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before whom it was presented satisfied himself that it was properly stamped. No inference can be derived from the fact that the copy bears a one rupee stamp. Under the Court Fees Act (VII of 1870), it is the proper stamp for issuing a copy of the proceeding in the Zillah Court ; and as a copy of the petition and the order thereon, it bears the right court fee stamp of one rupee. The District Judge clearly fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself.

Their Lordships concur generally with the reasons given by the learned Judges of the High Court for overruling the decision of the District Judge, and they are of opinion that this appeal should be dismissed with costs.

And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants :—*T. L. Wilson & Co.*

Solicitors for the respondents :—*Watkins & Hunter.*

J. V. W.

APPELLATE CIVIL.

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May, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

UDIT NARAIN MISIR AND OTHERS (DEFENDANTS) *v.* ASHARFI LAL (PLAINTIFF) AND AKHRAJ LAL AND OTHERS (DEFENDANTS).*

Mortgage—Subrogation—Partial discharge of prior incumbrance—Purchaser of equity of redemption entitled to stand in the shoes of prior incumbrancer to the extent that incumbrance has been discharged.

A purchaser of the equity of redemption is entitled to stand in the shoes of a prior incumbrancer where the purchaser has, with the consent of that incumbrancer, partially discharged the liability.

Gurdeo Singh v. *Chandrikah Singh* (1) dissented from. *Chetwynd* v. *Allen* (2) followed. *Baroness Wenlock* v. *The River Dee Company* (3) referred to.

THE facts of the case are as follows :—

The plaintiff Asharfi Lal instituted the present suit to enforce a mortgage, dated the 29th of June, 1904, executed

* Second Appeal No. 140 of 1915, from a decree of Lal Gopal Mukerji, Subordinate Judge of Gorakhpur, dated the 22nd of September, 1914, modifying a decree of Charu Deb Banerji, Munsif of Bansi, dated the 10th of December, 1912.

(1) (1907) I. L. R., 36 Calc., 193. (2) [1899] 1 Ch. D., 853.

(3) (1887) L. R. 19Q. B. D., 155.

by Hanuman Prasad and another. One of the mortgaged properties was a 10-pie share of mauza Bakhera Khas. This 10-pie share was subsequent to the plaintiff's mortgage, purchased by Udit Narain and Mahabir, appellants, from the mortgagor. They pleaded that they had paid off certain prior incumbrances and were to that extent entitled to priority as against the plaintiff. The lower appellate court found that they had paid Rs. 309, to a prior mortgagee, but this payment was insufficient to discharge that mortgage in full as a much larger sum was due to the prior mortgagee on the date of payment. The court held that "it is only when a transferee completely satisfies a prior charge, that he can use it as a shield against an attack. A mere part payment does not confer any right on the transferee to hold the mortgage as a shield. Udit Narain and Mahabir cannot therefore call upon the plaintiff or any one who may purchase the property in execution of the mortgage decree to pay them the sum of Rs. 309."

Udit Narain and Mahabir appealed to the High Court.

Pandit *Braj Nath Vyas*, for the appellants: —

The appellants are entitled to priority to the extent of the amount paid by them and accepted by the mortgagee. The opposite view would lead to the conclusion that the security of the plaintiff would be enhanced in value for no reason whatever.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the plaintiffs respondents :—

The view taken by the court below was right. A subsequent purchaser could claim subrogation only when he discharged in full a prior charge. A mortgage security was single and indivisible and could not be broken up at the mere will of the mortgagee or the mortgagor. A claim for enforcement of a part of the mortgage would not ordinarily lie. If a mere part payment was held to validate a claim for subrogation, it would result in great confusion and multiplication of suits. He relied on *Gurdeo Singh* v *Chandrikah Singh* (1); Ghose on Mortgages, p. 332; Jones on Mortgages, 6th ed., Vol. 1, sec. 874, p. 918; *Chetwynd* v. *Allen* (2).

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit to realize the amount of a mortgage, dated the

(1) (1907) I. L. R., 36 Calc., 1003. (2) [1899] 1 Ch. D., 853.

