co-sharers in respect of the mortgaged property, and that neither Musammat Laria nor her assignee (or sub-mortgagee) Baldeo became a co-sharer by virtue of their respective mortgages. When therefore Baldeo assigned or sub-mortgaged to Bansi, that which he transferred was not a co-sharer's interest, but an assignment of a mortgage of (or a sub-mortgage of) an interest executed by a stranger and not by a co-sharer. To such an alienation the terms of the *wajib-ul-arz* do not, in my opinion, apply. I would therefore affirm the decree of the lower Court and would dismiss this appeal with costs.

KNOX, J.—I agree with my brother Burkitt, and have nothing further to add to what he has said. I would affirm the decree of the lower Court and dismiss this appeal with costs.

BLAIR J.—I concur.

BY THE COURT.—This appeal is dismissed with costs.

Appeal dismissed.

1897
July 9.

Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt, and Mr. Justice Aikman.

NAND KISHORE (PLAINTIFF) *v.* RAJA HARI RAJ SINGH AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 60—*Mortgage—Purchase by mortgagee of portion of the mortgaged property—Mortgage not thereby necessarily extinguished.*

The purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage.

Ahmad Wali v. *Bakar Husain* (1) overruled. *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2), *Nilakant Banerji* v. *Suresh Chandra Mullick* (3), *Mahtab Singh* v. *Misree Lall* (4), *Bitthul Nath* v. *Toolsee Ram* (5),

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* Second Appeal No. 677 of 1892, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 21st March 1892, reversing a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Moradabad, dated the 26th September 1891.

(1) Weekly Notes, 1883, p. 61.
(2) 13 Moo. I. A., 404.
(3) I. L. R., 12 Calc., 414.
(4) N.-W. P., H. C. Rep., 1867, p. 88.
(5) N.-W. P., H. C. Rep., 1866, p. 125.

1897

NAND KISHORE v. RAJA HARIRAJ SINGH.

Kesree v. *Seth Roshun Lal* (1), *Kuray Mal* v. *Puran Mal* (2), *Mahtab Rai* v. *Sant Lal* (3), *Sumera Kuar* v. *Bhagwant Singh* (4), *Chunna Lal* v. *Anandi Lal* (5), *Khwaja Bakhsh* v. *Imaman* (6), *Ballam Das* v. *Amar Raj* (7) and *Bisheshar Singh* v. *Laik Singh* (8), referred to.

THIS was a reference to a Full Bench of a question which is thus stated in the referring order :—

"In this case certain villages were mortgaged to the same person, namely, Raja Sheoraj Singh, the predecessor in title of the respondents, under two mortgages, upon which decrees for sale were obtained. One of the decrees is No. 66, and the other is No. 77. The latter decree was obtained upon a mortgage of date subsequent to that of the mortgage upon which the other decree was passed. A portion of the property mortgaged under decree No. 66 was purchased by the mortgagee in execution of a simple money decree. Another portion of the mortgaged property, which was subject to both the mortgages, was sold in execution of decree No. 77, and was purchased by the decree-holder mortgagee.

"The question has been raised whether these purchases had the effect of fully discharging decree No. 66, without regard to the value of the property sold and the price paid for it by the purchaser."

Mr. *T. Conlan* and Pandit *Moti Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand*, for the respondents.

The following judgments were delivered :—

KNOX, J.—Two questions have been referred to us for decision. The form in which they have been referred admits of some improvement. They may be set out as follows :—(1) Does the purchase at a Court auction-sale (held in execution of a simple money decree) by a mortgagee of part of the property covered by the mortgage-deed have the effect of fully discharging the whole mortgage debt, without regard to the value of the property

(1) 2 N.-W. P., H. C. Rep., 4.
(2) I. L. R., 2 All., 565.
(3) I. L. R., 5 All., 276.
(4) Weekly Notes, 1895, p. 1.
(5) I. L. R., 19 All., 196.
(6) Weekly Notes, 1885, p. 210.
(7) I. L. R., 12 All., 537.
(8) I. L. R., 5 All., 257.

sold and the price paid for it by the purchaser? (2) Does the purchase at a Court auction-sale (held in execution of a decree obtained upon a subsequent mortgage-deed) by the mortgagee of part of the property covered by a mortgage-deed of earlier date held by the same mortgagee, have the effect of fully discharging the whole of the prior mortgage debt without regard to the value of the property sold and the price paid for the purchase?

