P. C.
1910
June 8, 9,
July 25.

BOHRA THAKUR DAS AND OTHERS (PLAINTIFFS), v. COLLECTOR OF ALIGARH AND OTHERS (DEFENDANTS),
and another appeal consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Mortgage—Redemption—Act No. IV of 1882 *(Transfer of Property Act), section 72—Purchase by mortgagee of portion of mortgaged property—Right of mortgagee to put whole burden of mortgage debt on remainder—Enhancement of revenue assessed on mortgaged property whose mortgagor makes himself liable for it and mortgagee pays it to protect property.*

In 1868 a village named Kachaura was mortgaged to the predecessors of the respondent (defendant); and in 1870 the same mortgagor mortgaged 11 biswas of Kachaura and 6 biswas of another village called Agrana to the same mortgagee. Under the terms of the later mortgage the mortgagee was to have possession of the mortgaged properties, realize the rents and profits, and pay therewith the Government revenue which was separately assessed on the two shares: out of the balance he was to retain the interest of the loan, and pay the mortgagor a yearly sum as malikana. As a fresh settlement was in progress the mortgage further provided that "if at the recent settlement the Government revenue is enhanced or decreased to some extent I (the mortgagor) shall be entitled to and liable for it, and the mortgagee shall have nothing to do with it." The revenue on the two properties was enhanced, on Kachaura by Rs. 895, and on Agrana by Rs. 469. In 1873 the equity of redemption in Agrana was purchased by the predecessor of the appellants (plaintiffs) who afterwards sued and obtained a decree for the apportionment of the malikana due in respect of his share of Agrana which amount they subsequently received annually less the enhanced amount of the Government revenue assessed on it. In 1878 the mortgagee purchased the whole of Kachaura in execution of a decree obtained by him on the mortgage of 1868, but he only obtained possession of an 11 biswas share of it. The mortgagee had from the date of the enhancement up to the time of his purchase paid the enhanced revenue assessed on Kachaura for which the mortgagor had made himself liable on the terms of the mortgage. In a suit by the appellants to redeem their 6 biswas share of Agrana on payment of a proportionate amount of the mortgage money, and for surplus profits if any.

Held by the Judicial Committee (affirming the decree of the High Court) that Agrana was liable for the whole mortgage debt, and the appellants could not therefore redeem on payment of only a proportionate amount.

Held also (reversing the decree of the High Court) that in calculating the amount to be paid on redemption the mortgagee was not entitled to tack on to the mortgage debt the amount he had paid for the enhanced revenue on Kachaura. The mortgagee was, on the terms of the mortgage, liable to pay the Government revenue. The clause as to the enhanced revenue could not be construed as meaning that the mortgagor agreed to pay every year separately the enhanced revenue, nor did it alter the liability of the mortgagee to meet the demand for the Government revenue. In the case of Agrana he had protected

PRESENT:—Lord ATKINSON, Lord SHAW, Sir ARTHUR WILSON and Mr. AMEER ALI.

himself by deducting the enhanced revenue from the malikana ; but he had omitted to do so in the case of Kachaura, and could not now be allowed to throw the burden of his laches on Agrana. It was not the mortgagor who was seeking to redeem the property, and any equity that might have been invoked against him, did not, in their Lordships' opinion, arise as against the appellants.

Appeals 43 and 44 (two appeals consolidated) from judgements and decrees (10th April, 1906) of the High Court at Allahabad in second appeals 265 and 298 of 1904, in the former of which second appeals the High Court upheld a decree of the District Judge of Aligarh, and in the latter varied a decree of the same Court.

The suit out of which these appeals arose was one for redemption of a mortgage, in which the Courts below differed as to the amount of redemption money payable by the plaintiff: and the main question for determination in the present appeals related to the amount so payable under the law and the terms of the mortgage in suit.

The facts are fully stated in the report of the hearing of the case in the High Court, which will be found in I. L. R., 28 All., 593: they are also given in the judgement of their Lordships of the Judicial Committee.

The mortgaged property consisted of two villages, Kachaura and Agrana. On 21st December, 1868, one Gardiner mortgaged the whole of Kachaura to Nand Kishore (the predecessor in title of the defendants now 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. The later mortgage contained a condition that if the Government revenue were enhanced the mortgagor would be liable for the amount of the enhancement. It was enhanced, and on failure of the mortgagor to pay, the defendant mortgagee paid it to protect the property from sale. The mortgagee obtained a decree on the mortgage of 1868, and under that decree the whole of Kachaura was sold on 20th June, 1878, and was purchased by Nand Kishore himself (the mortgagee) and the widow of Dwarka Das. The plaintiffs acquired the equity of redemption of 5¼ biswas in Agrana, and brought the suit out of which the present appeals arose for redemption on payment of a proportionate amount of the mortgage money.

