

1906

GANGA
RAM
v.
MISHIN
LAL.

defend the suit. He stood by and did not do so. There is no allegation that the debt was tainted with immorality. On these grounds we think that this appeal must succeed. We set aside the decrees of the Courts below, and we dismiss the plaintiff's claim with costs in all Courts.

Appeal decreed.

1906
February 15.

Before Mr. Justice Banerji and Mr. Justice Richards.

SHIB KUNWAR SINGH (DEFENDANT) v. SHEO PRASAD SINGH (PLAINTIFF) AND NAUNIHAL SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Sale in execution of a simple money decree of mortgaged property—Notification of mortgage—Purchaser not estopped from disputing the existence of the mortgage—Civil Procedure Code, sections 282, 283 and 287.

In execution of a simple money decree the rights of a mortgagor in certain property ostensibly subject to a mortgage were put up to sale. The property was not sold subject to the mortgage, as contemplated by section 282 of the Code of Civil Procedure, but the existence of the mortgage was notified in the proclamation of sale for the benefit of intending purchasers. *Held*, on suit brought by the mortgagee for sale, that the auction-purchaser was not under the circumstances debarred from proving that the mortgage in suit was fictitious and without consideration. *Inayat Singh v. Izzat-un-nissa* (1) referred to.

This appeal arose under the following circumstances:—

The rights of a mortgagor in certain mortgaged property were purchased at auction in execution of a simple money decree by the present appellant. It was mentioned in the sale proclamation that there was an alleged mortgage on the property, but the Court did not sell the property subject to a mortgage as contemplated by section 282 of the Code of Civil Procedure.

The mortgagee eventually brought the suit out of which this appeal arose upon his alleged mortgage.

The auction-purchaser resisted the suit alleging that the mortgage-bond was fictitious.

This defence was accepted by the first Court, but for reasons set forth in the judgment of their lordships the lower appellate Court rejected it and remanded the case under section 562.

The auction-purchaser brought this appeal from that order of remand.

* First Appeal No. 109 of 1905, from an order of D. R. Lyle, Esq., District Judge of Moradabad, dated the 4th of August, 1905.

(1) (1904) I. L. R., 27 All., 97.

1906

SHIB
KUNWAR
SINGHv.
SHRI
PRASAD
SINGH.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* and Munshi *Gulzari Lal*, for the appellant.

Dr. *Satish Chandra Banerji* and Dr. *Tej Bahadur Sapru*, for the respondents.

BANERJI and RICHARDS, JJ.—This appeal arises in a suit brought by the first respondent for sale upon a mortgage. The appellant, who was defendant No. 4 in the Court below, purchased at auction in execution of a simple money decree the rights of the mortgagor in the mortgaged property. As such purchaser he was made a party to the suit. He resisted the claim on the ground that the plaintiff's mortgage bond was fictitious and without consideration. The Court of first instance found in his favour and dismissed the suit. The lower appellate Court has set aside the decree of the Court of first instance and remanded the case under section 562 of the Code of Civil Procedure. From this order of remand the present appeal has been brought. The learned Judge was of opinion that the appellant was precluded from raising the plea that the mortgage deed was fictitious and without consideration for two reasons: first, that he was the legal representative of the mortgagor and could not for that reason dispute the validity of the mortgage; secondly, that as mention of the plaintiff's mortgage was made in the proclamation of sale issued in the execution case in which the appellant purchased the property, the property must be deemed to have been sold subject to the mortgage, and the appellant by his auction purchase acquired only the right to redeem the mortgage. In our judgment the learned Judge has erred on both these points. It is true that the appellant is in one sense the legal representative of the mortgagor, but the fact of his having purchased the mortgagor's rights does not debar him any more than the mortgagor himself would have been debarred from questioning the fact or validity of the mortgage. As for the second point, it is clear that the Court did not sell the property subject to a mortgage as contemplated by section 282 of the Code of Civil Procedure. All that it did was to mention in the sale proclamation the fact that there was an alleged mortgage on the property. It was not therefore incumbent on the judgment-debtor to bring a suit under section 282 to have it

