

1903

June 17.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

SHIB LAL (DEFENDANT) v. BHAWANI SHANKAR AND OTHERS

(PLAINTIFFS).\*

*Mortgage — Prior and subsequent incumbrancers — Effect of acquisition by mortgagees of the equity of redemption in part of the mortgaged property — Act No. IV of 1882 (Transfer of Property Act), section 91.*

The owners of shares in five separate properties mortgaged, first, all the five shares to one set of mortgagees, and subsequently four out of the five shares to a second set of mortgagees. The prior mortgagees, without making the puisne mortgagees parties to their suit, brought a suit for sale on their mortgage, obtained a decree, and in execution thereof caused lots 1, 2 and 4 out of the property comprised in their mortgage to be sold. Of these lots they themselves purchased lots 1 and 2, and lot 4 was purchased by one Shib Lal. The puisne mortgagees next brought a suit for sale on their mortgage without joining the prior mortgagees as parties, and obtained a decree for sale, which decree was purchased from them by Shib Lal. The proceeds of the sale by the first mortgagees of lots 1, 2 and 4 being insufficient to satisfy their decree, lots 3 and 5 were caused to be put up for sale. Shib Lal thereupon instituted a suit for a declaration that this property could not be sold without giving him an opportunity to redeem, and a decree was passed in his favour. The prior mortgagees then brought a suit against Shib Lal, the mortgagors and the subsequent mortgagees to recover payment of the amount remaining due to the plaintiffs on foot of their prior mortgage by sale of lots 3 and 5.

*Held* (1) that by reason of the purchase of lots 1 and 2 by the prior mortgagees in execution of their decree the integrity of the mortgage was broken up; (2) that the prior mortgagees were entitled to recover by the sale of lots 3 and 5 a rateable portion of the mortgage debt proportionate to the value of the said lots at the time when the prior mortgage was executed; (3) that Shib Lal as representing the puisne mortgagees was not entitled in the present suit, in which he was defendant, to claim to redeem the whole of the property mortgaged, notwithstanding that the puisne mortgagees were not made parties to the suit of the prior mortgagees, in execution of the decree in which the latter brought to sale and purchased lots 1 and 2. *Dina Nath v. Lachmi Narain* (1), *Bisheshur Dial v. Ram Sarup* (2) and *Mahab Singh v. Misra Lall* (3) referred to.

THE facts of this case are as follows :—

On the 9th of April, 1877, Hira Lal and Param Sukh executed in favour of Mahanand Ram and Sheodat a mortgage of shares in five separate properties, which may be described as lots

\* First Appeal No. 55 of 1901, from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 11th of September, 1900.

(1) (1903) I. L. R., 25 All., 446. (2) (1900) I. L. R.; 22 All., 284.  
(3) (1867) N.-W. P. H. C. Rep., 1867, p.-88.

1908

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 SHIB LAL  
 v.  
 BHAWANI  
 SHANKAR.

1—5, to secure a principal sum of Rs. 13,000 and interest. On the 27th of August, 1879, the mortgagors hypothecated lots 1—4 in favour of Ghansham Das and Radha Kishen. Bhawani Shankar and others, the representatives of the prior mortgagees, instituted a suit for the recovery of the amount due under their mortgage, but without making the puisne mortgagees parties thereto, and obtained a decree on the 2nd of October, 1883. Under this decree lots 1, 2 and 4 were sold. Lots 1 and 2 were purchased by the plaintiffs, and lot 4 was purchased by one Shib Lal. The puisne mortgagees then instituted a suit for sale on their mortgage and, on the 20th of August, 1891, obtained a decree for sale. They did not make the prior mortgagees parties to this suit. The decree which the puisne mortgagees had thus obtained they sold to Shib Lal together with the right of lien on the property charged in that decree. The proceeds of the sale, which took place under the prior mortgagees' decree of the 2nd of October, 1883, were insufficient to satisfy the decree, and thereupon lots 3 and 5 were put up to sale. On this Shib Lal instituted a suit for a declaration that inasmuch as his assignors, the puisne mortgagees, were not impleaded by the first mortgagees in their suit, a sale could not be had without giving him an opportunity of redeeming, and a decree was passed in his favour in this suit on the 13th of July, 1899. The suit out of which the present appeal arose was brought by the representatives of the prior mortgagees against Shib Lal and the mortgagors and the puisne mortgagees, and by it the plaintiffs sought to recover the amount remaining due in respect of their prior mortgage by sale of lots 3 and 5. The suit was resisted by Shib Lal mainly on the ground that the plaintiffs were not entitled to maintain their suit without giving him an opportunity of redeeming; and he alleged that he was entitled to redeem all the property comprised in the plaintiffs' mortgage, and that he was ready to sue for redemption of that mortgage. The Court of first instance (Subordinate Judge, Aligarh) gave the plaintiffs a decree for sale as prayed. The defendant, Shib Lal, therefore, appealed to the High Court.

