

1908

GAJADHAR
v.
MUSAMMAT
KAUNSILLA.

He urges that the right to maintenance has ceased because the relationship with the first husband's family has ceased; but in view of the rulings to which I have referred this contention cannot be accepted. If the widow even after remarriage is entitled to retain the estate of her first husband, she is *a fortiori* entitled to receive the maintenance fixed for her by the decree passed against her husband and against the transferees of his estate. The appeal therefore fails and must be dismissed.

STANLEY, C.J.—I agree in the proposed order.

Appeal dismissed.

1908

December 23.

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

HAR PRASAD (DEFENDANT) v. RAGHUNANDAN PRASAD AND OTHERS
(PLAINTIFFS).*

Act No. IV of 1882 (Transfer of Property Act), sections 82 and 100 - Mortgage—Effect of satisfaction of entire mortgage debt by one co-mortgagor—Charge—Subrogation.

Held (1) that a mortgagor who discharges the whole mortgage debt obtains thereby a charge on his co-mortgagor's share of the mortgaged property in respect of the amount paid by him in excess of the share of the mortgage debt for which he is proportionately liable; and (2) that such charge takes priority over a subsequent mortgage on the same property created by one of the other co-mortgagors. *Bhagwan Das v. Har Dei* (1) and *Pancham Singh v. Ali Ahmad* (2) referred to.

THE facts of this case are as follows:—

On the 25th May, 1892, Umrao and Piare Lal executed a mortgage in favour of Brij Lal and Lala Nanhe Mal for Rs. 2,500. On the 6th of January, 1890, Shib Lal and Piare Lal ancestors of defendants Nos. 1, 2 and 3, had executed a mortgage in favour of one Ghumi Mal. The whole of the mortgage money due under the bond was alleged to have been paid off by Har Prasad alone, son of Shib Lal, after the mortgage of the 25th May, 1892, was executed. The present suit was brought by the mortgagees to enforce their mortgage of the 25th May, 1892. To this suit, Har Prasad, son of Shib Lal, was made a defendant on his application. He contended that he had paid Piare Lal's share also of

* First Appeal No. 66 of 1907, from a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 7th of December 1906.

(1) (1903) I. L. R., 20 All., 227. (2) (1881) I. L. R., 4 All., 58.

1908

 HAR
 PRASAD
 v.
 RAGHUNAN-
 DAN
 PRASAD.

the mortgage money due under the mortgage of 6th January, 1890, and so had acquired the title of a prior mortgagee in respect of the mortgage money due from Piare Lal and the property hypothecated. The Lower Court (Subordinate Judge of Bareilly) held that he had acquired no charge by the payment he claimed to have made. The defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant, submitted that a co-debtor had a charge over his other co-debtor's property for any payment made on his behalf. The charge no doubt arose on the date of payment, but as Har Prasad discharged a prior debt, he was entitled to priority. To ascertain priority, the date of the debt which was discharged should be looked to and not the date of actual payment. There was no difference in principle between the position of a subsequent mortgagee in this respect and that of a subsequent charge holder. He cited *Bhagwan Das v. Har Dei* (1).

Dr. *Satish Chandra Banerji* (with him Pandit *Moti Lal Nelru*), for the respondents, admitted in view of the rulings of this court, that Har Prasad would acquire a charge, but contended that the charge had not a retrospective effect. Section 74 of the Transfer of Property Act dealt with the right of a subsequent mortgagee to pay off a prior mortgage and under that section the subsequent mortgagee acquired all the rights of the prior mortgagee. The language of section 95, however, was different. It only gave the co-mortgagee a charge which was distinct from a mortgage. Section 100 dealt with charges.

A mortgagor paying off the entire debt would not become the prior mortgagee or step into his shoes, nor would a co-mortgagor. The latter's charge would come into existence when the payment was made and there was no analogy between this right of the co-mortgagor and the right by subrogation which the subsequent mortgagee acquired under section 74. A statutory charge was not to be confounded with a mortgage.

Babu *Jogindro Nath Chaudhri* replied.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit for sale on a mortgage executed on the 25th of May, 1892, by two persons, Umrao and Piare Lal. One of the properties

1908

HAR
PRASAD
v.
RAGHUNAN-
DAN
PRASAD.

mortgaged is a five-biswa share in the village Meadi Khurd. A two-biswa share in that village had been mortgaged to one Ghumi Mal by Piare Lal on the 6th of January, 1890. To this mortgage Shih Lal, the father of Har Prasad, defendant, was also a party. Har Prasad, who was added as a defendant, contended that he had discharged the debt due on the aforesaid mortgage and had thereby acquired a prior charge on the two biswa share of Piare Lal mortgaged to Ghumi Mal and that the plaintiffs were bound to pay the amount which he, Har Prasad, had paid to Ghumi Mal before they could bring to sale a two-biswa share of the village Meadi Khurd. This contention was overruled by the court below on two grounds: first that if Har Prasad discharged the prior mortgage he did not thereby acquire a charge on the property of Piare Lal; and second that even if he acquired a charge he could not enforce it against the plaintiffs, who were puisne mortgagees. The correctness of these findings is impugned in this appeal which was brought by Har Prasad.

