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Devi (1), and asked me to refer an issue as to whether or not the demands made by the plaintiff were sufficient within the principle laid down in that case by Knox, J. The lower appellate Court has found that the preliminary demands were not made, and there is no ground of appeal taken as to the finding of the lower appellate Court on this question. The appeal fails and is dismissed with costs.

Appeal dismissed.

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May 30.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

JUGAL KISHORE AND OTHERS (DEFENDANTS) *v.* HARBANS CHAUDHRI AND OTHERS (PLAINTIFFS).*

Mortgage—Decree—Sale—Simple money decree—Purchase by decree-holders —Possession—Rights of parties.

The plaintiffs, respondents, obtained a decree for sale and an order absolute under a mortgage executed by one R. H. H. C., a son of R. H., on the sole ground that he had not been impleaded by the mortgagees, obtained a decree, dated the 6th July, 1898, declaring that his share in the family property was not liable to sale. Notwithstanding the latter decree, the plaintiffs sold the entire mortgaged property and themselves purchasing, obtained possession. Next J. K., the holder of a simple money decree against R. H. and H. C., brought to sale a six-pie share together with the equity of redemption of certain land in one of the mortgaged villages and purchased himself. J. K. then sued the plaintiffs for possession, obtained a decree on the 17th December, 1903, subject to any rights which the plaintiffs in the present case might have over the property, and in execution of his decree was given possession of the six-pie share.

Held that although the plaintiffs' purchase in respect of the property covered by J. K.'s decree must be treated as a nullity, their general rights as mortgagees were safe-guarded by the terms of that decree, and section 13 of the Code of Civil Procedure could not bar the plaintiffs' right to bring the present suit.

Held also that the fact that the plaintiffs had purchased a portion of the mortgaged property did not limit them to a right to sue for a proportionate part only of the mortgage debt. *Bisheshur Dial* v. *Ram Sarup* (2), distinguished.

THE facts of the case are as follows:—

On the 20th January, 1886, Ram Harakh, the father of Hanuman Chaudhri, mortgaged to the plaintiffs' father, Lachman

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*Second Appeal No. 248 of 1905, from a decree of W. Tudball, Esq., District Judge, Gorakhpur, dated the 4th of January, 1905, confirming the decree of Munshi Achal Behari, Subordinate Judge, Gorakhpur, dated the 15th of August, 1904.

(1) Weekly Notes, 1906, p. 144. (2) (1900) I. L. R., 22 All., 284.

Chaudhri, for the sum of Rs. 1,252, a one-anna share in mauza Utrasot and a one-anna four-pie share in mauza Jhugia. The mortgagee, suing the father on the mortgage bond, and omitting to make the son a party, obtained a decree for Rs. 2,650, on the 20th December, 1894. The corresponding order absolute was passed on the 18th September, 1867.

The son, Hanuman Chaudhri, on the sole ground that he had not been made a party to the mortgagee's suit, on the 6th July, 1898, obtained a decree declaring that his half interest in the property was not liable to sale. This decree was confirmed on appeal on the 10th September, 1898.

On the 20th June, 1899, Ram Harakh mortgaged an eight-pie share in mauza Jhugia to Basdeo Sahu and Hanuman Sahu and put them in possession.

The plaintiffs mortgagees, next applied for sale of the mortgaged shares of mauzas Utrasot and Jhugia. Hanuman Chaudhri, the son, objected on the ground of his decree, but the Court overruled the objection and the property was sold and purchased by the plaintiffs on the following dates, namely the one-anna four-pie share of mauza Jhugia on the 20th June, 1900, for Rs. 1,000, and the one-anna share of mauza Utrasot on the 21st September, 1900, for Rs. 900.

Ram Harakh then died.

