

APPELLATE CIVIL.

1906
December 19.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

RAGHUNATH PRASAD AND OTHERS (PLAINTIFFS) v. JAMNA PRASAD AND ANOTHER (DEFENDANTS).*

Mortgage—Same property mortgaged twice to same mortgagees—Part purchased by mortgagees under their decree on prior mortgage—Remainder liable for full amount of the subsequent mortgage.

Sixteen villages were mortgaged by two mortgages of different dates to the same mortgagees. The mortgagees put their earlier mortgage into suit, obtained a decree, brought to sale 10 out of the 16 villages and purchased them themselves. *Held*, in a suit to sell the remaining villages in satisfaction of the second mortgage, that the remaining six villages were liable to the full extent of the second mortgage and not merely for a proportionate part of the money thereby secured. *Zahir Singh v. Buri Singh* (1) and *Bohra Thakur Das v. The Collector of Aligarh* (2) referred to.

THE plaintiffs in this case held a mortgage, dated the 15th of December 1888, over sixteen villages belonging to the defendants, and a subsequent mortgage over the same property of the 4th of September 1894. They brought their earlier mortgage into suit, and having obtained a decree for sale caused ten out of the sixteen villages mortgaged to be sold and purchased them themselves. The present suit was brought on the 23rd of April 1904 for sale of the remaining six villages in satisfaction of the later mortgage of the 4th of September 1894. The Court of first instance (Subordinate Judge of Gorakhpur) gave the plaintiffs a decree for sale; but held that the six villages were not liable for the whole amount due in respect of the second mortgage, but only for a proportionate part thereof. The plaintiffs appealed to the High Court, contending that they were entitled to bring to sale the six villages for the whole amount due on their mortgage of the 4th of September 1894.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Sundar Lal*, for the appellants.

Pandit *Moti Lal Nehru*, and Babu *Iswar Suran*, for the respondents.

* First Appeal No. 242 of 1904, from a decree of Babu Achal Bihari, Subordinate Judge of Gorakhpur, dated the 11th of July 1904.

(1) F. A. No. 63 of 1903, decided 20th April 1905. (2) (1906) I. L. R., 26 All., 593.

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STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit for sale on several mortgages, but the only one with which we are concerned is a mortgage of the 4th of September, 1894. By that mortgage 16 villages were hypothecated in favour of the plaintiffs to secure a sum of Rs. 32,000. There was a prior mortgage in existence at the date of this mortgage, namely, a mortgage of the 15th of December 1888, in favour of the same mortgagees. A suit was brought on foot of this mortgage, and a decree for sale was passed thereon, in execution of which 10 out of the 16 villages were sold and purchased by the plaintiffs, the mortgagees. The suit which has given rise to this appeal was brought by the plaintiffs on the 23rd of April 1904, for sale of the remaining six villages to satisfy the later mortgage of the 4th of September 1894. The learned Subordinate Judge has given a decree for the sale of these villages, but decided that they were not liable to satisfy the whole of the mortgage debt, but only so much of it as is rateably attributable to them, holding that the 10 villages which had been previously sold must be treated as liable to satisfy a proportionate share of the mortgage-debt. In the course of his judgment the learned Subordinate Judge says:—"The plaintiffs say that they have a right to proceed against the six unsold villages mortgaged in this bond and to charge the whole amount upon them. I think this the plaintiffs cannot do. The above villages were liable to pay not only the amount due on the bond of 1888, but also a proportionate amount of the sum due on the bond in suit. As the plaintiffs have become the owners of these villages by their purchase at auction, they must contribute rateably towards the claim under the bond of 1894." We are wholly unable to agree with the learned Subordinate Judge in the view which he thus expressed. The 10 villages were sold to satisfy the earlier mortgage of the 15th of December 1888; and having been sold, those 10 villages must be treated as having been withdrawn from the operation of the later mortgage of the 4th of September 1894 by title paramount. This left the remaining villages alone liable to satisfy the puisne incumbrance. The learned Subordinate Judge is wrong in supposing that because the plaintiffs became the purchasers of the 10 villages, they must be treated as being in a different position from the

position of a stranger if a stranger had purchased at the auction sale. This is not a correct view of the matter. It is immaterial whether it was a stranger who purchased at the auction sale held in execution of the decree on the earlier mortgage or the plaintiffs to the suit. The fact that the plaintiffs became the purchasers cannot be regarded as having the effect of making the property which was included in the earlier mortgage responsible for the satisfaction of a later incumbrance. This question has been already decided by this Bench in *Zahir Singh v. Bansi Singh* (1). It was also the subject of decision in the case of *Bohra Thakur Das v. The Collector of Aligarh* (2).

We therefore allow the appeal, modify the decree of the Court below and give a decree to the plaintiffs for the relief claimed in the plaint, that is, for the recovery of the entire amount of their debt as against the six villages remaining subject to their mortgage in default of payment by the mortgagors of the amount found to be due. We extend the time for payment for a period of six months from this date. We direct that the decree be modified accordingly. The appellants will have their costs of this appeal.

Decree modified.

FULL BENCH.

1906
December 22.

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

MULCHAND AND OTHERS (DEFENDANTS) v. MUHAMMAD ALI KHAN

(PLAINTIFF) AND JADDU BIBI AND OTHERS (DEFENDANTS)*

*Civil Procedure Code, section 396—Partition—Commission to make partition—
Issue of commission to one person only.*

A Court issuing under section 396 of the Code of Civil Procedure a commission to make partition of immovable property not paying revenue to Government cannot legally issue such commission to one commissioner only.

Per RICHARDS, J.—But there is nothing to prevent the parties to partition proceedings agreeing that one commissioner only should be appointed; nor does it follow that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed.

* Second Appeal No. 811 of 1904 from a decree of J. Denman, Esq., District Judge, Cawnpore, dated the 1st of August 1904, modifying a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 31st of March 1904.

(1) F. A. No. 63 of 1903, decided
20th April 1905.

(2) (1906) I. L. R., 28 All., 593.