

1920

RAM NATH
v.
HUB NATH.

explanation, we are of opinion that the court below was right in not including the fees in the decrees and we therefore dismiss both appeals with costs.

Appeal dismissed.

1920
April, 26.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

SARJU KUMAR MUKERJI (DECREE-HOLDER) v. THAKUR PRASAD
(JUDGMENT-DEBTOR).*

Civil Procedure Code (1908), section 47—Mortgage—Execution of decree—Effect of purchase of a decree for sale by a person who has already purchased part of the mortgaged property at a sale in execution of the same decree.

At a sale in execution of a final decree upon a mortgage part of the mortgaged property was purchased by M. Subsequently to this purchase M. also obtained from the mortgagee an assignment of the mortgage decree itself.

Held, on application being made for further execution of the decree, that the effect of M's purchase was to discharge the mortgage debt *pro tanto*, that is to say, in the ratio which the property purchased bore to the rest of the property mortgaged, and the decree could only be executed for the balance. *Bisheshur Dial v. Ram Sarup* (1) and *Kudhai v. Sheo Dayal* (2) referred to.

THIS was an appeal arising out of an application for the execution of a decree for sale on a mortgage. The facts of the case are set forth in the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

Munshi Gokul Prasad, for the respondent.

TUDBALL and SULAIMAN, JJ.:—This appeal arises out of an application for execution of a mortgage decree. It appears that on the 2nd of January, 1918, one Kanhya Lal obtained a final decree for sale of two villages, Pasi and Amilia, and one house, against Thakur Prasad, the present respondent. In execution of a simple money decree against the latter, half of Pasi and the whole of Amilia and the house were sold at auction and purchased in the name of Hem Chandra on the 20th of March, 1918. Subsequently on the 7th of April, 1918, Dr. Mukerji, the father of Hem Chandra, purchased the whole of the mortgage decree from Kanhya Lal. Dr. Mukerji having got his name substituted in place of the original decree-holder under an order,

* First Appeal No. 103 of 1919, from a decree of Gauri Shankar Tiwari, Subordinate Judge of Allahabad, dated the 19th of February, 1919.

(1), (1900) I. L. R., 22 All., 284. (2) (1898) I. L. R., 10 All. 570.

dated the 24th of August, 1918, proceeded to execute the decree and wanted to realize the whole of the decretal amount by sale of only half the share in village Pasi, which was still owned by Thakur Prasad. The judgment-debtor put in objections to the application for execution and pleaded that it was Dr. Mukerji himself who had purchased part of the mortgaged property at auction in the name of his son, Hem Chandra, who was a mere *benamidar*. He further pleaded that inasmuch as Dr. Mukerji who was himself interested in part of the mortgaged property, had acquired the mortgage decree, the decree had become incapable of execution. The court below found that Dr. Mukerji was the real purchaser of part of the mortgaged property and although it did not hold that the decree had in consequence become incapable of execution, it held that the mortgagee decree-holder must give credit for the proportionate part of the decretal amount which was a charge on the property purchased by himself. The decree-holder has appealed to this Court and the judgment-debtor has filed cross-objections. In appeal the finding of the court below that Dr. Mukerji was the real auction-purchaser has not been challenged, but it has been strongly urged that a mortgagee is entitled to realize the whole of the mortgage debt from any part of the mortgaged property he likes and that the execution court is not competent to go behind the decree and consider the question of apportionment, which must be left to be determined in a subsequent contribution suit.

Now, it is a well established principle of law that when a mortgagee acquires a part of the mortgaged property, the integrity of his mortgage is broken and he can no longer compel the mortgagor to pay the whole of the mortgage money before redeeming his share of the mortgaged property. Such a principle is expressly embodied in section 60 of the Transfer of Property Act. The same principle has been applied to a suit for sale brought by a mortgagee after having acquired part of the equity of redemption. A Full Bench of the Allahabad High Court in *Bisheshur Dial v. Ram Sarup* (1) held that where a mortgagee purchases a part of the mortgaged property such purchase has, in the absence of fraud, the effect of

1920

SARJU
KUMAR
MUKERJI
v
THAKUR
PRASAD.

(1) (1900) I. L. R., 22 All., 284.

