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June, 29.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Ryves.

LACHMI NARAIN (DEFENDANT) *v.* SAJJADI BEGAM AND OTHERS (PLAINTIFFS).*

Mortgage—Annuity provided for by terms of deed—Equity of redemption acquired by mortgagee—Suit by heirs of annuitant to recover arrears of annuity.

By the terms of a mortgage-deed an annuity or *malikana* charge was made payable to one Musammat Turab-un-nissa and her heirs by the mortgagee. By a series of transactions the mortgagee ultimately became the owner of the equity of redemption in the whole of the mortgaged property.

Held that the mortgagee nevertheless still continued liable for the payment of the annuity secured by the mortgage

THIS was a suit brought by the heirs of the original annuitant to recover from a mortgagee arrears of an annuity secured by a mortgage-deed executed in 1870. The court of first instance decreed the claim in part. On appeal the lower appellate court set aside the decree of the first court and decreed the claim in full. The defendant mortgagee appealed to the High Court. The facts of the case are fully set out in the judgement of the Court.

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

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *S. A. Haidar* for the respondents.

PIGGOTT and RYVES, JJ.:—In this case the plaintiffs came into court as the heirs of one Musammat Turab-un-nissa. They claimed to recover from the defendant a certain sum of money as arrears of an annuity, or *malikana* charge, alleged to be payable by the defendant as the successor in interest of the mortgagee under a certain mortgage deed of the 1st of December, 1870. The defendant resisted the claim on three grounds, with two of which we are no longer concerned. He said that one Bismilla Begam was a necessary party to the suit and also put the plaintiffs to proof of their title as heirs of Turab-un-nissa. These two points have been concluded against him. His third

*Second Appeal No. 615 of 1916, from a decree of G. C. Badhwar, Additional Judge of Farrukhabad, dated the 22nd of January, 1917, reversing a decree of Muhammad Ali Ausat, Munsif of Farrukhabad, dated the 14th of September, 1914.

plea was to the effect that under a series of sale-deeds, beginning with the 3rd of November, 1912, and ending with the 16th of November, 1913, he had himself become the owner of the equity of redemption under the mortgage deed of the 1st of December, 1870. He contended that the liability sought to be enforced against him attached to him only so long as he was in possession of the land as mortgagee and ceased from the date of his complete acquisition of the equity of redemption. The learned Munsif tried the case on issues appropriately framed, but soon found himself involved, as we ourselves have done, in certain questions as to the effect of the result of previous litigation on the position of the parties to the present suit. However, he came to the conclusion that there had been no previous decision, binding upon the parties, which prevented the defendant from asserting that his liability to pay this annuity came to an end from the date on which he completely acquired the equity of redemption. He then went on to hold that this plea, open to the defendant, was a good one in fact and in law. He held that there had been a complete merger of the interests of the mortgagor and mortgagee under the deed of the 1st of December, 1870, and that all liability on account of this annuity came to an end from the date of such merger. He framed his decree accordingly, allowing a part of the claim of the plaintiffs and dismissing the rest. The plaintiffs went in appeal to the court of the District Judge. We have not found it at all easy to determine what the District Judge is to be understood as having decided. He certainly has not dealt with the difficult question of law which arises on the first court's finding that the equity of redemption under the mortgage of the 18th of December, 1870, had been completely acquired by the defendant. Indeed he purports to reverse that finding. He says in so many words that the defendant has not purchased the whole of the equity of redemption; and, in another portion of his judgement, that some part of the mortgagor's equity of redemption is still with the plaintiffs. If we felt able to treat these expressions of opinion by the learned District Judge as clear findings of facts, we should have to accept them as decisive of this suit. It seems to us, however, that they proceed in part upon an erroneous view of the effect of a particular finding recorded in a