The authority for holding that either of the above purchases would extinguish the whole mortgage debt is to be found in a case decided by this Court—*Ahmad Wali* v. *Bakar Husain* (1).

In that case the mortgagee purchaser held a decree enforcing a mortgage in his favour over several properties. One of these properties was put up for sale in execution of another decree against the original mortgagor, and the mortgagee, finding this, had it notified that the property advertized was being sold subject to the mortgage which he held, and at the sale which followed himself became the purchaser. He then sought to enforce his decree against the rest of the mortgaged property.

It was held that the fact of the purchase made by him of the portion of the property subject to his mortgage lien extinguished the mortgage debt *in toto*.

No principle of law is laid down as being the principle upon which this judgment proceeded. The judges contented themselves with setting out what appeared to be the facts of the case, and then without any further reason laid down the law which they considered applicable.

But it will be found that this judgment stands quite alone and is in conflict with the view held by this Court from 1866 to 1897, and by other Courts in a large number of reported cases, which under similar circumstances recognize the prior mortgage debt as still subsisting, and go on to lay down the principles upon which the mortgagor or a purchaser or assignee from the mortgagor of the equity of redemption over the whole or portion of

(1) Weekly Notes, 1883, p. 61.

1897

NAND KISHORE v. RAJA HARIRAJ SINGH

the remaining mortgaged property, may redeem such property or portion of it, a result which, it is needless to say, is quite incompatible with the conclusion that the prior mortgage debt is extinguished by the fact of the mortgagee purchasing a portion of the mortgaged property subject to the prior incumbrance.

In *Nawab Azimut Ali Khan* v. *Jowahir Sing* (1) their Lordships of the Privy Council held that the appellant, who was transferee of the interest of the original mortgagee, and who had subsequently become the owner by purchase of the equity of redemption in twelve and three-quarters of the sixteen mauzas of which the mortgaged property was comprised, if desirous of retaining possession of the villages (in which he had not purchased the equity of redemption) as mortgagee, was entitled to do so against the plaintiff who had purchased the equity of redemption in one of the villages (Hosseinpore) and that the plaintiff's right in that case was limited to the redemption and recovery of Hosseinpore upon payment of so much of the sum as represented the portion of the mortgage debt chargeable on that village.

The same principles were again laid down by the Privy Council in *Nilakant Banerji* v. *Suresh Chandra Mullick* (2).

So far back as the year 1867, in *Mahtab Singh* v. *Misree Lall* and *Mussamat Soondur* (3), this Court held that a mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor's interests, that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this that a mortgagee who has acquired by purchase a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the mortgage debt on the remaining portion of the equity of the redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden and must discharge it.

(1) 13 Moo. I. A., 404. (2) I. L. R., 12 Calc., 414.
(3) N.-W. P., H. C. Rep., 1867, p. 88.

It will be further seen from the cases cited below that, so far from any inclination to hold that the mortgage debt was discharged by the fact of the mortgagee purchasing a portion of the mortgaged property under such circumstances as are set out in the reference, this Court has consistently, with the one reported exception of *Ahmad Wali* v. *Bakar Husain* (1), held that the mortgage debt still subsisted, if not satisfied by the mortgagee's purchase, and had to be satisfied by any one seeking to redeem the remainder of the property. See *Bitthul Nath* v. *Toolsee Ram* (2); *Kesree* v. *Seth Roshun Lal* (3); *Kuray Mal* v. *Puran Mal* (4); *Mahtab Rai* v. *Sant Lal* (5). In the very recent cases of *Sumera Kuar* v. *Bhagwant Singh* (6) and *Chunna Lal* v. *Anandi Lal* (7) the same principle has been re-affirmed.

The law laid down in the above cases appears to have found a place in the last clause of section 60 of the Transfer of Property Act, wherein it is provided that nothing in section 60 shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Where the mortgagee or mortgagees has or have acquired in part the share of a mortgagor, a person interested in a share only of the mortgaged property is entitled to redeem his own share only on payment of a proportionate part of the amount of remaining due on the mortgage, a clear recognition that the mortgage debt in part still subsists.

Several cases to the same effect will be found in the reported decisions of other High Courts.

