

1921

PHUL CHAND  
v.  
KANHAIYA  
LAL.

my opinion the appeal must be dismissed, on the merits as well as upon the point of law that has been raised,

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.*

SOTI SURAJ MAL (PLAINTIFF) v. THAN SINGH (DEPENDANT).\*

*Mortgage—Right of mortgagee to enforce his whole claim against part of mortgaged property—Mortgaged property transferred to various hands, but not owing to the action of the mortgagee.*

Where property the subject of a mortgage has been broken up and various portions transferred to different alienees, the mortgagee, provided that he himself has not been a party to destroying the integrity of the mortgage, is entitled to realize his whole debt from any portion of the mortgaged property. *Sho Tahal Ojha v. Sheodan Rai* (1) followed. *Jugal Kishore Sahu v. Kedar Nath* (2) distinguished.

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

Babu Piari Lal Banerji, for the appellant.

Dr. Surendra Nath Sen, for the respondent.

GOKUL PRASAD and STUART, JJ.:—This is an appeal by the plaintiff arising out of a suit for sale on a mortgage. The mortgage-deed in suit was executed on the 19th day of October, 1906. Sipahi Singh, defendant No. 1, was the mortgagor and one Ali Muhammad, who sold his rights subsequently to the plaintiff, was the mortgagee. The property mortgaged was all the mortgagor's interests and rights in 20 biswas zamindari of a certain village. The plaintiff alleged that at that time the defendant's name was entered over a 1 biswa, 4½ biswansi share only, and this was mortgaged; that out of this a 6½ biswansi share was sold at auction in execution of a decree on a prior mortgage. He, therefore, claimed the whole of the mortgage money from the remaining 18 biswansis odd. The last mentioned share was sold at auction in execution of a simple money decree and has been purchased by Mulain Singh, defendant no. 3.

\* Second Appeal No. 1884 of 1919, from a decree of V. E. G. Hussey, District Judge of Moradabad, dated the 19th of May, 1919, modifying a decree of Lalta Prasad Johri, Subordinate of Moradabad, dated the 4th of February, 1919.

(1) (1905) I. L. R., 28 All., 174.

(2) (1919) I. L. R., 84 All., 606.

Defendant No. 4, Than Singh, has been impleaded as a puisne mortgagee.

The defence of Than Singh was that the bond in suit did not create any incumbrance; that the mortgagor had acquired a 5 biswa share under a pre-emption decree before the mortgage in suit; that this share was also included in the mortgage, and has subsequent to the mortgage been purchased by the plaintiff's own nephew Parmanand, and that the plaintiff dishonestly released this property from his claim. He further pleaded that the plaintiff could not get more than the proportionate amount of the mortgage debt chargeable on the  $18\frac{1}{2}$  biswansis share which the plaintiff wanted to sell. He also pleaded priority to the extent of Rs. 708-5-0. The defence of Mulaim Singh, the son of the mortgagor, was similar. The trial court came to the conclusion that the document of the 19th day of October, 1906, created a mortgage, that the share really mortgaged was only the 1 biswa,  $4\frac{1}{2}$  biswansis, originally owned by the mortgagor and with regard to which his name was entered, and did not and could not include the 5 biswas acquired by the pre-emption later on. He further went on to hold that even if the 5 biswas share were supposed to have been mortgaged, that fact could not affect the plaintiff's right to recover the whole of his mortgage money from a portion of the mortgaged property if he so wished. He also came to the conclusion that Parmanand who had purchased the 5 biswas share in execution of a simple money decree, although a nephew of the plaintiff, was separate from him. He decreed the suit for sale subject to the plaintiff paying to Than Singh Rs. 55 on account of the prior charge in the latter's favour. The defendant Than Singh went up in appeal and the learned Judge found (1) that the hypothecated property consisted of 6 biswas,  $4\frac{1}{2}$  biswansis, or in other words that the pre-empted share of 5 biswas was also included in the mortgage and (2) that the mortgagee could not throw the burden of the whole of the mortgage money on the 18 biswansis odd share only and release the 5 biswas pre-empted share, purchased by his nephew, from the claim. He also made a slight alteration in the amount awarded to Than Singh as a prior charge holder. Strange to say, the decree as framed in appeal is not exactly in accordance with the

1921

---

SOTI SURAJ  
MAL  
v.  
THAN SINGH.

1921

SOTI SURAJ  
MAL  
2.  
DHAN SINGH.

findings and this is because of the final order of the District Judge. It runs as follows :—" For the above reasons I allow the appeal with costs. The cross-objection is dismissed." The operative part of the judgment did not clearly specify the relief which was granted to the plaintiff or to what extent the appeal had been decreed. The plaintiff comes here in second appeal. His first contention is that the property mortgaged consisted of a 1 biswa,  $4\frac{1}{2}$  biswansi share only, as the mortgagor had not become the full owner of the pre-empted property at the time when the mortgage in suit was made and, secondly, that, even if he had become the owner thereof, the mortgagee was under the law entitled to recover the whole of the mortgage money from any portion of the property mortgaged to him and was not bound to enforce his mortgage against the whole of it.