On the 14th March, 1901, the appellant, Jugal Kishore Sahu, obtained a simple money decree against Hanuman Chaudhri on the basis of a bond executed by himself and his deceased father, Ram Harakh. In execution of this decree, Jugal Kishore Sahu sold and purchased himself, on the 20th November, 1902, the following shares:—

(1) A six-pie share of mauza Utrasot, and (2) the equity of redemption of an area of 19 bighas 15 biswas 13 dhurs of *sir* land in mauza Utrasot which had been usufructuarily mortgaged to him (Jugal Kishore Sahu) by the father and son, subsequently to the decree obtained by the plaintiffs on their mortgage.

On the 12th December, 1902, the plaintiffs on the basis of the purchases of 1900 were formally put into possession of the one-anna share of mauza Utrasot and the one-anna four-pie share of mauza Jhugia.

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In the contest for mutation of names between the plaintiffs and Jugal Kishore Sahu, the former were successful, and the latter filed a suit and, on the 17th December, 1903, obtained a decree for possession of the six-pie share of mauza Utrasot and the 19 bighas odd in the same village.

In the present suit the plaintiffs' case was that they have been dispossessed of one-half *(i.e.* six pies) of their share in mauza Utrasot and of the area of 19 bighas odd by Jugal Kishore Sahu, that they had been deprived of one-half *(i.e.* eight pies) of mauza Jhugia by Basdeo and Hanuman Sahu, the subsequent mortgagees, who, in spite of the formal proceedings of the 12th December, 1902, had retained actual possession, and that Hanuman Chaudhri was liable for his father's debt. The amount of the decree was Rs. 2,650. At the sale Rs. 1,900 had been paid for the whole property, of which the plaintiffs had only obtained possession of one-half. The plaintiffs therefore claimed that only Rs. 950 of their decree had been satisfied, leaving a balance of Rs. 1,700 still due.

The plaintiffs sought two alternative reliefs, namely, (1) a decree for foreclosure and possession of that half of the mortgaged property of which possession has not been obtained, or (2) a decree for sale of this half in satisfaction of the balance of Rs. 1,700, with interest due on the decree.

The Court of first instance granted the latter relief.

The lower appellate Court upheld the first Court's decree.

The Hon'ble Pandit *Madan Mohan Malaviya*, Dr. *Tej Bahadur Sapru* and Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Munshi *Iswar Saran*, for the respondents.

STANLEY, C.J. and KNOX, J.—The facts of this case are stated in the judgment of the learned District Judge, but it will be convenient to give a few of the salient facts upon which the questions raised in this appeal largely depend. One Ram Harakh, the father of Hanuman, defendant No. 1, executed in favour of the plaintiffs' father, who is dead, a mortgage of a one-anna share in a village called Utrasot, and also a one-anna four-pie share in a village called Jhugia to secure a sum of Rs. 1,252,

payable in three years. The plaintiffs, after the death of their father, instituted a suit on foot of this mortgage to raise the amount of the mortgage-debt and obtained a decree for sale and an order absolute. The defendant No. 1, Hanuman, was not impleaded in that suit, and he thereupon instituted a suit for a declaration that his share in the property, which was ancestral, was not liable to sale in execution of the decree obtained by the plaintiffs. As the law was then understood, a Hindu son could obtain such a declaration on proof of the fact that he had not been impleaded by the mortgagees. He was not required to prove that the debt for which the property was mortgaged was contracted for immoral purposes. Notwithstanding the decree so obtained by the defendant Hanuman, the plaintiffs proceeded to sell the entire shares in the two villages and they themselves purchased both shares, obtained sale certificates and possession on the 12th of December, 1902. Jugal Kishore, defendant No. 4, held a simple money decree against Hanuman, defendant No. 1, and his father, and in execution of that decree caused a six-pie share of the village Utrasot and also the equity of redemption in a plot of ground also in this village to be sold and himself purchased. When mutation of names was applied for a contest arose between the plaintiffs, respondents, and Jugal Kishore, and ultimately mutation was effected in favour of the plaintiffs respondents. Jugal Kishore then sued for possession of the six-pie share of Utrasot, which was then in the possession of the plaintiffs and obtained a decree on the 17th of December, 1903, and, in execution of that decree, possession was given to them. This decree is a most important document in the case, because the defendants rely upon it as operating as *res judicata* in the present case. It is contended on behalf of the defendants appellants that if the plaintiffs respondents relied upon their mortgage of the 20th of January, 1886, as binding upon the mortgagee's son by reason of his pious duty as a Hindu son to satisfy his father's debts, they ought to have raised it in that suit. It was found in that suit that the sale to the plaintiffs respondents of the six-pie share, that is, the share of Hanuman, defendant No. 1, was not valid, inasmuch as there was a binding decision of the Court in favour of Hanuman to the effect that his share of the property was not

