Commissioner as arbitrator and that on a request made by him to the Deputy Commissioner to decide the matter after giving him an opportunity to state his case, the Deputy Commissioner had refused to comply with his request. These are matters with which we are not concerned in this appeal. If no arbitration has been done and no award has been made by the Deputy Commissioner it is open to the plaintiff to take necessary proceedings in that behalf.

Raza and Srivastava JJ.

For the above reasons we allow the appeal, set aside the decision of the lower court and dismiss the plaintiff's suit with costs throughout.

The cross-objections also fail and are dismissed with costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

1932 *April*, 29.

KANHAIYA LAL (PLAINTIFF-APPELLANT) v. IKRAM FATIMA, MUSAMMAT, AND OTHERS (DEFENDANTS-RESPONDENTS).*

Civil Procedure Code (Act V of 1908), *section* 11, *Explanation IV*—Res judicata—*Duty of a person to set up a prior charge in defence to a claim for sale—Priority not set up—Subsequent suit for declaration that he was entitled to priority, if barred by* res judicata—*Transfer of Property Act (IV of* 1882), *sections* 92 *and* 101—*Subrogation—Absence of puisne encumbrances, if bars the presumption under section* 101 *of the Transfer of Property Act—Mortgagee purchasing mortgaged property—Intention to extinguish encumbrances—Purchaser, whether can set up his mortgage deeds as still alive—Part of a mortgage only redeemed—Right of subrogation, whether arises.*

Held, that where it is the duty of a person to set up a prior charge in defence to a claim for the recovery of a certain sum of money by sale of a certain property, but no priority is set

*First Civil Appeal No. 51 of 1931, against the decree of Pandit Bishnath Hukku, Additional Subordinate Judge of Hardoi, dated the 9th of February, 1931.

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up, a subsequent suit for declaration that he has a prior charge is barred by Explanation IV of section 11 of the Code of Civil Procedure. *Syed Mohammad Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (1), *and Gajadhar Teli* v. *Bhagwanta* (2), relied on. *Radha Kishun* v. *Khurshed Hossein* (3), and *Abdul Wahid Khan* v. *Ali Husain* (4), distinguished.

Held further, that in the absence of any puisne encumbrance it is difficult to imagine any reason for the plaintiff to keep the prior encumbrance alive. Where a mortgagee purchased the mortgaged property from the mortgagor and paid up the prior encumbrances and the intention of the parties to the sale at the time of the execution of the sale deed was to extinguish all the encumbrances on the property, the mortgagee is not entitled to set up his own mortgage and the mortgages he paid up. *Maqsud Ali Khan* v. *Abdulla Khan* (5), *Govindasami Tevan* v. *Dorasami Pillai* (6), *Har Shyam Chowdhuri* v. *Shyam Lal Sahu* (7), and *Said Ahmad* v. *Raja Barkhandi Mahesh Pratab Narain Singh* (8), referred to.

Held also, that as provided by section 92 of the Transfer of Property Amending Act of 1929 a right of subrogation cannot be claimed when only a half share in certain mortgages has been redeemed. *Gurdeo Singh* v. *Chandrikah Singh* (10), and *Udit Narain Misir* v. *Asharfi Lal* (9), referred to.

Messrs. *Radha Krishna* and *K. N. Tandon*, for the appellant.

Messrs. *Hyder Husain* and *Triloki Nath Kaul*, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ. :—This is an appeal against the judgment and decree dated the 9th of February, 1931, of the Additional Subordinate Judge of Hardoi dismissing the plaintiff's suit.

The facts material for the purposes of the appeal which are not in dispute between the parties are that one Saqib

(1) (1911) L.R., 39 I.A., 68 (83). (2) (1912) I.L.R., 34 All., 593 (601).
(3) (1919) I.L.R., 47 I.A., 11. (4) (1920) 6 O.W.N., 1.
(5) (1927) I.L.R., 50 All., 218. (6) (1910) I.L.R., 34 Mad., 119. 221, 222.
(7) (1915) I.L.R., 43 Cal., 69. (8) (1931) 9 O.W.N., 253.
(9) (1916) I.L.R., 38 All., 502. (10) (1907) I.L.R., 36 Cal., 193.

