

Before Mr. Justice Blair and Mr. Justice Banerji.
 GANGA SAHAI AND ANOTHER (DECREE-HOLDERS) v. TULSHI RAM
 (OBJECTOR). *

1903
 February 23.

Mortgage—Execution of decree—Sale of mortgaged property for arrears of revenue—Purchase of the same by the mortgagor—Realization of surplus sale proceeds by mortgagees—Subsequent application to sell the same property under a decree on the mortgage.

A mortgagor, by allowing the revenue payable in respect of the mortgaged property to fall into arrears, caused such property to be sold at auction by the revenue authorities, and it was purchased by the mortgagor *benami* in the name of a third person. The mortgagees, believing that this purchase was a genuine purchase, applied for and obtained payment out of Court of the surplus realized by the sale over and above the revenue due. Subsequently the mortgagees discovered the true nature of the purchase made by the mortgagor at the revenue Court sale, and sought to have the same property, then in the hands of a transferee from the mortgagor's successor in title, sold in execution of a decree upon their mortgage. *Held* that there was no legal objection to the property being sold in execution of the mortgage decree. *Otter v. Lord Fauw* (1) and *Raghunath Sahay Singh v. Lalji Singh* (2) referred to.

THE facts of this case are as follows:—On the 7th of April 1875, Chaudhri Jai Chand mortgaged several villages, including a village called Salempur, to Ganga Sahai and others. The mortgagor died without having paid the mortgage-debt, and subsequently the mortgagees brought a suit for sale on their mortgage against the representative of the mortgagor and other persons who were in possession of portions of the mortgaged property. On the 8th of May 1893, the mortgagees obtained a decree for sale in default of payment of the mortgage-debt, which was followed in due course by an order absolute for sale. Some of the mortgaged property was brought to sale by the decree-holders, but the village of Salempur, the Government revenue of which had been allowed to fall into arrears, was sold for satisfaction of the arrears due and was purchased, ostensibly by one Abdul Rahman, but in reality by the mortgagor judgment-debtor himself. The price paid for Salempur being more than the revenue due on it, the mortgagees applied for and obtained payment of the surplus. The next thing that happened was that

* First Appeal No. 132 of 1902, from a decree of Manvi Syed Muhammad Tajammul Husain, Subordinate Judge of Farrukhabad, dated the 19th of March 1902.

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the mortgagor died, and his widow Rani Indomati sold the village to one Tulshi Ram. In course of time the decree-holders became aware that Salempur had really been bought in by the mortgagor, and not purchased *bona fide* by an outsider, and accordingly applied to bring it to sale under their decree. The Court of first instance (Subordinate Judge of Farrukhabad) rejected this application on the ground that the decree-holders by their action in obtaining payment to themselves of the surplus proceeds of the Revenue Court sale were estopped from now seeking to bring the village to sale in execution of their decree. The decree-holders accordingly appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom *Munshi Gulzari Lal*), for the appellants.

Pandit *Sundar Lal* (for whom *Pandit Baldeo Ram*), for the respondent.

BLAIR and BANERJI, JJ.—These are proceedings in execution of a mortgage decree obtained by the appellants upon a certain village called Salempur together with other property. Chaudhri Raj Kumar, the representative of the mortgagor, allowed the Government revenue upon the village Salempur to fall into arrears. The property was put up to sale for satisfaction of those arrears by the Collector, and was bought for a sum in excess of the amount due for Government revenue. The apparent purchaser was one Abdul Rahman, and the actual purchaser was the mortgagor Raj Kumar. The holders of the mortgage took out the proceeds of the sale which were left after the Government revenue had been satisfied. They received the money, believing at the time that the purchaser was a person unconnected with the mortgagor, and a person in whose hands the property would vest free of all incumbrance. As a matter of fact, the purchaser bought *benami* for the mortgagor, so that the property, the subject of the mortgage, had returned into his possession. After his death his widow became seised of the property, and sold it to the present objector, Tulshi Ram. The sale-deed to Tulshi Ram recited that Raj Kumar had been the real purchaser at the sale held for the satisfaction of the Government revenue. The