The Hon'ble Mr. *Conlon*, for the appellant.

1903

SHIB LAL  
v.  
BHAWANI  
SHANKAR.

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

STANLEY, C.J., and BURKITT, J.—The litigants in this appeal are the representatives of first incumbrancers on certain properties on the one side and the assignee of a decree for sale passed on a puisne mortgage on the other. The suit was brought by the plaintiffs, the first incumbrancers, to realize the balance due to them on foot of a mortgage executed on the 9th of April, 1877, in favour of their ancestors Mahanand Ram and Sheodatt Rai. By this mortgage shares in five separate properties, which we shall describe as lots 1—5, were hypothecated to secure a principal sum of Rs. 13,000 and interest. On the 27th of August, 1879, the mortgagors hypothecated the same property, with the exception of lot 5, in favour of Ghansham Das and Radha Kishan. The plaintiffs instituted a suit on foot of their mortgage for recovery of the amount due thereunder without impleading the puisne incumbrancers, and obtained a decree on the 2nd of October, 1883, which was not, of course, binding upon the puisne incumbrancers. Under this decree three properties were sold, namely lots 1, 2 and 4. Lots 1 and 2 were purchased by the plaintiffs, and lot 4 was purchased by Shib Lal, the defendant-appellant. The puisne mortgagees instituted a suit on foot of their mortgage, and on the 20th of August, 1891, obtained the usual mortgage decree for sale. They did not make the prior mortgagees parties to this suit. Subsequently Shib Lal purchased from the decree-holders the decree of the 20th of August, 1891, together with the right of lien on the property charged in that decree. The proceeds of the sale by the first mortgagees of lots 1, 2 and 4 were insufficient to satisfy their mortgage and lots 3 and 5 were put up for sale. Thereupon Shib Lal instituted a suit for a declaration that inasmuch as his assignors, the puisne incumbrancers, were not impleaded by the first mortgagees in their suit, a sale could not be had without giving him an opportunity of redeeming, and a decree was passed in his favour on the 13th of July, 1899. The suit out of which the present appeal has arisen was then brought by the plaintiffs against Shib Lal and his mortgagors and the subsequent incumbrancers to recover payment of the amount

1903

---

 SHIB LAL  
 v.  
 BHAWANI  
 SHANKAR.

remaining due to the plaintiffs on foot of their prior mortgage by a sale of lots 3 and 5. The defendant-appellant Shib Lal resisted the suit mainly on the grounds that he was entitled to redeem all the property comprised in the plaintiffs' mortgage, and that he was ready to sue for redemption of that mortgage, and that the plaintiffs were not entitled to maintain their suit without giving him an opportunity of redeeming. The learned Subordinate Judge gave a decree in favour of the plaintiffs, and hence this appeal.

