

## APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice  
Ziaul Hasan

\*GAILU alias DALAI AND OTHERS, (PLAINTIFFS-APPELLANTS) v. 1934  
October, 25  
LEKHA SINGH AND OTHERS, (DEFENDANTS-RESPONDENTS)

*Civil Procedure Code (Act V of 1908), order XXI, rules 62 and 66—Mortgage—Sale of property “subject to mortgage”—Purchaser, whether can question the mortgage—Auction sale of property subject to mortgage and after giving notice of mortgage in sale proclamation, distinction between.*

It is clear from the phrase “subject to such mortgage” in order XXI, rule 62 of the Code of Civil Procedure that the Code makes a distinction between the case in which property is expressly sold subject to a mortgage and the case in which notice of an alleged mortgage is given in the proclamation of sale under order XXI, rule 66 of the Code. In the former case the Court, *after being satisfied of the existence of the mortgage*, sells only the judgment-debtor's equity of redemption, i.e., the purchaser at such a sale buys the property subject to the mortgage. In the latter case he buys the property with notice of the mortgage and subject to such risk as the notice might involve and in that case the executing court does not decide whether the mortgage subsists or not. *Shib Kunwar Singh v. Sheo Prasad Singh* (1), *Mirza Husain v. Beni Madho* (2), and *Sant Bakhsh v. Nadir Mirza* (3), dissented from. *Izzat-un-nisa Begam v. Partab Singh* (4), referred to.

Mr. *Hyder Husain*, for the appellants.

Mr. *Radha Krishna Srivastava*, for the respondents.

NANAVUTTY and ZIAUL HASAN, JJ.:—This is a plaintiffs' appeal arising out of a suit for the sale of a four biswansis share in village Lilwal on the basis of a mortgage deed for Rs.300 executed by Hulas Singh, the deceased father of defendants nos. 1, 2 and 3, in favour of Gailu and Badal Shah, the deceased father of plaintiffs nos. 2 and 3.

\*Second Civil Appeal No. 101 of 1933, against the decree of Pandit Bishunath Hukku, Subordinate Judge of Hardoi, dated the 23rd of December, 1932, modifying the decree of S. Abdul Qasim Zaidi, Munsif, North Hardoi, dated the 26th of September, 1932.

(1) (1906) I.L.R., 28 All., 418.

(2) (1930) 7 O.W.N., 676.

(3) (1924) 27 O.C., 308.

(4) (1909) I.L.R., 31 All., 588.

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One Hulasi owned the property in suit, 17 biswansis of which were said to be ancestral property and 4 biswansis self-acquired property. On the 16th of August, 1915, Hulasi mortgaged 17 biswansis to one Bakhtawar Lal for five years (exhibit E-1) and he mortgaged on the 22nd of June, 1917, 4 biswansis to the plaintiff no. 1 Gailu and Badal Shah, the father of plaintiffs nos. 2 and 3 (exhibit 1). On the 20th of February, 1930, Bakhtawar Lal mortgagee put the property to sale in execution of a simple money decree and defendants nos. 5 and 6 purchased 12 biswansis out of 17 biswansis of the property subject to the plaintiffs' mortgage. On the 7th of August, 1931, defendants nos. 5 and 6 redeemed Bakhtawar Lal mortgagee (see exhibit 3) and executed a fresh mortgage in favour of Bakhtawar Lal. On the 21st of June, 1932, the present suit was filed for sale of the four biswansis share in village Lilwal on the basis of the mortgage deed (exhibit 1) of the 22nd of June, 1917, on the allegation that defendants nos. 5 and 6 are bound by the mortgage of the plaintiffs and they impleaded them as subsequent mortgagees. The defence was that the plaintiffs' property was different from that held by them. The trial court of the Munsif of Hardoi North decreed the plaintiffs' suit. In appeal the learned Subordinate Judge of Hardoi allowed the appeal of defendants nos. 5 and 6 with costs, and modified the decree of the lower court by discharging defendants nos. 5 and 6 as unnecessary parties to the suit. The plaintiffs have, therefore, filed this second appeal challenging the correctness of the decision of the lower appellate court and praying that the decree of the lower appellate court be discharged and that of the first court restored *in toto*.

The sole point for determination in this appeal is whether the plaintiffs are entitled to sell the property in suit, in other words, whether the defendants nos. 5 and 6 purchased the property at the auction sale subject

to the plaintiffs' mortgage, and as such are bound to pay the plaintiffs' money. Both the lower courts have held that the property in suit was purchased by the defendants nos. 5 and 6 subject to the plaintiffs' mortgage under order XXI, rule 62 of the Code of Civil Procedure. The finding on this point of both the courts is clear and unanimous. Order XXI, rule 62 of the Code of Civil Procedure runs as follows:

"Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge."

