

APPELLATE CIVIL.

1903
August 13.*Before Mr. Justice Blair and Mr. Justice Banerji.*

SRI RAM AND OTHERS (DEFENDANTS) v. KESRI MAL (PLAINTIFF).*

Act No. IV of 1882 (Transfer of Property Act), sections 88 and 89—Mortgage—Decree for sale on a mortgage—Prior and subsequent mortgages—Rights of purchasers of the mortgaged property who have paid off prior incumbrances.

Where a subsequent mortgagee is seeking to bring to sale the property mortgaged to him and there are parties, defendants to the suit, who have purchased the property and paid off prior mortgages, the plaintiff is not entitled to an order absolute for sale unless he pays, not merely the amount which such defendants paid in respect of the prior mortgages, but the full amount due on such mortgages. But where such defendants had obtained possession of the mortgaged property, it was held that, having the usufruct, they were not entitled to interest after the date of such possession. *Dip Narain Singh v. Hira Singh* (1) and *Delhi and London Bank, Ltd. v. Bhikari Das* (2) followed.

THE facts of this case are as follows:—

On the 18th of July, 1879, one Afzal Husain mortgaged certain property to Makhan Lal, and on the 19th of February, 1880, mortgaged the same property in favour of Sri Ram. On the 30th of July, 1890, Afzal Husain again mortgaged the same property to Ramji Mal and Sri Ram, the share of the former being specified in the mortgage deed as two-thirds and that of the latter as one-third. On the 18th of April, 1884, Afzal Husain sold his interest in the property to Sri Ram and others for Rs. 7,376. Out of this sum Rs. 3,731 was paid to Makhan Lal in discharge of his mortgage of the 18th of July, 1879, and Rs. 1,800 was received by Sri Ram on account of his mortgage of the 19th of February, 1880. It was also agreed that Rs. 1,700 should be paid to Ramji Mal. This payment was not made, and thereupon Ramji Mal assigned his interest in the mortgage of the 30th of July, 1890, to Kesri Mal. Kesri Mal brought a suit for sale in respect of the amount due to Ramji Mal under that mortgage, and made Afzal Husain the mortgagor, and Sri Ram and others parties to his suit. In answer to the claim Sri Ram and

* Second Appeal No. 800 of 1902, from a decree of R. P. Dewhurst, Esq., District Judge of Saharanpur, dated the 4th of August 1902, confirming an order of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 5th of July, 1901.

(1) (1897) I. L. R., 19 All., 527. (2) (1901) I. L. R., 24 All., 185.

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others put forward a defence to the effect that they had paid Rs. 3,750 on account of Makhan Lal's mortgage of the 18th of July, 1879, and Rs. 1,800 on account of the mortgage of the 19th of February, 1880, and claimed priority in respect of the amount so paid. The plaintiff's claim was decreed, but it was provided by the decree that the plaintiff would not be entitled to bring the mortgaged property to sale unless he paid off the prior mortgages. The amount of the plaintiff's decree not having been paid, he applied for an order absolute for sale, and deposited in Court Rs. 5,531, which he alleged to be the amount due upon the prior mortgages, and asked for an order for sale for the realization of the amount of his own mortgage, as also of the amount above mentioned. To this application Sri Ram and others objected mainly upon the ground that the total amount due to them on account of the two mortgages was Rs. 73,689. This objection was disallowed by the Court of first instance (Subordinate Judge of Saharanpur), and an appeal preferred by the objectors was dismissed by the District Judge. The objectors thereupon appealed to the High Court.

The Hon'ble Mr. Conlan and Mr. Abdul Majid, for the appellants.

Pandit *Sundar Lal* and Dr. *Sutish Chandra Banerji*, for the respondents.

BLAIR and BANERJI, JJ.—This appeal arises out of an application under section 89 of the Transfer of Property Act for an order that the decree obtained by the respondent under section 88 of the Act on the 7th of July, 1898, be made absolute. That decree was passed upon the footing of a mortgage dated the 30th of July, 1890, executed by one Afzal Husain in favour of Ramji Mal and Sri Ram. The extent of the interest of the former in the mortgage was specified in the deed to be two-thirds, and that of the latter, one-third. There were two previous mortgages on the same property, one dated the 18th of July, 1879, in favour of Makhan Lal, and the other dated the 19th of February, 1880, in favour of Sri Ram. On the 18th of April, 1884, Afzal Husain sold his interests in the property to the appellants for a consideration of Rs. 7,876. Out of this sum Rs. 3,731 was paid to Makhan

