

1882

ZAMIR
HUSAIN
v.
DAULAT RAM.

red to—*Jai Kuar v. Heera Lal* (1)—the Judges of this Court accepted the finding of the lower appellate Court on remand, *viz.*, “that it was not necessary, according to the custom of the mohalla, that a person claiming pre-emption should fulfil all the conditions of the Muhammadan Law of pre-emption, but that it was only necessary for him, according to such custom, after ascertaining the existence of the right, to demand its satisfaction from the vendor and vendee before witnesses.”

I think, then, that the Judge ought not, on the grounds stated by him, to have reversed the judgment of the Subordinate Judge, and I concur with my learned colleague in decreeing the appeal and in remanding the case under s. 562, Civil Procedure Code, to the lower appellate Court, to dispose of the remaining pleas, and costs of this appeal will be costs in the cause.

1881
August 1.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

RATAN RAI (PLAINTIFF) v. HANUMAN DAS (DEFENDANT).*

Res judicata—Civil Procedure Code, s. 13.

Certain immoveable property was mortgaged to *R* and then sold to *N*. It was then brought to sale in execution of a decree against *N* and was purchased by *H*. The balance of the sale-proceeds after satisfaction of that decree was paid to *N*. Under the terms of the mortgage to *R* interest on the principal amount was payable annually, and its payment was charged on the property as well as the payment of the principal amount. The mortgagors having failed to pay the interest annually, *R* in 1875 sued them and *N* and *H* to recover the interest due. It was decided in that suit that *N* was primarily and personally liable for the interest then due on the mortgage, as he had received the sale-proceeds of the property, and that the property was only liable in case he failed to satisfy the claim. *N* subsequently paid into court the sale-proceeds he had received and *R* was paid the same. In 1878 *R* again sued the same persons for interest and again *N* was declared primarily and personally liable, on the ground that he had not at once made over the sale-proceeds to *R*. In 1880 *R* sued the same persons to recover the principal amount and interest due on the mortgage, by the sale of the mortgaged property.

Held that, whatever might have been the rights and relations of the parties so long as any portion of the sale-proceeds remained with *N*, their position towards him assumed an entirely different character when once he had discharged himself of those moneys, and with this change in the situation the “*ratio decidendi*”

* Second Appeal No. 125 of 1881, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 29th November, 1880, reversing a decree of Babu Nil Madhab Itai, Munsif of Gházipur, dated the 18th August, 1880.

of the suits of 1875 and 1878 no longer existed, and therefore the decisions in those suits did not preclude *R* from bringing a suit to recover the principal and interest due on his mortgage from the mortgaged property.

THE plaintiff in this suit, Ratan Rai, claimed Rs. 918-0-6, principal and interest, on a bond bearing date the 7th February, 1868, in which certain immoveable property was mortgaged for the payment of the bond, principal and interest. It appeared that the bond had been executed by the defendants Nos. 1 and 2, Rashi-ud-din and Fakhr-ud-din, in favour of the plaintiff, and that they agreed therein to pay the interest payable on its principal amount annually. The defendants Nos. 1 and 2 subsequently sold the mortgaged property to defendant No. 3, Nur Muhammad. After its transfer to the latter it was brought to sale in execution of a decree against him, held by one Sukhdeo, and was purchased by defendant No. 4, Hanuman Das. The balance of the proceeds of this execution-sale, amounting to Rs. 2,364, was received by Nur Muhammad. In 1875, Ratan Rai sued defendants Nos. 1 and 2, and Nur Muhammad and Hanuman Das for the annual interest due to him on the bond. It was held in that suit that Nur Muhammad was primarily liable to satisfy the claim, because he had appropriated the surplus proceeds of the execution-sale, and that the mortgaged property in the hands of Hanuman Das was only liable in case Nur Muhammad failed to satisfy the claim. After paying several instalments of interest, Nur Muhammad, in July, 1876, paid Rs. 1,418-10-0, the balance of the Rs. 2,364, into Court, and such balance was at once drawn out by Ratan Rai. In June, 1877, Ratan Rai again sued Nur Muhammad and Hanuman Das for the annual interest due to him on his bond. The decision in the first suit was followed in the second, Nur Muhammad being again held primarily liable, because he had not at once made over the whole of the proceeds of the execution-sale of the property to Ratan Rai. In June, 1880, the present suit was brought by Ratan Rai to recover the principal amount of his bond and interest, by the sale of the mortgaged property. The Court of first instance gave the plaintiff a decree for the amount of his claim, directing that such amount should be realized from the defendant Nur Muhammad, and that, if he failed to pay the same, such amount should be realized by the sale of the mortgaged property. On appeal by the defendant

1882

RATAN RAI
v.
HANUMAN
DAS.