It is clear from the phrase "subject to such mortgage" that the Civil Procedure Code makes a distinction between the case in which property is expressly sold subject to a mortgage and the case in which notice of an alleged mortgage is given in the proclamation of sale under order XXI, rule 66 of the Code. In the former case the Court, *after being satisfied of the existence of the mortgage*, sells only the judgment-debtor's equity of redemption. In other words, the purchaser at such a sale buys the property subject to the mortgage. In the latter case he buys the property with notice of the mortgage and subject to such risk as the notice might involve. In the latter case the executing court does not decide whether the mortgage subsists or not. Such being the case, if there is in reality a subsisting mortgage, then the purchaser has to redeem it. If, on the other hand, the mortgage specified in the proclamation of sale turns out to be invalid, the purchaser acquires the property free from liability of the mortgage. But where after a due inquiry by the executing court, that court finds that the property sought to be sold is subject to a mortgage, then the auction purchaser is not at liberty to question that mortgage, but he buys the property subject to that mortgage or charge. In

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*Mirza Husain v. Beni Madho and another* (1) to which one of us was a party, it was held that the mere fact that incumbrances were noted in a sale proclamation for the information of an auction purchaser and were subsequently noted in the sale certificate, did not establish the contention that the property was sold subject to the incumbrances. That was a case in which the Court caused a proclamation of the proposed sale to be made in which proclamation the incumbrance to which the property was liable was noted. In that case there was no inquiry made by the executing Court as to the existence of the incumbrance to which the property was said to be liable. In the present case it is admitted by both parties and found as a fact by both the lower courts that an order was made by the executing Court under order XXI, rule 62 of the Code, that is to say after the Court had satisfied itself that the property was subject to the mortgage of the plaintiffs.

The learned Counsel for the respondents relied upon a single Judge decision of the late Court of the Judicial Commissioner of Oudh in *Sant Bakhsh and another v. Nadir Mirza and another* (2). In that case it was held that when an entry is made in the sale proclamation under rule 66, sub-rule 2, clause (c) of order XXI of the Code of Civil Procedure, whether that entry is founded on an action of the Court taken under rule 62 or on the basis of a report from the registration office, the effect of the entry in both cases is the same. With great respect to the learned Judge who decided that case we find ourselves unable to accept that view. When a civil court in execution proceedings holds under order XXI, rule 62 of the Code of Civil Procedure that the property sought to be sold is subject to a mortgage or charge in favour of some person not in possession, it does so only after it has held an inquiry into the matter and has satisfied itself that that is the fact. In the other case under order XXI, rule 66 of

(1) (1930) 7 O.W.N., 676.

(2) (1924) 27 O.C., 308.

the Code of Civil Procedure where it enters in the sale proclamation the fact that the property is liable to an incumbrance, it does not make any such inquiry and has not satisfied itself as to the existence or otherwise of the alleged incumbrance on the property sought to be sold. The difference between the two rules 62 and 66 is therefore fundamental and it cannot be said that the effect of the entry in the sale certificate that the property is liable to some incumbrance is the same as the entry of the incumbrance under rule 66. In *Izzat-un-nisa Begam v. Partab Singh* (1), in which certain villages were put up for sale in execution of a decree under section 88 of the Transfer of Property Act and it was notified in the sale proclamation that the property was to be sold subject to two prior mortgages under order XXI, rule 66 of the Code of Civil Procedure, it was held that the mere notification in the sale proclamation that the property was to be sold subject to certain mortgages could not be a bar to the purchaser from challenging the validity of the incumbrance which it notified, and it was held by Lord MACNAGHTEN, who delivered the judgment of their Lordships of the Privy Council, that on the sale of property subject to encumbrances the vendor got the price of it together with an indemnity against the encumbrances affecting the land, and that if the incumbrances turned out to be invalid, the vendor had nothing to complain of and that he had got what he bargained for. That ruling, however, does not touch the question raised in this appeal, which is whether it is open to the auction purchaser to challenge the validity and the existence of the mortgage subject to which he got the property at the auction sale. In our opinion he clearly cannot do so.

Rule 63 of order XXI of the Code also makes this point quite clear. It lays down that where a claim or

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(1) (1909) I.L.R., 31 All., 583.

