

1911

RAHIM-UN-
NISSA
v.
BADRI
DAS.

entitled to the benefit of the prior incumbrance, as against the incumbrances which had been created between the original mortgage and the new security. The same view seems to have been taken by both the High Courts of Calcutta and Madras. Mr. *Hamilton*, on behalf of the appellant, contends that the decree was actually satisfied by the sale-deed, and that the subsequent mortgage was a new arrangement altogether in which not only the old mortgage debt was satisfied but also a criminal charge compromised. We cannot take this view. It is clear that owing to the fact that the adjustment of the decree was not certified the property could be sold in execution of the decree, notwithstanding any adjustment. If the sale had taken place and the property had been sold to a third party, the latter would have got a perfect title and the sale would have been considered to be free of all incumbrances. We feel that we must regard the position of the parties without considering the complication of the sale of 1903, that is to say, we must deal with the case on the basis that prior to the actual sale of the property on foot of the mortgage decree the decree-holder took from the judgement-debtor a fresh mortgage for the amount due on foot of the decree. In our opinion, under these circumstances and on the authorities, the mortgagee is entitled to the benefit of the prior mortgage at least to the extent of all moneys secured by that mortgage. We dismiss the appeal with costs.

Appeal dismissed.

1911

January, 4.

Before Mr. Justice Richards and Mr. Justice Tudball.

PHULMANI CHAUDHRAIN (DEFENDANT) v. NAGESHAR PRASAD AND OTHERS (PLAINTIFFS).*

Mortgage—Prior and subsequent mortgagees—Sale of mortgaged property in execution of prior mortgagee's decree—Subsequent mortgagee no party hereto—Price to be paid by subsequent mortgagee on seeking to redeem.

A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the mortgaged property may have been purchased at an auction sale held in execution of a decree obtained by a prior mortgagee without joining the subsequent mortgagee as a party; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on the prior mortgage. *Dip Narain Singh v. Hira Singh* (1) applied.

* First Appeal No. 393 of 1909 from a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 13th of August, 1909.

THE facts out of which this appeal arose are fully stated in the judgement of the Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Dr. *Tej Bahadur Sapru* and *Munshi Iswar Saran*, for the respondents.

1911

 PRULMANI
CHAUDHRAIN

 v.
NAGESHAR
PRASAD.

RICHARDS and TUDBALL, J.J.:—The facts of the case out of which this appeal has arisen are as follows:—One Agar Singh was the owner of certain shares in seven villages, namely, Mania, Ramnapur, Kakrahu, Benipur, Belghata, Parsu, and Mahadani. His share in mauza Kakrahu was 14 annas. On the 9th of July, 1880, he mortgaged an 8 anna share in mauza Kakrahu and a share in mauza Mahadani to Sheo Charan Misra, the predecessor in title of the present plaintiff respondents for a sum of Rs. 555. On the 1st of December, 1883, he mortgaged an 8 anna share of mauza Kakrahu together with shares in mauza Mania, Ramnapur, Benipur and Belghata, to one Jiwan Das, for the sum of Rs. 11,500. On the 16th of June, 1885, he gave a second mortgage to Sheo Charan Misra of the whole 14 anna share in mauza Kakrahu and a share in mauza Parsu for the sum of Rs. 2,000. This Rs. 2,000 consisted of Rs. 1,500, due on the bond of 9th July, 1880, and Rs. 500, cash. Jiwan Das brought a suit on his bond of 1883 without making Sheo Charan Misra a party, and obtained a decree on the 15th of March, 1887. In execution of that decree, on the 20th of June, 1893, an 8 anna share in mauza Kakrahu, together with the shares in mauza Ramnapur and Belghata, was sold at auction and purchased by Musammam Karamraji Kunwari, the wife of Agar Singh, for the sum of Rs. 700. On the 10th of June, 1895, Karamraji Kunwari sold an 8 anna share in mauza Kakrahu to the appellant defendant for the sum of Rs. 4,100. The heirs of Sheo Charan Misra have now sued on the bond of 16th June, 1885, and have made the appellant defendant a party to the suit and seek to bring to sale the whole 14 anna share of mauza Kakrahu and the share in mauza Parsu. The actual amount due on their bond was over 3 lakhs of rupees. The amount due in respect of the sum of Rs. 1,500 (which was the debt due on the old bond of 1880) would come to over two lakhs of rupees. The plaintiffs, however, sued only to recover Rs. 30,000, and the lower court has held that