1910

BOHRA THAKUR DAS v. COLLECTOR OF ALIGARH.

Of the issues raised those now material were—

"1. Was the whole of the mortgage debt chargeable on Agrana only? Was the unity of the mortgage split up by the sale of the 20th June, 1878? Is not the plaintiff entitled to redeem only a part of the mortgaged property?

"2. Was any and what sum payable to the defendants on account of enhanced revenue?

"9. What is the entire amount to be paid for the purpose of obtaining redemption?"

The Subordinate Judge recorded that the plaintiffs were willing to redeem the whole 6 biswas of Agrana, and on the 1st issue he found on the facts that the whole debt had to be accounted for as if the village Agrana alone had originally been mortgaged, and that upon it the whole mortgage debt was chargeable. With regard to the 2nd issue he decided that the defendants were entitled to the enhanced revenue of Agrana only, and not to the enhanced revenue of Kachaura: and on 23rd December, 1902, with reference to the 9th issue he decreed that Rs. 7,585-12-1 was the amount to be paid by the plaintiffs to the defendants for redemption and that on receipt of that sum the defendants should reconvey the property to the plaintiffs free of encumbrances.

Both parties appealed to the District Judge, who, on 2nd January, 1904, disposed of the appeals in two separate judgements. With regard to the defendants' appeal he held that the plaintiffs were not liable to pay the increased amount of Government revenue assessed and paid by the defendants in respect of the village Kachaura.

On the plaintiffs' appeal the District Judge modified the decree of the Subordinate Judge in regard to certain items of account, but on the question whether the plaintiffs could redeem the 6 biswas of Agrana by paying only a proportional part of the debt, he agreed with the Subordinate Judge in holding that, the Kachaura property being no security at all for the mortgage debt, the Agrana property was liable for the whole debt, and could not be redeemed without payment of the whole. The result of the two appeals to the District Judge was that the amount decreed by the Subordinate Judge was reduced to Rs. 6,870-11-8.

Each party preferred an appeal to the High Court, which were decided by a divisional Bench of that court (Sir GEORGE KNOX, Acting C. J., and AIKMAN, J.). The plaintiffs' appeal was numbered 265, and that of the defendant 298 of 1904.

On the plaintiffs' appeal the High Court was of opinion that the view taken by the lower courts was right and dismissed the appeal. On the defendant's appeal after a remand to the District Judge to inquire "what was the increased amount of Government revenue between the years 1873 and 1878 which the mortgagee paid on behalf of the mortgagor on account of the village Kachaura" the High Court held that the defendants were entitled to the amount of Rs. 895-15-9 which they had paid for each of the years from 1873 to 1878 inclusive, with 12 per cent. interest on each payment. To that extent they varied the judgement of the District Judge, and as to the rest of the appeal they dismissed it. The High Court judgements are reported at pages 595 to 599 of I. L. R., 28 All.

On these appeals,

DeGruyther, K.C., and *B. Dube* for the appellants contended that the mortgagee was not empowered to pay the enhanced amount of Government revenue in face of a distinct agreement to the contrary embodied in the deed of mortgage, and he was not now entitled to tack the enhanced amount of revenue so paid for Kachaura to the principal debt and to realize the same from the other mortgaged property which the High Court had wrongly held could be done. Reference was made to the Transfer of Property Act (IV of 1882), sections 72 and 76, and to the cases upon which the High Court had relied—*Kamaya Naik* v. *Devapa Rudra Naik* (1) and *Girdhar Lal* v. *Bhola Nath* (2), which, it was contended, were distinguished from the present case, on the ground that here the payment by the mortgagee of the enhanced revenue did not create a lien on the property, though it might be recoverable from the mortgagor in an action for breach of covenant; but the question of there being a personal covenant by the mortgagor to repay such amounts did not arise in the present case as the appellants were not the mortgagors, but merely purchasers. The sums paid were payments which the mortgagee was

(1) (1896) I. L. R., 22 Bom., 440. (2) (1888) I. L. R., 10 All., 611.

1910

BOHRA THAKUR DAS v. COLLECTOR OF ALIGARH.

bound to make. On the terms of the mortgage deed the mortgagee was not entitled to any interest on the enhanced amount of Government revenue, and in any case interest at 12 per cent. per annum should not have been allowed. It was also contended that a portion of the mortgaged property having been purchased by the mortgagee himself the appellants were entitled to redeem the remainder (i.e. Agrana) on payment of a proportionate amount of the mortgage money.