The learned counsel for the appellant made some show of relying upon the case of *Khwaja Bakhsh* v. *Imaman* (8) as an

(1) Weekly Notes, 1883, p. 61.
(2) N.-W. P., H. C. Rep., 1866, p. 125.
(3) 2 N.-W. P., H. C. Rep., 4.
(4) I. L. R., 2 All., 565.
(5) I. L. R., 5 All., 276.
(6) Weekly Notes, 1895, p. 1.
(7) I. L. R., 19 All., 196.
(8) Weekly Notes, 1885, p. 210.

1897

NAND KISHORE v. RAJA HARIRAJ SINGH.

authority in favour of his client; but in that case the mortgagee held two incumbrances over the same property and brought it to sale in execution of the puisne incumbrance after notifying that the sale was being made subject to the prior incumbrance. It was rightly held that the purchase, having been made subject to the prior incumbrance held by the purchaser himself, operated by the rule of merger to extinguish the prior incumbrance, there being no intervening equities in the case.

The same remarks apply to the case of *Ballam Das* v. *Amar Raj* (1), which was decided upon the same principles.

These cases are perfectly distinct from the cases previously cited.

BURKITT, J.—I concur with my brother Knox and have nothing to add to his judgment.

BLAIR, J.—The plaintiff-appellant represents the mortgagor interests and the respondent-defendant the mortgagee interests in this suit. The question referred to us is whether the mortgagees by purchasing certain portions of the mortgaged property sold in execution of money decrees have thereby extinguished their mortgages over the whole of such property. In other words—does the confluence of the mortgagor and mortgagee interests in one person in a part of the property included in a mortgage or mortgages, operate as an extinguishment of the mortgagee's interests in the entire property?

The first case cited for the appellant was that of *Ahmad Wali* v. *Bakar Husain* (2). It boldly answers the question in the affirmative. The learned Judges give no reason and rely upon no authority. No doubt their decision was based on the general doctrine of the indivisibility of mortgages. That case was professedly followed by a Division Bench of this Court (including one of the judges who decided it) in the case of *Khwaja Bakhsh* v. *Imaman* (3). The reason given in the judgment was that the mortgagee purchaser bought at a sale at which the prior

(1) I. L. R., 12 All., 537. (2) Weekly Notes, 1883, p. 61.
(3) Weekly Notes, 1885, p. 210.

incumbrance was notified, and must therefore be taken to have bought at a price in which the amount of the notified incumbrance must have been taken into account. Apparently the learned Judges failed to observe the distinction between the case they were deciding and the case they supposed themselves to be following. The decision in *Khwaja Bakhsh* seems to me open to no exception, and is certainly no authority for the proposition that the purchase by a mortgagee of part of the mortgaged property does *per se* extinguish the whole mortgage. What was purchased in *Khwaja Bakhsh* v. *Imaman* was the whole and not part of the mortgaged property. To reconcile the principle upon which the two cases were decided, we should have to suppose that in the case of *Ahmad Wali* v. *Bakar Husain*, the Judges were of opinion that the whole amount of the notified incumbrance must have been taken by the bidders to have been exigible from that part of the mortgaged property so sold and bought. If that doctrine were universally applied, the result would be that if several parts of the mortgagor's equity of redemption were sold separately with notice of the incumbrance in execution of separate money decrees, and the purchasers were each one to take into consideration in the price paid, the amount of the whole incumbrance, the mortgagor would be mulcted in the amount of the whole incumbrance just as many times as there were sales. *E converso*, if the mortgagee were the purchaser in one of such sales and paid a price in which the whole value of his incumbrance was deducted from the price he would have paid in the absence of incumbrance, then it would only be equitable to hold that his incumbrance was discharged by such purchase. In *Khwaja Bakhsh* v. *Imaman* the equity bought was co-extensive with the property mortgaged: that case therefore furnishes no answer to the question put to us.

The case of *Ballam Das* v. *Amar Raj* (1) appears simply to have followed the two previous rulings which I have discussed; but the Court apparently did not notice the distinction between

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

1897

NAND KISHORE v. RAJA HARIRAJ SINGH.

them. To the decision in that case in my opinion no just exception can be taken, but it is no authority for the much larger proposition contended for by the appellant.

