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MUHAMMAD  
ANSAN  
v.  
UMAR-  
DABAZ.

their Lordships of the Privy Council in *Mussamut Humceda v. Mussamut Buldin and the Government* (1), and in *Abdul Wahid Khan v. Nuran Bibi* (2), the latter position cannot be maintained. For the reasons set forth above we allow the appeal, and, setting aside the decree of the lower Court, dismiss the plaintiffs' suit with costs in both Courts.

*Appeal decreed.*

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April 30.

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

GOKUL DAS AND OTHERS (PLAINTIFFS) v. DEBI PRASAD AND  
OTHERS (DEFENDANTS).\*

*Mortgage—Redemption—Sub-mortgage—Sub-mortgagees impleaded—No  
specific prayer to redeem sub-mortgage.*

The plaintiffs had purchased the equity of redemption of all the mortgaged property, part of which had been sub-mortgaged.

*Held* that, having made the sub-mortgagees parties, they were entitled to redeem the whole mortgage, although they might not have specifically sought to redeem the sub-mortgage; that the proper course was to ascertain what sum was due to the sub-mortgagees and to direct payment of that amount to the sub-mortgagees out of the amount payable for redemption of the whole mortgage. *Narayan Vithal Maval v. Ganoji* (3), followed.

THE facts are as follows:—

The plaintiffs were (1) Raja Seth Gokul Das, (2) Rai Bahadur Ballabh Das, (3) Seth Jiwan Das.

The defendants were (1) Debi Prasad, (2) Durga Prasad, (3) Gajadhar Prasad, minor under the guardianship of Debi Prasad, his father, (4) Gaya Prasad, minor, under the guardianship of Durga Prasad, his father, (5) Sukhdeo, (6) Balmakund, (7) Sita Ram, (8) Bindeshri, (9) Tapesri, minors, under the guardianship of Sita Ram, their uncle, (10) Amarjit Singh, (11) Rai Seth Chandmal and (12) Mannu Lal.

Two persons, Mewa Lal and Amrit Lal owned the entire 16 annas of mauza Chapor Kalan *asli* with the *dakhili* villages. On 7th June, 1860, Mewa Lal and Dirgaj Singh, son of Amrit Lal, mortgaged the whole of the above property to Kishan Prasad and Behari Lal for Rs. 7,500, for ten years, the

\* First Appeal No. 146 of 1904, from a decree of Rai Shankar Lal, Subordinate Judge of Mirzapur, dated the 16th April, 1904.

(1) (1872) 17 W. R., 525. (2) (1885) I. L. R., 11 Calc., 597.  
(3) (1891) I. L. R., 15 Bom., 692.

mortgage being *bhog bandak*. Kishan Prasad and Bihari Lal subsequently separated, and on their death defendants Nos. 1 and 2, sons of Kishan Prasad, came to own an eight-anna share of the mortgagee rights and one Balbhaddar and defendants Nos. 5 and 6, sons of Bihari Lal, became the owners of the other eight-anna share. The three sons of Bihari Lal also separated and each became owner of a two-anna and eight-pie share. The plaintiffs in execution of their decrees purchased the shares of all the three brothers and in this suit further asserted that they had obtained and were in possession of Balbhaddar's two-anna eight-pie share of the mortgagee rights. The five-anna four-pie mortgagee share of defendants Nos. 5 and 6 were held in sub-mortgage by defendants Nos. 1 and 2.

The plaintiffs further asserted that they had purchased the equity of redemption in respect of the entire property under a sale deed, dated 13th July 1902, from defendant No. 10, Amarjit, who, it was asserted, purchased Mewa Lal's eight-anna share at an auction sale on 20th January 1873, and Dirgaj's eight-anna share under a sale-deed, dated 9th December, 1889, executed by Musammat Badami his widow, and Musammat Rukhminan, his daughter.

Defendants Nos. 7 to 9 were impleaded as they held a decree for sale of the mortgagee rights of defendants Nos. 1 and 2 on a sub-mortgage executed by them.

Defendants Nos. 11 and 12 were impleaded as attaching creditors of defendants Nos. 1 to 4.

Defendants Nos. 5, 6 and 11 were absent.

In this suit the plaintiffs sought to redeem the eight-anna share of the entire property held by defendants Nos. 1 and 2 as mortgagees and also the five-anna four-pie share held by them as sub-mortgagees. The plaintiffs offered to pay a proportionate part of the mortgage-money, Rs. 7,500, or any other sum which the Court might adjudge.

The lower Court (Subordinate Judge of Mirzapur) allowed the plaintiff's claim save in respect of the five-anna four-pie share holding that the plaintiffs could not get possession of that share in this suit because they did not claim to redeem the sub-mortgage.

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Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Madan Mohan Mulaviya*, for the appellants.

Messrs. *Shams-ud-din* and *M. L. Agarwala*, and Munshi *Jang Bahadur Lal*, for the respondents.

