

1929
 DIP. CHAND
 SREO
 PRASAD.

decree-holder being already on the record, the unnecessary procedure of showing them as the opposite party cannot be insisted upon, unless there was a clear warrant to the effect in rule 89. In the result, we allow the application in revision, set aside the orders of the learned Munsif and the Subordinate Judge, and set aside the sale.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Bennet.

1929
 April, 26

RAM SARUP AND OTHERS (PLAINTIFFS) v. RAM RICHHPAL AND OTHERS (DEFENDANTS).*

Mortgage—Subrogation—Property comprised in second mortgage being a fraction of that in the first—Third mortgagee and another person together paying off first mortgage—Third mortgagee gets priority over the second to the extent of a corresponding fraction of his contribution.

Where the third mortgagee and another person together paid off the first mortgage in full, *held*, on suit by the second mortgagee, that the third mortgagee was entitled to priority over the second to the extent of the sum which he had contributed for the discharge of the first mortgage; but as the property comprised in the second mortgage was only a fraction of that comprised in the first, the right of priority would be limited to the corresponding fraction of the amount contributed.

Hannumanthaiyan v. Meenatchi Naidu (1), distinguished. *Saminatha Pillai v. Krishna Ayyar* (2), followed.

Messrs. P. L. Banerji and H. P. Sen, for the appellants.

Dr. Kailas Nath Katju and Mr. Misri Lal Chaturvedi, for the respondents.

* Second Appeal No. 2145 of 1927, from a decree of S. Nawab Hasan, Additional Subordinate Judge of Bulandshahr, dated the 2nd of June, 1927, reversing a decree of Brijnandan Lal, Additional Munsif of Bulandshahr, dated the 9th June, 1926.

(1) (1911) I. L. R., 35 Mad., 188. (2) (1913) I.L.R., 38 Mad., 548.

KING and BENNET, JJ. :—This appeal arises out of a suit to recover the money due on a simple mortgage, dated the 11th of May, 1910, executed by Husain Khan and Nawab Khan in favour of Kcore Mal and Tulshi Ram as security for a sum of Rs. 800. Defendants Nos. 1 to 8 are heirs of the mortgagors. Plaintiffs Nos. 1 to 6 are heirs of the mortgagees. Bhup Singh, original defendant No. 11, was a subsequent mortgagee, who died during the pendency of the suit and whose heirs are now upon the record as defendants Nos. 11 to 14. Defendant No. 15, Chiranji Lal, was a subsequent purchaser.

1929
 RAM SARUP
 v.
 RAM
 RICHPAL.

The suit was contested by Bhup Singh and Chiranji Lal mainly on the ground that the mortgaged property situated in the town of Gulauthi is not liable to sale, and that Bhup Singh and Chiranji Lal had discharged a decree obtained on a prior mortgage and therefore had priority to the extent of the amount paid by them in discharging the prior mortgage.

The trial court repelled the defendants' contentions and decreed the claim in full.

The lower appellate court gave effect to the contention of Bhup Singh's representatives to the effect that they had priority to the extent of Rs. 3,063-9-0 which Bhup Singh had paid in satisfaction of the decree obtained by Faqir Chand on the basis of a mortgage dated the 29th of March, 1904. It may be mentioned that the appeal of Chiranji Lal abated in the court below as he died in November, 1926, and no representatives had been brought upon the record within the prescribed period. The court below, therefore, only had to consider the rights of Bhup Singh's representatives, and we also must leave out of account the claim made by Chiranji Lal.

1929

RAM SARUP
v.
RAM
RICHHPAL.

It has been found as a fact by the court below that when Faqir Chand obtained his decree on the basis of his mortgage dated the 29th of March, 1904, the decretal amount was paid off by Bhup Singh and Chiranji Lal to the extent of Rs. 3,063-9-0 and Rs. 1,000, respectively, and thus the mortgage was redeemed in full.

The court below held that Bhup Singh was entitled to priority to the extent of the sum which he had paid for the redemption of the prior mortgage, together with interest at 6 per cent. from the date of payment. The learned Subordinate Judge passed a decree allowing the plaintiffs' claim for Rs. 2,000 with costs and interest. He further directed that after the final decree is passed, first the property situated in the village of Faizabad be put up to sale and if its sale proceeds be sufficient to satisfy the amount of the decree, the other property of the town of Gulauthi should not be put to sale. But in case the property of the village of Faizabad be not sufficient to satisfy the decree, then he directed that the entire property of the town of Gulauthi, which was mortgaged in the mortgage of the 29th of March, 1904, would be put to sale, and out of the entire sale proceeds of both the properties of Gulauthi and Faizabad the amount of Rs. 3,665-13-6 will first go to the defendants Nos. 11 to 14 and the remainder will go to satisfy the decree, and the surplus, if any, would go to the other defendants. It must be explained here that in the earlier mortgage of the 29th of March, 1904, the whole 44 sihams of Gulauthi had been mortgaged. In the mortgage which is the basis of the present suit, only 23 sihams out of the 44 had been mortgaged together with 23 sihams out of 44 in mauza Faizabad.