1920

SARJU
KUMAR
MUKHERJI
v.
THAKUR
PRASAD

discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same *ratio* to the whole amount of the debt as the value of the property purchased bears to the value of the property comprised in the mortgage. In this case, however, the mortgagee having purchased a moiety of the mortgaged property was seeking to bring to sale the other moiety of the mortgaged property for recovery of only a moiety of the amount due on the mortgage, and was not trying to realize the whole of the mortgage money. It was the mortgagor who raised the point that inasmuch as the difference between the real value of half the mortgaged property, if sold unincumbered, and the price paid for it by the mortgagee was equal to the amount due upon the mortgage, the mortgage debt must be taken to have been extinguished. BANERJI, J., in delivering the main judgment of the Court, pointed out that when the mortgagee bought a portion of the mortgaged property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, became vested in the same person, and the result was that a part of the mortgage debt was wiped out by reason of this fusion of interests, and the balance only was recoverable from the remainder of the mortgaged property. The Court thereupon held that only so much of the debt could be held to be discharged as was proportionate to the value of the property in respect of which the confluence of rights had taken place.

The question that remains to be considered is whether there is any difference in principle in the case where it is after the decree for sale, and not before it, that the mortgagee acquires a part of the mortgaged property, or what comes practically to the same thing, where a co-mortgagor acquires the mortgagee's rights. The contention for the appellant is that the effect of the passing of the decree is to put it beyond the competence of the court to consider whether there should be any proportionate reduction in the amount sought to be recovered. It is true that an execution court cannot go behind the decree and must execute it as it finds it, and it is also true that ordinarily it is open to the mortgagee to recover the whole of his mortgage

money from any part of the mortgaged property he likes and that the mortgagor cannot insist that the mortgaged properties should be sold in any particular order. But if the vesting of part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage debt, there is no reason why an execution court should not recognize it and go into the question of the extent to which the decree has been satisfied. Section 47 of the Code of Civil Procedure would seem to be comprehensive enough to cover the case.

No reported case which can be said to be on all fours with the present case has been brought to our notice, and the nearest approach to it to which our attention has been drawn is the case of *Kudhai v. Sheo Dayal* (1). That was a case where a joint decree for possession by redemption of a house was passed in favour of Kudhai and several other persons against the mortgagees. Subsequent to the decree the rights of all the decree-holders other than Kudhai passed to the judgment-debtors. Kudhai sought execution in respect of the whole house and the mortgagee judgment-debtors objected that in consequence of the events that had happened Kudhai was not entitled to get possession of the whole house. MAHMOOD, J., after remarking that the question raised in that case was not free from difficulty, principally because the Code of Civil Procedure contained no express provision to meet cases such as this, was clearly of opinion that "when subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*." The learned Judge based this rule upon "the common principle of jurisprudence that a person cannot at one and the same time unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights, and it is upon this principle that the doctrine of merger and what would in Roman Law be called *confusio* proceed."

1920

 SARJU
KUMAR
MUKERJ
v.
THAKUR
PRASAD.

1920

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KUMAR
MUKERJI
v.
THAKUR
PRASAD.

In our opinion the rule enunciated by MAHMOOD, J., is based on a sound and equitable principle of law and clearly applies to the case before us. Dr. Mukerji has become owner of the equity of redemption in the bulk of the mortgaged property and has also acquired the whole of the mortgage decree. The legal effect of these devolutions of interest is an extinguishment of his decree *pro tanto*. It is, therefore, no longer open to him to say that in spite of the bulk of the mortgaged property having vested in him, his mortgage decree still remains intact, and the court cannot take into account the rateable liability of the property purchased by him but must allow him to realize the whole of the decree from the remainder of the property. It would be a very cumbersome and circuitous procedure indeed if the law were that Dr. Mukerji should realize the whole of the decretal amount in this proceeding, and then refund the excess amount realized by him in a subsequent regular suit for contribution brought against him by the mortgagor. We are satisfied that this is not the law.

Although the judgment-debtor has filed cross-objections to the effect that in consequence of the vesting of the mortgagee's rights in a person who is himself interested in part of the equity of redemption, the decree has become incapable of execution, the plea has not been pressed before us, and it has been conceded by the learned advocate for the respondent that the provisions of order XXI, rule 16, do not apply to a mortgage decree for sale. And we know of no provision of law or principle of equity under which a complete extinguishment of the decree can take place in such circumstances.

We accordingly dismiss both the appeal and the cross-objection with costs.

Appeal dismissed.