mortgage debt under section 72 of the Transfer of Property Act, 1882, or he may sue the mortgagor separately to recover the amount so paid. If, however, he has sued separately and obtained a decree against his mortgagor, he cannot then add the amount due to the mortgage debt; his two remedies are not concurrent.

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

Mr. *Abdul Majid*, Mr. *Roshan Lal* and Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the respondents.

KNOX, ACTING C. J., and BANERJI, J.—This was a suit for redemption of a mortgage made on the 29th of November, 1871, by one Makhan Singh in favour of Imdad Hasan, defendant, the appellant before us. The mortgage was usufructuary

* First Appeal No. 46 of 1896 from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 7th November 1895.

(1) I. L. R., 17 All., 529. (2) Weekly Notes, 1896, p. 30.

1898

IMDAD HASAN KHAN v. BADRI PRASAD.

and was redeemable in the month of Chait. The mortgagee, instead of taking actual possession of the mortgaged property, granted a lease of it to the mortgagor on the 20th of December, 1871. The rent reserved by the lease was equivalent to the interest payable on the mortgage, being Rs. 371-0-0 calculated at the rate As. 11 per cent. per mensem. Both the deeds were registered on the same date, namely the 10th of January 1872. On the 29th of July, 1876, Imdad Hasan, the mortgagee, sub-mortgaged the property to Chaudhri Jagan Singh and Chaudhri Man Singh, and on the 3rd of August, 1876, he executed an agreement in favour of the aforesaid persons, undertaking to pay Rs. 540 per annum as interest. Man Singh died, leaving Anup Singh, defendant, as his heir. Under a private partition between Jagan Singh and Anup Singh the sub-mortgage was allotted to the share of Anup Singh, so that Jagan Singh has no longer any interest in the mortgaged property. In 1878 Makhan Singh sold twelve biswas out of the twenty biswas mortgaged by him to one Irfan Ali. Out of the amount of consideration for the sale-deed executed in favour of Irfan Ali the amount of the mortgage referred to above was left in his hands for payment to Imdad Hasan, the mortgagee, but no payment was made by him. Mohan Lal, the father of the present plaintiffs, held several simple mortgages over the same property from Makhan Singh, all of dates subsequent to that of the mortgage of the 29th of November, 1871. He obtained a decree upon his mortgages in 1883 against Makhan Singh and Irfan Ali and in execution thereof he caused the property now in suit to be sold by auction and purchased it himself in 1886 and 1887.

It is by virtue of these purchases that the plaintiffs have brought the present suit for redemption of the mortgage of 1871. By the terms of the lease granted to Makhan Singh by Imdad Hasan the former was to pay the revenue payable to Government. Default having been made in the payment of revenue, Imdad Hasan paid the same, and brought a suit against

Makhan Singh and Irfan Ali and obtained a decree on the 24th of December 1885, for recovery of the amount so paid by sale of the mortgaged village. In execution of that decree he caused a four biswa share to be sold in 1889 and purchased it himself. Subsequently he obtained other decrees against Makhan Singh for arrears of revenue and sought to bring the mortgaged property to sale. Mohan Lal, the father of the plaintiffs, preferred objections to the sale, and those objections prevailed. Thereupon Imdad Hasan brought a suit for possession against Makhan Singh, Irfan Ali and Mohan Lal and obtained a decree for possession on the 11th of December 1893. In 1894 the plaintiffs brought a suit for redemption of the mortgage of 1871, but that suit was dismissed on the ground that tender of the mortgage money had not been made in accordance with the terms of the mortgage in the month of Chait. The plaintiffs then deposited in Court Rs. 4,500-0-0 the principal amount of the mortgage, and brought the present suit for redemption against Imdad Hasan, the principal mortgagee, and Anup Singh, the sub-mortgagee from Imdad Hasan.

