1899

EDWARD CASTON v. L. H. CASTON.

KNOX, J.—I fully concur both in the reasons and in the conclusions arrived at by the learned Chief Justice, and have nothing further to add.

BLAIR, J.—I also entirely concur in the conclusions arrived at by the learned Chief Justice and in the reasoning on which those conclusions are based. I have only one addition to make. It is that, in my opinion, the judgment of a Bench of this Court confirming the decree for nullity of marriage is an authority on the question of law whether for the validity of such a confirming order a delay of six months is necessary. The Bench which implicitly decided that the six months' delay imposed in cases of dissolution of marriage was not necessary in cases of nullity was a Bench similarly constituted to the present, and of co-ordinate authority; and, if not by strict law, by the comity of the Courts, the law in such a decision ought to be taken as authoritative until declared to be erroneous by a Full Bench of the Court. *A fortiori* it was not open to an inferior Court to question the decision of any Bench of this Court. It is impossible to draw the inference which appears to be suggested by the District Judge that the matter was not considered and decided by the Bench of this Court which confirmed the decree of nullity. It was necessary as a foundation for the order which it made that it should have adjudicated on that question and decided that the six months' delay was not in that case imposed by the law. Therefore on authority as well as on the reasoning set forth in detail in the learned Chief Justice's judgment I would make the same answer to this reference.

1900

April 3.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

BISHESHUR DIAL AND ANOTHER (PLAINTIFFS) *v.* RAM SARUP (DEFENDANT).*

Act No. IV of 1882 (Transfer of Property Act), Section 82—Mortgage—Purchase by mortgagee at auction of portion of the mortgaged property—Effect of such purchase in reducing the mortgage debt.

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect

* Second Appeal No. 221 of 1897 from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 22nd December, 1896, reversing a decree of Maulvi Muhammad Fida Husain, Munsif of Agra, dated the 30th of June, 1896.

of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. *Lakhmidas Ramdas* v. *Jamnadas Shankar Lal* (1) followed. *Nand Kishore* v. *Raja Hariraj Singh* (2), and *Sumera Kuar* v. *Bhagwant Singh* (3), and *Chunna Lal* v. *Anandi Lal* (4), considered. *Mahabir Pershad Singh* v. *Macnaghten* (5). *Nawab Azmat Ali Khan* v. *Jawahir Singh* (6), and *Mahtab Singh* v. *Misri Lal* (7), referred to.

THE facts of the case are as follows:—Balak Ram, the ancestor of the defendants, made a simple mortgage for Rs. 1,000 in favour of Jai Gopal, the plaintiffs' ancestor, on November 3rd, 1885. In 1893 the property mortgaged was advertised for sale in execution of a decree of one Kunj Behari and another. As the amount of the decree of Kunj Behari was only Rs. 1,155-1-9, only half of the property was sold by auction and it was purchased, on November 21st, 1893, by the plaintiffs for Rs. 1,500. At the time of the auction sale an application was made to notify the amount of the mortgage-money. The plaintiffs, alleging that as they had purchased only half of the property, one-half only of the mortgage-debt had been discharged, brought a suit against the defendants claiming that the remaining half of the property in the hands of the defendants was liable for the other half of the mortgage-debt, together with interest, and asking that that amount might be awarded to them and in default of payment sale of that half of the property which remained with the defendants. The defendants objected that, the plaintiffs having purchased half of the property, the whole hypothecation debt should be charged against that half.

The first Court decreed the claim for a moiety of the principal and dismissed the claim for interest. The lower appellate Court allowed the appeal of the defendants, dismissing the suit of the plaintiffs on the ground that the property purchased by them was worth, approximately, Rs. 3,000, and that as they had purchased it for Rs. 1,500 only it must be taken that they purchased it for Rs. 1,500 plus Rs. 1,000, the mortgage-money

(1) (1896) I. L. R., 22 Bom., 304.
(2) (1897) I. L. R., 20 All., 23.
(3) Weekly Notes, 1895, p. 1.
(4) (1896) I. L. R., 19 All., 196.
(5) (1889) I. L. R., 16 Calc., 632.
(6) (1870) 13 Moo., I. A., 404.
(7) N.-W. P., H. C. Rep., 1867, p. 88.

