

would use ordinary prudence if he had resort to arrest instead of serving a writ of demand.

For a defaulter to escape from a custody in which he has been locked and detained is not a very grievous offence; still it is an offence in which the authority of the officer who issued it is set at defiance, and that authority must be maintained. The sentence which we propose to pass is not to be looked upon as a sentence which is generally passed in such cases. We take this more or less to be a test case, and we trust that when it is known that escape from such custody is an offence, the commission of such an offence will be avoided. We direct that, under section 225B of the Indian Penal Code, Gulab Singh, Bishnath Singh, Chatar Singh and Baldeo Singh, suffer, each and all of them, simple imprisonment for seven days from the date of their arrest.

Appeal allowed.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
SHAM DEI AND ANOTHER (PLAINTIFFS) v. BALJIT SINGH AND OTHERS
(DEFENDANTS.)*

Civil Procedure Code (1882), sections 13, 43—Mortgage—Prior and subsequent mortgages—Mortgaged property brought to sale and purchased by each mortgagee separately, the other not being made a party—Suit by prior mortgagee to bring to sale part of the mortgaged property in the hands of the subsequent mortgagee to recover unsatisfied balance of the mortgage debt.

The prior mortgagee of mortgaged property brought the whole of it to sale without impleading the subsequent mortgagee of a portion and purchased the mortgaged property himself. The subsequent mortgagee in turn brought a portion of the mortgaged property to sale without impleading the prior mortgagee and also himself became the purchaser. The prior mortgagee, after an unsuccessful attempt to recover from the subsequent mortgagee possession of the mortgaged property so purchased, sued to bring that property to sale for the realization of the unrecovered balance of the original mortgage money.

Held, that the suit was maintainable and was not barred by either section 13 or section 43 of the Code of Civil Procedure (1882).

THE facts of this case were as follows:—

On the 25th of February, 1874, Baljit Singh, Sarup Singh, Gopal Singh and Chandan Singh, members of a joint Hindu

* First Appeal No. 296 of 1907, from a decree of Pitambar Joshi, Additional Subordinate Judge of Aligarh, dated the 19th August 1907.

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family, mortgaged to Lachman Das a $4\frac{1}{2}$ biswa share in a village, along with some other properties, situate in other villages, for the sum of Rs. 12,000 with interest at Re. 1-2-0 per cent. per month. On the 29th of July, 1881, the sons of Lachman Das obtained a decree against the executants of the mortgage and some other members of the joint family on foot of the mortgage of the 25th February, 1874, and on 28th April, 1885, got the $4\frac{1}{2}$ biswa share of the village sold in execution of their decree and purchased it in the name of their mother Musammat Sohini. Out of this share was formed afterwards a separate mahal of 4 biswas. Later on a partition took place among the sons of Lachman Das and the 4 biswa share was allotted jointly to the plaintiff appellant Musammat Sham Dei, widow of one of the sons of Lachman Das, and Musammat Gobindi, widow of another son of Lachman Das. There was an unrealized balance of the decree against Baljit and others amounting to Rs. 30,000. This fell to the share of Musammat Sham Dei alone.

On the 18th of January, 1880, Chandan Singh and two other members of the joint family, Kanhai Singh and Durjan Singh, had mortgaged a 2 biswa 6 biswansi share out of the $4\frac{1}{2}$ biswa share of the village to one Banshi Dhar, but to the decree obtained by the sons of Lachman Das on the 29th July, 1881, Banshi Dhar had not been made a party. On 9th August, 1884, Banshi Dhar obtained a decree on foot of his mortgage without impleading Lachman Das' heirs. On the 16th of January, 1895, Banshi Dhar applied for execution of his decree by sale of a 13 biswansi $6\frac{1}{2}$ kachwansi share and Musammats Sham Dei and Gobindi were made parties in this application. Sham Dei and Gobindi objected that they were no parties to the decree and their names were removed from the array of parties. The execution proceedings were, however, proceeded with and the 13 biswansi $6\frac{1}{2}$ kachwansi share was sold by auction and purchased by Banshi Dhar. On the 18th of January, 1897, Banshi Dhar obtained possession of the share. On the 4th of January, 1899, Sham Dei and Gobindi brought a suit against the legal representatives of Banshi Dhar for possession of the 13 biswansi $6\frac{1}{2}$ kachwansi share on the ground of their prior purchase. This suit, though decreed by the lower court, was dismissed by the High Court in 1903 on the ground that Banshi Dhar was