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an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. Sir Dinshah Mulla in his learned commentary on the Code of Civil Procedure annotating upon the phrase "parties to suits under this rule" observes that the party against whom an order may be made may be either the decree-holder, or the claimant including an incumbrancer, or even the judgment-debtor. Since the judgment-debtor is precluded under this rule 63 from challenging the validity of an order made under rule 62 of Order XXI of the Code of Civil Procedure, if he fails to institute a suit contesting the order passed under rule 62 making his property subject to a mortgage or charge in favour of a third person, the auction purchaser, who purchases his property subject to the charge, is also bound by the decision of the executing Court arrived at under Order XXI, rule 62 of the Code of Civil Procedure on the question of the existence or validity of the mortgage. The auction purchaser would not have been so bound if the order was passed by the executing Court under Order XXI, rule 66 of the Code of Civil Procedure.

In *Shib Kunwar Singh v. Sheo Prasad Singh* (1) the distinction between Order XXI, rule 62 of the Code of Civil Procedure corresponding to section 282 of the old Code and Order XXI, rule 66 corresponding to section 287 of the old Code has been clearly brought out by the learned Judges, who decided that case in the following illuminating passage:

"As for the second point, it is clear that the Court did not sell the property subject to a mortgage as contemplated by section 282 of the Code of Civil Procedure. All that it did was to mention in the sale proclamation the fact that there was an alleged

(1) (1906) I.L.R., 28 All., 418.

mortgage on the property. It was not therefore incumbent on the judgment-debtor to bring a suit under section 282 to have it declared that no mortgage existed on the property. The object of specifying the mortgage in the sale proclamation was to give to intending purchasers all the information which it was necessary for them to know in respect of the property advertised for sale. The fact that the appellant purchased the property with notice of the alleged mortgage does not estop him from questioning the mortgage. The Code of Civil Procedure clearly makes a distinction between a case in which property is sold subject to a mortgage and a case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided for by section 282, and the latter by section 287. In the former case the Court after being satisfied of the existence of the mortgage sells only the judgment-debtor's right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. In the latter he buys the property with notice of the mortgage and subject to such risks as the notice might involve. The Court does not decide whether the mortgage subsists or not. If there is in reality a subsisting mortgage, the purchaser has to redeem it. If, on the other hand, the mortgage specified in the proclamation of sale is a fictitious mortgage, or did not subsist at the date of the sale by reason of its having been previously discharged by payment, the purchaser acquires the property free from liability for the mortgage. Any other conclusion might work hardship and injustice."

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The learned Counsel for the defendants-respondents has argued that this Bench decision of the learned Judges of the Allahabad High Court was discussed by a learned Judge of the late Court of the Judicial

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Commissioner of Oudh in *Sant Bakhsh v. Nadir Mirza* (1). With great respect we are of opinion that the reasoning in *Sant Bakhsh v. Nadir Mirza* (1) is unsound and the correct law on the subject has been propounded in the decision of *Shib Kunwar Singh v. Sheo Prasad Singh* (2) quoted above.

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For the reasons given above, we are unable to accept the contention urged by the learned Counsel for the defendants-respondents that whether the property is sold subject to a mortgage or charge or whether merely a notice of such incumbrance is given in the sale proclamation, the result is the same. This in our opinion is an entirely wrong construction of the provisions of Order XXI, rule 62 of the Code of Civil Procedure.

For the reasons given above, we allow this appeal, set aside the judgment of the lower appellate court and restore the judgment and decree of the trial court, with costs in this Court and in the lower appellate court.

*Appeal allowed.*

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*Before Mr. Justice C. M. King, Chief Judge and Mr. Justice  
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BRIJ GOPAL AND ANOTHER, (JUDGMENT-DEBTORS-APPELLANTS)  
v. MUSAMMAT MASUDA BEGAM (DECREE-HOLDER-  
RESPONDENT).

*Transfer of Property Act (IV of 1882), section 83—Civil Pro-  
cedure Code (Act V of 1908), Order XXIV—Maintenance  
charged upon property—Suit for arrears of maintenance—  
Preliminary decree passed—Deposit of decretal amount in  
Court—Interest on decree, whether ceases from date of deposit  
—Section 83, Transfer of Property Act, whether applies to*

\*Execution of Decree Appeal No. 50 of 1933, against the order of Babu Mahabir Prasad, Subordinate Judge of Lucknow, dated the 14th of July, 1933, reversing the order of S. Akhtar Ahsan, Munsif, Haveli, Lucknow, dated the 10th of November, 1932.

(1) (1924) 27 O.C., 308.

(2) (1906) I.L.R., 28 All., 413.