1900

BISHESHUR DIAL v. RAM SARUP.

due to them, and which mortgage was duly proclaimed at the time of the sale of half the property.

Pandit *Sunder Lal*, with whom was Munshi *Ram Prasad*, for the appellant.

Where several parcels of property are jointly mortgaged to secure a mortgage-debt, in the absence of a contract to the contrary each parcel is jointly and severally liable for the whole debt due to the mortgagee. If one of these parcels is purchased by a person other than the mortgagee, it may be sold in execution of the decree obtained by the mortgagee on his mortgage. As between themselves each parcel is liable to contribute rateably to the debt secured by the mortgage (*vide* section 82 of Act IV of 1882). The parcel purchased by the stranger from the mortgagor as between it and other mortgaged parcels was liable to contribute its quota of the mortgage-debt apportioned according to the valuation of each of the mortgaged parcels and so was every other parcel mortgaged.

If the whole of the mortgaged debt was recovered by sale of the parcel purchased by the stranger, the owner of this parcel could claim contribution from the owners of the other parcels for the sum recovered from it in excess of its proper quota, under section 82 of Act IV of 1882.

If the mortgagee himself purchased one of the parcels, as owner of the parcel purchased, he is bound to pay to himself the quota of the mortgage-debt for which the parcel in question is liable under the rule formulated in section 82 of Act IV of 1882. In such case there is a confluence of the estates of the mortgagor and the mortgagee in the same person, and to the extent of the quota of the mortgage-debt, for which this property is liable, the mortgage is extinguished, the balance of the mortgage-debt being still recoverable by the mortgagee. The last paragraph of section 60 of Act No. IV of 1882 is based on the same principle. Where the mortgagee himself purchases a part of the mortgaged property, the remainder of the mortgaged property might be redeemed "on payment of a proportionate part of the amount remaining due on a mortgage." These propositions are supported by the following cases :— *Nawab Azmat Ali Khan* v. *Jawahir Singh* (1), *Mahtab Singh* v. *Misri Lal* (2),

(1) (1870) 13 Moo., I. A., 404. (2) N.-W. P. H. C. Rep., 1867, p. 88.

Kesree v. *Seth Roshan Lal* (1), *Sobha Sah* v. *Inderjeet* (2), *Nathoo Sahoo* v. *Lalah Ameer Chand* (3), *Gossyen Luchmee Narain Poori* v. *Bicram Singh* (4), *Hirdy Narain* v. *Syed Allaoollah* (5), *Bisheshar Singh* v. *Laik Singh* (6), *Lakhmidas Ramdas* v. *Jamnadas Shankar Lal* (7), *Flint* v. *Howard* (8).

The Honorable Mr. Justice Aikman referred to *Maharajah Kishen Pertab Sahee Bahádoor* v. *Lalla Nund Coomar Singh Purray* (9), *Sheonath Doss* v. *Janki Prosad Singh* (10). These cases support the appellant's contention. A mortgagee purchasing a part of the mortgaged property at a public auction with the leave of the Court is exactly in the same position as a stranger purchaser.

The rule laid down in *Sumera Kuar* v. *Bhagwant Singh* (11) is based on no principle. On this rule the liability of each parcel of the property would depend :— *(a)* upon who the purchaser is at the public auction, whether he is the mortgagee himself or a stranger; *(b)* upon the fluctuations of the market at the sale of each parcel of the mortgaged property.

In the case, say of a mortgage of ten parcels of property, the amount for which the last parcel is liable to the mortgagee, would fluctuate with the prices fetched by each of the nine other parcels and upon the purchaser of the parcel being the mortgagee or a stranger. The true rule is the one on which the last paragraph of section 60 and section 82 of Act IV of 1882 are based.

The principle upon which the ruling of the majority in the Full Bench in *Nand Kishore* v. *Raja Hariraj Singh* (12) is based also supports my case.

