

codicil. He enabled her by the exercise of the testamentary power over this income conferred upon her so to provide for them after her death. The income was large, Rs. 1,000 per mensem. She was a woman who at the date of the codicil must have been at least 45 years of age, her son Jang Bahadur being then 30 years of age. The son's mistress and her children lived with her. She, according to the evidence, helped to rear them. It was scarcely conceivable that she should require Rs. 12,000 per annum for her personal expenses alone. The power of disposing of this income by will clearly showed that the testator had some object in view beyond providing adequately for her maintenance. What more natural than that this income, handsome in amount, and disposable by her will, should have been given to enable her to provide for her grandchildren. Their Lordships are therefore of opinion that having regard to all the evidence in the case and the provisions of the codicil itself, the intention of the testator plainly was to treat the marriages of Jang Bahadur with the two Chhattri women already mentioned as valid marriages, and the issue of those marriages as legitimate issue. They think that the judgement appealed from was right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

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Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the first respondent: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir

Pramada Charan Danerji.

RAGHUNATH KUNWAR (PLAINTIFF) v. SHANKAR SINGH AND OTHERS

(DEPENDANTS). *

Mortgage—Prior and puisne incumbrancers—Suit for sale by prior incumbrancer without impleading puisne incumbrancer—Subsequent suit by puisne incumbrancer for sale—Form of decree.

Where a prior incumbrancer sues for sale on his mortgage and brings the mortgaged property to sale without making a puisne incumbrancer party to his

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* First Appeal No. 265 of 1911 from a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore, dated the 11th of May, 1911.

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suit, and thereafter the puisne incumbrancer brings a suit for sale on his mortgage, the proper decree to be made in the second suit is to direct a calculation of what was due on foot of the prior incumbrance up to the date of the taking over of possession upon sale, or, if that date cannot be ascertained, the date of the sale, and to declare the puisne incumbrancer entitled to redeem upon payment of the amount so ascertained. *Dip Navain Singh v. Hira Singh* (1), *Phulmani Chaudhrain v. Nageshar Prasad* (2) and *Manohar Lal v. Ram Babu* (3) referred to.

THIS was a suit for sale on a mortgage dated the 5th of September, 1881. There had been a prior mortgage over the same property dated the 14th of January, 1879. On this mortgage the mortgagees had instituted a suit for sale and had brought the mortgaged property to sale about the year 1896, but without making the puisne incumbrancer a party to these proceedings. The plaintiff in the present suit contended that the mortgagee of the mortgage of 1881 should be entitled to call upon the purchaser to account for the profits from 1896 up to the present time, and that if this were done it would be found that the mortgage of 1879 had been discharged so far as it affected the property which it was sought to sell in this suit. The defendants, on the other hand, contended that they were entitled to have an account taken of what would be due to them on their mortgage from the date thereof up to the present time, or that they should be allowed the amount of the purchase money which they paid with interest thereon. The court of first instance passed a decree which was not in accordance with the views of either the plaintiff or the defendants. The plaintiff appealed to the High Court.

Mr. B. E. O'Connor and Munshi Damodar Das, for the appellants.

The Hon'ble Dr. Sundar Lal, for the respondents.

RICHARDS, C. J. and BANERJI, J.—This and the connected appeal No. 302 of 1911 arise out of a suit on foot of a mortgage, dated the 5th of September, 1881. It appears that there had been a prior mortgage, dated the 14th of January, 1879. On foot of this prior mortgage a suit was brought and a decree obtained and the property put up to sale some time about the year 1896. To that suit the mortgagee in the mortgage of 1881 was not made a party, and the substantial question in the present appeal is as to

(1) (1897) I. L. R., 19 All., 527. (2) (1911) I. L. R., 33 All., 370.