no party to the decree obtained by the sons of Lachman Das in 1881 and therefore the title of the plaintiffs was not of a character which would justify the ousting of the defendants, though there was a flaw in the title of the latter. The suit out of which this appeal has arisen was brought by Sham Dei and her adopted son for sale of the 13 biswansi and 6½ kachwansi share for a part of Rs. 30,000 which was still due on the original mortgage and which had fallen to her share. The suit was dismissed by the lower court on the ground that a suit for a part of the unrealized portion of the debt was not maintainable.

Babu Durga Charan Banerji (with him Babu Purushottam Das Tandan for Pandit Moti Lal Nehru), for the appellants, submitted that the suit was maintainable and that the money being due on the original bond, every portion of the property hypothecated in the bond was liable to be sold for the debt. The earlier suit brought by Sham Dei and Gobindi had been rightly dismissed by the High Court, because no opportunity had been ever given to Bansi Dhar or his heir to redeem the property mortgaged to him, he having not been made a party to the decree obtained by the heirs of Lachman Das in 1881. That opportunity was given now by impleading the representatives of Bansi Dhar. He cited *Balmakund v. Musammatt Sangari* (1) and *Kudratullah v. Kubra Begam* (2).

The Hon'ble Pandit Sundar Lal (with him Mr. M. L. Agarwala, Babu Satya Chandra Mukerji, Munshi Gulzari Lal and Babu Girdhari Lal Agarwala), for the respondents :—

The suit is practically one for foreclosure of the right of redemption of the puisne mortgagee. The puisne mortgagee has a right to redeem the whole of the property. Therefore an opportunity should be given to him to pay the whole amount of the mortgage and redeem the whole property. The first sale is wholly void.

STANLEY, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was brought by two plaintiffs, namely Musammatt Sham Dei and Narain Das, for sale of a 13 biswansi and 6½

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(1) (1897) L. L. R., 19 ALL, 379. (2) (1900) L. L. R., 23 ALL, 25.

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kachwansi share in the village Dyanatpur, under a mortgage dated the 25th of February, 1874. The said mortgage was executed in favour of one Lachman Das by Baljit Singh, Sarup Singh, Chandan Singh and Gopal Singh. Lachman Das, the mortgagee, died leaving four sons—Nand Ram, Dila Ram, Makund Lal and Khusbi Ram. The plaintiff Sham Dei is the widow of Makund Lal. One of the defendant's, Musammat Gobindi, is the widow of Khusbi Ram. The plaintiff Narain Das is alleged to be the adopted son of Makund Lal, but this adoption is denied, and the question whether he is or is not the adopted son of Makund Lal has not been raised in this appeal. The learned *advocate* for the appellants has argued the case as if it were a suit by Musammat Sham Dei alone. After the death of Lachman Das a suit was brought for sale on the basis of the aforesaid mortgage by the four sons of Lachman Das on the 24th of February, 1880. They obtained a decree for sale from this Court on the 29th of July, 1881, against the mortgagors and other members of their family, including Kanhai Singh and Durjan Singh. The mortgage comprised, among other property, a $4\frac{1}{2}$ biswa share in the village Dyanatpur. This was sold by auction on the 20th of April, 1885, and was purchased by the decree-holders in the name of their mother Musammat Sohini. The purchasers had the village partitioned, and the $4\frac{1}{2}$ biswas share was formed into a 4 biswa mahal, which under a subsequent partition between the heirs of Lachman Das was allotted to the shares of Sham Dei and Gobindi. It is alleged that after the sale of the $4\frac{1}{2}$ biswa share and other property, a balance of Rs. 30,000 remained due upon the decree, and under the partition referred to above, the decree was allotted to the share of Sham Dei alone. On the 18th of January, 1880, Chandan Singh, Kanhai Singh, and Durjan Singh made a simple mortgage of 2 biswas 6 biswansis out of the $4\frac{1}{2}$ biswas mentioned above, in favour of Bansi Dhar, the adoptive father of Piare Lal, defendant No. 50. On the 1st of May, 1884, Bansi Dhar brought a suit upon the said mortgage against his mortgagors only and did not implead in it the heirs of Lachman Das. On the 9th of August, 1884, he obtained a decree for sale and in execution of that decree caused a 13 biswansi and $6\frac{1}{2}$ kachwansi share to be sold and himself purchased it on the 8th September, 1896. On the

