

ordinary agent as regards the other members of the family. The contention of the learned counsel for the respondents, based on the argument that the defendants Nos. 16 and 17 were agents of the other defendants, cannot therefore prevail.

Appeal decreed and cause remanded.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SHEO SAMPAT PANDE AND ANOTHER (PLAINTIFFS) v. BANDHU PRASAD MISR AND OTHERS (DEFENDANTS).*

Act No. XIX of 1873 (N. W. P. Land Revenue Act), sections 166, 167, 168—Act No. XII of 1884 (Agriculturists' Loans Act), section 5—Takavi loan—Sale of house in default of payment of loan—Effect of such sale.

The provisions of sections 166, 167 and 168 of the North-Western Provinces Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was held that such sale did not avoid the prior incumbrance.

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

Babu *Durga Charan Banerji* for the appellants.

Pandit *Sundar Lal* (for whom *Manvi Ghulam Mujtaba*) and Babu *Jiwan Chandar Mukerji* for the respondents.

BANERJI and AIKMAN, JJ.—The decree of the lower appellate Court cannot possibly be supported. The suit was one for sale upon a mortgage. The property mortgaged consisted of a house and certain zamindari property. Subsequently to the mortgage the mortgagor took takavi advances from Government which he did not repay. The Government therefore caused the said house, upon the security of which the takavi advance had been made, to be sold, and Sheo Sahai, defendant, purchased it. Both the Courts below have dismissed the claim in respect of the house on the view that the purchase by Sheo Sahai conveyed to him the house free from the incumbrance created by the mortgage in suit. The learned Judge has relied on the provisions of section 167 of Act No. XIX of 1873, and holds that as arrears of takavi are, by virtue of section 5 of Act No XII of 1884, realized in the same manner as arrears of land revenue, property

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* Second Appeal No. 700 of 1897, from a decree of Mr. V. A. Smith, Judge of Gorakhpur, dated the 22nd May, 1897, confirming the decree of Maulvi Saiyid Jafar Husain, Subordinate Judge of Gorakhpur, dated 19th February 1897.

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sold for recovery of takavi loans is sold free of all incumbrances. The learned Judge has overlooked the fact that section 167 relates to the sale of the patti or mahal in respect of which an arrear of land revenue is due. In such a case the purchaser would no doubt acquire the patti or mahal sold free of all incumbrances. But if any property other than the patti or mahal in respect of which arrears are due be sold, the purchaser would only acquire the rights and interests which the defaulter had at the time of the sale, and any incumbrances created by him would not be rendered invalid by reason of the sale. This is clear from the provisions of section 168. The learned Judge no doubt refers to that section, but he says that the section would have applied had the house in question not been hypothecated to Government as security for the takavi loan.

We fail to see how the fact of a hypothecation subsequent to that in favour of the plaintiff's right under his prior mortgage can invalidate that mortgage as against the purchaser under the later hypothecation. The mortgagor, when he made the hypothecation in favour of Government, hypothecated only such rights as he had at the time of the hypothecation. Those rights were nothing more than the rights to redeem the mortgage in favour of the plaintiff. In our opinion the Courts below erred in exempting from the claim the house purchased by Sheo Sahai, and we think the plaintiffs were entitled to a decree for the sale of that house.

We notice that although in the judgment of the Court of first instance the house was exempted from liability for the claim, the decree which was drawn up directed the sale of the house. This was evidently an oversight as the decree totally exempted Sheo Sahai from liability.

We allow the appeal and make a decree in favour of the plaintiff for the sale of the whole of the property mentioned in the plaint. We extend the time for the payment of the mortgage money up to the 1st August, 1900. The appellants will get their costs of this appeal and of the appeal to the Court below from Sheo Sahai, defendant, who will also be liable for the costs of the Court of first instance.

Appeal decreed.