Ross and *A. M. Dunne* for the respondent, the Collector of Aligarh, contended that it had been rightly held by the High Court that the appellants were not entitled to redeem the 6 biswas of Agrana on payment of only a proportionate amount of the mortgage money; that under the circumstances of the case the burden of the second mortgage fell entirely upon Agrana; and that the respondents were entitled to get from the appellants the enhanced Government revenue assessed on Kachaura for the years 1873 to 1878 with interest thereon at 12 per cent. per annum. The cases cited by the High Court were in point and should be followed in principle. The mortgagor did not, as he covenanted to do, pay the enhanced revenue, and consequently the mortgagee had himself to pay it to save the mortgaged property from being sold for arrears of revenue, and it should be credited to him in calculating the amount due on redemption.

DeGruyther, *K.C.*, replied, citing *Girdhar Lal* v. *Bhola Nath* (1), where it was said that though the mortgage was executed before the Transfer of Property Act came into force, yet section 72 of that Act was only a reproduction of the old law previous to that Act, and referring to section 90 of the Indian Trusts Act (II of 1882); section 69 of the Contract Act (IX of 1872) and *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (2).

1910 *July 25th*:—The judgement of their Lordships was delivered by Mr. AMEER ALI:—

These two appeals, which have been consolidated by an Order of His Majesty in Council, arise out of a suit for redemption brought by the appellants in the Court of the Subordinate Judge of Aligarh in the United Provinces.

(1) (1888) I. L. R., 10 All., 611 (614). (2) (1887) I. L. R., 14 Calc., 809 (825).

191

BOHRA THAKUR DAS v. COLLECTOR OF ALIGARH.

The property in suit, a 6-biswa share of mauza Agrana, was, with an 11-biswa share of mauza Kachaura, mortgaged in January, 1870, by a Mr. William L. Gardiner to one Bakhshi Nand Kishore, since deceased, for a sum of Rs. 5,000. Under the terms of the mortgage the mortgagee was to have possession of the mortgaged properties, realize the rents and profits and pay therewith the Government revenue which was separately assessed on the two shares. Out of the balance he was to retain Rs. 600 for the interest on the loan and pay the mortgagor a yearly sum of Rs. 2,400 as *malikana* or proprietor's allowance. In view of settlement proceedings in progress at the time, the deed further provided that "if at the recent settlement the Government revenue, which is paid at present, is enhanced or decreased to some extent, I [meaning the mortgagor] shall be entitled and liable for it, and the mortgagee shall have nothing to do with it."

As a matter of fact, the revenue respectively assessed on the two properties was enhanced, in the case of Kachaura by Rs. 895; in that of Agrana by Rs. 469.

On 20th December, 1873, the equity of redemption in Agrana was acquired by the predecessor in title of the appellants, who afterwards sued and obtained a decree for the apportionment of the *malikana* due in respect of the 6-biswa share of Agrana. Admittedly, the plaintiffs appellants have since received from Nand Kishore or his representatives the *malikana* for Agrana less the enhanced amount of the Government revenue assessed on it.

William Gardiner appears to have executed in 1868 a simple mortgage of Kachaura in favour of Nand Kishore and another, who in 1878 purchased the property in execution of a decree on their mortgage. They obtained possession, however, of only an 11-biswa share under a decree of the Court.

In the present suit the appellants seek to redeem Agrana upon payment of a proportionate share of the Rs. 5,000; their contention being that as Nand Kishore purchased one of the properties on which the mortgage debt was secured, it was *pro tanto* satisfied, and Agrana was only liable for the share legitimately chargeable on it. As Kachaura was sold and purchased

1910

BOHRA THAKUR DAS v. COLLECTOR OF ALIGARH.

by Nand Kishore in execution and part satisfaction of a decree obtained on the prior mortgage of 1868, the courts in India properly overruled the appellant's contention which has not been pressed before this Board.

Agrana, therefore, is now liable for the entirety of the mortgage debt. But the defendant, the Collector of Aligarh, representing the estate of Nand Kishore, among other pleas, urged that the mortgagee had from the date of the enhancement up to the time of his purchase paid the additional revenue assessed on Kachaura for which the mortgagor had made himself liable, and he was consequently entitled to tack on to the mortgage debt the amounts so paid, with interest from 1873 to 1878.