The suit was defended on two grounds: first, that the four biswa share which Imdad Hasan had purchased at auction had absolutely passed to him, and that the plaintiffs had no right to claim redemption of that share, and, secondly, that a sum of Rs. 23,340-0-0 was due upon the mortgage, and unless payment of that sum was made the plaintiffs could not redeem. It was alleged that, in addition to the principal amount of the mortgage, Rs. 10,897-3-5 were due on account of revenue payable for the mortgaged village, which the mortgagor had not paid, and which the mortgagee had paid for him, and for which he had obtained decrees against the mortgagor; that a further sum of Rs. 7,942-13-0 was due on account of arrears of interest payable on the mortgage for the years 1289 to 1295 Fasli, the measure of the interest being the amount of profits payable under the lease granted to the mortgagor; and that these

1898

IMDAD HASAN KHAN v. BADRI PRASAD.

two sums together with interest, amounted to the Rs. 23,340 referred to above.

The Court below has decreed the plaintiff's claim. It was of opinion that the Government revenue had all along been paid by Makhan Singh, the mortgagor, and that the mortgagee was not entitled to any amount on account of revenue. As for the profits, it held that there was no charge on the mortgaged property for the profits, and therefore it was not incumbent on the plaintiffs, in order to redeem the mortgage, to pay the arrears of profits that might be due to the mortgagee in his capacity of lessor.

The defendant mortgagee has preferred this appeal, and two questions have been raised on his behalf. First, whether the plaintiffs are entitled to claim redemption of the four biswa share purchased by Imdad Hasan, that is to say, what is the effect of the purchase of that share by Imdad Hasan, and, secondly, whether the mortgagee is entitled as such to the revenue paid and to unpaid profits.

As regards the first point we are of opinion that the contention of the appellant must fail. The principal ground upon which it is urged that it is no longer open to the plaintiffs to claim redemption of the four biswa share is, that in the suit brought by Imdad Hasan in 1893 he claimed proprietary possession of the four biswa share and obtained a decree. It appears, however, from the judgment of the Court in that suit (appellant's second book, page 1) that the question of proprietary right in regard to the four biswas was not determined in that suit. On the contrary, as we read the judgment, the Court abstained from deciding that question. It simply held that Imdad Hasan being the mortgagee of the whole property was entitled to the possession of it, and that it was immaterial whether he had acquired any other rights in regard to any portion of that property. In this view the plaintiffs are not precluded from raising the question whether they are entitled to redeem the four biswa share purchased by Imdad Hasan. It is true that the decree in execution of which that share was sold was a decree which directed the sale of the whole of the mortgaged

property, but at the time when that suit was brought the mortgaged property had passed to Mohan Lal, the father of the plaintiffs, by virtue of the auction sales held in 1886 and 1887 at which he purchased the property. He was therefore a necessary party to Imdad Hasan's suit, and, as he was not impleaded in that suit, his right of redemption has not become extinct. Further, the mortgages in satisfaction of which Mohan Lal purchased the property were of dates prior to that of the charge created in favour of Imdad Hasan by the decree obtained by him in 1893, in execution whereof he caused that four biswa share to be sold. On this ground also the plaintiffs have priority over Imdad Hasan, and they are in our opinion entitled to sue for the redemption of the four biswa share referred to above. For these reasons we repel the first contention raised on behalf of the appellant.

The second contention of the appellant relates, as we have said above, to (1) the amount of revenue alleged to have been paid by the mortgagee for the mortgagor, and (2) the amount of profits payable under the lease taken by the mortgagor and not paid by him. Whilst it is urged on the one hand that the mortgage-deed and the lease constitute one mortgage transaction; that the relation between the parties as regards both the instruments is that of mortgagor and mortgagee; that the mortgagee is entitled under section 72 of Act No. IV of 1882 to add the amount of the revenue paid by him to the principal amount of the mortgage; that the amount of profits payable under the lease is in reality the amount of interest payable under the mortgage, and that redemption cannot be effected without payment of the amounts referred to above; it is contended on the other hand that the lease is a separate transaction by itself; that the rights and obligations arising under it are rights and obligations which exist between a lessee and his lessor, and that the amount which might be due to the mortgagee in this character of lessor cannot be taken into account in the present suit. The determination of the question raised on behalf of the appellant therefore turns upon the construction to be placed on the mortgage-deed and the lease. In

1898

IMDAD HASAN KHAN v. BADRI PRASAD.

