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and several, the appeal could proceed against the surviving respondents, and that it abated only as far as the deceased respondent was concerned. There seems to be no reason for distinguishing between the liability of several holders of a fixed-rate tenure and the liability of several tenants of any other holding. The liability of fixed-rate tenants in respect of the rent of their holding appears to be joint and several. The case is, therefore, on all fours with the case decided by the Calcutta High Court. In this connection, we may refer to the case of *Muhammad Askari* v. *Radhe Ram Singh* (1), where the court held that the effect of of section 43 of the Indian Contract Act was to exclude the right of a joint contractor to be sued along with his co-contractors. We allow this appeal, set aside the decree of the lower appellate court, and remand the case to that court to be restored to the pending file and disposed off according to law. Costs in this Court will be costs in the cause.

Appeal decreed—Cause remanded.

Before Mr. Justice Chamier and Mr. Justice Piggott.

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July, 4.

JUGAL KISHORE SAHU AND ANOTHER (PLAINTIFFS) v. KEDAR NATH AND ANOTHER (DEFENDANTS.)*

Mortgage—Prior and subsequent mortgagees—Release of part of mortgaged property for less than its value—Suit for recovery of entire balance of mortgage debt from the residue of the mortgaged property.

Held that a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. *Mir Busuff Ali Haji* v. *Panchanan Chatterjee* (2) *Hari Kissen Bhagat* v. *Velait Hossein* (3) and *Ponnusami Mudaliar* v. *Srinivasa Naicken* (4) referred to.

The facts of this case were as follows :—

This was a suit upon a mortgage made in January, 1888, in favour of the predecessor of the appellants. The mortgage covered shares in several villages, including a two anna share in a village called Haria. In May, 1895, the mortgagors sold

* Second Appeal No. 1159 of 1911, from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 3rd of August, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 25th of March, 1911.

(1) (1900) I. L. R., 22 All., 307.
(2) (1910) 15 C. W. N., 800.
(3) (1903) I. L. R., 30 Calc., 755.
(4) (1908) I. L. R., 31 Mad., 393.

a one anna six pie share in Haria to one Asuda Bibi, leaving with her Rs. 500, part of the purchase money, to be paid to the appellants. That sum was paid to the appellants in July, 1896, and a receipt was given by them, which shows that they accepted the money in reduction of the amount due on the mortgage. In 1906, the appellants released the one anna six pie share from the mortgage, stating that they did so in consideration of the payment made to them in 1896. In the present suit, instituted in 1910, the appellants claim to be entitled to bring the remainder of the mortgaged property to sale for the recovery of the whole amount remaining due upon the mortgage, after giving credit for the sum of Rs. 500 paid in 1896. The principal defence to the suit was that of certain puisne mortgagees who had taken a mortgage of the property in September, 1895. They said that the share sold to Asuda Bibi was, roughly speaking, half the mortgaged property in value, and that the appellants were entitled to proceed against the remainder of the mortgaged property for only so much of the mortgage money as was rateably due from it.

The court of first instance (Additional Subordinate Judge of Gorakhpur) decreed the claim in full. On appeal the District Judge sustained the defence set up and granted a decree to the plaintiffs for an amount proportionate to the value of the property not released by them. The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Govind Prasad*, for the respondents.

CHAMIER and PIGGOTT, JJ.:—This was a suit upon a mortgage made in January, 1888, in favour of the predecessor of the appellants. The mortgage covered shares in several villages, including a two anna share in a village called Haria. In May, 1895, the mortgagors sold a one anna six pie share in Haria to one Asuda Bibi, leaving with her Rs. 500, part of the purchase money, to be paid to the appellants. That sum was paid to the appellants in July, 1896, and a receipt was given by them, which shows that they accepted the money in reduction of the amount due on the mortgage. In 1906, the appellants released the one anna six pie share from the mortgage, stating that they did so in consideration of the payment made to them in 1896. In the present suit

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instituted in 1910, the appellants claim to be entitled to bring the remainder of the mortgaged property to sale for the recovery of the whole amount remaining due upon the mortgage, after giving credit for the sum of Rs. 500 paid in 1896. The only defence with which we are concerned now is that of the respondents who took a mortgage of the property in September, 1895. They said that the share sold to Asuda Bibi was, roughly speaking, half the mortgaged property in value, and that the appellants were entitled to proceed against the remainder of the mortgaged property for only so much of the mortgage money as was rateably due from it. The Subordinate Judge rejected this defence and decreed the claim in full, but on appeal the District Judge held that the defence was well founded and he gave the appellants a decree for an amount proportionate to the value of the property not released by them. The Subordinate Judge had relied upon the decisions of this Court in *Jai Gobind* v. *Jas Ram* (1) and *Sheo Tahal Ojha* v. *Sheodan Rai* (2). The District Judge followed the decisions of the Calcutta High Court in *Hari Kissen Bhagat* v. *Velait Hossein* (3) and the Madras High Court in *Ponnusami Mudaliar* v. *Srinivasa Naickan* (4), and he distinguished the other cases on the ground that in them the mortgagee had merely refrained from proceeding against part of the mortgaged property, whereas in the present case the appellant had definitely released part of the property from the mortgage, and he held that the release had the same effect as a purchase of that part by the appellants would have had.