1906

SHIB
KUNWAR
SINGH
v.
SHRO
PRASAD
SINGH.

declared that no mortgage existed on the property. The object of specifying the mortgage in the sale proclamation was to give to intending purchasers all the information which it was necessary for them to know in respect of the property advertised for sale. The fact that the appellant purchased the property with notice of the alleged mortgage does not estop him from questioning the mortgage. The Code of Civil Procedure clearly makes a distinction between a case in which property is sold subject to a mortgage and a case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided for by section 282, and the latter by section 287. In the former case the Court after being satisfied of the existence of the mortgage sells only the judgment-debtor's right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. In the latter he buys the property with notice of the mortgage and subject to such risks as the notice might involve. The Court does not decide whether the mortgage subsists or not. If there is in reality a subsisting mortgage, the purchaser has to redeem it. If, on the other hand, the mortgage specified in the proclamation of sale is a fictitious mortgage, or did not subsist at the date of the sale by reason of its having been previously discharged by payment, the purchaser acquires the property free from liability for the mortgage. Any other conclusion might work hardship and injustice. Take, for instance, the case of a creditor who has obtained a decree for money and has applied for and obtained leave to bid at the sale to be held in execution of his decree because he is aware that his debtor, with a view to defeat and defraud him, has executed a fictitious mortgage of his property. If, upon his buying the property at auction under these circumstances, the fact of the mortgage having been notified at the sale be held to preclude him from proving the real nature of the mortgage when a suit is brought on the basis of it the very object with which the mortgage was fraudulently made would be obtained. The case of *Inayat Singh v. Izzat-un-nisa* (1) upon which the learned vakil for the respondent relies, has in our opinion no bearing on the present case. That case was decided

(1) (1904) I. L. R., 27 All., 97.

upon the particular facts of it. In our judgment the order of remand is erroneous. We accordingly set it aside, and, allowing the appeal with costs, remand the case to the Court below with directions to readmit it and dispose of it according to law.

1906

SHIB
KUNWAR
SINGH
v.
SHEO
PRABAD
SINGH.

REVISIONAL CRIMINAL.

1906

February 16.

Before Mr. Justice Sir George Knox.

IN THE MATTER OF THE PETITION OF DUKHI KEWAT.*

Criminal Procedure Code, sections 528 and 537—Transfer—Notice—Reasons for transfer not recorded, the transfer being obligatory—Police Officer against whom a complaint was made called upon to submit an explanation.

A complaint was made in the Court of a Deputy Magistrate accusing a Sub-Inspector of Police of offences under sections 323 and 384 of the Indian Penal Code. The Deputy Magistrate brought the complaint to the notice of the District Magistrate, who without recording his reasons for so doing, but in obedience to an order of Government, transferred the case to his own file. The District Magistrate also called upon the officer accused to report as to any reason which he knew for the complaint having been made against him. This report was placed on the record, and was used, as the Magistrate stated in his order, to supply grounds for cross-examining the witnesses produced by the complainant. *Held* that omission on the part of the Magistrate to record his reasons for transferring the case was not under the circumstances more than an irregularity, and that his action in calling for a report from the Sub-Inspector and the use made of that report were not improper. *Baidya Nath Singh v. Muspratt* (1) dissented from. *Held* also, that where a District Magistrate transfers a case from the file of a Subordinate Magistrate to his own, it is not necessary that he should issue notice to the complainant before doing so.

ONE Dukhi Kewat filed a complaint in the Court of a Deputy Magistrate, accusing Shifayat-ullah, a Sub-Inspector of Police, of offences under sections 323 and 384 of the Indian Penal Code. The Magistrate in whose Court this complaint was filed sent the papers to the Magistrate of the district, who without recording his reasons for so doing, but apparently in obedience to a general order of Government (*vide* Manual of Government Orders, Department VI, p. 104), transferred it to his own

* Criminal Revision No. 733 of 1905.

(1) (1886) I. L. R., 14 Cal., 141.