The reason for the rule I contend for is thus explained in N.-W. P. H. C. Rep., 1873, at p. 150 :—

"The reason of this is obvious. The whole estate as to one "portion of the property has merged in the mortgagee, and the "mortgagor, if compelled to redeem by payment of the whole debt, "would have to sue the mortgagee for contribution afterwards

(1) N.-W. P. H. C. Rep., 1870, p. 4.
(2) N.-W. P. H. C. Rep., 1873, p. 148.
(3) (1875) 15, B. L. R., 303.
(4) (1879) 4, C. L. R., 294.
(5) (1878) I. L. R., 4 Cal., 72.
(6) (1883) I. L. R., 5 All., 257.
(7) (1896) I. L. R., 22 Bom., 304.
(8) L. R., 1893, Ch. D., Vol. II, p. 54.
(9) (1876) 25 W. R., 388.
(10) (1888) I. L. R., 16 Cal., 132.
(11) Weekly Notes, 1895, p. 1.
(12) (1897) I. L. R., 20 All., 23.

1900

BISHESHUR DIAL v. RAM SARUP.

"and thus by two suits between the same parties attain the "result which, under the law as above interpreted, is now attained "by one suit."

Pandit *Madan Mohan Malaviya* for the respondent.

BANERJI, J.—This appeal has arisen in a suit brought under section 88 of Act No. IV of 1882 for sale upon a mortgage, dated the 3rd of November, 1885. A moiety of the mortgaged property was sold by auction on 21st of November, 1893, in execution of a simple decree for money held by other creditors of the mortgagor, and was purchased by the mortgagee subject to the above mortgage. The plaintiffs, who represent the mortgagee, seek in this suit to bring to sale the other moiety of the mortgaged property for recovery of a moiety of the amount due upon the mortgage. The Court of first instance made a decree in favour of the plaintiffs for one-half of the principal amount of the mortgage and dismissed the claim for interest. Upon the appeal of the defendant, who represents the original mortgagor, the lower appellate Court dismissed the suit. The Court found that the market value of the moiety of the mortgaged property purchased by the mortgagee, if sold as unincumbered property, was Rs. 3,000; that the price paid for it by the mortgagee was Rs. 1,500, and that the difference between those two sums was equal to the amount due upon the mortgage. The Court held that the purchase by the mortgagee had thus the effect of fully discharging the mortgage, and that the plaintiffs' claim was not therefore maintainable. The correctness of this conclusion has been challenged in this second appeal, and it is contended that the purchase of a moiety of the mortgaged property by the mortgagee extinguished the mortgage debt to the extent of one-half only, and not in its entirety.

The view of the Court below is supported by the ruling in *Sumera Kuar* v. *Bhagwant Singh* (1). Having regard to that ruling and certain observations contained in the judgments of my brother Blair and myself in the Full Bench case of *Nand Kishore* v. *Raja Hariraj Singh* (2), this case has been referred to a Full Bench.

In some of the earlier cases decided by this Court, it was held that the mere fact of the mortgagee buying a part of the mortgaged

(1) Weekly Notes, 1895, p. 1. (2) (1897) I. L. R., 20 All., 23.

property subject to his mortgage had the effect of totally extinguishing the mortgage. This view was dissented from in the Full Bench ruling referred to above, and it was held that such a purchase "has not necessarily the effect of fully discharging the mortgage." To what extent the mortgage should be held to have been discharged by the purchase was not decided in that case. That question, however, arises in this appeal, and is the only question to be determined by the Full Bench.

It is urged on behalf of the appellants that the price paid by the mortgagee for the portion of the mortgaged property purchased by him is not, in the absence of fraud, a material factor in determining the extent of the mortgage debt which is extinguished by the purchase, and that in each case the amount by which the mortgage debt is reduced, is that portion of it for which the property purchased was proportionately liable. After careful consideration I am of opinion that this contention is valid.

