

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

KASHI RAM AND OTHERS (PLAINTIFFS) v. HET SINGH AND OTHERS
(DEFENDANTS.)*

*Act No. IV of 1882 (Transfer of Property Act), section 82—Mortgage—
Contribution—Charge.*

1914
November, 25.

In the year 1880, one Tikam Singh, who with several sons constituted a joint Hindu family, executed a mortgage of a village forming part of the joint family property. In 1889, he, with five of his sons, executed a second mortgage of the same village. In 1891, he, with two of his sons, executed a third mortgage of the same village. Tikam Singh died and the sons partitioned the village amongst them into several mahals. The first mortgagee brought a suit for sale on his mortgage, and having obtained a decree brought to sale the share of Het Singh, one of the brothers, and the mortgage was discharged. Thereafter Het Singh brought a suit for contribution and obtained a decree. After the satisfaction in this manner of the mortgage of 1880, the other brothers discharged the later mortgages of 1889 and 1891 and then brought the present suit for contribution against Het Singh.

Held that in these circumstances the plaintiffs were not entitled to a decree against Het Singh. *Har Prasad v. Raghunandan Prasad* (1) referred to.

THE facts of this case were as follows :—

One Tikam Singh executed a mortgage of the village Kakna in 1880. In 1889, the same village was mortgaged under a mortgage which was executed by Tikam Singh and his five sons. In 1891, Tikam Singh and two of his sons again mortgaged the same property. The mortgagee, under the mortgage of 1880, brought a suit after the death of Tikam Singh and obtained a decree. In the meantime the six sons of Tikam Singh had divided the village between themselves. The decree-holder executed the decree against one of the sons (Het Singh) and sold his share. Thereafter the other sons paid up the mortgages of 1889 and 1891. Het Singh brought a suit for contribution, after discharge of the decree on the mortgage of 1880, against his brothers. Some of the defendants, Kashi Ram and Tota Ram, in their defence, set up a plea that they had discharged the mortgages of 1889 and 1891 and the plaintiff was liable to pay his share. They did not substantiate this plea and the suit was decreed. The present suit for contribution was brought by the defendants to that suit.

* Second Appeal No. 1241 of 1913, from a decree of D. R. Lyle, District Judge of Agra, dated the 14th of August, 1913, modifying a decree of Bans Gopal, Additional Subordinate Judge of Agra, dated the 7th of December, 1912.

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The court below held that the suit of the plaintiffs who were parties to Het Singh's suit or their representatives was barred by *res judicata*. The plaintiffs appealed to the High Court.

Pandit *Sham Krishna Dar*, for the appellants :—

The mortgages of 1889 and 1891 were payable on demand, but were discharged in 1910. The personal liability of the mortgagors had come to an end by that time. The property was, however, liable. The defendants to the suit brought by Het Singh were not bound to raise the question which they now allege. As a matter of fact the plea was raised, but it was not substantiated. As the defendants were not bound to raise it they can raise it now. In that suit they could not claim a set-off, but only could bring a counter claim for a declaration of their charge on Het Singh's property. The charge was only a statutory charge. The claim is not barred by *res judicata*. There are three mortgages. Het Singh paid up the first and so paid more than his share, and he realized the excess from other mortgagors. His property having been sold, if he is allowed to escape from liability to pay other mortgages it would not be equitable. If instead of a decree for contribution he were to get a share from the shares of the other brothers that share would be liable. Here he has got a decree instead of that share and that decree should be made liable.

Babu *Durga Charan Banerji*, for the respondents :—

In Het Singh's suit they had as a matter of fact set up the mortgages of 1889 and 1891 : and the issue was raised and decision was given on it. The matter cannot be raised in the present suit. It was a case in which the question might and ought to have been raised but was not raised. The issue was not irrelevant in that suit. The plaintiffs had paid some money part of which the defendant was liable to pay. They alleged that they were entitled to contribution as against the defendants. The question was decided against them. The second question is whether under their own plaint they are entitled to any relief. They claim a charge against the decree obtained by Het Singh. The charge of Het Singh was created on payment of a prior mortgage. That gave him priority, for he stepped into the shoes of the prior mortgagee. He is not liable to pay up the subsequent mortgages. The question under section 82 of the Transfer

of Property Act, is whether the decree which Het Singh obtained has been relieved so as to give rise to a claim for contribution. A mortgagor, who sells the mortgaged property subject to the mortgage and is subsequently compelled to pay the debt, is subrogated to the rights of the mortgagee. One of the mortgagors here has paid off the prior mortgage. The effect of that is that he has redeemed it. The mortgagor who redeems the entire mortgage steps into the shoes of the mortgagee; Ghose on Mortgage, pp. 347; 348, Jones on Mortgage, Vol. I, 817; *Har Prasad v. Raghunandan Prasad* (1).

