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We accordingly allow the application with costs. A week's time is allowed to the learned Advocate for the appellants for amending the valuation. When the valuation has been altered to Rs.9,900 it follows that the record need not be printed.

*Application allowed.*

## APPELLATE CIVIL

*Before Sir G. M. King, Knight, Chief Judge and  
Mr. Justice E. M. Nanavutty*

1935  
December, 4

NAND LAL MANUCHA AND ANOTHER (DEFENDANTS-  
APPELLANTS) v. AJODHYA BANK, LTD.,

FYZABAD, PLAINTIFF AND OTHERS (DEFENDANTS-RESPONDENTS)\*

*Mortgage—Subrogation—Suit by prior mortgagee joining subsequent mortgagee—Subsequent mortgagee paying off prior mortgagee, whether entitled to obtain final decree and execute it—Civil Procedure Code (Act V of 1908), Order XXXIV, rule 4, and Appendix D, form 9—Interpretation of para. 7, form 9, Appendix D—United Provinces Agriculturist Relief Act of 1934, section 30(2)—Interest—Appellate Court's power to reduce interest.*

If a subsequent mortgagee pays up the amount found due to the plaintiff—the prior mortgagee—then the subsequent mortgagee is subrogated to the rights of the prior mortgagee and is entitled to apply for a final decree, and would be entitled to apply for sale in execution of that final decree.

Paragraph 7 of form no. 9 of Appendix D to the Code of Civil Procedure must be interpreted as authorising the Court to pass suitable orders so as to safeguard the rights of the subsequent mortgagees, if any, to obtain a final decree or to sell the property.

The question of the reduction of interest under the Agriculturists Relief Act is for the determination of the Court which passed the original decree and not for the Appellate Court.

Messrs. *Ram Bharose Lal and Suraj Sahai*, for the appellants.

Mr. *K. P. Misra*, for the respondents.

\*First Civil Appeal No. 114 of 1933, against decree of Babu Mahabir Prasad Varma, Subordinate Judge of Lucknow, dated the 18th of September 1933.

KING, C.J. and NANAVUTTY, J.:—This is a defendants' appeal arising out of a suit for sale upon the basis of a mortgage (exhibit 1) executed by defendant No. 3 on the 9th of February, 1927 in favour of the plaintiff, namely, the Ajodhya Bank, Ltd. The principal amount was Rs.1,00,000.

On the 19th of February, 1930, the defendant No. 3 executed a mortgage (exhibit A-1) in favour of defendants 1 and 2 mortgaging the same property which had been mortgaged in exhibit 1. The mortgage money of the second mortgage (exhibit A-1) was Rs.1,80,416. This consideration was made up of two items: the first item was Rs.68,118-14-0, due from defendant No. 3 to the mortgagees, defendants 1 and 2, in respect of a promissory note (exhibit C-23) which had been executed on the 25th of February, 1927. The other item, consisting of Rs.1,12,297-2-0, was the sum due to the Ajodhya Bank, Ltd., in respect of the mortgage, exhibit 1. This sum was left with the mortgagees (defendants 1 and 2) for payment to the plaintiff in discharge of exhibit 1.

It is admitted that the defendants 1 and 2 failed to discharge the plaintiff's mortgage and the plaintiff accordingly brought a suit to recover the mortgage money due on exhibit 1. Defendants 1 and 2 were impleaded as subsequent mortgagees and defendants 3 to 6 as mortgagors. Defendant No. 3 pleaded that he had been induced to execute the second mortgage (exhibit A-1) on the understanding that if he did so then defendants 1 and 2 would pay off the plaintiff's mortgage and the plaintiff would not enforce the mortgage against defendant No. 3. It is unnecessary to state the facts in any detail as they are no longer in dispute before us. The Court below found that the plaintiff Bank did not release defendant No. 3 from liability under the mortgage deed (exhibit 1) and decreed the plaintiff's claim. Under Order XXXIV, rule 4, sub-rule (4) the Court below also determined the rights and liabilities of defendants 1 and 2—the subsequent mortgagees. The Court,

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in its finding on issue No. 5, held that the mortgage money was due to the defendants 1 and 2 as default had been made in the payment of interest and instalments. Defendants 1 and 2 had claimed a sum of Rs.80,297-10-6 as being due to them up to the 24th of October, 1932. The Court below ordered that their accounts should be checked by the office and if correct the figure claimed would be entered in the decree. The Court found further that defendants 1 and 2 would not be entitled to apply for the sale of the property, but they would only be entitled to get their money under the plaintiff's decree if the property is put to sale at the instance of the plaintiff (namely, the first mortgagee) and if there is a surplus left after satisfying the claim of the first mortgagee.