Ali owned a 10-biswa share in Village Dhagasar. On his death the share was inherited by his minor son, Riasat Ali. On the 26th of July, 1912, Riasat Ali, acting through his mother and certificated guardian, Ikram Fatima, defendant No. 1, executed a deed of mortgage (exhibit 1) in respect of a 5-biswa share in favour of four persons, Hori Lal, Hukmi, Dharmoon, and Mihin Lal, for a sum of Rs.2,000. On the same date a deed of further charge (exhibit 2) was also executed for Rs.50. On the 7th of October, 1915, Ikram Fatima, acting as guardian of Riasat Ali, executed another mortgage deed (exhibit 3) of the remaining 5-biswa share in favour of Kanhaiya Lal, plaintiff. Riasat Ali died in September, 1916 and his mother Ikram Fatima, became owner of the entire 10-biswa share. On the 9th of February, 1917, Ikram Fatima executed a deed of further charge (exhibit 4) in favour of the plaintiff. She followed this up with a sale deed (exhibit 5) in respect of the entire 10-biswa share in favour of Kanhaiya Lal. This sale deed was executed on the 12th of April, 1917, in lieu of Rs.15,000. Out of the sale consideration Rs.2,444 were credited in respect of the amount due to the plaintiff on account of the mortgage deed (exhibit 3) and the deed of further charge (exhibit 4) and Rs.2,050 were left with the vendee, Kanhaiya Lal, for redemption of the mortgage deed (exhibit 1) and the deed of further charge (exhibit 2). Out of the balance the vendor acknowledged receipt of Rs.156; Rs.3,800 were paid in cash at the time of registration, Rs.466-15 were to be paid to the vendor after 15 days and the rest was to be left in the hands of the vendee for payment to certain creditors of the vendor. In 1917 and 1923 Kanhaiya Lal obtained deeds of release (exhibits 6 and 7) from two out of the four mortgages of the deeds (exhibits 1 and 2) and redeemed $2\frac{1}{2}$ biswas out of the 5 biswas mortgaged under those deeds. On the 9th of April, 1923, Ikram Fatima instituted a suit for recovery of the unpaid sale consideration, on the allegation

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that Kanhaiya Lal had failed to pay her creditors the money left with him for that purpose. On the 31st of May 1924, a decree was passed in favour of Ikram Fatima in the suit just mentioned for Rs.7,637-15-11. The decree provided that if the decretal amount was not paid within three months the 10-biswa share in Village Dhagasar would be sold to realize the amount. On the 5th of January, 1927, Ikram Fatima assigned one-third of her decree to Ram Narain, defendant No. 2. Thereafter Ram Narain applied for a final decree which was passed on the 17th of March, 1928. On the 9th of July, 1928, Ikram Fatima made an assignment of the remaining two-thirds of her decree in favour of Mata Din and Ram Sarup, defendants Nos. 3 and 4. The defendants Nos. 3 and 4 put their share of the decree into execution and a $6\frac{2}{3}$-biswas share in Village Dhagasar was put up for sale and purchased by the defendants Nos. 3 and 4 themselves on the 20th of June, 1930. On the 16th of July, 1930, the plaintiff instituted the present suit claiming various reliefs out of which only one need be stated, namely a declaration to the effect that the property purchased by defendants Nos. 3 and 4 was subject to the prior charge of the plaintiff in respect of the mortgage deeds (exhibits 1 and 3) and the deeds of further charge (exhibits 2 and 4). The defendants denied that the plaintiff was entitled to claim any priority on the basis of exhibits 1 to 4 against the defendants and pleaded *inter alia* that the claim for priority was barred by *res judicata* by the decree dated the 31st of May, 1924. The learned Subordinate Judge held that the exhibits 1 to 4 were no longer subsisting and the plaintiff was, therefore, not entitled to claim priority in respect of them. He also held that the plaintiff was precluded under section 11 of the Code of Civil Procedure from claiming priority in respect of the mortgages that had been paid up and discharged. The learned Subordinate Judge also negatived the plaintiff's claim in respect of the other reliefs and in the result dismissed the suit.

The only contention urged by the learned counsel for the plaintiff-appellant is that the learned Subordinate Judge has wrongly disallowed the plaintiff's claim for *priority*. In the first place, it is argued that as in the previous suit instituted by Ikram Fatima there was no controversy in regard to the mortgages (exhibits 1 to 4) it was not necessary for the plaintiff to set up his plea of priority in that suit. We find ourselves unable to accede to this argument. Exhibit C3 is a copy of the plaint of the suit which was instituted by Musammat Ikram Fatima for recovery of the unpaid purchase money. In paragraph 20 of this plaint she claimed a decree for Rs.9,000 on account of the unpaid consideration money of the sale deed, and further prayed that if the defendant did not pay the decree money "then the 10 biswas land situate at Village Dhagasar, Pargana Sandi, Tahsil Bilgram, District Hardoi, be sold."

Exhibit C8 is a copy of the written statement filed on behalf of Kanhaiya Lal. He denied the plaintiff's right to any relief, but he did not raise any plea that in case the plaintiff was held entitled to a decree for sale the sale could only be made subject to his prior charge on the basis of the mortgages (exhibits 1 to 4). Exhibit C1, the judgment, and exhibit C2, the decree passed in favour of Ikram Fatima, also show that the plea of priority set up in the present suit was not raised in that suit. Explanation IV to section 11 of the Code of Civil Procedure provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. That this plea of priority might have been made a ground of defence in the former suit cannot admit of any doubt. It is also clear that if the plea had been raised and had been decided in the plaintiff's favour in the previous suit the necessity for his bringing the present suit would not have arisen. The suit, as we have stated above, was for a decree for sale. Reading the plaint as a whole it

