

that the lady did make the demand known as *talab-i-mawasibat*. The result is that this appeal is dismissed with costs.

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CHAKAURI
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v.
SUNDARI
DEVI.

Appeal dismissed.

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April.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

BOHRA THAKUR DAS AND OTHERS (PLAINTIFFS) v. COLLECTOR OF ALIGARH (DEFENDANT) AND COLLECTOR OF ALIGARH (DEFENDANT) v. BOHRA THAKUR DAS AND OTHERS (PLAINTIFFS).*

Mortgage—Redemption of part—Whole burden on remainder—Transfer of Property (Act IV of 1882), section 72—Purchase by mortgagee of portion of mortgaged property—Enhancement of Government revenue—Compensation for improvements.

G., the predecessor in title of the plaintiffs, mortgaged Kachaura to N. K., the predecessor of the defendant, and subsequently mortgaged 11 biswas of Kachaura and 6 biswas of Agrana to N. K. N. K. obtained a decree on the first mortgage and purchased the whole of Kachaura. The plaintiffs acquired from G. the equity of redemption in 5½ biswas of Agrana and brought the suit out of which these two appeals arose to redeem this 5½ biswa share on payment of a proportionate amount of the mortgage-money and to recover surplus profits if any. The parties submitted to the decision of the lower Courts that the plaintiffs must redeem the whole 6 biswa share.

Held (in S. A. 265 of 1904) that the answer to the question whether the defendant (mortgagee) could throw the whole burden of the second mortgage on the remainder of the mortgaged property depended on the circumstances under which his purchase was made. If two persons jointly mortgaged property to a third person who subsequently purchased the equity of redemption from one of them he could not throw the whole burden of his mortgage on the other. But in this case the purchase was made at an open sale and not subject to any charge, and the defendant could throw the whole burden on the remaining property. *Sosla Ayyar v. Krishna Ayyangar* (1), referred to.

The second mortgage further contained clauses (a) that if the Government revenue was enhanced the mortgagor was to be liable for the amount to the enhancement; (b) that if the mortgagee spent any money in the construction of wells the mortgagor would recoup him the amount at the time of redemption.

Held (in S. A. 298 of 1904) (a) that the defendant (mortgagee) having paid enhanced revenue to save the property upon failure by the mortgagor was entitled to receive from the plaintiff the whole amount of the enhancement with interest. *Girdhar Lal v. Bholu Nath* (2), referred to.

* Second Appeals Nos. 265 and 298 of 1904, from decrees of L. M. Thornton, Esq., District Judge of Aligarh, dated the 2nd of January, 1904, modifying decrees of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 23rd of December, 1902.

(1) (1901) I. L. R., 24 Mad., 96. (2) (1894) I. L. R., 10 All., 611, at p. 614.

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(b) That the defendant (mortgagee) having himself acquired the property in Kachaura could not recover the money spent in constructing wells in Kachaura.

THESE two cross appeals arose out of the following facts:—

One W. L. Gardner on December 12th, 1868, mortgaged the whole of Kachaura to Nand Kishore (the predecessor in title of the defendants, represented by the Collector of Aligarh) and one Dwarka Das.

On January 5th, 1870, Gardner again mortgaged 11 biswas of Kachaura, together with 6 biswas of Agrana, to Nand Kishore.

This mortgage contained a condition that if the Government revenue were enhanced, the mortgagor should be liable for the amount of the enhancement. It was enhanced, and, on failure of the mortgagor to pay, the defendant (mortgagee) paid to protect the property.

The mortgage contained a further clause that the mortgagor should at the time of redemption recoup the mortgagee any money spent on the construction of wells.

On June 27th, 1878, the mortgagee obtained a decree on the first mortgage and the whole of Kachaura was sold and it was purchased by Nand Kishore himself and the widow of Dwarka Das.

The present plaintiffs acquired the equity of redemption of $5\frac{1}{2}$ biswas in Agrana, and brought the suit out of which these appeals arise for redemption on payment of a proportionate amount of the mortgage-money.

The Court of first instance (Additional Subordinate Judge of Aligarh) held that the plaintiffs must redeem the whole 6-biswa share of Agrana, and this decision was accepted by the parties.

The Court of first instance and the lower appellate Court (District Judge of Aligarh) further held—

- (1) that the plaintiff must pay the whole amount of the loan on both properties ;
- (2) that the plaintiff was not liable for the amount of the enhanced revenue paid by the defendants ;
- (3) that the plaintiff was not liable for the amount expended on constructing wells in Kachaura.