In second appeal the appellants contend that the case is covered by the decisions of this Court mentioned above and also by the decision in *Sheo Prasad* v. *Behari Lal* (5), *Ghafur Hasan Khan* v. *Muhammad Kifait-ullah* (6) and *Pirbhu Narain Singh* v. *Amir Singh* (7), and that we should follow those cases in preference to the decisions of the Calcutta and Madras High Courts.

In the Calcutta and Madras cases the mortgagee had released part of the mortgaged property from the mortgage in favour of a person who had purchased that part from the mortgagor, and it was assumed in the Calcutta case and decided in the Madras case

(1) Weekly Notes, 1898, p. 120.
(2) (1905) I. L. R., 28 All., 174.
(3) (1903) I. L. R., 30 Calc., 755.
(4) (1908) I. L. R., 31 Mad., 333.
(5) (1902) I. L. R., 25 All., 79.
(6) (1905) I. L. R., 28 All., 19.
(7) (1907) I. L. R., 29 All., 369.

that the mortgagee was bound to abate a part of the mortgage money proportionate to the value of the property released and could only recover the balance from the property not released. With the possible exception of the case of *Jai Gobind* v. *Jas Ram* (1) the cases in this Court which have been referred to do not in any way touch the question which we have to decide. In *Sheo Prasad* v. *Behari Lal* (2) the mortgagee had asked for and obtained a decree for sale of part only of the mortgaged property. It was held that he was entitled to a decree under section 90 of the Transfer of Property Act after bringing that part to sale. The only defendant to the suit was the mortgagor. In *Ghafur Hasan Khan* v. *Muhammad Kifait-ullah Khan* (3) a mortgagee obtained a decree *nisi* for sale of the whole of the mortgaged property, but took an order absolute for sale of a part only of it. It was held that after bringing that part to sale he was entitled to a decree under section 90 of the Transfer of Property Act. These two cases obviously have no bearing upon the present case. In *Sheo Tahal Ojha* v. *Sheodan Rai* (4) part of the mortgaged property was found to belong to persons who had not joined in the mortgage, and the mortgagee withdrew his claim against that part. It was held that a mortgagee suing for sale of part of the mortgaged property was not bound to implead the persons interested in the remainder of the property. In that case there were no puisne mortgagees or subsequent purchasers from the mortgagors. RICHARDS, J., pointed out that the effect of a release by the mortgagee of one of the mortgagors and of his share of the property behind the backs of the other mortgagors was not in question. It seems to us that that case also has no bearing upon the present case. In *Pirbhu Narain Singh* v. *Amir Singh* (5) a mortgagee obtained a decree for sale of the whole of the mortgaged property. After he had brought part of it to sale, it was discovered that the remainder was not saleable, being an occupancy holding. It was held that the mortgagee was entitled nevertheless to a decree under section 90 of the Transfer of Property Act. That case in no way affects the present case. In *Jai Gobind* v. *Jas Ram* (6) a mortgagee sued his two mortgagors, A and B, and a puisne mortgagee

(1) Weekly Notes, 1898, p. 120.
(2) (1902) I. L. R., 25 All., 79.
(3) (1905) I. L. R., 28 All., 79.
(4) (1905) I. L. R., 28 All., 174.
(5) (1907) I. L. R., 29 All., 369.
(6) Weekly Notes, 1898, p. 120.

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from B, for sale of the whole of the mortgaged property, but at the hearing he asked for a decree against the share of A only. It was held that he was entitled to a decree for the whole of the mortgage money against the share of A. That case is distinguishable from the present case, for in this case the plaintiff mortgagee has definitely released part of the property from the mortgage, whereas in that case the plaintiff merely abstained from asking for relief against part of the property, and if the defendant A redeemed the plaintiff's mortgage, there was nothing to prevent him from claiming contribution from B's share of the property.

