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But the mere fact that there was a civil liability does not necessarily absolve one from criminal liability. When a receiver attaches property and entrusts it to some person in the village, he does not purport to sell it to him or dispose of it at that time. The receiver may not even be in a position to know its true value. The intention of the parties is that the articles should be returned in specie or produced at the time when the auction sale is to take place. The covenant that the accused would be liable to pay a certain amount is more by way of security than because the property is transferred to him with liberty to dispose of it or withhold it. In such cases it is the true intention of the parties which must be taken into account. There can be no doubt that in this case it could never have been the intention of the receiver that the property attached should not be actually produced when the auction is to take place. If such property is not produced, the insolvent as well as the creditors may suffer, for it cannot be known beforehand what actual price would be fetched at the sale.

I dismiss the application.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Boys and Mr. Justice Banerji.

SHIB NARAIN (PLAINTIFF) v. GAJADHAR AND OTHERS
(DEFENDANTS).*

Mortgage—Three documents executed one after another between the same parties—Mashrut-ul-rah—Redemption—Mortgagor not entitled to redeem one without redeeming all three.

A mortgagor sold his equity of redemption in respect of three mortgages to the son of the original mortgagee. The

* Second Appeal No. 826 of 1923, from a decree of E. Bennet, District Judge of Agra, dated the 15th of February, 1923, confirming a decree of Aboul Hasan, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 2nd of June, 1921.

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first mortgage was a usufructuary mortgage for Rs. 500. The second, which was for Rs. 200, recited the first mortgage for Rs. 500, and made redemption conditional on the discharge of the second loan also. The third, after reciting the total prior debt of Rs. 700, referred to a subsequent *mashrut-ul-rahn* document for Rs. 200, which was being taken back, and then said that "Rs. 99 were being taken in cash, and for this total Rs. 299 the mortgagor was executing this fresh *mashrut-ul-rahn* document." It was further declared that the executant would pay this Rs. 299 before discharging the earlier debt and would pay up all interest before taking possession. The purchaser sued for redemption; but of the first mortgage only.

Held that the plaintiff was not entitled to redeem the first mortgage without also redeeming the other two. But in the circumstances the Court allowed him to amend his plaint and ask for redemption of all three together. *Ranjit Khan v. Ramdhan Singh* (1), *Brij Lal Singh v. Bhawani Singh* (2), *Har Prasad v. Ram Chandar* (3), referred to. *Bhartu v. Dalip* (4) and *Kesar Kunwar v. Kashi Ram* (5), distinguished.

The suit was by one Shib Narain, who had purchased the rights of the mortgagor, for redemption of a usufructuary mortgage, dated the 21st of May, 1864, made by Govind Prasad in favour of Chaudhri Behari Lal.

This mortgage was for a sum of Rs. 500 and was admittedly a usufructuary mortgage.

It had been followed by a second mortgage on August 14th, 1864, for Rs. 200 in favour of the same mortgagee. It recited the first mortgage for Rs. 500 and further declared that the mortgagor should not be entitled to redeem without discharging the second loan also.

This was again followed by a third mortgage on June 1st, 1867, in favour of the same mortgagee. It recited the prior total debt of Rs. 700; it referred to a subsequent *mashrut-ul-rahn* document for

(1) (1909) I.L.R., 31 All., 482. (2) (1910) L.L.R., 32 All., 651.

(3) (1921) I.L.R., 44 All., 37. (4) (1906) 3 A.L.J., 672.

(5) (1915) I.L.R., 37 All., 634.

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Rs. 200 which was being taken back (and with which we are no further concerned) and then said that Rs. 99 was being taken in cash and for this total Rs. 299 the mortgagor was executing this fresh *mashrut-ul-rahn* (the deed itself contains this description) document; and it was further declared that the executant would pay this Rs. 299 first before discharging the earlier debt, and would pay up all interest before taking possession.

