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nature of a simple money debt or liability, not amounting to a charge on any portion of the property which was under the superintendence of the Court of Wards.

In the lower appellate court no other plea was pressed. We allow the appeal accordingly and, setting aside the decree of the lower appellate court, restore that of the court of first instance with costs.

Appeal decreed.

Before Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

AMBA PRASAD (PLAINTIFF) v. WAHID-ULLAH AND OTHERS
 (DEFENDANTS).*

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Act No. IV of 1882 (*Transfer of Property Act*), section 82—*Mortgage—Integrity of mortgage broken up—Parts of the mortgaged property purchased by prior and subsequent mortgagees—Rights of purchasers inter se.*

Where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part; but where the rights of the mortgagor have vested partly in a prior mortgagee and partly in a subsequent mortgagee, as a result of a suit brought by each of them to enforce his mortgage without impleading the other, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired.

THE facts of this case are fully stated in the judgment of the Court.

Mr. B. E. O'Connor, Dr. Surendra Nath Sen and Munshi Narain Prasad Ashthana, for the appellant.

Maulvi Iqbal Ahmad, for the respondents.

STUART and KANHAIYA LAL, J.J. :—This appeal arises out of a suit brought by the plaintiff (appellant) for the redemption of a two-thirds share of Katra Gulab Singh situated in Kashmiri Bazar, Agra. The Katra originally belonged to Dhumi Singh, who left three sons, Jwala Prasad, Bhawani Shankar and Debi Shankar. On the 28th of November, 1877, these three brothers mortgaged two stables and a house situated in Katra Gulab Singh in favour of Sukhdeo Rai. The mortgage was simple. On the 6th of March, 1878, the three brothers mortgaged the said Katra Gulab Singh with other properties with possession in favour of Sheikh Abdullah. On the 30th of May, 1878, two of them, Bhawani Shankar and Jwala Prasad, mortgaged their two-thirds share of Katra Gulab Singh in favour of Durga Prasad.

On the 15th of August, 1879, Sukhdeo Rai sued on his

* Second Appeal No. 1149 of 1920, from a decree of T. K. Johnston, District Judge of Agra, dated the 22nd of July, 1920, reversing a decree of Kanleshar Nath Rai, Subordinate Judge of Agra, dated the 3rd of August, 1918.

mortgage of the 28th of November, 1877, without impleading Sheikh Abdullah or Durga Prasad, and obtained a decree for sale, in execution of which the mortgaged property, namely, two stables and a house in Katra Gulab Singh, was sold by auction and purchased by Sheikh Abdullah, the subsequent usufructuary mortgagee. On the 12th of October, 1879, Durga Prasad sued on his mortgage of the 30th of May, 1878, without impleading any of the prior mortgagees and got a decree for sale, in execution of which he brought to sale the two-thirds share of his mortgagors in Katra Gulab Singh and purchased it himself.

The present suit has been filed by the plaintiff (appellant), who is the son of Durga Prasad, for the redemption of the usufructuary mortgage of the 6th of March, 1878, in respect of that two-thirds share. The defendants are the sons of Sheikh Abdullah. One of them disclaimed any interest in the mortgage; the other defendants pleaded that they had spent a considerable amount in the repairs and improvements of the mortgaged property and that a sum of over a lakh and seventy-six thousand was due to them under the mortgage. There were other pleas, too, with which this appeal has no concern.

The court of first instance held that the contesting defendants had spent Rs. 1,000 in repairs, that they were not entitled to claim the cost of any additions or improvements made by them, and that Rs. 8,343-5-4 were due to them on account of a two-thirds share of Katra Gulab Singh purchased by the plaintiff. It decreed the claim accordingly for redemption, subject to the payment of the said amount. On appeal the lower appellate court allowed to the defendants a right to redeem the mortgage of the 30th of May, 1878, on the payment of the amount of the decree obtained on foot of that mortgage by Durga Prasad, within a certain date, and further directed that if such payment was not made, it shall proceed to determine upon payment of what amount the plaintiff should be allowed to redeem the mortgage held by the defendants. In effect it recognized the right of the defendants, who had purchased two stables and a house in Katra Gulab Singh in satisfaction of the mortgage of the 28th of November, 1877, to redeem the subsequent mortgage of the 30th of May, 1878, in preference to the plaintiff who by virtue of his purchase claimed a right to redeem the prior usufructuary mortgage of the 6th of March, 1878.

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No question of preference is, however, really at issue. No right of redemption was claimed by the defendants in their written statement or otherwise asserted in the course of the trial. The rights of the original mortgagors have been split up. The defendants have purchased two stables and a house in Katra Gulab Singh in satisfaction of a prior mortgage and they are entitled to retain the same until some person entitled to redeem comes forward to pay the money due on that mortgage. The plaintiff holds the rights of a puisne mortgagee under the mortgage of the 30th of May, 1878, and has purchased the rights of two of the mortgagors in Katra Gulab Singh in satisfaction of that mortgage. A portion of the rights of the original mortgagors has thus vested in the defendants and another portion in the plaintiff; and the plaintiff cannot be allowed to redeem more than what he has purchased on payment of a proportionate share of the mortgage money, any more than the defendants can be allowed to redeem more than what they have purchased on payment of a corresponding part of the mortgage money.