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is perfectly clear that Musammat Ikram Fatima in claiming a decree for the unpaid purchase money did not recognize any prior charge of Kanhaiya Lal. We have no doubt that the decree for sale claimed by her was on the footing of her having the first and the only charge on the property. If the defendants had a prior charge and the decree for sale as claimed by her could not be properly passed without the sale being made subject to the defendants' charge, it was clearly the duty of the plaintiff to set up the prior charges in defence to the claim of Ikram Fatima for sale of the property. We are supported in this view by the decision in *Syed Mohammad Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (1) and *Gajadhar Teli* v. *Bhagwanta* (2). The cases relied on by the learned counsel for the appellant, namely *Radha Kishun* v. *Khurshed Hossein* (3) and *Abdul Wahid Khan* v. *Ali Husain* (4) are distinguishable. The determination of the question must depend to a great extent upon the facts and pleadings of each case. In a case like the present we think the plaintiff not only "might" but also "ought" to have set up the priority of his mortgages by way of defence in the former suit. The defendants Nos. 3 and 4 are admittedly the assignees of the decree obtained by Ikram Fatima and as such her representatives. We have, therefore, no hesitation in agreeing with the lower court that the plaintiff's claim for priority against the defendants-respondents is barred by *res judicata*.

Apart from the bar of *res judicata* the plaintiff's plea about priority must, in our opinion, also fail on the merits. The argument on behalf of the plaintiff is that it was to the benefit of the plaintiff to keep alive his charge in respect of his own mortgages (exhibits 3 and 4) and in respect of the mortgages (exhibits 1 and 2) redeemed by him to the extent of half and that under the provisions of the amended section 101 of the Transfer of

(1) (1911) L.R., 39 I.A., 68 (83). (2) (1912) I.L.R., 34 All., 599. (601).

(3) (1919) L.R., 47 I.A., 11. (4) (1926) 6 O.W.N., 1.

Property Act he must be deemed to have kept them alive. It is true that while under the old section 101 merger was the rule, the section, as amended, makes it the exception. But we are of opinion that the facts and circumstances of the present case are sufficient to displace the general rule as enacted by the amended section. The only encumbrances existing on the property at the date of the sale in the plaintiff's favour were the mortgages (exhibits 1 to 4). If there had been any puisne encumbrance it would, no doubt, have been to the benefit of the purchaser to keep the prior encumbrance alive for being used as a shield against the claim of the puisne encumbrancers. But in the absence of any puisne encumbrance there is no room for any presumption in favour of an intention to keep the prior encumbrance alive. In fact the terms of the sale deed definitely point to a contrary intention. The details of the sale consideration show that the whole of the money due on the plaintiff's mortgages (exhibits 3 and 4) was paid up out of it. It also shows that the entire money due on the other encumbrances (exhibits 1 and 2) was left in the hands of the plaintiff for the said mortgages being redeemed. It seems, therefore, to be clear that the intention was to completely discharge all encumbrances existing on the property. When we put it to the learned counsel for the plaintiff that in the absence of any puisne encumbrance it was difficult to imagine any reason for the plaintiff vendee intending to keep the mortgages alive, the learned counsel said that he had intended to keep it alive to be used as a shield against the vendor's lien in respect of the unpaid purchase money. The reply was ingenious but has no substance. It can hardly be supposed that at the time of the execution of the sale deed the vendee had no intention of making payments to the creditors whom he undertook to pay. It may also be pointed out that in the case of some of these creditors the money was not payable until some years after the execution of the sale deed. We are,

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therefore, of opinion that the intention of the parties to the sale at the time of the execution of the sale deed was to extinguish all the encumbrances on the property and the plaintiffs are, for this reason, not entitled to set up the mortgages (exhibits 1 to 4) against the defendants-respondents. See *Maqsud Ali Khan* v. *Abdullah Khan* (1), *Govindasami Tevan* v. *Dorasami Pillai* (2), *Har Shyam Chowdhuri* v. *Shyam Lal Sahu* (3) and *Said Ahmad* v. *Raja Barkhandi Mahesh Pratab Narain Singh* (4). It may also be pointed out that the plaintiff cannot claim any right of subrogation in respect of the mortgages (exhibits 1 and 2), because admittedly only a half share in those mortgages has been redeemed. Section 92 of the Transfer of Property Act provides that nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full. Even before the enactment of this provision by the Transfer of Property (Amendment) Act, 1929, the same principle was recognized in *Gurdeo Singh* v. *Chandrikah Singh* (6) and *Udit Narain Misir* v. *Asharfi Lal* (5).

For the reasons given above, we are of opinion that the decision of the lower court is correct and must be upheld. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1927) I.L.R., 50 All., 218, 221, 222.
(2) (1910) I.L.R., 34 Mad., 119. (3) (1915) I.L.R., 43 Cal., 69.
(4) (1931) 9 O.W.N., 253 (264). (5) (1916) I.L.R., 38 All., 502.
(6) (1907) I.L.R., 36 Cal., 193.