plaintiffs having sued the mortgagor for the sale of the property mortgaged, and having got a decree, have recovered in execution by sale of sundry villages a large portion of the decretal amount. They now seek to bring to sale the village Salempur, which was purchased by Raj Kumar at the sale for arrears of revenue, and which was bought by Tulshi from the widow of Raj Kumar with full knowledge that he had been the purchaser at what for brevity we call the revenue sale. Tulshi Ram objects to the sale prayed for by the plaintiffs decree-holders, and his objection has been maintained by the Court below. The Court below has decided upon the ground that the decree-holders by taking out the surplus proceeds of the revenue sale have relinquished their right in respect of the mortgage of the said village as well as in respect of bringing it to sale. The learned Subordinate Judge made the following observations in regard to the application for the surplus found on the revenue sale by the holders of the mortgage:—"They under the said application marked (1) proved to the public and by their own actions led every person to believe, that the said village, whosoever be its purchaser, was sold free from all incumbrance and liabilities, and that it was no longer subject to the charge under the decree passed on the mortgage of the decree-holders themselves. On this understanding they limited the amount of their mortgage only to the surplus amount of the sale proceeds amounting to Rs. 6,696, and being contented with this, they prayed for recovery of the said money under section 73 of the Transfer of Property Act. When the Court granted their prayer, they realized the sale proceeds of the sale aforesaid and put the same into their pocket. Thus they clearly relinquished their right in respect of the mortgage of the said village, as well as in respect of bringing it to sale." It has cost us some little trouble to discover the precise nature of the estoppel which seems to have been found by the Court below. We are unable to see how the acceptance of the surplus proceeds of the auction sale could be in any way a relinquishment of the right of the mortgagees to recover by all legal means the remaining mortgage money due to them. Moreover, it seems impossible, on the face of the facts before us, to find that there

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was any misrepresentation by word or action on the part of the mortgagees. They believed that the purchaser was a third person, who was taking with an absolutely clear title, and that therefore the village, which had been part of their security, was no longer answerable to their mortgage. That was practically a *bond fide* representation by them, if made at all; and moreover it was induced by the action of Raj Kumar himself, who, in putting forward a *benami* purchaser, allowed the world to believe that the property had passed unincumbered to such a purchaser. Tulshi, who bought from the widow of Raj Kumar, was aware of this deception. He knew that Raj Kumar was the real purchaser, and that the property had not gone unincumbered into the hands of a third person. It does seem to us somewhat remarkable that an estoppel should have been set up by a person who is the representative in title of the person by whom the original misrepresentation had been made. It is manifest, therefore, that no estoppel stands in the way of recovery by the mortgagees of the unpaid balance of the mortgage-debt. The objection that the property cannot be put up to sale a second time, the mortgagees having received and put into their pocket the surplus proceeds of the revenue sale of that very property, seems to have no weight. The principle of law applicable in parallel circumstances has been laid down in great breadth by the House of Lords in *Otter v. Lord Vaux* (1). The following extract from the judgment of the Lord Chancellor lays down the law as we believe it to have been always from that time acted upon in England, and as it has been accepted by the Indian Courts:—"The general principle that a mortgagor cannot set up against his own incumbrancer any other incumbrance created by himself is a proposition that I think has never been controverted." We fail to see any distinction between the case of a first incumbrance created by the acts of the parties, and an incumbrance created by the *laches* of the mortgagor. We see no difference in point of principle between a charge for revenue created upon the property by the mortgagor's failure to pay the Government revenue, and the case of a clear mortgage created by him in

(1) (1856) 6 De Gex M. and G., 638.

the ordinary way. In the case in the House of Lords a mortgagor having made two successive mortgages of his estate to different persons, purchased the estate from the first mortgagee, selling under a power of sale contained in his mortgage; it was held that the mortgagor could not by this purchase defeat the title of the second mortgagee. This case has been followed in *Raghunath Sahay Singh v. Lalji Singh* (2). That was a case in which a property had been put up for sale under a mortgage decree and purchased by the mortgagor; but the purchase money was not sufficient to satisfy the mortgage debt. The mortgagee a second time attempted to put the same property to sale. It was held that he was entitled to do so, and that the previous sale under the mortgage decree was no bar to a fresh sale under the same decree. The principle of this ruling seems to us to be applicable to this case. We have failed to detect in the argument to the contrary addressed to us any sort of substance. We think, therefore, that the order of the Court below cannot be supported. We are also of opinion that the plea of *res judicata* set up on behalf of the respondent is untenable. We accordingly decree this appeal, set aside the order of the Court below, and send back the case to that Court under section 562 of the Code of Civil Procedure for disposal according to law. The appellants are entitled to their costs of this appeal.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

1903
February 28.

Before Mr. Justice Banerji.

EMPEROR v. GIRAND.*

Criminal Procedure Code, sections 123 and 340—Security for good behaviour—Reference to the Sessions Judge—Notice to be given of proceedings before the Judge to the persons required to find security.

Where under section 123 of the Code of Criminal Procedure reference is made to the Sessions Judge in the case of a person called upon by a Magistrate to find security for a term exceeding one year, it is expedient, and highly desirable for the ends of justice, that a date should be fixed for the

* Criminal Revision No. 853 of 1902.

(2) (1895) I. L. R., 23 Cal. 397.

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