The decision on the first point was the subject of the plaintiffs' appeal (S. A. No. 265 of 1904). The decision on the other two points was the subject of the defendant's appeal (S. A. No. 298 of 1904).

Babu *Jogindro Nath Chaudhri*, for the plaintiffs.

Mr. *A. E. Ryves*, for the defendant.

Judgment in S. A. No. 298 of 1904:—

KNOX and AIKMAN, JJ.—This and the connected Second Appeal No. 265 of 1904 are cross appeals arising out of a suit brought by Bohra Thakur Das, Musammat Nannhi Kuar and Musammat Durga Kunwar for the redemption of a mortgage. The Court of first instance decreed the claim, fixing a certain amount to be paid by the plaintiffs. Both parties appealed and the learned District Judge varied the amount which had been fixed by the Court of first instance as the amount to be paid for redemption. There are two appeals here from the decrees of the lower appellate Court. This appeal is that on behalf of the defendant.

On the 5th of January, 1870, one William Linneus Gardner executed a usufructuary mortgage of 11 biswas of Kachaura and 6 biswas of Agrana for a term of eleven and a half years in favour of one Nand Kishore, the predecessor in title of the defendants appellants as security for a loan of Rs. 5,000. The mortgage-deed provides that the rate of interest on this loan was to be 12 per cent. per annum. The mortgagee undertook to pay the Government revenue. At the same time the mortgage-deed provided that if the Government revenue were to be reduced at the ensuing revision of settlement the mortgagor was to benefit by the reduction. On the other hand if the Government revenue were enhanced the mortgagor made himself liable for payment of the amount by which the revenue should be enhanced. It has been found on an issue sent down by us to the lower Court that the revenue was enhanced by the amount of Rs. 895-15-9 annually. It is not denied that the mortgagor did not fulfil his promise to pay this enhancement, and that consequently the mortgagee had himself to pay the enhancement to save the mortgaged property from being proceeded against for arrears of revenue. Another stipulation in the deed was that if the mortgagee spent any money in the construction of wells, the mortgagor would recoup him the amount

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at the time of redemption with interest at 12 per cent. per annum. Prior to this mortgage, there was a simple mortgage of the whole of Kachaura, dated the 21st December, 1868, in favour of Nand Kishore aforesaid and one Dwarka Das. A decree was obtained on the mortgage of 1868, and under that decree the whole of the village of Kachaura was sold on the 20th of June, 1878, and purchased by Nand Kishore and the widow of Dwarka Das. The present plaintiffs have acquired the equity of redemption of $5\frac{1}{4}$ biswas of the mortgaged share in Agrana, and they brought the suit out of which these two appeals arise to redeem this $5\frac{1}{4}$ biswa share on payment of a proportionate amount of the mortgage-money and to recover surplus profits if any. For the defence various pleas were put forward. One was that the plaintiff must redeem the whole 6-biswa share of Agrana and not only $5\frac{1}{4}$ biswa. This plea was sustained by the Court of first instance, which passed a decree declaring plaintiff's right to redeem 6 biswas. The decision on this plea has been submitted to by the parties. The next plea raised by the defendants was that the plaintiffs were not entitled to redeem on payment of a proportionate amount of the mortgage-money secured on the two properties, but must pay the whole amount of the loan with interest. This plea was sustained by the Courts below and the decision on it forms the subject of plaintiff's cross appeal. The defendants further pleaded that in order to redeem, the plaintiffs must pay the enhanced amount of revenue which the defendants had to pay on account of the mortgagors together with interest. Further that the plaintiffs must pay at the time of redemption the amounts expended by the mortgagees in the construction of wells. These pleas were repelled by the Courts below and the decision of the lower Court as to these two pleas forms the subject of this appeal. In regard to the later plea, namely, as to the right of the appellants to recover their outlay in Kachaura on the wells, we entirely agree with the view taken by the Court below. The mortgagee having himself acquired the property in Kachaura gets the benefit of the improvements he made, and it would be in the highest degree inequitable that he should not only have the benefit of the wells, but also recover the money he spent in constructing them. The stipulation in the mortgage-deed was made to provide for the mortgagor himself getting possession

of the property with the improvements made on it by the mortgagee and was never framed to meet the contingency of the mortgagee himself acquiring the property.

