

In the view taken we may assume that there was a real mortgage by Enayet Ali, and it is unnecessary to remand the case to have that point determined.

It was lastly argued that as the mortgage carried with it a guarantee of title, some relief should be given as against the mortgagor; but no such relief was asked for in the plaint, and it is too late to ask for it now. We dismiss the appeal with costs.

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BASHI
CHUNDER
SEN
v.
ENAYET
ALI.

Appeal dismissed.

A. A. C.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

GOSFO BEHARY PYNE AND ANOTHER (DEFENDANTS NOS. 1 AND 2)
v. SHIB NATH DUT (PLAINTIFF) AND OTHERS (DEFENDANTS
Nos. 3, 4 and 5).

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July 20.

*Sale for arrears of rent—Patni sale—Mortgage security, conversion of—
Surplus sale proceeds, charge of mortgagee upon—Charge—Transfer
of Property Act (IV of 1882), s. 73.*

A patni taluk having been sold for arrears of rent under Regulation VIII of 1819, the surplus sale proceeds held in deposit in the Collectorate were drawn out at intervals by the holders of money decrees against the patnidars. The plaintiff, who held a mortgage of the taluk, sued to recover from these decree-holders the amount of his unsatisfied claim. Two of the defendants pleaded that, over and above the amount taken by them, there remained in deposit sufficient money to satisfy the plaintiff, and that the other unsecured creditors who had drawn out this balance should alone be held liable.

Held, that the surplus sale proceeds were to be regarded as the shape into which the plaintiff's security was converted, and as before such conversion the security could not be split up into parts, the plaintiff was entitled to realise the balance due to him out of the whole of the surplus, as otherwise his security would be diminished.

ONE Khairat Ali Sheik, the predecessor of the defendants Nos. 6 to 11, on the 18th December 1878 borrowed from the plaintiff the

* Appeal from Appellate Decree No. 1331 of 1891. against the decree of J. Crawford, Esq., District Judge of Hooghly, dated the 7th of May 1891, affirming the decree of Baboo Kedar Nath Mojoinadar, Subordinate Judge of that district, dated the 20th of May 1890.

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sum of Rs. 6,000 upon mortgage of a patni mehal lot Chiladingi and other properties. On the 25th July 1883, the accounts being adjusted and Rs. 2,600 being found due to the plaintiff, Khairat Ali borrowed from him a further sum of Rs. 6,400 upon a further mortgage bond being executed. The debt remained unpaid, and upon Khairat Ali's death the plaintiff sued the defendants Nos. 6 to 11 and obtained a decree on the 9th May 1888 for the sale of the mortgaged properties. On the 14th May, however, lot Chiladingi was sold in the Collectorate under Regulation VIII of 1819 for the zamindar's patni rent. After payment of the patni rent and costs a surplus of Rs. 6,564-12-3 remained in deposit in the Collectorate. The plaintiff applied to the Subordinate Judge for the attachment of the surplus sale proceeds, but his prayer was refused on the receipt of a *rubakari* from the Collector stating that there was another attachment. Subsequently the defendants Nos. 1 to 5, who held money decrees against defendants Nos. 6 to 11, drew out the whole of the surplus in the following manner :—On the 30th November defendants Nos. 1 and 2 drew out Rs. 1,995-2; on the 14th December defendant No. 3 drew out Rs. 2,498-2-3, and on the 21st December defendants Nos. 4 and 5 drew out Rs. 2,076-8. The plaintiff then proceeded to execute his mortgage decree against other properties. A balance of Rs. 3,150-12 remaining due to him upon the mortgage bond, the plaintiff brought this suit to have it declared that the whole of the surplus sale proceeds were subject to his lien, and praying for a decree for Rs. 3,150-12 against the defendants Nos. 1 to 5 in such proportions as the Court should think fit.

The Court of first instance held that the plaintiff's mortgage lien was transferred to the surplus sale proceeds by the operation of section 73 of the Transfer of Property Act (IV of 1882), that the plaintiff had a right to follow the surplus sale proceeds, and that the defendants Nos. 1 to 5 were liable for the amount claimed in proportion to the sums respectively drawn out by them from the Collectorate. From this decision the defendants Nos. 1 and 2 appealed and contended (*inter alia*) that as there was Rs. 4,569-10 left in the Collectorate on the 30th November after they had drawn out the amount of their money decree, which sum was more than sufficient to satisfy the plaintiff's claim, the other defendants

who had subsequently drawn out the balance, Rs. 4,669-10, should alone have been held liable. The lower Appellate Court held that the whole of the money in deposit was subject to the plaintiff's lien, and that the plaintiff was entitled to resort to any and all of the defendants Nos. 1 to 5 for payment.

The defendants Nos. 1 and 2 appealed to the High Court.

Dr. *Rashbehary Ghose* and Baboo *Jogesh Chunder Dey* appeared for the appellants.

Baboo *Srinath Dass* and Baboo *Karuna Sindhu Mookerjee* appeared for the plaintiff-respondent.

The judgment of the High Court (MACPHERSON and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This was a suit brought by the plaintiff-respondent, who held a mortgage of a patni taluk, which has subsequently been sold for arrears of rent and free of the mortgage, to recover from the principal defendants the surplus proceeds of the patni sale which they have taken in satisfaction of decrees held by them against the defaulting patnidars.

The defence of the defendants Nos. 1 and 2, who are the appellants before us, raised (amongst other points not necessary now to consider) this: namely, that as there was left sufficient money in deposit in the Collectorate over and above the amount taken by them, they are not liable for the plaintiff's claim.

The Courts below have disallowed this contention of the defendants Nos. 1 and 2, and the only point argued in this appeal on their behalf is, whether the defendants are liable for any portion of the plaintiff's claim when the money taken by them out of the surplus sale proceeds still left enough in deposit in the Collectorate to enable the plaintiff to realize the mortgage debt from it.

The provision of the law bearing on the subject is to be found in section 73 of the Transfer of Property Act (IV of 1882), which enacts that "when mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus (if any) of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part." It is not denied that a literal construction

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of this section would give the mortgagee a claim on the whole and on every part of the surplus proceeds; but it is contended that the section ought to receive a more liberal construction, and that it ought to be construed so as to allow unsecured creditors of the mortgagor to realize their claims out of the surplus sale proceeds so long as they do not reduce the amount below the mortgage debt. And as in the present case the money taken out by the appellants did not reduce the amount in deposit in the Collectorate below that limit, it is argued that they ought to be exonerated from all liability.

We do not consider this contention to be sound. For though, if the amount that had been left in deposit in the Collectorate after the appellants had drawn out their money had still remained there, the mortgagee might have satisfied his claim without bringing any suit against them, still, as there is nothing in the law to prevent other creditors of the mortgagor from drawing the money in deposit in satisfaction of their claims as has been done in this case, it must be held that any one who takes any portion of such money does so under the liability of being sued in case the mortgagee finds any difficulty in getting himself paid. To hold that unsecured creditors taking portions of the sale proceeds are exempt from liability to the mortgagee so long as they leave enough in the hands of the Collector would evidently have the effect of diminishing the mortgagee's security. For the persons who may take out money from the amount in deposit subsequently may not be sufficiently solvent, and the mortgagee may not be able to realize his money from them with the same facility that he might have in his realization if he got a decree against all the persons who took any portion of the money. We think that the proper view to take of the matter is to regard the surplus sale proceeds as the shape into which the mortgage security is converted, and as before such conversion the security could not be split up into parts, and the mortgagee was entitled to realize his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect. The point taken before us therefore fails, and the second appeal must be dismissed with costs.

Appeal dismissed.