1911

PHULMANK
CHAUDHRAI
v.
NAGESHAR
PRASAD.

this is a part of the debt due in respect of the old mortgage of 1880. The appellant defendant pleaded that the bond of 1883 was prior to that of 1885, and that therefore, the plaintiffs could not bring to sale an 8 anna share of mauza Kakrahu unless they paid the whole amount due on the mortgage of 1883 or at least Rs. 4,100, the price which she had paid to Karamraji Kunwari, for this 8 anna share. The lower court held that out of this 8 anna share mortgaged in 1883, 6 annas were not mortgaged in the bond of 1880, but that the remaining 2 annas formed a part of that 8 anna share which was mortgaged under that bond; decreed the plaintiff's claim, and made the sale of this six anna share in mauza Kakrahu conditional upon the plaintiffs paying the sum of Rs. 700, to the defendant appellant. The defendant appellant appeals and urges that she is entitled to receive the sum of Rs. 4,100 before her six anna share can be put to sale. In our opinion the lower court's order in regard to the payment of Rs. 700 is clearly wrong. In the first place Rs. 700 is not the price which was actually paid at the auction sale for this six annas, but the price paid for 8 anna share in this village and shares in two other villages. In the second place the price paid at that auction sale is not a true measure, in our opinion, of what the plaintiffs respondents ought to pay in order to redeem the prior mortgage on the six anna share. The fact that Sheo Charan Misra was no party to the former suit which terminated in the decree of 15th March, 1887, left in Sheo Charan Misra the right to redeem the prior mortgage of the property. The right of the present defendant appellant is the right to have the mortgage redeemed. We fail to see on what principle she is entitled to receive merely the sum which was paid at the auction sale whether that was a high price or a low price. This was the view taken by a Bench of this Court in *Dip Narain Singh v. Hira Singh* (1), wherein it was held that a subsequent mortgagee is not entitled to redeem a prior mortgage by simply paying the price for which the prior mortgagee may have purchased the property at an auction sale held in execution of a decree obtained by him without joining the subsequent mortgagee as party; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount

due on his mortgage. The only difficulty in applying this principle to the present case is due to the fact that the prior mortgagee Jiwan Das and all those persons who may have purchased the mortgaged property in execution of his decree have not been made parties to this suit. There is nothing on the record to show whether or not the decree of the 15th of March, 1887, has been satisfied or in what manner it has been satisfied, if at all. There is nothing to show whether the other properties mortgaged were sold or not, and if sold, to whom and for what amounts. No objection was taken by the defendant appellant in the lower court as to the non-joinder of parties, and in this appeal she merely claims that she is entitled to receive the price which she paid to Karamaji Kunwari (not for the 6 anna share) but for the 8 anna share. In these circumstances it seems to us that the only equitable method of doing justice between the parties is to allow the plaintiffs respondents to bring this six anna share in mauza Kakrahu to sale conditional on their paying to the appellant that portion of the mortgage debt due on the bond of 1883 which can properly be attributed to the 6 anna share in dispute. In order to enable us to do this we must have findings by the lower court upon the following points, which we refer as issues under order 41, rule 25, of the Code of Civil Procedure:—(1) What was the total amount of the debt due on the bond of 1883 at the date of the sale, namely, the 20th of June, 1893? (2) What was the value of the property mortgaged in the bond of 1883 other than the six anna share of mauza Kakrahu on the date of the sale? And what was the value of the six anna share in mauza Kakrahu? (3) What was the proportionate part of the mortgage debt which could properly be attributed to the six anna share now in dispute? Fresh evidence may be taken, and the case will be put up on return of findings. Ten days will be allowed for objections.

1911

 PHULMANY
 CHAUDHURAI
 v.
 NAGESHAR
 PRASAD.

Issues remitted.