The lower court's view that a mortgagor, who discharges a simple mortgage, does not thereby acquire a charge on the property of his co-mortgagor comprised in the mortgage for a rateable share of the debt, is clearly erroneous. By virtue of the provisions of sections 82 and 100 of the Transfer of Property Act a charge is acquired by a co-mortgagor redeeming a mortgage. This was held in *Bhagwan Das v. Har Dei* (1). If therefore Har Prasad, who upon the death of his father, Shih Lal, became the co-mortgagor of Piare Lal in respect of the mortgage of the 6th of January, 1890, discharged that mortgage, he acquired a right to obtain contribution from Piare Lal and a charge for the amount of the contribution on Piare Lal's two-biswa share.

The next question is whether this charge can take priority over the plaintiffs' mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage, he acquired we think priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee or the purchaser of the equity of redemption who pays off a prior mortgage, acquires, on equitable grounds, priority over a puisne

mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other. The rule of subrogation is founded on equitable principles and if a subsequent mortgagee or purchaser is subrogated to the rights of the prior mortgagee whose debt he discharges, a co-mortgagor is equally subrogated. It was held by this Court in *Pancham Singh v. Ali Ahmad* (1) that a co-mortgagor who discharged the whole amount of the mortgage debt acquired the rights of the mortgagee. The same rule is applied by the courts in America. It is thus stated in Jones on *Mortgages*, Vol. I, para. 877 :—“ When a mortgage is paid by one entitled to redeem who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property and holds the title so acquired as against subsequent incumbrances In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it.” In the present case Har Prasad, who was one of the mortgagors, was entitled to redeem Ghumi Mal, but he was under no obligation as between himself and Piare Lal to pay the latter's share of the debt. He could not redeem the mortgage piecemeal and was therefore bound to pay the whole amount of the mortgage. If he paid that amount he was by such payment subrogated to the rights of the mortgagee and was entitled to priority over the subsequent mortgagees, who appear from their mortgage deed to be the sons of the prior mortgagee whose prior mortgage is mentioned in that deed. We have not been referred to any authority in support of the view of the learned Subordinate Judge. For the reasons

1908

 HAR
 PRASAD
 v.
 RAGHUNAN-
 DAN
 PRASAD.

(1) (1881) I. L. R., 4 All., 58.

1908

HAR
PRASAD
v.
RAGHUNAN-
DAN
PRASAD.

stated above we hold that if Har Prasad discharged the mortgage of the 6th of January, 1890, he acquired priority over the plaintiffs, as regards two biswas of Meadi Khurd, to the extent of the proportionate liability of that property for the mortgage debt. The court below has not found whether he has paid off that debt, and, if he has done so, what is the proportionate amount of liability of the aforesaid share for that debt. We accordingly refer the following issue to that court under the provisions of section 566 of the Code of Civil Procedure :—

Did Har Prasad pay the amount due upon the mortgage of the 6th of January, 1890, and if so, for what portion of that amount was the two-biswa share of the village Meadi Khurd comprised in that mortgage proportionately liable ?

The court below will take such additional evidence relevant to the above issue as may be necessary. On receipt of its findings ten days will be allowed for filing objections.

Case remanded.

1909
January 8.

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

HAMID-UN-NISSA BIBI (PLAINTIFF) v. NAZIR-UN-NISSA AND ANOTHER (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act, section 53—Transfer with intent to defeat or delay creditors—Muhammadian law—Transfer by Muhammadan to one of his wives with intent to defeat claim of the other for dower.

A few days after the institution of a suit against him by his first wife for recovery of her dower, a Muhammadan, who had two wives, transferred the bulk of his property to his second wife in satisfaction of her claim for dower. *Held*, on suit by the first wife to have the transfer above mentioned set aside, that such transfer was not necessarily unimpeachable, but that it was necessary to find, first, that the transfer was a real, and not merely a colourable transaction ; and, secondly, that the second wife had not combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claim of the first wife.

THE facts out of which this appeal arose are as follows :—

One Ali Jawad had two wives, Hamid-un-nissa and Nazir-un-nissa. On the 1st December 1904, Hamid-un-nissa

* Second Appeal No. 1324 of 1907, from a decree of C. Rustomjee, District Judge of Allahabad, dated the 3rd June 1907, confirming a decree of Raj Nath Sahib, Subordinate Judge of Allahabad, dated the 16th of May, 1906.