1882

RATAN RAI
v.
HANUMAN
DAS.

Hanuman Das, the lower appellate Court held that the defendant Nur Muhammad was primarily liable for the claim, and that the mortgaged property in the hands of the defendant Hanuman Das should be exempted, as he had purchased in good faith.

The plaintiff appealed to the High Court, contending that the mortgaged property was liable to satisfy the claim.

Lala Lalta Prasad, for the appellant.

The *Junior Government Pleader* (*Dwarka Nath Banarji*) and *Munshi Sukh Ram*, for the respondent (*Hanuman Das*).

The Court (STUART, C. J. and STRAIGHT, J.) delivered the following

JUDGMENT.—This appeal must prevail. That part of the property mortgaged by Rashi-ud-din and Fakhr-ud-din on the 7th of February, 1868, to the plaintiff-appellant, which has not been redeemed is admittedly in the possession of the defendant-respondent, and is therefore *prima facie* liable to the lien the plaintiff-appellant seeks by this suit to enforce against it. But the defendant-respondent's pleader urges that the rights of the plaintiff-appellant as against him and the property have already been determined by two suits in the year 1875 and 1878 respectively, and that the question now raised between them is *res judicata* and cannot be re-opened. We do not concur in this contention. At the time of the litigation referred to, Nur Muhammad Khan had on the 20th of April, 1874, taken out of Court the Rs. 2,364 balance left of the proceeds of the sale in execution of Sukhdeo's decree, after satisfaction of the two decrees of Sukhdeo and the present appellant; and whether rightly or wrongly it is not for us now to say, Nur Muhammad Khan was, by reason of his having done so, held primarily and personally liable for the interest then due under the bond of 1868 to the plaintiff-appellant. Subsequently, Nur Muhammad, probably being tired of litigation, after he had paid one or two instalments, having a balance of Rs. 1,418-10-6 out of the Rs. 2,364 in his hands, took that amount and paid it into Court on the 11th of July, 1876, and on the following day it was promptly drawn out by the present plaintiff-appellant, in part satisfaction of the principal and interest then due to him. It will thus be seen that whatever may have

been the rights and relations of the parties so long as this Rs. 2,364 or any portion of it remained with Nur Muhammad Khan, their position towards him assumed an entirely different character when once he had discharged himself of those moneys, and with this change in the situation the "*ratio decidendi*" of the suits of 1875 and 1878 no longer existed. We cannot hold that the decisions in those cases, under an entirely different state of facts, preclude the plaintiff bringing his present suit to recover the balance of principal and interest due upon his bond from the property mortgaged to him after crediting the Rs. 1,418-10-6 taken out of Court by him on the 11th July, 1876.

We think therefore that the Judge, who most carelessly seems to have overlooked the fact that the whole of the Rs. 2,364 was refunded by Nur Muhammad Khan, was altogether wrong in his order, and this appeal will therefore be allowed with costs, and the plaintiff-appellant's claim will be decreed against the property pledged now in the hands of the defendant-respondent.

FULL BENCH.

1882
June 13.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

GOPAL PANDEY (DEFENDANT) *v.* PARSOTAM DAS (PLAINTIFF) *

BADRI NATH AND ANOTHER (PLAINTIFFS) *v.* PARBAT AND ANOTHER
(DEFENDANTS) †

*Landholder and tenant—Right of occupancy—Mortgage—Act XVIII of 1873
(N.-W. P. Rent Act), s. 9—Meaning of "transfer."*

Held by the Full Bench (MAHMOOD, J., dissenting) that an hypothecation by an occupancy-tenant of his right of occupancy was not a "transfer" within the meaning of s. 9 of the N.-W.P. Rent Act, 1873.

THESE were two second appeals in which the question arose whether an hypothecation by an occupancy-tenant of his interest was a 'transfer' within the meaning of s. 9 of Act XVIII of

* Second Appeal No. 1152 of 1881, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 12th August, 1881, affirming a decree of Babu Mritonjoy Mukarji, Munsif of Benares, dated the 4th March, 1881.

† Second Appeal No. 509 of 1881, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 4th February, 1881, affirming a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 19th November, 1880.