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this being so, the adoption of the respondent, Kallu Mal, by Hira Lal was not an invalid adoption. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

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August 1.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Richards.

SHEO TAHAL OJHA (PLAINTIFF) v. SHEODAN RAI AND OTHERS
(DEFENDANT).*

Act No. IV of 1882 (Transfer of Property Act), section 55—Parties to suit—Suit for foreclosure exempting part of the mortgaged property—Persons interested only in the portion exempted not necessary parties.

If a plaintiff mortgagee, suing on the basis of his mortgage for either sale or foreclosure, thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the mortgage in respect of the remainder, there is nothing in law to prevent his doing so. If such a plaintiff exempts a portion of the mortgaged property from his suit, he is not obliged to make parties to the suit the persons interested in the portion of the property so exempted. *Chandika Singh v. Pohkar Singh (1)* distinguished. *Sheo Prasad v. Bihari Lal (2)*, *Jai Gobind v. Jasram (3)* and *Nazir Husain v. Nihal Chand (4)* referred to by Banerji, J.

THIS was a suit for foreclosure of a mortgage executed in favour of the plaintiff by one Alrakh Rai and his nephew, Sheodan Rai, on the 12th of August 1889 for a sum of Rs. 432, of which sum, according to the deed, Rs. 164 was borrowed by Alrakh Rai and Rs. 268 by Sheodan Rai. The property mortgaged was a two-anna zamindari share. The plaintiff stated that the two mortgagors had executed the mortgage as heads of their respective families, and he accordingly impleaded as defendants to the suit Alrakh Rai and his sons and grandsons and Sheodan Rai and his sons, grandsons and great-grandsons. Sheodan Rai, who is the son of Ablakh Rai, a brother of Alrakh Rai, had five brothers, four of whom, namely, Beni Rai, Madho Rai, Shankar Rai, and Khedu Rai, were not joined as parties

* Second Appeal No. 831 of 1903, from a decree of L. Marshall, Esq., Officiating Judge of Ghazipur, dated the 30th of July 1903, confirming a decree of Babu Harimohan Banerji, Munsif, Ghazipur, dated the 15th of April 1903.

(1) (1880) I. L. R., 2 ALL. 906.

(2) (1902) I. L. R., 25 ALL. 79.

(3) Weekly Notes, 1898, 120.

(4) Weekly Notes, 1905, 156.

to the suit. The defendants raised the plea that as all persons interested in the mortgaged property had not been made parties to the suit, there was a defect of parties. They stated, however, that of the two-anna mortgaged to the plaintiff one anna belonged to Alrakh Rai and his descendants and the other one anna to Abrakh Rai and his descendants, and that the two brothers were separate. It was further stated in the written statements of the defendants, and this was apparently admitted before the Court of the first instance, that of the one anna belonging to Ablakh Rai mortgaged to Sheodan Rai, six pies belonged to Beni Rai and others, who had not been made defendants to the suit. Thereupon the plaintiff, by means of an application, dated the 30th of March 1903, withdrew his claim in respect of this six pies share. The Court of first instance (Munsif of Ghazipur) overruled all the pleas raised by the defendants and made a decree for foreclosure in respect of a one and a half anna share. On appeal the lower appellate Court (District Judge of Ghazipur) reversed this decree and dismissed the suit, apparently upon two grounds, first, that the plaintiff was not competent to exempt from his claim for foreclosure any part of the mortgaged property; and, secondly, that "all interested persons" had not been made parties. The plaintiff thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji* (for whom Pandit *Mohan Lal Nehru*), for the appellant.

Mr. *Abdul Majid* and *Munshi Gobind Prasad*, for the respondents.

STANLEY, C.J.—Having regard to the admitted facts this appeal appears to me to present little difficulty. The case of *Chandika Singh v. Pohkar Singh* (1) is not similar as regards the facts and I abstain from any comments on it. Two brothers named Ablakh Rai and Alrakh Rai were entitled each to a one anna share in several villages. Ablakh Rai died leaving six sons, of whom Sheodan was the eldest. On the 12th of August 1889 Alrakh Rai and Sheodan Rai executed a mortgage by way of conditional sale of the two-anna share in question in

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favour of the plaintiff to secure an advance of Rs. 432 made by him to them. In the mortgage it is stated that of this sum Rs. 164 was borrowed by Alrakh Rai and Rs. 268 by Sheodan Rai. It is admitted that the five brothers of Sheodan Rai were equally entitled with him to the one-anna share which belonged to their father, and of this share Sheodan Rai in his written statement admits that a six-pie share belonged to his brothers Beni Rai, Madho Rai, Sheodan Rai, Shankar Rai and Khedu Rai and their children. The plaintiff instituted the suit which has given rise to this Second Appeal for foreclosure of his mortgage. A number of defences were filed by the different defendants, and amongst others they pleaded that Beni Rai, Madho Rai, Shankar Rai and Khedu Rai's heirs were not joint with Sheodan Rai at the date of the mortgage, but were separate from him. The plaintiff accordingly exempted their six-pie share from his claim for foreclosure. These persons whose shares were so exempted were not made parties to the suit, and an objection was raised on the part of the defendants that the suit was on this account defective in view of the provisions of section 85 of the Transfer of Property Act.