When several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt; but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. This is the rule enunciated in section 82 of the Transfer of Property Act, 1882. The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to to that extent. There can be no doubt that if persons other than the mortgagee purchase different parcels of the mortgaged property, their liability, *inter se*, is, as stated above, proportionate to the relative value of the property purchased by each of them, and it is immaterial what price was paid for it. If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property, and this right subsists even if the price of the parcel purchased by him was grossly inadequate, and the difference between that price and the actual market value of the property was in excess, not only of the amount of the proportionate liability of the property, but also of the whole amount

1900

BISHESHUR DIAL v. RAM SARUP.

of the mortgage debt. For instance, if three parcels of property, each of the value of Rs. 500, are mortgaged to secure a debt of Rs. 300, each parcel is liable for Rs. 100. If one of them be purchased at auction for Rs. 50 and the purchaser be compelled to discharge the mortgage, he would be entitled to claim from the mortgagor or purchasers of the other two parcels Rs. 200, the amount for which those parcels were liable, although he himself benefited immensely by his purchase. The above is no doubt an extreme case, but it is not one which is wholly inconceivable. In such a case the price paid by the purchaser is never taken into account, and it has never been held that any equities exist as between him and the mortgagor or the purchasers of the remainder of the mortgaged property. Upon this point there is no controversy.

Does the case become different if the purchaser of a part of the mortgaged property be the mortgagee himself? When he buys a portion of that property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, become vested in the same person, and the result is that a part of the mortgage debt is wiped out by reason of this fusion of interests, and the balance only is recoverable from the remainder of the mortgaged property. It is in consequence of this confluence of interests and the discharge of a portion of the mortgage debt, that upon the mortgagee purchasing a part of the property, the integrity of the mortgage is broken up, and the mortgagee is not allowed to recover the whole amount of the debt from the remainder of the property. As has been already stated, each parcel of the mortgaged property is liable for the debt rateably to its value. Therefore when the rights of the mortgagee and the mortgagor become vested in the same person, only so much of the debt can be held to have been discharged as was proportionate to the value of the property in respect of which the confluence of rights takes place. There appears to be no difference in this respect between the case of a purchase by a stranger and that of a purchase by the mortgagee. When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, all that the mortgagor or other person interested in the remainder of the mortgaged property can claim is, that he should not be placed in

a worse position than that in which he would have been had the purchase been made by an outsider ; that is to say, that the property in his hands should not be rendered liable for a larger amount than the sum with which it would have been chargeable in the case of a purchase by a stranger. In the latter case, if the mortgagor or other owner were compelled to discharge the whole of the debt he would be entitled to contribution from the purchaser rateably to the value of the property purchased by him. In the case of a purchase by the mortgagee there appears to be no reason why the mortgagor or his representative should be allowed anything beyond a right to have his liability reduced to the same extent as in the case of a purchase by an outsider, and this seems to be the only equity to which he is entitled. It has been held by the Privy Council in *Mahabir Pershad Singh* v. *Macnaghten* (1), that a mortgagee who buys the mortgaged property at auction with the leave of the Court is not a trustee for the mortgagor, and is in the same position as any independent purchaser. As against the mortgagee, therefore, no higher equity exists in this respect in favour of the mortgagor than that which exists against any other purchaser. These considerations were overlooked in the case of *Sumera* v. *Bhagwant* (2), and in my judgments in *Chunna Lal* v. *Anandi Lal* (3), and *Nand Kishore* v. *Raja Hariraj Singh* (4). When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property for a grossly inadequate value, it no doubt appears at first sight that an injury has been done to the mortgagor, and that the mortgagee has taken advantage of his position. That was the case in *Sumera* v. *Bhagwant* (2). But where no fraud has been perpetrated and no undue advantage has been taken by the mortgagee, and he has purchased the equity of redemption in good faith, like any other independent purchaser, there is obviously no reason for placing him in a worse position than any other purchaser.