Indeed both these later cases are consistent with the principle laid down by the Lords of the Privy Council in *Nawab Azimut Ali Khan* v. *Jowahir Sing* (1). It is remarkable that each of the Judges who decided the case of *Ahmad Wali* v. *Bakar Husain* has lent the weight of his authority to some other decision, the principle of which it seems practically impossible to reconcile with the judgment in that case. *Vide* the case of *Bisheshar Singh* v. *Laik Singh* (2) and that of *Ballam Das* v. *Amar Raj* (3).

The later judgments of this Court have consistently followed the principle of allocating to each part of a divided equity an *ad valorem* share of the mortgage debt to which the whole property is subject. The Calcutta rulings are to the same effect. A vast preponderance of authority, based, as it seems to me, upon sound considerations of justice and equity, constrains me to answer the question put to us in the negative. It is not in my opinion a sound general principle of law that the purchase by a mortgagee at a sale under a decree of part of the mortgaged property extinguishes the mortgagee's rights against the whole.

BANERJI, J.—The question referred to us is substantially this:—Has the purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage?

My answer to the question is that such purchase does not necessarily discharge the mortgage in full and extinguish it. As I said in my judgment in *Chunna Lal* v. *Anandi Lal* (4) "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

(1) 13 Moo. I. A., 404.
(2) I. L. R., 5 All., 257.
(3) I. L. R., 12 All., 537.
(4) I. L. R., 19 All., 196.

effect in every case." If a part of the mortgaged property be acquired by a sole mortgagee, or by all the mortgagees where there are more mortgagees than one, the integrity of the mortgage is thereby broken up and the owner of the remainder of the property becomes entitled to redeem his own share upon payment of a proportionate part of the amount due on the mortgage But the mortgage does not, by reason of such purchase, of necessity become extinct. This is clear from the provisions of the last paragraph of section 60 of Act No. IV of 1882, and the rulings cited in his judgment by my brother Knox. That paragraph would be unnecessary and superfluous, if, as is contended on behalf of the appellant, the purchase of a part of the mortgaged property by the mortgagee has the effect of fully discharging the mortgage in every instance. That property may be sold subject to a mortgage and that the mortgagee himself may purchase the mortgagor's equity of redemption in whole or in part, either by private sale or at auction in execution of a decree, can admit of no doubt. If, however, a part of the property comprised in a mortgage is sold subject to the mortgage, and the mortgagee himself buys it, certain equities arise between the mortgagee or his representative in interest on the one hand and the mortgagor or the mortgagor's representative in interest on the other, to which a Court is bound, as a Court administering justice and equity, to give effect. One of those equities is that the mortgagee by purchasing a part of the mortgaged property should not place the mortgagor in a worse position than that in which the mortgagor would have been had any other person purchased the property. Where several properties are mortgaged to secure one debt, such properties are, under section 82 of Act No. IV of 1882, liable, in the absence of a contract to the contrary, to contribute rateably to the debt, the extent of the liability of each property being proportionate to its value at the date of the mortgage. If the mortgagee himself purchases one of the properties liable to contribute rateably to the mortgage debt, he must bear a rateable share of the debt, and he cannot be allowed to benefit himself and to prejudice the mortgagor or the owner of the

1897

NAND KISHORE v. RAJA HARIRAJ SINGH.

remainder of the property by throwing on it the whole burden of the debt and making that property solely responsible for the debt. He must bring into account the value of the property purchased by himself. When property is sold subject to a mortgage, the price which the purchaser pays for it is ordinarily the difference between the market value of the property and the amount due upon the mortgage. If the mortgagee himself be the purchaser, and, as generally happens in such cases, the price paid by him, is not the full market value of the property, he should not be allowed to keep in his pocket the difference between the market value and the price paid by him and thereby damnify the mortgagor or other owner of the remainder of the mortgaged property. That is the reason why the mortgagee must bring into account the value of the property purchased by himself. As a result of his doing so, the mortgage may, in some instances, be found to have been fully discharged by his purchase. But there is no principle of law or equity under which it may be held that the fact of the mortgagee buying, subject to his mortgage, a part of the property comprised in his mortgage, is in itself sufficient to extinguish the mortgage. Suppose the mortgaged property consists of a large zamindari. Surely it cannot be said that if the mortgagee buys a few acres of land in the zamindari the whole mortgage will thereby be discharged. It is conceivable that the mortgagee may for special reason, *e.g.*, proximity to property owned by himself, be anxious to purchase a small portion of the mortgaged property, and may therefore pay full value for it, the remainder of the property being sufficient security for the mortgage debt. If he pays full value for the portion purchased by him, the purchase cannot in any way damnify the mortgagor so as to create an equity in his favour as against the mortgagee. It is true that if a person other than the mortgagee buys a part of the mortgaged property, he can only protect the part which he has purchased from the claim of the mortgagee, by payment of the whole of the mortgage money due, but he would have the right of contribution as against the other properties comprised in the mortgage. There appears to be no

