

the decree-holder certified the part payments in the application for execution and thereupon the court having recorded the whole of the petition directs execution to issue for the balance."

We are not prepared to accept this as the practice in these provinces. In our opinion the practice is that when payments are made in court or out of court there is a record on the execution file showing that the payments have been certified and recorded. It would obviously not be within the spirit of order XXI, rule 2, that "certifying" of the payments on foot of a decree should rest entirely with the decree-holder. He might often be tempted to record on his private copy of the decree a part payment which had in fact never been made. We may assume for the purposes of argument that a decree-holder may at any time come in with an application to the court that he should be at liberty to certify a payment and have it recorded, but in the present case there was no such application made by the decree-holder. He merely came in with an application for execution alleging that certain payments had been made. As to what has been the practice of "certifying" payments, we may refer to the case of *Gokul Chand v. Bhika* (1), and also to the case of *Bhajan Lal v. Cheda Lal* (2). In our opinion no payment on foot of the decree having been "certified and recorded" within the meaning of order XXI, rule 2, the court was bound to assume that no such payments had been made and it was not entitled to go into evidence as to payment on an application for execution of the decree. In this view the decree of the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

*Appeal dismissed.*

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

JAMNA DAS (PLAINTIFF) v. RAM AUTAR PANDE (DEFENDANT).\*

*Mortgage—Sale of mortgaged property—Purchase money "left with the purchaser for payment to the mortgagee"—Nature of the transaction—Trust.*

Where a mortgagor sells the mortgaged property and, as it is commonly expressed, leaves part of the price with the purchaser for payment to the mortgagee, the transaction is merely one of sale subject to the mortgage. No

\* First Appeal No. 12 of 1914, from a decree of I. B. Mundle, Subordinate Judge of Mirzapur, dated the 30th of August, 1913.

(1) (1914) 12 A. L. J., 387.

(2) (1914) 12 A. L. J., 825.

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trust is created in the purchaser for payment of the portion of the price "left with him" to the mortgagee.

THE fact of this case were as follows :—

On the 2nd of June, 1913, one Musammat Lakhpati Kunwar made a mortgage in favour of Jamna Das. The mortgage consisted of zamindari property and also mortgagee rights in other property. On the 24th of November, 1896, Musammat Lakhpati sold the entire mortgaged property, that is to say, the zamindari and the mortgagee rights, to the defendant Pandit Ram Autar Pande for the sum of Rs. 44,000 leaving Rs. 40,000 with the vendee for payment of the money due to Jamna Das. On the 9th of February, 1900, Jamna Das sued for sale of the mortgaged property. After a considerable amount of litigation he got a decree, but only for the sale of the zamindari; the mortgagee rights were excluded. The sale of the zamindari property being insufficient to satisfy the decree, the plaintiff, on the 7th of January, 1907, applied for a decree under section 90 of the Transfer of Property Act, and after some further litigation obtained a decree against the judgement-debtors other than the present defendants.

The mortgagee then brought the present suit seeking to recover from the purchaser of the mortgaged property, Ram Autar Pande, Rs. 33,099 out of the Rs. 40,000 which had been "left with him for payment to the mortgagee." The court of first instance dismissed the suit. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Dr. *Sundar Lal*, and The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit in which the plaintiff Lala Jamna Das claimed the sum of Rs. 30,009 together with interest. It appears that on the 2nd of June, 1913, one Musammat Lakhpati Kunwar made a mortgage in favour of Jamna Das. The mortgage consisted of zamindari property and also mortgagee rights in other property. On the 24th of November, 1896, Musammat Lakhpati sold the entire mortgaged property, that is to say, the zamindari and the mortgagee rights, to the defendant Pandit Ram Autar Pande for the sum of Rs. 44,100 leaving Rs. 40,000 with the vendee for

payment of the money due to Jamna Das. On the 9th of February, 1900, Jamna Das sued for sale of the mortgaged property. After a considerable amount of litigation he got a decree, but only for the sale of the zamindari ; the mortgagee rights were excluded. The sale of the zamindari property being insufficient to satisfy the decree, the plaintiff, on the 7th of January, 1907, applied for a decree under section 90 of the Transfer of Property Act, and after some further litigation obtained a decree against the judgement-debtors other than the present defendant. It is alleged that a balance of Rs. 33,009 still remained due. He now brings the present suit alleging that Pandit Ram Autar Pande was a trustee for him because Rs. 40,000 out of Rs. 44,000 was left in his hands for payment of the plaintiff's debt. There is no doubt that it was due to certain rulings of this High Court that mortgagee rights were excluded from the original decree which Jamna Das obtained on foot of his mortgage. Ever since the case of *Ram Shankar Lal v. Ganesh Prasad* (1) was decided a mortgagee of mortgagee rights that is, a sub-mortgagee) is entitled to pursue his remedy and realize his debt out of the mortgage security, even though that security be mortgagee rights. In the case we have referred to the authorities were fully discussed and the Court unanimously overruled the case of *Mata Din Kasodhan v. Kasim Husain* (2). The latter decision of this Court is supported by the provisions of order XXXIV. In reality the present suit has been brought because the plaintiff failed to realize his debt in the appropriate way. In our opinion the real nature of the sale of the 24th of November, 1896, was a sale by Musammat Lakhpati to Pandit Ram Autar Pande for Rs. 4,000 subject to the mortgage of Rs. 40,000. In our judgement it is absolutely clear that no trust was created in favour of the plaintiff. He was no party to the transaction and the sale did not in any way affect his rights to proceed against the property mortgaged to him. We consider that the decision of the Court below was quite correct and must be confirmed. We accordingly dismiss the appeal with costs.

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*Appeal dismissed.*

(1) (1907) I. L. R., 29 All., 385.

(2) (1891) I. L. R., 18 All., 432.