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29th of June, 1904. The point for decision in the present appeal arises under the following stated facts. In the year 1907 the appellants (who are defendants to the suit) purchased a 10-pie share of mauza Bakhera. It has been found by the court below that Rs. 309 went to discharge a prior mortgage of 1899. The defendants had contended that all that was due upon this previous mortgage was Rs. 309, which they paid. The court below has found that the appellants did in fact pay Rs. 309, but that they did not discharge the entire amount due on foot of the mortgage of 1899. No claim, however, seems ever to have been made on foot of this mortgage of 1899, and it seems long to have been barred by limitation. We must, however, for the purpose of the present appeal assume that the court below rightly decided that the appellant had only discharged the prior mortgage in part. The question is whether, having not entirely discharged the mortgage, they are entitled to be substituted for the prior incumbrancer even to the extent of Rs. 309, which they admittedly paid. The court below has held that the appellants were not entitled to claim priority in respect of this sum against plaintiff. It seems to us that this decision was wrong. If a purchaser of the equity of redemption discharges a prior incumbrance he is under ordinary circumstances admittedly entitled to hold up that prior incumbrance as a shield against the puisne incumbrancer By payment of the prior incumbrance the purchaser of the equity of redemption enhances the security of the puisne incumbrancer and he has relieved him of obligation to discharge the prior incumbrance or to be obliged to sell the property subject thereto. The contention is that this right of the purchaser is limited to cases in which he has discharged the prior incumbrance in its entirety. It is difficult to see upon what principle this distinction proceeds. No doubt the prior incumbrancer is entitled to refuse a part payment of his mortgage debt. If, however, he accepts the part payment and allows the liability upon the property to be discharged in part, the puisne incumbrancer benefits in exactly the same way as he would if the entire debt had been discharged, though not the same extent. His security is enhanced to the extent that the debt has been discharged. There seems to be no reason why the purchaser of the equity of

redemption should not be entitled to stand in the shoes of the prior incumbrancer where he has with the consent of that incumbrancer partially discharged the liability. In support, however, of the contention (which found favour in the court below) the learned advocate for the respondents has relied on the case of *Gurdeo Singh* v. *Chandrikah Singh* (1). With great respect to the learned Judges who decided that case we are unable to agree with them. They quote a passage from Jones on Mortgages, which, with every possible respect, we think has been misunderstood. In the case of *Chetwynd* v. *Allen* (2) a prior mortgage had been partially paid off and the party so paying was held entitled to stand in the shoes of the prior incumbrancer to the extent of the money advanced. It is true that the particular question which arises in the present case was not discussed, but it would appear that no one ever thought of raising the point. In *The Baroness Wenlock* v. *The River Dee Company* (3) the doctrine of subrogation was discussed. In that case a Company had borrowed money beyond its powers. Part of that money was paid away by the Company in discharge of certain liabilities of the Company existing at the time the money was lent. A further portion of the money went to discharge liabilities incurred by the Company subsequent to the advance of the money. All sides admitted that the lender was entitled to stand in the shoes of the creditors whose debts existed at the time of the advance. The question was whether the lender was also entitled to stand in the shoes of the creditors whose debts were incurred and discharged subsequent to the loan. The Court of Appeal consisting of Lord ESHER, M. R., FRY and LOPES, L. J., held that the lender was entitled to recover his money by being subrogated for the creditors of the Company. By reason of the fact that the appellants in the present case paid off the mortgage in part no further liability was thrown on the puisne incumbrancer or the property. In our opinion the appellants were entitled to stand in the shoes of the prior incumbrancer to the extent of the further sum of Rs. 309. We accordingly allow the appeal and modify the decree of the court below by directing that the plaintiff must pay to the appellants a further sum of

(1) (1909) I. L. R., 36 Calc., 193 (193, 220). (2) [1899] 1 Ch. D, 853.

(3) (1887) L. R., 19 Q. B. D., 155.

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Rs. 309, that is to say in all Rs. 434, as a condition precedent to bringing the 10-pie share of mauza Bakhera to sale. The money must be paid within six months from this date. If the money is not paid within that time the suit will stand dismissed as against the appellants in respect of 10-pie of the Bakhera. If the money is paid within the time aforesaid the plaintiff will be at liberty to add this amount to his own claim against the share and sell the said 10-pie share. The appellant will have his costs of this appeal (to be paid by the plaintiff respondent).

Appeal decreed.

REVISIONAL CRIMINAL.

1916
May, 25.

Before Mr. Justice Sundar Lal.

EMPEROR *v.* AIJAZ HUSAIN.*

Act No. XLV of 1860 *(Indian Penal Code), section* 225B—*Warrant of arrest—Actual resistance necessary.*

In order to constitute an offence under section 225B of the Indian Penal Code something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest. There must be positive evidence to show that the officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest.

THE facts this case were as follows :—

One Barkat Hasan was the lambardar of a village. He made default in payment of the Government revenue. He had transferred his own share to a near relative. The accused Aijaz Husain was one of the biggest co-sharers in the village. The Tahsildar called upon him to pay the Government revenue, but he objected. Thereupon the matter was reported to the Collector. The Collector passed an order directing realization of the revenue by the arrest of the accused. A warrant of arrest was issued signed by the Naib Tahsildar on the 24th of February, 1916, returnable by the 29th. The peons were unable to execute this warrant. Time for execution was extended up to the 6th of March. In the meantime one of the other co-sharers who had been arrested for non-payment of Government revenue was released and he was asked to trace out Aijaz Husain for whose arrest the warrant was issued. This co-sharer took the

* Criminal Reference No. 336 of 1916.