While mortgaged property remains in the hands of the mortgagor, the mortgagee may enforce his mortgage against any part of the property, and so long as there are no other persons interested in the property, the mortgagee may, as between himself and the mortgagor, release any part of the property from the mortgage. But when an estate subject to a mortgage belongs to or subsequently becomes the property of several co-sharers and one of those persons pays off the debt, he can call upon the other co-sharers to contribute rateably out of their shares to the payment of the debt, and when, after a mortgage has been made, another person purchases or takes in mortgage part of the property, the prior mortgagee cannot even with the consent of the mortgagor release any part of the property from the first mortgage to the prejudice of that person, that is to say, notwithstanding the release, the part released remains liable to contribute rateably to the payment of the mortgage debt.

The question is whether a mortgagee who releases part of the property from the mortgage without receiving from the releasee his proper share of the mortgage money, can, in a suit against a subsequent purchaser or mortgagee, obtain a decree against the rest of the mortgaged property for the balance of the mortgage money. The Calcutta and Madras High Courts hold that he cannot do so against purchasers of the property. Their view appears to be that the right to contribution between several properties rests upon the principle of subrogation. In the recent case of *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee* (1) the Calcutta High Court quote with approval the following statement of the law from an American case (2):—"While the whole of the debt is secured by the whole

(1) (1910) 15 C. W. N., 800. (2) *Brooks* v. *Benham*, 66 Am. St. Rep., 87.

of the land, each parcel of the land as between the different properties is equitably subject to so much of the debt as corresponds to the proportion between its value and the value of all the land, and if its owner should be compelled to redeem the mortgage, he can resort to the others for a contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage encumbrance is to make as respects that any subrogation impossible. The mortgagee, therefore, releases at his peril if he had notice of the conveyance out of which the equities arise, and if he does so without receiving from the releasee his proper contributory share of the debt, he is still chargeable with the residue of that share in favour of the owners of the remaining parcels." Whether this view is correct or not, it seems clear that a mortgagee cannot release part of the mortgaged property for less than its proportion of the mortgage debt and then sue the mortgagor and a puisne mortgagee for the whole of the balance of the mortgage money. Under section 74 of the Transfer of Property Act a puisne mortgagee is entitled to redeem the next prior mortgagee as soon as the amount due on that mortgage has become payable, and when he has done so, he acquires all the rights and powers of the prior mortgagee as such. In England in a suit by a prior mortgagee against the mortgagor and puisne mortgagees the decree may provide for the exercise by the puisne mortgagees of their successive rights of redemption or for working out the rights of the parties in the event of any puisne mortgagee in front of the mortgagor redeeming the mortgaged property. A form for this purpose is to be found in Seton on Decrees, Volume, 5th Edition, p. 1641, 6th Edition, p. 1979, and was recommended for use in India by their Lordships of the Privy Council in the case of *Gopi Narain Khauna* v. *Bansidhar* (1). It has not hitherto been the practice for courts in these Provinces to make such decrees, probably because there was till recently no form prescribed for the purpose, but such a form has been provided in Appendix D to the first schedule to the Code of Civil Procedure, 1908. It is clear, therefore, that a puisne mortgagee may in a suit by a prior mortgagee be given, not only the right to redeem the prior mortgage, but the right, when he has done so, to go on and enforce his own and the prior mortgage against the property. The

(1) (1905) I. L. R., 27 All., 325.

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puisne mortgagee might be seriously prejudiced if the prior mortgagee had released part of the property from his mortgage for less than its due proportion of the mortgage money and had nevertheless obtained a decree for the whole of the balance due on the mortgage.

It seems to us that the decisions of the Calcutta and Madras High Courts cited above are correct, and that whether they are correct or not, a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. It may be suggested that this should be the rule only where the mortgagee has notice of the puisne mortgage when he gives the release. It is unnecessary to consider this, for there is no question that the appellants had notice or must be deemed to have had notice of the puisne mortgages when they gave the release. In our opinion, the decision of the District Judge is correct. We dismiss this appeal with costs.

Appeal dismissed.

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July, 12.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

HABIB-ULLAH KHAN AND ANOTHER (DEFENDANTS) *v.* LALTA PRASAD AND ANOTHER (PLAINTIFFS.)*

Civil Procedure Code (1908), *order XXI, rule 23—Remand—Finding that burden of proof has been wrongly laid, without finding that the decision of the first court is wrong.*

It is not a good ground for passing an order of remand under order XLI, rule 23, of the Code of Civil Procedure, to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision is wrong.

THIS was a suit for possession of certain alluvial land, the question at issue being whether the land accrued to a certain village as a whole so as to become the property of the zamindars (the plaintiffs) or whether it accrued specially to certain *muafi* land of the defendants. The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land, and finding that they had failed to do so

* First Appeal No. 55 of 1912, from an order of I. B. Mundle, Additional Judge of Bareilly, dated the 1st of March, 1912.