The claim in the present suit is, however, confined to the redemption of the usufructuary mortgage of the 6th of March, 1878, and the plaintiff is clearly entitled to a decree for the redemption of that mortgage, so far as it relates to the two-thirds share of his mortgagors, on payment of such proportionate amount as may be found due on that mortgage, including the cost of any repairs that may have been carried out by the mortgagee, and free from any liability for such improvements as the mortgagee may have made, which were not needed for the protection or preservation of the mortgaged property. The proportionate mortgage money payable on account of such portion of the mortgaged property as has been purchased by the defendants in satisfaction of the prior mortgage, should be determined after excluding the prior mortgage money, computed as laid down in *Matru Lal v. Durga Kunwar* (1) from the value of the said property, inclusive of any interest chargeable after decree.

The learned counsel for the defendants respondents relies on the decision in *Yadalli Beg v. Tukaram* (2), ~~but in that~~ case one of the mortgaged fields had been purchased by a third person before the mortgagee had sued to enforce his mortgage. In the present case the rights of the mortgagors had not passed

(1) (1919) I. L. R., 42 All., 364.

(2) (1920) I. L. R., 48 Calc., 22.

to any third persons on the dates on which the suits on either of the mortgages of Sukhdeo Rai and Durga Prasad were filed. The mortgagors were parties to those suits; and the only effect of not making the prior or subsequent mortgagees parties to them was to leave their rights of sale or redemption unaffected. The father of the plaintiff and that of the defendants subsequently purchased the rights of the mortgagors in certain portions of Katra Gulab Singh in satisfaction of their respective mortgages; and the only manner in which the rights of the parties can now be properly safeguarded is by applying the principle recognized by section 82 of the Transfer of Property Act (IV of 1882) and allowing redemption in respect of such rights as have been acquired by each party subsequent to the above suits. A reference has also been made to the case of *Parasram Singh v. Pandohi* (1). In that case one of the parties had sued the mortgagors and obtained a decree for foreclosure without making the subsequent mortgagee a party to the suit, but no rights in the mortgaged property had been acquired by the subsequent mortgagee. Section 60 of the Transfer of Property Act lays down that where a mortgagee has acquired in part the share of the mortgagor, a person interested in the remaining portion of the mortgaged property is entitled to redeem the same on payment of a proportionate part of the mortgage money. As observed in *Dinanath v. Lachmi Narain* (2), *Kallan Khan v. Murdan Khan* (3) and *Munshi v. Daulat* (4), where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part; but where the rights of the mortgagors have vested, as in this case, partly in a prior mortgagee and partly in a subsequent mortgagee, after a suit had been brought by each of them to enforce his mortgage, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired.

The question of the costs of repairs and improvements claimed by the mortgagee does not present any difficulty. The parties agree that the cost of the repairs should be charged against the mortgaged property in connection with which such costs have been incurred. The mortgagee has no right to

(1) (1922) I. L. R., 44 All., 462.

(2) (1903) I. L. R., 25 All., 446.

(3) (1905) I. L. R., 28 All., 155.

(4) (1906) I. L. R., 29 All., 262.

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claim any cost of the improvements made by him; but if he has rebuilt any fallen portion in order to retain the income which was derivable from the same, he can legitimately get the cost thereof and charge the same on the property in connection with which such expense was incurred. In other respects the mortgagee can only claim a right to remove the materials of any improvements which may have been made by him, unless the portions so improved are such as can be allotted to him when a partition takes place, without impairing the rights of the plaintiff. But in no event he can claim the cost thereof from the persons who have acquired the rights of the mortgagors therein.

The appeal is, therefore, allowed and the suit remanded to the lower appellate court with a direction to readmit the appeal under its original number and to dispose of it in accordance with the directions above given. The costs here and hitherto will abide the result.

Appeal decreed.

Before Mr. Justice Stuart and Mr. Justice Sulaiman.

KAMMU AND OTHERS (DEFENDANTS) v. MUSAMMAT FAHIMAN AND OTHERS (PLAINTIFFS).*

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 June, 2.

Civil Procedure Code (1908), section 11—Res judicata—First Court not competent to try second suit.

In order that the doctrine of *res judicata* may apply it is necessary that the trial court which passed the earlier decision should have been competent to try the suit subsequently brought.

Rajah Run Bahadoor Singh v. Mussumat Lachoo Koer (1) and Misir Raghobar Dial v. Rajah Sheo Baksh Singh (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Narain Prasad Ashthana, for the appellants.

Mr. Muhammad Yusuf, for the respondents.

STUART and SULAIMAN, JJ. :—This appeal arises out of a suit for damages brought in the following circumstances :—The plaintiffs, who alleged themselves to be successors in interest of a certain Badlu, claimed title to a house in Agra city. This house had been sold to the predecessors in interest of the defendants in 1884. The plaintiffs contested the validity of the transfer. A previous suit had been brought by the plaintiffs against the defendants to obtain an injunction to

* Second Appeal No. 664 of 1921, from a decree of T. K. Johnston, District Judge of Agra, dated the 4th of February, 1921, reversing a decree of Govind Sarup Mathur, Officiating Subordinate Judge of Agra, dated the 19th of November, 1919.

(1) (1884) L. R., 12 I. A., 23.

(2) (1882) L. R., 9 I. A., 197.