Pandit *Sham Krishna Dar*, was heard in reply.

RICHARDS, C. J., and BANERJI, J.—The facts connected with the suit out of which this appeal arises are a little complicated, but they nevertheless may very shortly be stated. Tikam Singh made a mortgage in the year 1880 of a village called Kakna. A second mortgage was made in the year 1889 by the same Tikam Singh and five of his sons. A third mortgage was made in the year 1891 by the same Tikam Singh and two of his sons. The village was at that time joint family property. Subsequently the sons of Tikam Singh divided the village into a number of mahals. The mortgagee under the mortgage of 1880 brought a suit against Het Singh, one of the sons, with the result that his mahal was sold and the mortgage discharged. Het Singh brought a suit against his brothers and their children claiming contribution under section 82 of the Transfer of Property Act and obtained a decree. In the meantime, however, the plaintiffs had discharged the two later mortgages and they brought the present suit claiming that they also had a charge under section 82. It was useless to them to claim any charge against the mahal which had belonged to Het Singh, because that mahal had been sold in discharge of the first mortgage. A number of questions were gone into in the court below which, it appears to us, were not very relevant. The court of first instance granted the plaintiffs a decree. The lower appellate court modified the decree of the court of first instance by dismissing the suit of some of the plaintiffs, on the ground that they pleaded their claim as a set-off to the suit brought by Het Singh; that such plea was decided against them, and that accordingly

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on the principle of *res judicata* they could not now set up a claim which was disposed of in the previous litigation. Had it been necessary to decide the point, we doubt very much that we would have agreed with the lower appellate court on this question of set-off. It seems to us very doubtful whether under the circumstances of the present case the claim of the plaintiffs could have been "set off" against the claim of Het Singh in the previous litigation. In the view we take of the case, however, it is unnecessary to decide this point. It seems to us that the only question which it is necessary to decide is the question of the priority of the charge of Het Singh. The mortgage of 1880 was not discharged until the 20th of April, 1907. If Het Singh's charge is to take priority as of this date, then it would appear to us that the plaintiffs would be entitled to make the "interest" of the defendants, i. e., their charge, contribute rateably to the discharge of the two mortgages of 1889 and 1891. On the other hand, if Het Singh's charge takes priority from the date of the mortgage of 1880 then the plaintiffs are not entitled to any charges under section 82 of the Transfer of Property Act. The very question seems to have arisen in the case of *Har Prasad v. Raghunandan Prasad* (1). At page 168 of the judgement there is the following passage:—

"The next question is whether this charge can take priority over the plaintiff's mortgage. No doubt the charge came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage, he acquired, we think, priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee, or the purchaser of the equity of redemption, who pays off a prior mortgage, acquires, on equitable grounds, priority over a puisne mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other."

Applying this principle to the present case, it would appear that the plaintiff's position cannot be placed higher than that of standing in the shoes of the mortgagees under the mortgages of 1889 and 1891, that is to say, that they are puisne to Het Singh

and his successors in title, who for the purposes of the present claim stand in the shoes of the mortgagee under the mortgage of 1880 which was discharged by the sale of Het Singh's property. This being so, it is clear that none of the plaintiffs has any right against the person or property of the defendants. The result is that we must dismiss this appeal with costs.

Appeal dismissed.

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DAYA SHANKAR (DEFENDANT) v. HUB LAL AND ANOTHER (PLAINTIFFS).
Registration—Family settlement—Distribution of family property carried out by means of mutation proceedings—Hindu law—Joint Hindu family—Representative capacity of father.

The members of a Hindu family, one of whom was a minor, entered into a compromise concerning the partition of certain property in the course of mutation proceedings, and the partition agreed to was carried into effect by these proceedings.

Held that, inasmuch as the minor was represented by his father and there was no evidence of fraud or collusion, the compromise was binding on him. *Held also*, that the compromise did not require registration. *Kokla v. Piari Lal* (1) referred to.

THE facts of this case were as follows :—

One Bhajan Lal made a will of certain property in favour of, among others, the plaintiffs. In mutation proceedings the father of the minor plaintiff Raj Narain entered into a settlement with the defendant, who had filed objections to mutation in favour of the plaintiffs being effected, by which the defendant got a share out of the property left to the minor. The minor brought this suit for possession of the entire share given to him under the will. The defence was that the arrangement made was a family settlement and was binding on the minor. The court below held that Bhajan Lal was entitled to give away the property to whomsoever he pleased and the father of the plaintiff could not enter into any settlement on behalf of his minor son. It decreed the suit. The defendant appealed to the High Court.

*Second Appeal No. 82 of 1914, from a decree of A Sabonadiere, District Judge of Aligarh, dated the 8th of November, 1913, modifying a decree of Kunwar Sen, Assistant Judge of Aligarh, dated the 16th of May, 1912.