reason why, if the mortgagee be the purchaser, he should be in a worse position than any other purchaser. For the above reasons I am of opinion that the fact of the mortgagee buying a part of the mortgaged property, does not necessarily extinguish the mortgage. To what lesser extent such a purchase may be held to have discharged the mortgage, is not a question which we are called upon to decide on the reference before us. All I need say on that question is that the answer will depend upon the circumstances of each individual case.

The only reported ruling in which a view contrary to that stated above was adopted is that of *Ahmad Wali* v. *Bakar Husain* (1). The report is very meagre, but it appears from the record of the case, to which we have referred, that in that case a subsequent mortgagee purchased a part of the property comprised in his mortgage in execution of a decree obtained by another mortgagee upon a prior mortgage. Strangely enough the property sold under the prior mortgage was sold subject to the lien created by the subsequent mortgage. Oldfield and Brodhurst, J.J., held "that if the sale was made subject to the lien which he [subsequent mortgagee] had, his debt must be held as satisfied." The learned Judges referred to no authority or principle of law which supported their view. They did not consider whether the difference between the market value of the property and the price paid for it was equal to the amount of the subsequent mortgage, and they held without any qualification that the fact of the mortgagee buying a part of the mortgaged property subject to his mortgage was enough fully to discharge the mortgage. For the reasons I have stated above I am unable to agree with the opinion of the learned Judges. I notice that in *Bisheshar Singh* v. *Laik Singh* (2), one of those learned Judges came to a conclusion inconsistent with the view adopted by him three days afterwards in *Ahmad Wali* v. *Bakar Husain*.

The next case which was referred to on behalf of the appellant was that of *Khwaja Bakhsh* v. *Imaman* (3). That was a case

(1) Weekly Notes, 1883, p. 61. (2) I. L. R., 5 All., 257.
(3) Weekly Notes, 1885, p. 210.

1897

NAND KISHORE v. RAJA HARIRAJ SINGH.

in which the whole of the mortgaged property was purchased by the mortgagee in execution of a decree obtained by him upon a subsequent mortgage, after notifying to intending purchasers the prior incumbrance held by him. It was held that the prior mortgage was discharged by the purchase. One of the learned Judges based his opinion on the doctrine of merger, which cannot certainly apply to the case of the purchase by the mortgagee of a part only of the mortgaged property. In such a case there cannot be a complete fusion of all the rights of the mortgagor and the mortgagee in the same person. That ruling, therefore, is no authority for the proposition for which the appellant contends.

In the case of *Ballam Das* v. *Amar Raj* (1) the mortgagee appears to have purchased the mortgaged property with the leave of the Court at a sale held in execution of a decree obtained by him upon his prior mortgage. I fail to see how such a purchase could have the effect of extinguishing a subsequent mortgage held by him over the same property.

The opinion I have expressed above is in accord with the ruling in *Sumera Kuar* v. *Bhagwant Singh* (2).

I would answer the question referred to us by saying, as I have said above, that the purchase by the mortgagee of a part of the mortgaged property under the circumstances stated in the order of reference, does not necessarily extinguish the mortgage.

AIKMAN, J.—I concur with my learned colleagues in thinking that the case of *Ahmad Wali* v. *Bakar Husain* (3), was wrongly decided, and I concur in the judgment of my brother Banerji.

BY THE COURT.—We have no hesitation therefore in holding that the precedent *Ahmad Wali* v. *Bakar Husain* (3), must be overruled, and in answering both the questions submitted to us in the negative.

We direct that with this answer the record be returned to the Bench which made the reference.

(1) I. L. R., 12 All., 537. (2) Weekly Notes, 1895, p. 1.
(3) Weekly Notes, 1883, p. 61.