considering the nature of the transaction entered into by the parties under those documents what we have to look to is the intention of the parties, whether both the documents were intended to be parts of one and the same transaction or whether one was meant to have no connection with the other. After giving the two documents our best consideration we have come to the conclusion that they form one and the same transaction, namely, a usufructuary mortgage, the condition of that mortgage being the conditions contained in both the deeds. Our reason for arriving at that conclusion is that one of the two deeds cannot be considered apart from the other. In the mortgage-deed reference is made to the lease, and the latter deed refers to the former. In the mortgage-deed mention is made of the payment of interest, but the amount or rate of interest or the mode of payment is not distinctly specified or provided for. All that it says is that the mortgagee has been put into possession in this way that the mortgagor has agreed to pay him lease money under a lease "by fixing the profits at the rate of 11 annas per cent. per mensem," and that at the time of redemption no reduction of interest would be asked for. The lease, however, provides for these matters in detail. It recites first the fact of the mortgage, and then states that the amount of the mortgage, Rs. 4,500, would be paid by four instalments, each payment being endorsed on the deed. Such a statement seems to be out of place in a deed which is a lease pure and simple. The deed next provides that after deduction from the principal of the amounts paid, "profits will be reduced in proportion to the reduction in the principal". It then goes on to say that the total amount payable, calculated at the rate of eleven annas per cent per mensem, is Rs. 371, which is to be paid to the "mortgagee" (not lessor) "year by year, harvest by harvest, instalment by instalment, within each year," and in "case of default in payment of the profits within the year, at the expiry of an instalment, interest at the rate of one rupee per cent per mensem will be charged."

If the transaction had been one of a lease independent of the mortgage, the rent reserved by the lease would not have been

calculated with reference to the amount of the mortgage, and it would not have been made liable to reduction proportionately to the reductions that might take place in that amount. It may, therefore, be reasonably inferred that the lease was only a mode adopted for the payment of interest on the mortgage money. Another circumstance which in our opinion indicates the true nature of the transaction is that the lease is terminable with the mortgage and cannot be surrendered so long as the mortgage subsists. Both the documents were completed on the same day and were presented for registration on the same date, *viz.*, the 10th of January, 1872. The lease, it is true, is of a date subsequent to the date of the mortgage-deed, but the fact that reference is made to the lease in the mortgage-deed shows that the whole matter was arranged and agreed upon at the same time, and the registration of both the documents on the same date shows that they were intended to take effect from the same date. These circumstances to our minds clearly indicate that the mortgage and the lease form one transaction, namely, that of a usufructuary mortgage, the lease providing the manner in which the usufruct was to be taken in lieu of interest. The relation between the parties is therefore that of mortgagor and mortgagee, and any rights and liabilities arising under the lease must be considered as arising out of that relation.

In this view the arrears of lease money due to the mortgagee must be deemed to be arrears of interest. As under the terms of the mortgage the mortgagee is entitled to remain in possession until the principal amount and interest have been realised, he has the right to continue in possession so long as the interest payable to him is in arrear, and the plaintiffs are not entitled to redeem without payment of the arrears. The lease money, *qud* lease money, was undoubtedly not a charge on the mortgaged property; but, *qud* interest it is a charge on the property, and the mortgagee is entitled to hold the property as security, not only for his principal mortgage money, but also for interest. We are of opinion that the plaintiffs must pay to the mortgagee the

1898

IMDAD HASAN KHAN v. BADRI PRASAD.

arrears of interest due to him in addition to the principal, and that the Court below has erred in holding the contrary.

The amount of arrears due has in our opinion been calculated upon a wrong basis. The mortgagee appellant has claimed as arrears Rs. 540 a year, that being the amount which he agreed to pay to his sub-mortgagees. As there was no privity between the mortgagor and the sub-mortgagees, there is none between the latter and the plaintiffs who stand in the shoes of the mortgagor, Makhan Singh. The plaintiffs are therefore liable only to pay the amount which Makhan Singh agreed to pay under the instrument of the 20th of December 1871, namely, Rs. 371 per annum, and, as default was made in the payment of that amount, they are liable to pay interest on the amount in arrear at the rate of one rupee per cent per mensem. It is not denied that the amounts payable for the years mentioned in the statement appended to the written statement of Imdad Hasan (P. 11 of the Paper-book) have not been paid. We hold that the mortgagee Imdad Hasan is entitled to arrears of interest at the rate of Rs. 371 per annum and not at the rate claimed.