STANLEY, C.J. and KNOX, J.—This appeal is not by any means free from difficulty. It arises out of a suit for redemption of a usufructuary mortgage of the 7th of June, 1860. The plaintiffs are admittedly entitled to the equity of redemption of the entire property which consists of villages called *Chapor asli* and *dakhili*. It is also admitted that the plaintiffs are entitled to a two-anna eight-pie share of the mortgagees' interest which belonged to one Balbhaddar and to a five-anna four-pie share of the mortgagees' interest which belonged to Sukhdeo and Balmakund. The first two defendants are in possession of an eight-anna share of the property as mortgagees representing to that extent original mortgagees, and they are also in possession of a five-anna four-pie share which belonged to Sukhdeo and Balmukand as sub-mortgagees under two sub-mortgages. The claim of the plaintiffs is to redeem the entire mortgaged property by payment of the amount due on foot of the mortgage, viz. seven thousand five hundred rupees, after deducting a sum of rupees twelve hundred and fifty representing the two-anna eight-pie share to which the plaintiffs are absolutely entitled. The Court below has allowed the plaintiffs' claim save in respect of the five-anna four-pie share. This share it has excluded from the operation of the decree on the ground that the plaintiffs did not seek to redeem the sub-mortgages to which we have referred and therefore they cannot get possession of these shares in this suit. We think in adopting this view the Subordinate Judge was wrong. The plaintiffs, who have purchased the equity of redemption of all the mortgaged property, are entitled to redeem the mortgage provided that they implead all necessary parties. The sub-mortgagees have derivative interests in the mortgage as sub-mortgagees and they were therefore properly impleaded in the suit. The proper course, we think, for the Court below to have adopted was to ascertain what sum is due to the sub-mortgagees or to their representatives on foot of the sub-mortgages, which are dated respectively the 15th of December, 1890 and the 6th of September

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1895, and to direct payment of this sum out of the money lodged in Court, which is the full amount of principal which the plaintiffs are liable to pay. The learned Subordinate Judge appears to us to have attached undue weight to the proceeding recorded by him on the 9th of December, 1903 (No. 68 of the record). The pleader for the plaintiffs made certain admissions in answer to questions put to him which led the Court to entertain the view that the plaintiffs abandoned their claim in respect of the five-anna four-pie share. The answers of the pleader which induced this belief did not warrant the conclusion. He merely stated that the redemption which the plaintiffs sought was of the mortgage of 1860, and they did not set up a claim to redeem the sub-mortgages. He did not apparently understand the position; but this did not justify the Court below in assuming that the plaintiffs did not desire to have the mortgage of 1860 fully redeemed. As was laid down in the case of *Narayan Vithal Maval v. Ganoji* (1), the rule is that "in the case of a derivative mortgage or sub-mortgage the judgment directs an account of what is due to the original mortgagee or his assignee and then what is due to the derivative or sub-mortgagee, and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee and on payment of the residue, if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor." Before we pass a final order we must, therefore, remand the following issue to the Court below, *viz.*—"What sums are due to the defendants 1 to 4 on foot of the sub-mortgage of the 15th December 1890, executed by Sukhdeo Prasad in favour of the defendant, Debi Prasad, and also on foot of the sub-mortgage of the 6th September, 1895, executed by Balmukand in favour of the defendants 1 and 2." The Court may take such relevant evidence as the parties may tender. On return of the findings the parties will have the usual ten days for filing objections. As regards the only other ground of appeal which has been discussed before us, *viz.* that a bond executed on the 9th of December, 1861 (No. 41C. of the record) is a clog upon redemption and as such could not be given effect to, the learned vakil

(1) (1872) 17 W. R., 525.

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for the respondents was bound to admit that this ground of appeal was well founded. In view of the decision in *Sheo Shankar v. Parma Mahton* (1) this ground of appeal could not be resisted. This bond which has been relied upon clearly is a clog upon redemption within the rule referred to in that case. The matter must not be overlooked when the case comes up for final orders. The objections filed under section 561 of the Code of Civil Procedure have been abandoned.

*Cause remanded.*

*Before Mr. Justice Richards.*

KALESHAR RAI (PLAINTIFF) v. NABIBAN BIBI (DEFENDANT).\*

*Pre-emption—Two successive purchases by same vendee—Claim to be co-sharer at date of suit on first purchase in virtue of second purchase.*

Where in a suit for pre-emption it appeared that the vendee had, prior to the date of the suit, made a second purchase in regard to which no suit had been filed prior to the date of the institution of the suit in regard to the first purchase, but limitation had not expired in regard to the second purchase, *held* that the vendee could not be considered by virtue of his second purchase to have been a co-sharer at the date of the institution of the suit on the first purchase. *Bhagwan Das v. Mohan Lal* (2) distinguished.

In this case the defendant purchased a share in certain villages on the 11th of November, 1902. In respect of this purchase the plaintiff filed a suit for pre-emption on the 3rd of November, 1903. The defendants' main answer to the suit was that by a second purchase on the 30th of June, 1903, long before the institution of the present suit he had become a co-sharer, and therefore the suit would not lie. In respect, however, of this second purchase a second suit for pre-emption was filed against the defendant on the 11th of November, 1903. The Court of first instance (Munsif of Muhammadabad) dismissed the suit, holding that the ruling in *Bhagwan Das v. Mohan Lal* (2) applied to the case before him, and consequently that the plaintiff had no right of pre-emption. On appeal by the plaintiff, the lower appellate Court (District Judge of Ghazipur) for similar

\* Second Appeal No. 768 of 1904, from a decree of L. Marshall, Esq., District Judge of Ghazipur, dated the 10th May, 1904, confirming a decree of Munshi Chandī Prasad, Munsif of Muhammadabad, dated the 5th February, 1904.

(1) (1904) I. L. R., 26 All., 559.

(2) (1903) I. L. R., 25 All., 421.