The claim of the appellants to add to the mortgage-money the amount they paid on behalf of the mortgagors as enhanced revenue is based on the principles embodied in section 72 of the Transfer of Property Act. That section authorizes a mortgagee in possession to spend such money during the continuance of the mortgage as is necessary to preserve the property from forfeiture or sale, and authorizes the mortgagee "in the absence of a contract to the contrary to add the money so spent to the principal money at the rate of interest payable on the principal or where no such rate is fixed at the rate of 9 per cent. per annum." It is true that this mortgage was entered into before the Transfer of Property Act came into force. But it has been held in *Girdhari Lal v. Bhola Nath* (1), that the rules contained in section 72 of the Transfer of Property Act "only reproduce the doctrines which the Courts of Justice in India have uniformly adopted," and that the section reproduces the old law. The learned advocate for the respondent to this appeal argues, however, that in the mortgage-deed under consideration there was a contract to the contrary. He is unable to point out any specific stipulation which can be called a contract to the contrary, but he relies on the two provisions in the mortgage-deed, one the stipulation regarding the recovery of the outlay on improvements which has been referred to above, and the other a stipulation regarding the payment by the mortgagor on redemption of arrears due by tenants; and contends that as we find these stipulations in the deed and find no express stipulation providing that the mortgagor is to repay at the time of redemption any sums paid by the mortgagee to save the property from forfeiture or sale, a contract to the contrary must be inferred. Further, on the question as to whether the mortgagee was entitled to interest on these sums, he referred to the fact that the bond provided that payments by the mortgagor at the time of redemption on account of outlay on wells and on account of arrears due from tenants, were to carry interest at the rate of 12 per cent. per annum. It was argued that even if

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the mortgagees are entitled to recover the amount they paid as revenue on the mortgagor's behalf, they are not entitled to interest thereon. These contentions are ingenious, but we cannot accede to them. The mortgagor made himself personally liable for payment of the enhanced revenue and we cannot hold that the absence from the bond of any provision for the mortgagor breaking his word amounts to a contract that the mortgagee is not to recover, along with the principal, the sums, which he had to pay in order to save the property, owing to the mortgagor's default. It is true that the mortgagee, had he so chosen, might have sued the mortgagor from time to time on the personal covenant and recovered year by year the excess amount of land revenue which the mortgagor had contracted to pay. But we hold that he was not bound to do so. We cannot read into the mortgage-deed any contract to the contrary, either as regards recovery of the principal sum paid for revenue or as regards interest thereon. For the above reasons we sustain the first plea in the memorandum of appeal and hold that the appellants are entitled to the amount of Rs. 895-15-9 which they paid for each of the years 1873 to 1878 inclusive, and that each of these sums should carry interest at the stipulated rate of 12 per cent. per annum from the beginning of the year following that on account of which it was paid up to the date which we now fix for redemption, namely, the 10th of August, 1906. To this extent we allow this appeal and vary the decree of the Court below. *Quoad ultra* the appeal is dismissed. The parties will pay and receive costs here and in the Courts below in proportion to their failure and success here and the costs in this Court will include fees on the higher scale. The office will calculate the amount payable on the date mentioned above and the amount so calculated, after being shown to the counsel on both sides, will be entered in the decree.

Judgment in S. A. No. 265 of 1904:—

KNOX and AIKMAN, JJ.—This appeal is connected with Second Appeal No. 293 of 1904, just disposed of. The first ground in the memorandum of appeal was abandoned and the last ground was not pressed. The second and third grounds were supported and they raise what is really the same question,

that is, whether the mortgagee, having himself purchased part of the mortgaged property, can throw the whole burden of the mortgage on the remainder of the mortgaged property. The answer to this question depends on the circumstances under which the purchase was made. Supposing A and B are mortgagors of certain property which they have jointly mortgaged to C. Now if C, the mortgagee himself, purchases the equity of redemption from A, it is clear that he cannot be permitted to throw on B's share the whole burden of his mortgage. In such a case B's share can only be saddled with the proportionate amount of the mortgaged debt. But if, as is the case here, C's purchase was at a sale in execution of a decree obtained on a prior mortgage, the case is different. The learned Judge finds that the mortgagee bought the Kachaura property at an open sale and not subject to any charge and that he must be presumed to have paid fair value for it. The case then stands thus—the whole of the Kachaura property has been swallowed up by the first mortgage and consequently the burden of the second mortgage falls entirely on the Agrana property. The owner of the latter property has under the circumstances no right of contribution against the owner of the Kachaura property. In support of the view taken we may refer to the decision in an unreported case of this Court in First Appeal No. 63 of 1905, decided on the 20th of April 1905, and to the case of *Sesha Ayyar v. Krishna Ayyangar* (1). We are of opinion that the view taken by the Courts below on the question raised in this appeal is right. We dismiss this appeal with costs including in this court fees on the higher scale.

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Decree modified.

(1) (1901) I. L. R., 24 Mad., 96.