On the 23rd of August, 1880, an agreement was signed between one Baldeo, the father of Gajadhar, the principal defendant respondent in this case, and Chaudhri Behari Lal, the mortgagee abovenamed, in which Chaudhri Behari Lal is said to have recognized Baldeo as half owner in, at any rate, the first mortgage, and one of the questions we have to decide is whether this agreement recognized him as half owner of the second and third mortgages also.

On the 6th of December, 1914, the heirs of Govind Prasad, the mortgagor, sold the equity of redemption to Shib Narain, the present plaintiff, who is the son of the deceased Chaudhri Behari Lal the mortgagee. The result of this transaction was that Shib Narain became the sole owner of half the property and owner of the equity of redemption in regard to Baldeo's half.

On the 5th of December, 1919, Shib Narain filed this suit for redemption, in respect of the first mortgage, of the half mortgaged to Baldeo. He alleged that he had deposited certain monies under section 83 of the Transfer of Property Act; that the defendant refused to withdraw the amount; and that now, on the other hand, there was due to him, Shib Narain, a sum of Rs. 650. The defence was that the defendant Gajadhar, son of Baldeo, now deceased, was also

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entitled to a half share in the second and third mortgages, and further that the first mortgage could not be redeemed without prior or at least simultaneous discharge of the second and third. Both points were decided against the plaintiff by both courts and the suit was dismissed *in toto*.

The plaintiff appealed.

Pandit *Braj Nath Vyas* and Munshi *Baleshwari Prasad*, for the appellants.

Pandit *Uma Shankar Bajpai* and Munshi *Narain Prasad Ashthana*, for the respondents.

The judgement of the Court (BOYS and BANERJI, JJ.) after setting forth the facts as above, thus continued. :—

Three points arise for determination in this case.

First, whether the defendant Gajadhar, son of Baldeo, is entitled under the agreement of the 23rd of August, 1880, to a half share only in the first mortgage, or also to a half share in the second and third mortgages.

The second question is, whether the defendant could insist upon the discharge of the second and third mortgages at the same time as the redemption of the first usufructuary mortgage.

The third question is, if it be held that the plaintiff could only obtain redemption of the first mortgage on condition that he also discharged the second and third, could he now be given a decree in respect of all three mortgages when he had only asked for redemption in regard to the first.

We will consider first the agreement of 1880. That contains the words :—“ *Girwi ki 70 bigha 4 biswa* ”, and later the words,—“ *Hamaro tumharo jo hissa barabar ka hai* ”. It is urged for the appellant that the word “ *girwi* ” indicates that this

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acknowledgement of equal shares could refer only to mortgages of the nature of a usufructuary mortgage and could not refer to the second and third mortgages. We see no justification for this restriction of the term, but we may add that even if that were a justifiable interpretation of the word, there is authority in the judgement of Mr. Justice BANERJI in *Har Prasad v. Ram Chandar* (1), for holding that even the second and third mortgages in this case may be regarded as usufructuary mortgages. It is not, however, necessary to press that, for, as we have said, there is nothing in the word "*girwi*", so far as we are aware, to restrict it to a usufructuary mortgage. On the other hand, we think that the words "*girwi ki*" were here only used as descriptive of all the mortgagee rights of the parties in the property specified, as distinguished from their vendee rights in other property referred to as "*bainamah ki*". Further, for the appellant reliance was placed on an admission said to have been made by the defendant Gajadhar in cross-examination that his right to possession was only based on the first usufructuary mortgage-deed. This would clearly not be sufficient to preclude him from maintaining that the three mortgages were really one. It is obvious that in one sense his claim for possession would be based on his first usufructuary mortgage. The statement was, moreover, brought out in cross-examination, but in examination-in-chief he had already definitely asserted his claim to be based on all the three mortgages. We hold, therefore, that the defendant had in fact a half share in all three of the mortgages, and we decide this question against the appellant.

The second question is, can the defendant compel simultaneous redemption of the second and

(1) (1921) I.L.R., 44 All., 37.