The Court of first instance disallowed this defence and gave a decree in favour of the plaintiff in respect of a one anna six pies share of the property comprised in the mortgage, excluding therefrom the six pies which had been exempted from the claim. On appeal the learned District Judge reversed this decree, holding that the owners of the six-pie share which was exempted were necessary parties to the suit. The learned District Judge in his judgment says:—"Sheodan has some brothers and nephews. Plaintiff has not only exempted some of these to the extent of a six-pie share, but has also neither made them parties to the suit nor deducted anything from his claim on account of those shares. A mortgagee may, if he likes, exempt from sale any portion of the property, but not from foreclosure, and in any case all interested parties should be made parties."

I am unable to agree with the learned District Judge. The plaintiff was in my opinion entitled to exempt from his claim the portion of the property which admittedly belonged to

persons who were not impleaded in the suit. He was not bound to attempt to enforce a claim against property the title to which was in dispute or was doubtful. The claim having been withdrawn as regards the six-pie share, it appears to me that the owners of that share, who admittedly have no interest in the remaining shares, were in no way necessary parties to the suit. I would therefore set aside the decree of the lower appellate Court and remand the appeal to that Court under the provisions of section 562 of the Civil Procedure Code for trial on the merits.

BANERJI, J.—This appeal arises out of a suit brought by the appellant for foreclosure of a mortgage executed in his favour on the 12th of August 1889 in respect of a two-anna share by Alrakh Rai and his nephew, Sheodan Rai, for a sum of Rs. 432, of which according to a recital contained in the mortgage deed, Rs. 164 was received by Alrakh Rai and Rs. 268 by Sheodan Rai. The plaintiff stated that the two mortgagors had executed the mortgage as heads of their respective families, and he accordingly impleaded as defendants to the suit Alrakh Rai and his sons and grandsons, and Sheodan Rai and his sons, grandsons and great-grandsons. Sheodan Rai, who is the son of Ablakh Rai, a brother of Alrakh Rai, has five brothers, four of whom, Beni Rai, Madho Rai, Shankar Rai, and Khedu Rai, were not joined as parties to the suit. The defendants raised the plea that as all persons interested in the mortgaged property had not been made defendants to the suit there was a defect of parties. They stated, however, that of the two annas mortgaged to the plaintiff one anna belonged to Alrakh Rai and his descendants and the other one anna to Ablakh Rai and his descendants, and that the two brothers were separate. It was further stated in the written statements of the defendants, and this was apparently admitted in the Court of first instance, that of the one anna belonging to Ablakh Rai mortgaged by Sheodan Rai, six pies belonged to Beni Rai and others, who had not been made defendants to the suit. Thereupon the plaintiff, by an application, dated the 30th of March 1903, withdrew his claim in respect of the

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said six pies share. The Court of first instance overruled all the pleas raised by the defendants and made a decree for foreclosure of a $1\frac{1}{2}$ anna share. Upon appeal the learned Judge reversed the decree of the Court of first instance and dismissed the suit, apparently upon two grounds: first, that the plaintiff was not competent to exempt from his claim for foreclosure any portion of the mortgaged property; and, second, that "all interested persons" had not been made parties.

On both points the view of the learned Judge is in my opinion erroneous. In a suit for foreclosure the mortgagee is not bound to include the whole of the property comprised in the mortgage any more than in a suit for sale. Where several properties are mortgaged to the same mortgagee for the same debt, each of these properties is liable as between the mortgagor and mortgagee for the whole of the debt; and the mortgagee has the right to recover the debt from any part of the property. There is no obligation on him to proceed against the whole of the property. It may be that as regards a part of it a third party has a paramount title. It may also be that a part is so heavily encumbered as to be of almost no value. In such cases it is competent to the mortgagee to exempt such part from liability for the mortgage debt, and I see no reason why he should be compelled to proceed against it. It has been held by this Court that it is competent to a mortgagee to abandon a part of his security and sue for the sale of the remainder—*Sheo Prasad v. Behari Lal* (1), *Jai Gobind v. Jasram* (2). It seems to me that he is equally competent to sue for foreclosure of a part of the mortgaged property. The effect of a decree for foreclosure which has been made absolute is to vest the property in the mortgagee in lieu of the amount due upon the mortgage. In the case of a mortgage by way of conditional sale, if the mortgagee thinks that a part of the mortgaged property would be sufficient to cover the amount of his mortgage, and he is willing to have the conditional sale in his favour made absolute in respect of that part only, there is no reason for forcing him to take the whole of the property comprised in his mortgage. One of several mortgagees cannot, it is true,