Lal in discharge of his mortgage of 1879, and Rs. 1,800 was received by Sri Ram on account of his mortgage of the 19th of February 1880, thus making a total of Rs. 5,531. It was also agreed that Rs. 1,700 should be paid to Ramji Mal. This payment was not made, and thereupon he assigned his interest in the mortgage of the 30th of July, 1890, to Kesri Mal, the respondent. The latter brought a suit for sale in respect of the amount due to Ramji Mal under that mortgage, and made Afzal Husain, the mortgagor, and the appellants Sri Ram and others, purchasers of the mortgaged property, parties to his suit. In answer to that claim the present appellants put forward a defence to the effect that they had paid Rs. 3,750 on account of Makhani Lal's mortgage of the 18th of July, 1879, and Rs. 1,800 on account of the mortgage of the 19th of February, 1880, and claimed priority in respect of the amounts so paid. The plaintiff respondent's claim was decreed by the Court of first appeal, but it was provided in the decree that the plaintiff would not be entitled to bring the mortgaged property to sale unless he paid off the prior mortgages. As the amount of the plaintiff's decree has not been paid, he has made the present application for an order absolute for sale, and has deposited in Court Rs. 5,531, which he alleges to be the amount due upon the prior mortgages. He asks for an order for sale for the realization of the amount of his own mortgage, as also of the amount mentioned above. To this application the appellants took objection, mainly upon the ground that the total amount due to them on account of the two mortgages was Rs. 73,689. This objection has been disallowed by both the Courts below, and hence the present appeal. The Court of first instance was of opinion that according to the ruling in the case of *Dip Narain Singh v. Hira Singh* (1) the appellants' purchasers were not entitled to claim more than the purchase-money paid by them, and consequently refused to allow them further interest. The report of the case on which the learned Subordinate Judge relies is incorrect and misleading. What was held by this Court, as the original judgment in the case shows, was that a subsequent mortgagee must, if he wishes to exercise the

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(1) (1897) I. L. R., 19 All., 527, at p. 531.

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right of redemption left open to him, pay to the prior mortgagee who had purchased the mortgaged property the full amount due to him upon his prior mortgage and not merely the amount of the purchase-money. The words "due to him upon his prior mortgage and not merely the" have been omitted in the report. So that it was not held in that case that the purchaser could only obtain from the subsequent mortgagee the amount of his purchase-money. On the contrary, it was distinctly held in that case that the subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on his mortgage.

Mr. *Conlan* on behalf of the appellants contends that the Court below should have allowed to the appellants not merely the amount which they had paid in discharge of the prior mortgages, but also interest upon those amounts, giving credit against such interest for the amount of the usufruct of the property obtained by the appellants during the period of their possession. On the other hand it is urged that any claim which the appellants had for interest should have been advanced in the suit, and that it is now too late for them to claim it in proceedings under section 89. We do not agree with the last contention. As we read the decree, it directed the plaintiff to pay such sums as could be demanded under the prior mortgages; so that the plaintiff was bound by the terms of the decree to discharge the prior mortgages with all the incidents attaching thereto. We, however, think that since the appellants have from the date of their purchase been in possession of the mortgaged property, it must be deemed that the usufruct was appropriated as an equivalent for the interest upon the money paid by them. Every person who purchases property for a certain value is presumed to pay such value as would yield to him a sufficient return for the money invested by him in the property. Therefore, when the appellants purchased the mortgaged property and as consideration thereof discharged the prior mortgages, it is reasonable to assume that since the date of the payment of the consideration they received as an equivalent for the interest of the money paid the usufruct of the property. This inference is strengthened by the fact that in their defence

in the suit the appellants did not in distinct terms claim interest upon the money which they had paid in liquidation of the prior mortgages. Supposing the mortgage of Makhan Lal, instead of stipulating for cash payment by way of interest, had provided that he should enjoy the usufruct as the equivalent of interest, then, the moment the mortgage was discharged by payment, the purchaser would himself enter into usufructuary possession. Could it be contended, then, in answer to a suit for sale by a puisne incumbrancer, that the purchaser could use as a shield, not only the sum he had paid to discharge the mortgage, but also the value of the usufruct which he had appropriated after such discharge? In other words, would he be entitled to enjoy the usufruct and also obtain from the later mortgagee the value of it? The proposition seems to be founded upon no legal or equitable consideration. How then is it possible to distinguish between usufruct in lieu of interest, and interest in cash? In the case of *Dip Nurain Singh v. Hira Singh*, to which we have already referred, and in the recent case of *The Delhi and London Bank, Limited, v. Bhikari Das* (1) interest was not allowed for any period subsequent to the date of possession of the purchaser. We think that the Courts below arrived at a right conclusion and dismiss the appeal with costs.

Appeal dismissed.

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REVISIONAL CRIMINAL.

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August 14.

Before Sir John Stanley, Knight, Chief Justice.

EMPEROR v. RAGHUNATH SINGH.*

Criminal Procedure Code, section 122—Security for good behaviour—Power of Magistrate to refuse to accept surety offered.

Held that the fact that a proposed surety has on one occasion offended against the law and been punished for an offence under the Indian Penal Code does not of itself render such person for ever afterwards unfit to be surety for a party who is required to give security for good behaviour.

ONE Raghunath Singh was required by a Magistrate of the first class to find security to be of good behaviour under chapter VIII(B) of the Code of Criminal Procedure. Amongst the

* Criminal Revision No. 399 of 1903.

(1) (1901) I. L. R., 24 All., 185.