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liable to sale in execution of the earlier decree of the plaintiffs respondents. We think there might be force in this contention were it not for the language of the decree itself. Though the Munsif held that the sale of Hanuman's share was a nullity, he expressly reserved by his judgment all questions touching the rights of the plaintiffs respondents as mortgagees, and accordingly he gave Jugal Kishore a decree for possession "subject to any right which the present plaintiffs *(i.e.* the plaintiffs respondents), might have over the property." Now the effect, as it seems to us, of this decree, was to leave the plaintiffs respondents, as regards their mortgage, exactly in the position in which they stood before, what we may term, the abortive sale to them was carried out. That sale, so far as regards the six-pie share, was held to be and must be treated by us now as a nullity, but no decision whatever was passed as to their rights as mortgagees. Those rights, whatever they were, were expressly safeguarded. This being so, the plaintiffs respondents were in a position to proceed against Hanuman with a view to establish his obligation to satisfy his father's debt and the liability of his share of the property, also to satisfy it so far as it remained unsatisfied by the sale of the other portions of the property carried out in their favour. In view then of the reservation to which we have referred in the decree of the plaintiff, dated the 17th of December, 1903, there appears to us to be no force in the argument that the provisions of section 13 of the Code of Civil Procedure bar the right of the plaintiffs respondents to institute the suit out of which this appeal has arisen. The decision of the learned District Judge was, we think, on this question correct.

The only other question which has been pressed in argument before us, is contained in the fourth ground of appeal, namely, that the plaintiffs having acquired half of the property cannot under any circumstances sue to recover more than half of the mortgage debt. The contention is that the mortgaged property is liable rateably to satisfy the mortgage debt and that the plaintiffs, respondents having purchased half, must be treated as having exonerated the other half from all liability to a moiety of the debt. For this contention reliance is placed upon the decision in the case of

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Bisheshur Dial v. *Ram Sarup* (1), in which it was decided that when a mortgagee buys at auction the equity of redemption in a part of the mortgage 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 portion so purchased. In that case, however, the property which was so purchased by the mortgagee was purchased at a sale in execution of a decree obtained by a third party. The case here is entirely different. The plaintiffs respondents filed their suit to have their mortgage debt satisfied by sale of all the property subject to the mortgage. A portion only of that property was at first sold and failed to satisfy the mortgage debt. In such a case it is clear, we think, that the balance of the mortgaged property is liable to satisfy whatever balance remained due after the first sale.

We therefore, on the two points which have been raised in argument, hold that the Courts below were right and we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1906
June 1.

Before Mr. Justice Banerji and Mr. Justice Aikman.

EMPEROR *v.* RAM KHILAWAN AND ANOTHER.*

Act No. XLV of 1860 *(Indian Penal Code), sections* 193, 201*—False evidence —Accused person or fabricating false evidence for the purpose of concealing his own guilt.*

Held that an accused person cannot be charged either with giving or fabricating false evidence with the sole object of diverting suspicion from himself and concealing his guilt in regard to a crime with which he is charged.

THE following are the facts:—

Ram Khilawan and Musammat Manki were placed on their trial for the murder of Musammat Bundao. They were discharged by the Magistrate. There was some evidence to show that the accused had endeavoured to make it appear that the murder

* Criminal Appeal No. 273 of 1906.

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