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suit between Musammat Turab-un-nissa and the present defendant to which we shall have to refer at greater length. In part also they are based upon certain arguments as to an apparent discrepancy between the area shown in the two documents of title produced by the defendant with regard to that portion of the mortgaged property which is situated in a village called Dhelawal. These arguments we find ourselves quite unable to follow; indeed the learned advocate for the respondents could only suggest that there must be some clerical error, either in the judgement of the learned District Judge, or in the documents referred to by him. We are not prepared therefore to deal with the case on this basis, that the appeal of the defendant is concluded by any finding of fact recorded by the lower appellate court. The judgement of that court has not as a matter of fact been supported before us on the grounds on which it proceeds. We have, however, been asked to hold that, in any case, the decision of the court of first instance, according to which the liability of the defendant in respect of the annuity claimed came to an end on the 16th of November, 1913, is unsustainable upon legal grounds, in view of the results of the previous litigation in which these same parties had been concerned. We feel that this is substantially the point with which we have to deal. The mortgage of the 1st of December, 1870, containing curious provisions as to the reservation of an annuity in favour of the mortgagor, Maujud Ali Shah and his wife Abadi Begam, was eminently calculated to lead to misunderstanding and litigation between the parties concerned. The records of this Court show that it has had that result. What we are concerned with at present is a suit instituted in the year 1909, by Musammat Turab-un-nissa, the predecessor in title of the present plaintiffs. That was a suit against the same defendant who is now the appellant before us, and it is not denied that whatever was decided in that litigation is binding upon the parties to the present suit. Musammat Turab-un-nissa claimed to be entitled to recover from this defendant, as mortgagee in possession of the property referred to in the deed of the 1st of December, 1870, a large sum of money on account of the arrears of the annuity thereby reserved. Her claim was based upon the allegation that she was

the heir of the original mortgagor Maujud Ali Shah. The allegation was contested, but was finally decided in her favour after an order of remand by this Court. The principal defence to that suit was that the proprietary rights of Maujud Ali Shah in all the lands affected by the mortgage in question had been sold at successive auction sales in execution of decrees. It was contended that inasmuch as no portion of the equity of redemption in the mortgaged property remained vested in Maujud Ali Shah, or in Musammat Turab-un-nissa as his heir, it followed that no claim on account of this annuity or *malikana* allowance was maintainable by the then plaintiff. This point was dealt with by the learned Subordinate Judge who first decided that case on the 16th of December, 1909, and whose judgement is on the record now before us. The 7th issue framed by him was "Whether the equity of redemption has been sold? If so, what is its effect?" On this he found, to begin with, that only a portion of the equity of redemption had been sold. He then went on to say, referring to certain previous litigation which had taken place between the present defendant on the one side and the auction purchaser of a portion of the equity of redemption on the other, that the right to receive this allowance was not saleable and could not have passed to the auction purchasers at any of the auction sales. He decreed Musammat Turab-un-nissa's claim as brought. There was an appeal to the court of the District Judge and the judgement of that court is dated the 12th of September, 1910. It is clear that before the District Judge the defendant then took the point that the whole of the equity of redemption in the mortgaged property had, as a matter of fact, been sold and no longer belonged to Maujud Ali Shah or his heirs, and from this allegation of fact asked the court to draw the conclusion that Musammat Turab-un-nissa, as heir of Maujud Ali Shah, had no right to claim any portion of this annuity. The learned District Judge dealt with this plea on the assumption that the whole of the equity of redemption had as a matter of fact been sold prior to the institution of that suit. There has been some argument before us as to whether his remarks on this point can be treated as representing admissions made by both the parties at the hearing of the appeal, or findings of fact binding upon the parties.

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It was certainly the case for the present defendant, both in the suit brought by Musammat Turab-un-nissa and in the present suit, that the proprietary rights of Maujud Ali Shah in respect of all the property which formed the subject-matter of the mortgage of the 1st of December, 1870, had been put up for sale in successive execution proceedings and had entirely passed into the hands of various auction purchasers. In the case now before us the learned Munsif has found that this is what had taken place, and he gives certain dates according to which the last fragment of his proprietary rights in the mortgaged property passed from the hands of Maujud Ali Shah at an auction sale which took place on the 3rd of January, 1873. It does not seem to us that this finding of fact was seriously challenged in the appeal before the District Judge, and in any case we think that the present defendant at any rate has no ground for complaint if we assume the truth to be what we think it actually was, namely, that the proprietary rights of Maujud Ali Shah had been entirely sold up and had passed into the hands of various auction purchasers long before Musammat Turab-un-nissa instituted her suit in the year 1909.