This case is not unlike that of *Dina Nath v. Lachmi Narain*, First Appeal No. 15 of 1901 (unreported)\* which came before this Court. The contention here, as also in that case, was that under the provisions of section 91 of the Transfer of Property Act, the defendants were entitled to redeem the entire mortgaged property by payment or tender of the entire mortgage debt, and that inasmuch as the prior mortgagees had placed it out of their power to transfer all the mortgaged property to the puisne incumbrancers on redemption, they could not sue for foreclosure of part only of the mortgaged property. In that case we decided that where mortgagees have acquired the right of redemption in a portion of the mortgaged property, and an attaching creditor had also become part owner of that equity, the mortgagees could maintain a suit for foreclosure or sale against the attaching creditor who had so purchased, for a portion of the mortgage-debt proportionate to the value which the property purchased by the latter bore to the value of the entire mortgaged property—such value to be calculated in accordance with the provisions of section 82 of the Transfer of Property Act,—and that the attaching creditor who had so purchased was entitled to redeem only the share which he had purchased. There is nothing to prevent a mortgagee from purchasing the equity of redemption in portion of the mortgaged property from the mortgagor. The effect of such purchase would be to extinguish a portion of the mortgage-debt proportionate to the value of the part of the property so purchased—*Bisheshwar Dial v. Ram Sarup* (1). Although the sale held under the plaintiffs'

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\* Since reported, (1903) I. L. R., 25 All., 446.

(1) (1900) I. L. R., 22 All., 284.

1903

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SRI LAL  
v.  
BHAWANT  
SHANKAR.

decree of the 2nd of October, 1883, was not binding upon the defendant-appellant, that sale was effectual as between the parties to the suit. The plaintiffs under it acquired the equity of redemption in lots 1 and 2, and the defendant-appellant acquired the equity of redemption in lot No. 4. The effect of this sale was to break up the integrity of the mortgage; and when a mortgage security is so broken up the mortgagors or their representatives become entitled to redeem on payment of a proportionate part only of the debt charged on the property. The first mortgagees having acquired part of the mortgagors' rights and interests could not throw the entire burden of the mortgage debt on the remaining portion of the equity of redemption in the hands of a purchaser who had purchased at a sale in execution of a decree against the mortgagor. As was said by Morgan, C.J., in the case of *Mahlab Singh v. Misree Lall* (1), "a mortgagee is entitled to say to each of several persons who may have succeeded to the mortgagor's interest 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 mortgage 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 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." In such a case each property becomes liable to contribute rateably<sup>c</sup> to the debt secured by the mortgage, so much of the debt being extinguished as the property purchased by the mortgagees was liable to contribute. The extent of the liability of each property being proportionate to its value at the date of the mortgage, the mortgagee who has himself purchased must bear a rateable share of the debt, and bring into account the value of the property purchased by him. For these reasons it seems to us that the plaintiffs were entitled to maintain this suit for the purpose of realizing out of lots 3 and 5 a rateable proportion of the debt secured by the

(1) (1867) N.-W. P., H. C. Rep., 1867, p. 88.

mortgage, to be estimated according to the value of the respective lots at the date of the mortgage. This is not a suit for redemption by the puisne mortgagees. The puisne mortgagees have not instituted a suit to redeem the whole mortgage; and, though the appellant, their assignee, professes himself to be ready to institute such a suit he has not as yet done so. This is a suit by prior mortgagees to have a portion of the debt secured by their mortgage realized by sale of a portion of the mortgaged property. The learned Subordinate Judge appears to us, however, to have fallen into an error in the manner in which the sum chargeable upon lots 3 and 5 has been calculated. In his judgment he directed that an account should be taken of the amount due to the plaintiffs under their mortgage, and that out of that amount the sums realized by the sale of the property held under the plaintiffs-respondents' decree for sale should be deducted, and that a decree should be passed for the balance with interest. It does not follow that the amounts realized by sale represent the full value of the properties sold. It may be that the lots, or some of them, were sold at an under-value. An inquiry should have been directed for the purpose of ascertaining what the respective values of each of the respective lots were at the date of the plaintiffs-respondents' mortgage, as well as the amount of the entire mortgage debt on that date with interest, and a direction given for the preparation of a decree for realization out of lots 3 and 5 of a rateable proportion of the amount so ascertained according to the values of lots 3 and 5. We accordingly refer to the lower Court to ascertain and determine these matters, and we direct that it take such additional evidence as may be required, and return to this Court its findings together with the evidence. Upon return of the findings the parties will have the usual ten days' notice for filing objections.

*Issues referred.*

1903

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SHIB LAL  
v.  
BHAWANI  
SHANKAR.