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third mortgages? The plaintiff appellant claims that he cannot. It is urged for him that he need not redeem simultaneously the later mortgages, unless they "consolidated the old and the new transactions". It would seem that of this class of case there may be three types, where it is suggested (1) that the first mortgage cannot be redeemed unless the second mortgage is first or simultaneously redeemed; (2), that the second mortgage cannot be redeemed unless the first mortgage is first or simultaneously redeemed, and (3) that neither the first nor the second can be redeemed separately. The present case is alleged by the defendant to be of the first type, with this addition that there is a third mortgage which bears to the first two the same relation that the second bears to the first.

We will consider first whether the first mortgage can be redeemed without redeeming the second.

We have set out at the commencement of this judgement the terms of the deeds sufficiently for the present purpose.

In support of his claim to redeem the first mortgage alone, the appellant relies on *Bhartu v. Dalip* (1) and *Kesar Kunwar v. Kashi Ram* (2). In *Bhartu v. Dalip* (1), it is clear that the restrictive agreement embodied in the later mortgage was misread and the effect of the particular decision was explained away in the later decision by the same learned Judge in *Brij Lal Singh v. Bhawani Singh* (3), which we shall notice later when considering the cases that support the respondent. The other case, *Kesar Kunwar v. Kashi Ram* (2), relied on for the appellant, helps him no more. In that case it was

(1) (1906) 3 A.L.J., 672.

(2) (1915) I.L.R., 37 All., 684.

(3) (1910) I.L.R., 32 All., 651.

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only held that (assuming that, if the second mortgage was not time-barred, the defence would be a good one that it must be paid off before redeeming the first mortgage) where there was a provision that the first mortgage should not be redeemed without paying off the second, and the second was in fact barred by limitation, the court could not possibly allow the defendant to rely on the condition as to first discharging the second mortgage and so in fact enable him to secure payment of a debt which he had allowed to become time-barred.

For the defendant respondent reliance was placed on *Ranjit Khan v. Ramdhari Singh* (1), *Brij Lal Singh v. Bhawani Singh* (2), and *Har Prasad v. Ram Chandar* (3). We are perfectly satisfied that on the terms of the second mortgage it is governed by the principles laid down in the three cases that we have quoted; that it is in the nature of an additional mortgage hypothecating the property, and that, on the principles laid down in those three cases, the plaintiff mortgagor was not entitled to redeem the first mortgage without at the same time discharging the second.

The case of the third mortgage is even more clear. In that the expression "*mashrut-ul-rahn*" specifically occurs, and as regards this mortgage counsel for the appellant has not found it possible to resist seriously the contention of the defendant that this third mortgage must be discharged before, or simultaneously with, redemption of the first.

As to the third question it has similarly not seriously been contended that the plaintiff could obtain redemption of the first mortgage and discharge the second and third on his prayer, as at

(1) (1909) I.L.R., 31 All., 482 (2) (1910) I.L.R., 32 All., 651.

(3) (1921) I. L. R., 44 All., 37.

present framed, in which the relief asked for has only referred to the first mortgage. But it is urged on his behalf that we should allow him now, even at this stage, to amend his plaint, and remand the case to the lower court for determination of the question as to how much is due on all three mortgages together. This course was permitted in *Brij Lal Singh v. Bhawani Singh* (1), though it appears not to have been followed in the earlier case, *Ranjit Khan v. Ramdhan Singh* (2).

We think that such a prayer should not be too readily granted; that in view of the decisions to which we have referred, the law as interpreted by this Court, at any rate, should be well enough known. In the present case, however, we are prepared to accede to the prayer. We have, therefore, given the appellant permission to amend the plaint so as to ask for relief as regards the second and third mortgages also, and, that amendment having been made, we remand this case to the court of first instance through the lower appellate court under order 41, rule 25 with directions to take such further evidence as may be necessary, and to determine the amount that may be due by the plaintiff to the defendant on foot of all three mortgages. On return of the finding the usual ten days will be allowed for filing objections.

[On receipt of the finding, the appeal was allowed, and order passed decreeing the plaintiff's suit for redemption.]

Appeal allowed.

(1) (1910) I.L.R., 92 All., 651.

(2) (1909) I.L.R., 91 All., 482.

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