This claim was disallowed by the court of first instance whose judgement was affirmed by the District Court. In second appeal by the defendant the High Court of Allahabad has taken a different view. It has held upon the construction of the clause in the mortgage bond relating to the liability of the mortgagor in case of enhancement of Government revenue that, as the mortgagor did not fulfil his promise to pay the enhancement, and that consequently the mortgagee had himself to pay the enhancement to save the property from being proceeded against for arrears of Government revenue, the defendants were entitled to the amount of Rs. 895-15-9, which they paid from 1873 to 1878 inclusive, with interest. The accounts taken on this basis have swelled the amount payable by the appellants in order to redeem Agrana to over Rs. 30,000.

Their Lordships regret they cannot concur with the learned Judges of the High Court either in the construction of the clause under reference or in the view they have expressed regarding the liability for the payment of the enhanced amount of the assessment on Kachaura. The mortgage bond provided that the mortgagee should, like the mortgagor, remain in possession of the mortgaged properties during the term of the mortgage, and "pay the Government revenue of his own authority." He had thus undertaken the duty of meeting the Government demand. The provision was as much for his own safety as that of the mortgagor. The condition as to mutation of names may be taken to have been duly carried out and his name placed on the Collector's Register

as mortgagee in possession. The demand for payment of Government revenue would in the ordinary course be made upon him.

The *malikana* had been fixed on the basis of the existing revenue on the two properties; but as settlement proceedings were pending which involved a possibility of a modification in the assessment, the parties provided that in case of reduction the mortgagor should have the benefit, whilst in case of enhancement the liability should be his. In other words, if the assessment was lowered, he would receive more by way of *malikana*, whilst if it was enhanced he would be entitled to less.

Their Lordships do not understand that the mortgagor by the clause under reference, agreed to pay year by year separately the enhanced amount to meet the Government demand, or that the clause in any way altered the liability of the mortgagee in possession to pay the Government revenue assessed on the mortgaged properties. The conduct of the mortgagee in respect of Agrana may be taken as affording some indication of the meaning the parties attached to the clause. After the decree for the apportionment of the *malikana* in respect of Agrana, he invariably deducted the additional amount of the assessment from the sum payable to the appellants. Instead of taking the same course with regard to Kachaura, he appears to have paid to the mortgagor the whole *malikana* less the share payable for Agrana.

In their Lordships' judgement the principle on which the learned Judges of the High Court have based their view of the rights of the parties is not applicable to the circumstances of the present case. It was the plain duty of the mortgagee to pay the Government revenue for both properties; in one case he took care to protect himself by deducting the enhanced revenue from the *malikana*; in the other he omitted to do so. Whatever the reason, he cannot be allowed now to throw the burden of his own laches on Agrana. In the present suit it is not the mortgagor who is seeking to redeem the property; and it seems to their Lordships that any equity that might have been invoked against him does not arise as against the plaintiffs.

On the whole their Lordships are of opinion that the decree of the High Court, dated the 10th April, 1906, in second appeal 265 of 1904, should be affirmed, and the decree of the High Court

1910

BOHRA THAKUR DAS v. COLLECTOR OF ALIGARH.

of even date in second appeal 298 of 1904, should be discharged, and in lieu thereof it should be ordered that the accounts between the parties should be taken on the lines laid down by the District Judge in partial modification of the order of the court of first instance. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships think that, in the circumstances, the parties should bear their respective costs before this Board and in the High Court.

Appeal 43 *dismissed.*

Appeal 44 *allowed.*

Solicitors for the appellant:—*Barrow, Rogers and Nevill.*

Solicitor for the respondent—The Collector of Aligarh:—*The Solicitor, India Office.*

J. V. W.

1910.
May 25.

REVISIONAL CRIMINAL.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

EMPEROR *v.* BALDEO PRASAD.*

Act (Local) No. 1 *of* 1900, *(United Provinces Municipalities Act), section* 147—*Municipal Board—Jurisdiction—Prosecution in respect of matter concerning which a civil suit was pending.*

The plaintiff to a suit against a Municipal Board was permitted by the court to erect certain structures as specified in the decree of the court. Subsequently a dispute arose as to whether the structures which the plaintiff had erected were within or in excess of the powers given to him by the decree, and the Court decided, and the Board did not contest its decision, that the plaintiff had exceeded his rights under the decree, and that some portion of the said structures must be demolished. The Board meanwhile took action against the plaintiff under section 147 of the United Provinces Municipalities Act, 1900. *Held* that it was not open to the Board to prosecute the plaintiff in respect of the structures, pending the decision of the Civil Court and to continue the prosecution after its decision.

THE facts of this case were as follows:—

One Baldeo Prasad brought a suit against the Etawah Municipality, and in the appellate court a decree was given under which the Municipal Board had to make certain constructions, and in default of their doing so, the applicant was to make them and recover the cost from the Board. The Board failed to

* Criminal Reference No. 186 of 1910.