

## APPELLATE CIVIL.

1911

January, 3.

*Before Mr. Justice Richards and Mr. Justice Tudball.*

RAHIM-UN-NISSA (DEFENDANT) v. BADRI DAS (PLAINTIFF).\*

*Mortgage—Prior and subsequent mortgages—Decree obtained on a prior mortgage satisfied by execution of a fresh mortgage in favour of decree-holder—Priority over an intermediate mortgage.*

A decree for sale upon a mortgage of 1895 was obtained in 1901. In 1903 the decree-holder accepted in satisfaction of the decree a sale-deed of a certain portion of the mortgaged property, but this adjustment was never certified to the court. Subsequently the decree was put into execution and a sale was ordered, but before it was carried out the parties came to terms, and the judgment-debtor executed a fresh mortgage to secure the decretal amount. This was in May, 1904. Meanwhile, in April, 1904, another mortgage had been executed by the judgment-debtor. *Held* that the mortgage of May, 1904, being in satisfaction of the earlier mortgage of 1895 had priority over that of April, 1904. *Kanhaiya Lal v. Chedda Singh* (1) and *Shyam Lal v. Bashiruddin* (2) followed.

THIS was a suit brought to enforce a mortgage of date the 17th of May, 1904, executed under the following circumstances. The plaintiff mortgagee held a mortgage from the same mortgagor of the 6th of February, 1895. This mortgage was put into suit and a decree obtained on it, and eventually matters were arranged between the plaintiff and the defendant in this way that the plaintiff took a fresh mortgage for the decretal amount and the decree was entered up as satisfied. When the present suit was brought one of the defendants resisted it on the ground that she held a prior mortgage of the 25th of April, 1904. The court of first instance, however, held that this was of no avail against plaintiff's mortgage, inasmuch as he was entitled to claim priority in virtue of the original mortgage of 1895. The defendant mortgagee of April, 1904, appealed to the High Court.

Mr. A. H. C. Hamilton, for the appellant.

Dr. Satish Chandra Banerji, for the respondent.

RICHARDS and TUDBALL, J. J. :—This appeal arises out of a suit on foot of a mortgage dated the 17th of May, 1904. The plaintiffs stated in the plaint that the mortgage was made to satisfy a certain decree obtained on the 25th of February, 1901,

\* First Appeal No. 358 of 1909 from a decree of Kanhaiya Lal, Second Additional Judge of Meerut, dated the 29th of June, 1909.

on foot of a mortgage, dated the 6th of February, 1895. They therefore claimed that their mortgage had priority over the defendant's mortgage. The defendant claimed under a mortgage, dated the 25th of April, 1904, made by the last male owner of the property in favour of his wife, who is the present appellant. It appears that when the decree, dated the 25th of February 1901, had been obtained, the decree-holder accepted from the judgment-debtor a sale-deed of a certain part of the mortgaged property in full discharge of the decree. Possession, however, it is said, was never given, and it is admitted that the adjustment of the decree was never certified to the court. Subsequently, the decree-holder put the decree into execution. The judgment-debtor objected, pleading the adjustment. The court refused to recognize the adjustment, because it had not been certified according to law, and directed the property to be sold. Before the property was sold, however, the judgment-debtor asked for sanction to prosecute the decree-holder for fraudulently executing the decree which had been satisfied. The result of all this was the mortgage of May, 1904, on foot of which the present suit has been instituted. The amount of the mortgage was the amount of the decree of February, 1901. The court below has decreed the plaintiff's claim giving the plaintiff the priority which was claimed. In appeal here it is contended that the decree of the 25th of February, 1901, was fully discharged by the sale-deed of 1903, and that the plaintiff's mortgage is only entitled to the priority of its actual date. Reliance has been placed upon the case of *Nakta Ram v. Moti Ram* (1). In that case, no doubt, it was decided that where the decree-holder took a usufructuary mortgage in discharge of a mortgage decree, he could not fall back upon the original mortgage on foot of which he had obtained his decree. This decision was considered in the case of *Kanhaiya Lal v. Chedda Singh* (2), and a Bench of two Judges expressed their dissent. In the case of *Shyam Lal v. Bashir-ud-din* (3), it was held that where a third person advanced money for the purposes of satisfying a mortgage decree for sale of the property and took a mortgage for the amount so advanced, he was

1911

---

 RAHIM-UN-  
 NISSA  
 v.  
 BADEE  
 DAS.

(1) Weekly Notes, 1906, p. 191. (2) (1910) 7 A. L. J., 984.  
 (3) (1906) I. L. R., 28 All. 778.

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.