The first point taken by the learned advocate for the appellants is that Bhup Singh can have no priority in respect of the payment made by him in discharge of the prior mortgage, because he did not pay the full amount necessary to discharge that mortgage. As we have already mentioned, Bhup Singh paid Rs. 3,063-9-0, whereas the balance of Rs. 1,000 was paid by Chiranji Lal. Bhup Singh and Chiranji Lal between them, therefore, certainly did extinguish the prior mortgage, but Bhup Singh himself only paid a portion of the money necessary for discharging that mortgage. The ruling in *Hanumanthaiyan v. Meenatchi Naidu* (1), has been relied upon in support of the contention that payment of a portion only of the money required for the discharge of a prior mortgage cannot give the person who makes the payment any priority. In that ruling it was held that where there are two mortgages on a single property and a person advances money for the payment of the first mortgage, the claim of such person to priority over the second mortgage cannot be sustained unless the first mortgage is entirely discharged. This ruling does not help the appellants, since it only lays stress upon the necessity for the entire discharge of the prior mortgage. In the present suit it is found that the prior mortgage has been entirely discharged. The other rulings cited by the learned advocate for the appellants are to the same effect that the entire discharge of the prior mortgage is necessary, but they do not go so far as to say that if the prior mortgage is discharged by two persons, each of whom contributes a share of the money, then neither person acquires any priority in respect of such discharge.

1929

RAM SARUP
v.
RAM
RICHHPAL.

(1) (1911) I.L.R., 35 Mad., 183.

1929

RAM SARUP
v.
RAM
RISHIPAL.

On the other hand, a ruling has been cited by the learned advocate for the respondents, *Saminatha Pillai v. Krishna Ayyar* (1), in which it was held that a subsequent mortgagee who advances money towards the discharge of a first mortgage on a property is entitled to priority over an intermediate mortgagee to the extent to which the money advanced by him went towards discharging the first mortgage. The facts of that case are very similar to the facts of the case before us. In that case a prior mortgage deed had been completely discharged. Rupees 300 had been advanced by a subsequent mortgagee, and the balance of Rs. 50 had been paid by the mortgagor himself. It was held that although the subsequent mortgagee did not advance the whole of the money required for discharge of the prior mortgage, he was entitled to priority over an intermediate mortgagee to the extent of the money advanced by him for discharge of the prior mortgage. This ruling is directly applicable to the facts of this case and we see no reason for not following it. We find, therefore, that Bhup Singh was entitled to priority over the plaintiff, who was an intermediate mortgagee, to the extent of the sum which he paid towards the discharge of the prior mortgage dated the 29th of March, 1904.

The next point is that the court below was wrong in allowing the defendants Nos. 11 to 14, i.e., the representatives of Bhup Singh, any share in the sale proceeds of the village Faizabad. Here we must accept the appellants' contention. Bhup Singh had no interest whatever in the village of Faizabad, and we see no reason why his representatives should be entitled to any share of the sale proceeds of that village.

(1) (1913) I.L.R., 38 Mad., 548.

1929

 RAM SARAI
 v.
 RAM
 RICHHPAL.

Another objection has been raised to the direction contained in the decree of the court below, that after the sale of the property in village Faizabad the entire property of the town of Gulauthi, which was mortgaged in the mortgage of the 29th of March, 1904, should be put to sale. Here again we think the court below was clearly wrong. The plaintiff is a mortgagee of only 23 out of 44 sihams of the town of Gulauthi, and he only asked for sale of that share. We see no justification for ordering sale of property which is not included in the plaintiff's mortgage deed and which he never sought to put to sale. In our opinion, only the 23 out of 44 sihams included in the mortgage in suit can be put to sale.

The last point argued is that even if Bhup Singh is entitled to priority in respect of the sum which he paid towards the discharge of the prior mortgage, he is only entitled to an amount proportionate to the share of Gulauthi which is being sold, i.e., 23/44 of the sum which he paid. No authority has been cited before us by either party on this point. Bhup Singh is entitled to priority in respect of the sum which he paid towards the discharge of the prior mortgage which covered the whole 44 sihams of Gulauthi. Now the plaintiff is only seeking to put to sale 23 out of 44 sihams of Gulauthi, and in our opinion it would be just and equitable that Bhup Singh should get priority to the extent of 23/44 of the sum which he paid in discharge of the prior mortgage.

We therefore vary the decree of the court below on this point by declaring that Bhup Singh's representatives, defendants Nos. 11 to 14, will be entitled to 23/44 out of Rs. 3,665-13-6 which was decreed to them by the court below.

1929

RAM SARUP
v.
RAM
RICHHPAL.

We accordingly allow the appeal in part and modify the decree of the court below by ordering (1) that the property situated in village Faizabad be put to sale first, and the sale proceeds thereof shall be wholly paid to the decree-holder and shall in no circumstances be paid to the defendants, and (2) that in case the property of the village of Faizabad be not sufficient to satisfy the decree, then the 23 sihams out of 44 sihams of the town of Gulauthi, which were mortgaged in the mortgage deed in suit, shall be put to sale, and out of the sale proceeds of these sihams the amount of $\frac{23}{44}$ of Rs. 3,665-13-6 will first go to defendants Nos. 11 to 14 and the remainder will go to satisfy the decree, and the surplus, if any, will go to the other defendants. Parties will bear their own costs in this Court.

Before Mr. Justice Niamat-ullah and Mr. Justice Bennett.

JOHARI MAL AND ANOTHER (PLAINTIFFS) v. BALMAKUND AND OTHERS (DEFENDANTS).*

1929
April, 30

*Act (Local) No. II of 1901 (Agra Tenancy Act), section 146—
Distraint—Misappropriation of crops—Suit for compensation—Jurisdiction—Civil and revenue courts.*

A suit by a tenant for recovery of the value of crops, on the allegations that the landlord had distrained and then misappropriated them and had thereafter obtained a decree for the arrears and realized it from the tenant by execution, is not a suit within the purview of section 146 of the Agra Tenancy Act, 1901, and is cognizable by the civil court.

Dr. M. L. Agarwala, for the appellants.

Dr. N. C. Vaish, for the respondents.

* Second Appeal No. 1891 of 1927, from a decree of Ganga Prasad Varma, Subordinate Judge of Bulandshahr, dated the 21st of April, 1927, confirming a decree of Ratan Lal, Munsif of Khurja, dated the 23rd of October, 1926.