4th of January, 1899, Sham Dei and Gobindi instituted a suit against Piare Lal and other purchasers from him for possession of the 13 biswansi $6\frac{1}{2}$ kachwansi share mentioned above on the ground that they were prior purchasers of the said property in execution of the decree passed on the mortgage of the 25th of February, 1874. This claim was dismissed by this Court, on the ground that Bansī Dhar was not a party to the suit brought by the sons of Lachman Das for sale under the mortgage held by them. Thereupon the present suit was brought for the sale of the 13 biswansi $6\frac{1}{2}$ kachwansi share for the realization of Rs. 5,100 out of the balance due under the mortgage of the 25th of February, 1874.

The Court below has dismissed the suit, being of opinion that it is not maintainable.

We are unable to agree with the learned Judge of the Court below. The legal representatives of Lachman Das were competent, in the suit which they brought to enforce the mortgage of the 25th of February, 1874, to add the second mortgagee Bansī Dhar as a party to their suit. In fact they were bound to do so for the purpose of giving to Bansī Dhar, who as subsequent mortgagee had a right of redemption, an opportunity to redeem their mortgage. This opportunity was not afforded to Bansī Dhar, and therefore the sale of the 13 biswansi $6\frac{1}{2}$ kachwansi share mortgaged to him was not binding on him. It was on this ground, as we have said above, that the plaintiff's suit against Bansī Dhar's legal representatives for possession of the aforesaid share was dismissed. The fact that Bansī Dhar was omitted from the suit brought upon the mortgage of 1874 does not preclude the present plaintiff, who has an interest in that mortgage, from maintaining the present suit and seeking to bring to sale the 13 biswansi $6\frac{1}{2}$ kachwansi share for the sale of which a proper decree had not been passed against Bansī Dhar. The object of the suit is to afford to Bansī Dhar's legal representatives an opportunity to redeem the aforesaid share from the mortgage of 1874. There can be no bar to such a suit. Sections 13 and 43 of the Code of Civil Procedure, 1882, are no bar to the suit, inasmuch as Bansī Dhar was not a party to the first suit. On this point there cannot be any doubt, and the court below is clearly in error in holding

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that the suit is not maintainable. There are other questions involved in the case. The plaintiff claims Rs. 5,100, alleging that amount to be part of the money due upon the mortgage of 1874, but as the mortgagees themselves have purchased portions of the mortgaged property, the joint nature of the mortgage has been severed and the owner of the 13 biswansi 6½ kachwansi share is only liable for that portion of the mortgage money which is proportionate to the aforesaid share of the mortgaged property. This is one of the questions which the court below will have to determine and which it has not determined. There are other questions also; for example, the question whether the 13 biswansi 6½ kachwansi share could be properly mortgaged by the persons who made the mortgage of 1874, and whether the mortgage of that share is a valid mortgage. As all these questions have not been properly tried by the court below, and as the suit has been dismissed upon a preliminary ground and its decision on that point is in our judgment erroneous, we allow the appeal, set aside the decree of the court below and remand the case to that court under the provisions of order 41, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and dispose of it on the merits, regard being had to the observations made above. Costs here and hitherto, will abide the event.

The objections under section 561 of Act No. XIV of 1882, preferred on behalf of certain respondents, necessarily fail and are dismissed with costs to be borne by the objectors.

Appeal allowed and cause remanded.