As regards the amount of Government revenue alleged to have been paid, the obligation to pay the revenue was, under the terms of the contract embodied in the instrument of the 20th of December 1871, on the mortgagor. If the mortgagor did not pay that amount and the mortgagee had to pay it in order to protect the mortgaged property, he was competent under section 72 of Act No. IV of 1882 to add the money so paid by him to the principal money. But he was also entitled to sue the mortgagor on his covenant for the amount paid for the mortgagor. He elected to pursue the latter remedy, and what he claims now is the amount of the decrees obtained by him on various dates. We are of opinion that the mortgagee having preferred to seek one remedy is no longer entitled to the remedy given to him by section 72 of the Transfer of Property Act, 1882. The debt has become merged in the decrees, and is only payable under the decrees. We are unable to agree with the contention of the learned advocate for the

appellant that a mortgagee may at the time of redemption exercise the right given to him by section 72, although he has already sought and obtained another remedy in respect of the same matter, and we have not been referred to any authority which supports this contention. The ruling of their Lordships of the Privy Council in *Hemanchal Singh* v. *Jowahir Singh* (1) cited by Mr. *Moti Lal*, does not, in our opinion help him. The judgment of their Lordships is very brief, but it seems from the facts of the case that the tender made in that case was held not to be a sufficient tender within the terms of the mortgage-deed, inasmuch as the interest for the second year had not been paid at the close of that year. In our judgment the mortgagee is not entitled to concurrent remedies. Any other conclusion may lead to anomalous results and cause serious injury to the mortgagor. As has happened in this case, the mortgagee may have assigned to strangers the decrees obtained by him against the mortgagors. There would be nothing to preclude the assignees from executing the decrees transferred to them, and, if the mortgagee may add to the principal money the amounts for which he has obtained his decrees, the mortgagors may have to pay the same amount twice over. In our opinion the claim for the revenue alleged to have been paid by the mortgagee and for which he has obtained decrees cannot be sustained, and it is not stated that any other amount is due for which he has not obtained a decree.

The result is that in our judgment the plaintiffs are entitled to obtain a decree for redemption upon payment, not only of the principal mortgage money, but also of arrears of interest for the period claimed by the appellants calculated at the rate of Rs. 371 per annum, together with interest thereon at the rate of one per cent per mensem from the date of non-payment to the date of the institution of the suit. We vary the decree below to the extent indicated above, and we order the parties to pay and receive costs in this Court and in the Court below in proportion to their failure and success. We fix the 1st of September, 1898, as the date on or

(1) I. L. R., 16 Calc., 307.

1898

IMDAD HASAN KHAN v. BADRI PRASAD.

before which the amount decreed by us should be paid, and we direct that the said amount be paid into Court. We make the order last mentioned because we deem it unnecessary to determine in this suit which of the two sets of defendants is entitled to the mortgage money. The amount decreed by us should be calculated and entered in the decree of this Court.

Decree modified.

1898
May 10.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

UMDA BIBI AND OTHERS (OPPOSITE PARTIES) *v.* NAIMA BIBI (PETITIONER.)*

Suit in formâ pauperis—Review of judgment—Court fee—Act No. VII of 1870 (Court Fees Act). sch. 1, cl. (5)—Civil Procedure Code, section 410.

Held that when an application for review is presented in a suit *in formâ pauperis*, that application, like the plaint in the suit, is not liable to any court fee.

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

Maulvi *Ghulam Mujtaba* and Pandit *Madan Mohan Malaviya*, for the appellants.

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

BURKITT and DILLON, JJ:—This is an appeal against an order of the Subordinate Judge of Gorakhpur admitting a review of judgment. The plaintiff, respondent here, had sued to recover certain property and had got permission to use *in formâ pauperis*. Some time afterwards a petition was presented purporting to be on behalf of the plaintiff, and alleging that she and the defendants had compromised the suit on certain terms, and asking that a decree should be drawn up in the terms of the compromise. The Court ordered a decree to be drawn up as prayed. Within three months the plaintiff applied to the Court, substantially, though not formally, for a review of its judgment and of the decree passed on the compromise. In this application the plaintiff alleged that she had been cheated by her own legal adviser in collusion with the defendants; that the compromise as drawn up

*First appeal from Order No. 22 of 1898 from an order of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 31st January 1898.