(1) (1902) L. L. R., 25 ALL., 79. (2) Weekly Notes, 1898, 120.

be allowed to bring a suit for foreclosure of a part of the mortgaged property for a proportionate part of the mortgage-money which he claims to be his share of it, but that is because a mortgage cannot be foreclosed in parts, but must be foreclosed as a whole. This, however, does not affect the right of a sole mortgagee to foreclose the mortgage as a whole by proceeding against a part only of the mortgaged property where, as in this case, he abandons the remainder of his security. Such abandonment, except where the mortgagee himself has bought a part of the mortgaged property, cannot work any in justice. It leaves the right of the owners of the several properties comprised in the mortgage to claim and obtain contribution *inter se* wholly unimpaired. The Court below relies in support of its view on the case of *Chandika Singh v. Pohkar Singh* (1). That case is not on all fours with the case before us; but if the learned Judge intended to lay down a general proposition to the effect that no mortgagee can sue for foreclosure of a part of the mortgaged property, I am, with all deference, unable to agree with them. Straight, J., in the course of his judgment, says:—"The plaintiff respondent was not justified in exempting the half pie share of Shankar Singh from the foreclosure proceedings and in directing his claim against the property of the appellants alone." I fail to appreciate the reason given in the judgment for holding the above view. If one of the mortgagors makes part payment, it is a payment which goes towards the reduction of the whole debt, and when credit is given for it by the mortgagee it is immaterial whether it is treated as payment made by an individual mortgagor or as a general payment towards the mortgage. In the present suit the plaintiff mortgagee has in his claim given credit for all sums which he alleges to have received on account of the mortgage, whether paid by the mortgagors themselves or by other persons interested in the mortgaged property, and I do not think that his claim offends against any principles of equity and justice.

As the plaintiff does not seek to foreclose the mortgage in respect of the six-pie share which admittedly belongs to Beni Rai and others, those persons are not necessary parties to the

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suit; and the omission to implead them as defendants is not, in my judgment, fatal to the claim. The object of a suit for foreclosure being to put an end to the equity of redemption, only those persons are necessary parties to the suit who have the right of redemption of the property sought to be foreclosed. What is required is that the suit should be so framed that complete justice may be done, and that the owners of the equity of redemption are fully represented. Section 85 of the Transfer of Property Act does not, in my opinion, lay down a different rule. As observed by Dr. Ghose in his valuable work on the Law of Mortgage in India (p. 685, 3rd Edn.) the words "all persons having an interest in the property comprised in a mortgage" in that section, in so far as they relate to a suit for foreclosure, "point merely to persons whose right would be prejudiced by a decree for foreclosure." A similar view was held by a Bench of this Court in the recent case of *Nazir Husain v. Nihal Chand* (1). It was there held that if a part of the property originally mortgaged has been absolutely released from the mortgage and has become excluded from the operation of the security, the property so released and excluded ceases to be property comprised in the mortgage, and section 85 does not make it necessary that a person having an interest in such property should be joined as a defendant. The learned Judges, Stanley, C.J. and Burkitt, J., said:—"We think that by 'interest in the property comprised in the mortgage' was intended interest in the property which is the subject-matter of the suit and which alone can be affected by the decree." With this view I fully agree. As the plaintiff in this case has abandoned his security in respect of the six-pie share in question and has excluded it from his claim, the persons who are the owners of that share were not necessary parties to the suit, and their omission from the array of parties is no defect in the suit. For the above reasons I would allow the appeal and remand the case to the Court below under section 562 of the Code of Civil Procedure.

RICHARDS, J.—When this appeal was first argued before Mr. Justice Banerji and myself it was presented and argued,

(1) Weekly Notes, 1905, p. 156.

as I understood, without dissent on the part of the appellants, as a case in which a mortgagee in a joint mortgage by an arrangement made with some of the mortgagors without the knowledge or consent of the other mortgagors credited the payments that had been made on foot of the mortgage debt, not as against the mortgage debt generally, but against the indebtedness of particular mortgagors, and in consideration thereof released part of the mortgaged property and the owners of the equity of redemption in the released property. The case was then referred to a Full Bench. It is clear from the facts as set forth in the judgments of the other members of the Court that this important question does not arise, and for that reason I express no opinion on it. It has already been held by this Court that in the case of a simple mortgage, the mortgagee can omit from his suit any part of the mortgaged property, and that the owners of the equity of redemption, and the persons interested in the property so omitted, need not be made parties. I can see no distinction between a suit to enforce a simple mortgage by sale and a suit for foreclosure of a mortgage by conditional sale. I concur with the other members of the Court in allowing the appeal and remanding the case.

By THE COURT :—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside, and the case is remanded to that Court under section 562 of the Code of Civil Procedure with directions to readmit it under its original number in the register and dispose of it according to law. The appellant will have his costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

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