To return now to the finding of the District Judge in that suit; he starts, as we have said, with the assumption that "the mortgagor's equity of redemption" had been entirely sold away before the institution of that suit. He goes on to hold, however, that the right to receive the annuity, or *malikana* allowance, was a thing quite distinct from the equity of redemption strictly so-called, that is to say, from the proprietary rights of Maujud Ali Shah in the mortgaged land. He holds that this allowance sought to be charged on the mortgaged property went with the land, so that the defendant, as successor of the transferee of the rights of the original mortgagee, was liable to pay it. He holds, further, that the right to receive this allowance was not saleable and as a matter of fact had never been put up for sale at any of the auction sales held in execution against Maujud Ali Shah, in the course of which his proprietary rights had passed to various auction purchasers. On this finding amongst others he based his decision dismissing the defendant's appeal and affirming the decree of the first court in favour of Musammat Turab-un-nissa

The defendant came in second appeal to this Court, and the result is to be found in *Lachmi Narain* v. *Turab-un-nissa* (1). A perusal of that judgement will show that the finding of the District Judge that the proprietary rights of Maujud Ali Shah had entirely passed to certain auction purchasers was not challenged, nor was any plea argued against the decision of the District Judge that the mere sale of the proprietary rights passed no title to the auction purchasers to receive the *malikana* allowance and that the right to receive this allowance still inured in favour of the heirs of Maujud Ali Shah. A question of limitation was raised which found favour with this Court, to this extent that the sum decreed in favour of the plaintiff was considerably reduced.

A plea was also taken that the position of Musammat Turab-un-nissa as heir of Maujud Ali Shah was not satisfactorily established by the decision of the courts below. An issue was remitted upon this point resulting in a finding in the plaintiff's favour. This court thereupon decreed Musammat Turab-un-nissa's claim to such extent as it was found to be unaffected by the Statute of limitation. In view of the result of this litigation it is not open to us to go back to the beginning of things and examine the question of the precise nature of the rights which the mortgagor Maujud Ali Shah reserved to himself under the deed of the 1st of December, 1870. We may note in passing, as one of the relevant facts of the case, that in the year 1881, the question was raised by an auction purchaser of a portion of Maujud Ali Shah's proprietary rights as to whether he himself, as such purchaser, was not entitled to receive from the mortgagee in question a proportionate share of the *malikana* allowance. This claim was resisted by the father of the present defendant, and was decided against the auction purchaser by a judgement of the 8th of November, 1881, which is on this record. This fact shows that the decision arrived at in the litigation of 1909 to 1911 in favour of Musammat Turab-un-nissa was not a new thing, but was as a matter of fact an affirmation of the position which the defendant had himself previously taken up. We must take it now as decided finally *inter partes*, as the result of the suit brought by

(1) (1911) I. L. R., 34 All., 246.

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Musammat Turab-un-nissa, that the auction purchasers at the various sales in the course of which different portions of Maujud Ali Shah's proprietary rights in the mortgaged property were put up to sale did not by their auction purchase acquire any portion of the right to receive the annuity or *malikana* allowance now in suit.

The final question which we have to determine now is whether the position has been altered by the fact that, since the final decree in favour of Musammat Turab-un-nissa, the present defendant has been round to the various auction purchasers of Maujud Ali Shah's proprietary rights and has acquired from them, under a series of sale-deeds, whatever rights they themselves took by their auction purchase. It seems to us impossible to hold that this circumstance distinguishes the position of the present plaintiffs from that of Musammat Turab-un-nissa, so as to free the defendant from his liability. However anomalous the result may appear, and whatever arguments might be put forward against the soundness of that position, it has been definitely settled between the parties that in the year 1911 there were three distinct sets of persons who possessed rights in respect of the land dealt with by the mortgage deed of the 1st of December, 1870. (1) There was the present defendant, in possession as mortgagee. (2) There were a number of auction purchasers who had acquired piecemeal the proprietary rights of Maujud Ali Shah in the different items making up the mortgaged property. (3) There were the heirs of Maujud Ali Shah, entitled to receive an annuity or *malikana* allowance out of the income of the property in question. It is impossible to hold that a merger of the rights of the 1st and 2nd of these categories of persons automatically extinguished the rights of the 3rd. There has been no complete merger in the person of the present defendant of all the rights created by the mortgage deed of the 1st of December, 1870; and until such complete merger has taken place the heirs of Maujud Ali Shah are entitled to maintain their claim for this allowance, payable out of the profits of the mortgaged property by the person in possession and enjoyment of the same. The result is that this appeal fails and we dismiss it with costs.

Appeal dismissed.