This appeal is on behalf of defendants 1 and 2—the subsequent mortgagees. Their principal ground of appeal is that the Court below erred in holding that the appellants are not entitled to apply for sale of the property. They have referred to the language of the amended sub-rule (4) of Order XXXIV. Sub-rule (4) provides that where, in a suit for sale, subsequent mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D appended to the Code of Civil Procedure with such variations as the circumstances of the case may require. Form No. 9 of Appendix D is the form that is applicable to the present suit. It is urged on behalf of the appellants that under section 67 of the Transfer of Property Act a mortgagee has a statutory right to an order that the property be sold. As the rights of the appellants, as subsequent mortgagees, were adjudged in the suit of the first mortgagee it was necessary to safeguard their

interests including the right to obtain an order that the property be sold. It was argued that it cannot be correct to deprive the appellants absolutely of any right to bring the property to sale. The language used by the Court below in the operative portion of the judgment is: "They will not be entitled to apply for the sale of the property". We think that this has certainly been too widely and unconditionally expressed. We do not think that the subsequent mortgagees can be deprived of the right of putting the property to sale in all circumstances. Form No. 9 of Appendix D, paragraph 5, itself shows that in certain circumstances the subsequent mortgagee would be at liberty to apply for sale. Paragraph No. 5, clause (a) lays down: "That if defendant No. 2 (i.e. subsequent mortgagee) pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 (mortgagor) makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree." This shows that if the subsequent mortgagee pays up the amount found due to the plaintiff—the prior mortgagee—then the subsequent mortgagee is subrogated to the rights of the prior mortgagee and is entitled to apply for a final decree, and of course would be entitled to apply for sale in execution of that final decree. It is certainly going too far, therefore, to say that the subsequent mortgagee will in no circumstances be entitled to apply for the sale of the property. It has also been pointed out that if the mortgagor himself paid the amount due to the plaintiff but not the amount found due to the subsequent mortgagee then it must be open to the subsequent mortgagee to apply for a final decree and thereafter for sale. This contention is not seriously opposed by the learned Advocate for the respondents, but no provision for such a contingency is expressly made in Form No. 9 of Appendix D. It has also been

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suggested that the plaintiff might collude with the mortgagor and might refrain from executing the final decree and putting the property to sale and in such a case the subsequent mortgagee would have no remedy, if he were not entitled to get the decree executed for his own benefit. There may be other contingencies in which it would seem necessary to give the subsequent mortgagee the right of applying for sale, but it is obviously impossible to provide expressly for every possible contingency. We think it is clear that the decree of the Court below should be amended in accordance with Form No. 9 of Appendix D. That form, as we have already shown, provides expressly for a case in which a subsequent mortgagee can obtain the right to apply for a final decree if he satisfies the plaintiff's mortgage. Paragraph 7 of Form No. 9 gives the parties the right "to apply to the Court from time to time as they may have occasion" and no doubt the Court will exercise a proper discretion when applications are made so as to safeguard the interests of the subsequent mortgagee. We think that it is not possible for us to amend the decree by providing for the various contingencies suggested by the learned Advocate for the appellants, but it would be sufficient if the decree is amended in accordance with Form No. 9 of Appendix D. The decree must accordingly contain declarations regarding the amount due to defendants 1 and 2 in respect of their mortgage, together with future interest and costs. It must be understood that paragraph 7 of Form No. 9 of Appendix D must be interpreted by the Court concerned as authorising him to pass suitable orders so as to safeguard the right of the subsequent mortgagees, if any, to obtain a final decree or to sell the property. The office will calculate the amount due to the appellants up to the 18th of September, 1933, that is the date of the trial Court's decree. The interest will be allowed at the stipulated rate up to the date of that decree, and six months from today is

fixed as the date for payment by the mortgagors to the plaintiff Bank, and six months thereafter, for payment by the appellants—the subsequent mortgagees—to the plaintiff Bank. Future interest is allowed at  $3\frac{1}{2}$  per cent. per annum, simple, from the date of the decree of the Subordinate Judge.

Only one other point remains in this appeal. The appellants have taken exception to certain remarks made by the Court below about the dishonest conduct of defendant No. 1. In our opinion the remarks are not uncalled for as the defendant No. 1 certainly undertook to pay off the mortgage in favour of the plaintiff Bank and failed to do so although it is not alleged that the failure was due to the inability of defendant No. 1 to pay it off. In the circumstances we think that the remarks are not unjustified.

We may add that the question of the reduction of interest under the Agriculturists Relief Act was raised on behalf of the respondents 2 to 5. We do not decide that question as it is for the determination of the Court which passed the original decree.

We allow the appeal to the extent indicated above, but make no order as to costs.

*Appeal partly allowed.*

## REVISIONAL CRIMINAL

*Before Mr. Justice Ziaul Hasan*

BRIJ KISHORE (COMPLAINANT-APPLICANT) v. PANDIT  
CHANDRIKA PRASAD (ACCUSED OPPOSITE-PARTY)\*

1936  
February, 2

*Indian Penal Code (Act XLV of 1860), sections 405 and 408—Criminal breach of trust by servant—Failure to deliver money realized, whether amounts to embezzlement—Criminal Procedure Code (Act V of 1898), section 181(2)—Venue of trial—Accused's failure to account and deposit at place of accounting moneys realized at different places—Jurisdiction of Court at the place of accounting to try suit.*

\*Criminal Revision No. 15 of 1935, of the order of Mr. W. Y. Madeley, I.C.S., Sessions Judge of Lucknow, dated the 29th of January, 1935.

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