

1936
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learned Sessions Judge acquitting Kallu. We accordingly dismiss the appeal. If Kallu is in custody he should be released at once.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

1937
 January, 6

MUSAMMAT SIDDIQ-UN-NISA AND ANOTHER (DEFENDANTS-APPELLANTS) v. BHAGWAN DIN (PLAINTIFF-RESPONDENT)*

Mortgage—Decree for sale obtained—Transferee of portion of mortgaged property not impleaded—Property purchased by mortgagee decree-holder himself—Mutation refused for property in possession of transferee—Second suit by mortgagee for proportionate amount of mortgage money against transferee, if maintainable—Transferee's right to redeem—Amount for which mortgagee required to give credit for portion of property purchased by him and not in possession of transferee.

Where a mortgagee brings a suit to enforce his mortgage by sale without impleading a subsequent transferee of a portion of the mortgaged property, and obtains a final decree for sale, in execution whereof he himself purchases the mortgaged property, and obtains formal possession, but his application for mutation of names in his favour is opposed by the transferee and ultimately he obtains mutation only in respect of untransferred portion, the mortgagee can bring a second suit against the transferee claiming a decree for the proportionate amount of the mortgage money by sale of the transferred portion. On the other hand, the vendee not being impleaded in the previous suit is not affected by the decree passed in that suit and is entitled to redeem the property in spite of that decree. *Lakshmanan Chetty v. Muthaya Chetty* (1), *Venkat Reddy v. Kunjapa Goundan* (2), and *Rampia v. Hazari Lal* (3), referred to.

*Second Civil Appeal No. 61 of 1935, against the decree of Syed Yaqub Ali Rizvi, Second Additional Judge, Small Cause Court, as Additional Civil Judge Lucknow, dated the 2nd of November, 1934, confirming the decree of Babu Girish Chandra, Munsif, Haveli, Lucknow, dated the 20th of August, 1934.

(1) (1919) 62 I.C., 833.

(2) (1923) I.L.R., 47 Mad., 551.

(3) (1922) 65 I.C., 654.

When a mortgagee buys at auction sale the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which is chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. *Bisheshur Dial v. Ram Sarup* (1), relied on. *Jugal Kishore v. Harbans Chaudhri* (2), distinguished.

Mr. *Mohammad Ayub*, for the appellants.

SRIVASTAVA, C.J.:—This is a second appeal against an appellate decree of the Additional Subordinate Judge of Lucknow upholding the decree of the Munsif. Havali, Lucknow. It arises out of a suit for sale on the basis of a mortgage. The facts of the case are that on the 20th of October, 1924, Hamid Ali defendant No. 2 made a mortgage of three plots Nos. 946, 959 and 1006 in village Nagram Purab to the plaintiff Bhagwan Din. On the 16th of December, 1926, he sold two of the three mortgaged plots, namely, Nos. 946 and 959 to one Chaudhri Rahat Husain. Bhagwan Din plaintiff on the 7th of October, 1930, brought a suit to enforce his mortgage by sale of the three abovementioned plots and obtained a decree for sale which was made final. In execution of this decree the three plots were put to sale and purchased by the mortgagee decree-holder himself. He also obtained formal delivery of possession on the 6th of November, 1933. However Chaudhri Rahat Husain was not impleaded in the suit brought by the plaintiff and on the 5th of September, 1933, Chaudhri Rahat Husain sold the two plots Nos. 946 and 959 to Musammat Siddiq-un-nisa defendant No. 1. Thus when Bhagwan Din applied for mutation of names in his favour he was opposed by Musammat Siddiq-un-nisa and ultimately he could obtain mutation only in respect of plot No. 1006. Being deprived of possession and mutation in respect of the two plots

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(1) (1900) I.L.R., 22 All., 284(F.B.). (2) (1906) I.L.R., 28 All., 790.

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Nos. 946 and 959 Bhagwan Din brought the present suit against Musammat Siddiq-un-nisa, the original mortgagor Hamid Ali being also impleaded as a *pro forma* defendant. In this suit the plaintiff claimed a decree for Rs.450 being the proportionate amount of the mortgage money by sale of the two plots Nos. 946 and 959. The suit has been decreed by both the courts below and hence the present second appeal.

Srivastava,
C. J.

It has been in the first place faintly contended that the second suit was not maintainable and reliance has been placed on an observation in *Lakshmanan Chetty and another v. V. A. L. R. L. M. Muthaya Chetty* (1), in support of this contention. As pointed out in a later decision of the same court—*Venkata Reddy v. Kunjapa Gounden* (2), the observation relied on was a mere *obiter*. The lower appellate court has relied on the decision in the last mentioned case: *Venkat Reddy v. Kunjapa Gounden* (2); and on the decision of the Allahabad High Court in *Musammat Rampia v. Hazari Lal* (3), in support of its opinion that a second suit was maintainable as against persons in the position of defendant No. 1 who were not parties to the prior suit. The view taken in these cases appears to be more equitable and I think it should be followed. It cannot be denied that Rahat Husain not having been impleaded in the previous suit was not affected by the decree passed in that suit and was entitled to redeem the property in spite of that decree. There is no reason why in such circumstances the plaintiff should not have the corresponding right to enforce his mortgage against Ranat Husain and his transferee.

The next contention which has been more seriously pressed is that the plaintiff can claim only the balance which remains unpaid after giving credit for the amount for which the three plots had been purchased by him. It may be noted that the correctness of the

(1) (1919) 62 I.C., 833(836). (2) (1923) I.L.R., 47 Mad., 551.

(3) (1922) 65 I.C., 654.

amount claimed by the plaintiff was not questioned in the lower appellate court. As already pointed out the plaintiff never got possession of plots Nos. 946 and 959 and the sale in respect of these plots, which at the time of the sale were owned by Chaudhri Rahat Husain, is altogether ineffective. In such circumstances the plaintiff can in fairness be required to give credit only for the proportionate value of the one plot in respect of which the sale has been effective. This view is in consonance with the decision of the Full Bench of the Allahabad High Court in *Bisheshur Dial v. Ram Sarup* (1). It was held in this case that when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which is chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. The other decision of the Allahabad High Court to which reference has been made. *Jugal Kishore v. Harbans Chaudhri* (2)—is not in point inasmuch as no portion of the sale which had been made at first in that case was ineffective.

The result therefore is that no ground has been made out for interference with the decree of the lower court. I accordingly dismiss the appeal. As the respondent has not appeared I make no order as to costs.

Appeal dismissed.

(1) (1900) I.L.R., 22 All., 284F.B. (2) (1906) I.L.R., 28 All., 700.

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