In order to decide the first point it is necessary to refer to certain facts. As has been stated above, the mortgage in dispute was executed on the 19th day of October, 1906.

It appears that Sipahi Singh the mortgagor brought a suit for pre-emption of a 5 biswas share in the village on the 29th day of June, 1905. The suit was decreed on the 10th day of November, 1905, on the condition that he was to pay Rs. 3,000 within two months of the decree becoming final. On the 6th day of January, 1906, Sipahi Singh executed a mortgage of the pre-empted 5 biswas share in favour of one Kundan Lal in order to raise funds to pay up the pre-emption money, and deposited Rs. 3,000, the pre-emption money, in court on the 8th day of January, 1906. He applied for execution and got possession the same day. The defendant in that suit went up in appeal and on the 17th day of August, 1906, the appellate court added Rs. 250 to the pre-emption money and a further sum of Rs. 24 as costs to the amount already payable under the decree of the first court. This extra amount was paid in by Sipahi Singh on the 25th day of October, 1906. This payment was within time because of the intervention of the civil court's long vacation. There can be no doubt in these circumstances that Sipahi Singh had become owner of and come into possession of the pre-empted property under a subsisting decree of court and treated it as his own, long before the date of the mortgage in suit, and, as the mortgaged property comprised

the whole of his rights and interests in the village, the mortgage was of the total 6 biswas odd share then owned by the mortgagor.

This brings us to the second point raised in this appeal.

Has the plaintiff the right to claim that the whole of the debt due under the deed is to be borne by a portion of the property mortgaged?

In *Sheo Prasad v. Behari Lal* (1) a Bench decided (1) that it was competent for a mortgagee to abandon a part of his security and sue for the sale of the remainder, and (2) if the sale proceeds of the remainder proved insufficient to satisfy his decree, to obtain a decree under section 90, Act IV of 1882, against the unhypothecated property of the mortgagor. This decision followed on the first point the decision of a single Judge in *Jai Gobind v. Jas Ram* (2). In 1905 a Full Bench had to decide whether a mortgagee could abandon a part of his security and foreclose on the remainder. The Full Bench in *Sheo Takhal Ojha v. Sheodan Rai* (3) decided that he could do so. In this decision the decisions in A. W. N., 1898, p. 120, and I. L. R., 25 All., 79, were approved. It has been urged for the respondent that the pronouncement at p. 178 "it is competent to a mortgagee to abandon a part of his security and sue for the sale of the remainder" is not authoritative. We do not agree. It is on this principle that the right to sue for foreclosure of a portion—the point then under decision—was justified. Thus we have on the authority of a Full Bench that a mortgagee can claim that the whole debt shall be borne by a portion of the mortgaged property.

But it is urged that the principle does not apply when the mortgaged property has been divided amongst several owners after the execution of the mortgage. We are unable to understand why it would not so apply, except in cases where the mortgagee has destroyed the integrity of the mortgage. The authority of a Bench in *Jugal Kishore Sahu v. Kedar Nath* (4) is quoted, but that decision only determined that where the mortgagee had accepted money in full satisfaction of the amount due in respect of a liability on a portion of the mortgaged property he could

(1) (1902) I. L. R., 25 All., 79. (3) (1905) I. L. R., 28 All., 174.

(2) Weekly Notes, 1893, p. 123. (4) (1912) I. L. R., 34 All., 1606.

1921

SOTI SURAJ  
MAL  
v.  
THAN SINGH.

only recover the proportion due on the remainder. There the mortgagee had himself destroyed the integrity of the mortgage. The decision is authority for the rule that where the mortgagee has, prior to the suit, definitely released part of the property from the mortgage for consideration, without receiving from the releasee his proper share of the mortgage money, he cannot in a suit against a subsequent purchaser or mortgagee obtain a decree against the rest of the mortgaged property for the balance of the mortgage money (p. 610). We express no opinion on the doctrine enunciated, as the point does not arise here, beyond observing that in such a case the mortgagee has himself disturbed the integrity of the mortgage.

But in this case, where the mortgagee has been no party to the division of the mortgaged property, the principle that the mortgagee has the right to sell a portion of the mortgaged property to recover the whole amount due on the deed holds good, whether the division has been the result of a voluntary or involuntary transfer. The owner of the portion sought to be sold, if he redeems, can claim contribution from the owners of the remainder. The dispute here is as to form rather than effect, for if the mortgagee had sought to bring to sale the whole of the six biswas odd, he could, after he obtained his decree, bring to sale a portion in satisfaction of the total amount due.

In this view the appeal must succeed. The decree of the trial court is restored, with [this modification that the amount of Rs. 55 due to Than Singh is increased to Rs. 88. The parties entitled to redeem will be allowed six months from the date of this decree. The plaintiff will be allowed three months from the date of their failure to redeem within which to deposit Rs. 88 and will then be entitled to add that Rs. 88 to the decretal amount. The respondent will pay his own costs of this appeal and those of the appellant.

*Appeal allowed.*