In *Nawab Azmat Ali Khan* v. *Jawahir Singh* (5), where the mortgagee had purchased a part of the mortgaged property, their Lordships of the Privy Council observed that the proportion of the debt chargeable on each village ought to vary

(1) (1889) I. L. R., 16 Calc., 682.
(2) Weekly Notes, 1895, p. 1.
(3) (1896) I. L. R., 19 All., 196.
(4) (1897) I. L. R., 20 All., 23.
(5) (1870) 13 Moo., I. A., 404.

1900

BISHESHUR DIAL v. RAM SARUP.

according to the actual value of the village, and the plaintiff in that case was allowed to redeem the village Hosseinpore purchased by him upon payment of the proportion of the mortgage debt thus chargeable on his village. The actual value paid by the mortgagee for the villages purchased by him was not taken into account.

In *Muhtab Singh* v. *Misri Lal* (1), this Court held in a case similar to the case cited above that each purchaser, including the mortgagee, had "bought subject to a proportionate share of the "burden," and that the plaintiff was entitled to redeem the village purchased by him on payment of such portion of the mortgage debt "as is proportionate to the relative value of the mortgaged "properties."

The case which most resembles the present is that of *Lakhmidas Ramdas* v. *Jamnadas Shankar Lal* (2). In that case three properties were mortgaged to the plaintiff for Rs. 90. In execution of a simple decree for money the equity of redemption in one of those properties, namely, a house, was sold by auction and purchased by the plaintiff-mortgagee for Rs. 2-2. He sold it to one Francis for Rs. 100, and subsequently brought his suit to recover Rs. 90, the whole of his mortgage money, by sale of the two remaining properties. The suit was dismissed by the Court of first instance, on the ground that the plaintiff had realized Rs. 100 by the sale of the property purchased by him, and that therefore nothing was due. Farran, C. J., held "that the plain-"tiff, when he purchased the equity of redemption in the house, "purchased it subject to its due proportion of the mortgage debt. "That portion of the mortgage debt thus ceased to exist, and the "plaintiff's right as mortgagee to recover the money secured by "his morgtage was reduced to that extent. What proportion of "the mortgage debt was thus wiped out depends upon the pro-"portion of the value of the house to the value of the rest of the "mortgaged properties." This is an instructive case, and shows that the price paid by the mortgagee is not to be taken into account in determining the extent of the mortgage debt discharged by the purchase made by the mortgagee. Upon further consideration, I am of opinion that the rule laid down by the Bombay

(1) N.-W. P., H. C. Rep., 1867, p. 88. (2) (1896) I. L. R., 22 Bom., 304.

High Court is the true rule, and that when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. It is not necessary to say in this case whether the same result will ensue if the purchase by the mortgagee is made under a private contract with the mortgagor and not at auction.

The learned vakil for the respondent referred to the rulings in *Gokuldas* v. *Puran Mal* (1), and *Hart* v. *Tara Prosanna* (2), and section 90 of the Indian Trusts Act. The first case has no bearing upon the question before us, and, having regard to the decision of the Privy Council in *Mahabir Pershad Singh* v. *Macnaghten* (3), the argument based on the other ruling and on section 90 cannot prevail.

As the mortgagee in this case purchased a moiety of the mortgaged property, the mortgage debt became extinct to the extent of a moiety only, and the plaintiffs were entitled to recover the other moiety by the sale of the remainder of the mortgaged property. The Court of first instance granted them a decree for a half of the principal mortgage amount. The plaintiffs submitted to that decree and did not appeal. They are not therefore entitled to a decree for a larger amount than that decreed to them by the first Court. The result is that I would allow this appeal with costs, set aside the decree of the Court below with costs, and restore the decree of the Court of first instance.

STRACHEY, C. J.—I concur in the judgment of my brother Banerji.

KNOX, J.—I also concur.

BLAIR, J.—I also concur.

BURKITT, J.—I am of the same opinion.

AIKMAN, J.—I also concur in the judgment of my brother Banerji.

Appeal decreed.

(1) (1884) I. L. R., 10 Calc., 1035. (2) (1885) I. L. R., 11 Calc., 718.
(3) (1889) I. L. R., 16 Calc., 682.