(3) (1912) I. L. R., 34 All., 323.

the proper order that should now be made. On behalf of the appellant it is contended that the mortgagee in the mortgage of 1881 should be entitled to call upon the purchaser to account for the profits from the year 1896 up to the present time, and that if this was done it would be found that the mortgage of the 14th of January, 1879, had been discharged so far as it affected the property which is sought to sell in the present suit. On the other hand, it is contended by the respondents in the present appeal, who are the appellants in the connected appeal, that they are entitled to have an account taken of what would be due upon foot of their mortgage from the date thereof right up to the present time or in the alternative that they should be allowed the amount of the purchase money they paid in the year 1896 and interest thereon. In our opinion the proper order to make in a case of this description is to direct a calculation of what was due upon foot of the prior incumbrance up to the date of the taking over of possession upon sale (or, if that date cannot be ascertained, the date of sale), and the puisne incumbrancer should be declared entitled to redeem upon payment of the amount so ascertained. We are clearly of opinion that the prior incumbrancer ought not to be called upon for an account of the profits which he has received subsequent to the sale. This in principle was the view taken in the case of *Dip Narain Singh v. Hira Singh* (1). In the case of *Phulmani Chaudhrai v. Nageshar Prasad* (2) accounts were directed to be taken upon this basis in order to enable the Court to make what it considered a proper decree. See also the issues referred in *Manohar Lal v. Ram Babu* (3). The real principle upon which in our opinion, the decree should be drawn up is to place the puisne incumbrancer, whom the prior incumbrancer neglected to make a party, in as nearly as possible the position he would have been in if he had been made a party to the suit of the prior incumbrancer. This principle, we think, is carried out in making the order in the form indicated above. In the present case the court below has declared what was the proportionate amount due on account of the prior mortgage (having regard to the value of the property now sought to be sold as compared to the value of the property comprised in the prior mortgage). This we think is correct. It has allowed

(1) (1897) I. L. R., 19 All., 527. (2) (1911) I. L. R., 33 All., 370.

(3) (1912) I. L. R., 34 All., 323; (330).

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interest up to the date of the taking of possession by the auction purchaser on the sale in 1896. This we think is quite correct, and we accordingly dismiss the appeal with costs. We extend the time for payment by the plaintiffs to four months from this date, and we direct that, upon such payment being made, the defendants will have a further period of two months for payment of the amount so paid by the plaintiff as well as the amount due on foot of their own mortgage, and to this extent the decree of the court below is varied.

Appeal dismissed.

Before Mr. Justice Tuóball and Mr. Justice Ryas.

RAM MANORATH SINGH AND OTHERS (PLAINTIFFS) v. DILRAJI KUNWARI,
(DEFENDANT).*

Act No. 1 of 1877 (Specific Relief Act), section 42—Joint Hindu family—Widow alleged to be in possession of part of the joint property under a family arrangement—Suit for declaration of rights of other members of the family.

Under a deed of compromise the name of the widow of a member of a joint Hindu family was entered in the place of that of her husband and she was put in possession of the property that stood in his name. On an application being made for partition of one of the villages, the widow also applied for partition of the share which stood in her name. The plaintiffs objected on the ground that she was not entitled to partition, and they were referred to the Civil Court to have their rights established. They then sued for a declaration that the deceased died while living jointly with themselves, that the widow was not in possession as the heir of the deceased, and that she was not entitled to obtain partition. Section 42 of the Specific Relief Act was set up in defence. *Held*, that inasmuch as the possession of the defendant was ultimately admitted and the real dispute between the parties was one as to the nature of the possession of the widow, section 42 of the Specific Relief Act did not bar a suit for declaration of title.

THIS was a suit for a declaration that the defendant's husband had died whilst he was a member of a joint Hindu family with the plaintiffs, and that although the defendant's name was recorded in the revenue papers as owner and in possession of a certain portion of the family property, this was merely *solatii causa* and in virtue of family agreement, dated the 19th of May, 1905. The plaintiffs also, although relying on the said agreement, pleaded that they were themselves in fact in possession of the property in question. The court of first instance found that the plaintiffs

* First Appeal No. 92 of 1912 from a decree of Girdhari Lal, Second Additional Subordinate Judge of Gorakhpur, dated the 22nd of December, 1911.

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December, 16.