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RAJCHANDRA
 MARWARI
 v.
 KRISHNA
 LAL
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 DAWSON
 MILLER,
 C. J.

It is not necessary in this case to decide whether a Court having made a decree ceases to have jurisdiction in execution proceedings where it has once sent a copy of the decree and the other papers to another court for execution and I merely wish to state that it is not my intention that anything I have said in this judgment should lead to the conclusion that I consider the court which made the decree would in such circumstances lose all jurisdiction in the matter.

The appeal is dismissed with costs.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

RAM NARAYAN SAH

v.

SAHDEO SINGH.*

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Jan. 17.

Mortgage—final decree on prior mortgage—sale set aside on deposit of decretal amount—suit by puisne mortgagees, whether prior mortgage can be used as a shield in—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 3—Transfer of Property Act, 1882 (Act IV of 1882), section 89.

Where a final decree has been obtained on a prior mortgage and the sale in execution thereof has been set aside by deposit of the decretal amount, which the judgment-debtor has borrowed on the security of another mortgage, the holders of the latter mortgage are entitled, in a suit on a mortgage executed subsequently to the prior mortgage, to claim priority in respect of the amount deposited in court to set aside the sale under the decree on the prior mortgage.

Het Ram v. Shadi Ram(1), distinguished.

Sukhi v. Ghulam Safdar Khan(2), followed.

* Appeal from Original Decree No. 115 of 1919, from a decision of M. Shah Muhammad Khalilur Rahman, Subordinate Judge of Patna, dated the 29th April, 1919.

(1) (1918) L. R. 45 I. A. 130; I. L. R. 40 All. 407.

(2) (1921) L. R. 48 L. A. 465; I. L. R. 43 All. 469.

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Appeal by defendants 3 and 4.

The facts of the case material to this report are stated in the judgment of Das, J.

Susil Madhab Mullick and *Siveswar Dayal*, for the appellants.

Kulwant Sahai and *J. P. Singh*, for the respondents.

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DAS, J.—The only question raised in this appeal is whether the defendants 3 and 4, who are the appellants before us, are not entitled to priority in respect of 4-annas share in a property bearing *Touzi* No. 126. The material facts are as follows :—

On the 22nd December, 1905, one Bisheshwar, the father of defendants 1 and 2, borrowed a sum of money from one Ramlagan and executed a mortgage in his favour in respect of a 4-annas share in a property known as Mauza Parmanandpur, bearing *Touzi* No. 126. Bisheshwar executed two further mortgages, one dated the 19th June, 1911, and the other dated the 27th April, 1913, in favour of the plaintiffs. In 1912, Ram Lagan brought a suit to enforce his mortgage, and on the 24th September, 1912, he recovered a decree as against Bisheshwar. Thereafter the mortgaged properties were put up for sale and were in fact purchased by Ram Lagan. On the 14th December, 1914, Bisheshwar, along with two other persons, borrowed a sum of Rs. 4,935 from the appellants and executed a mortgage in favour of the appellants in respect of certain properties including the 4-annas shares in Mauza Paramanandpur, bearing *Touzi* No. 126. The mortgage in favour of the appellants recited that Ram Lagan had recovered a decree as against them and that it was absolutely necessary for them to deposit the decretal money in Court in order to have the sale in favour of Ram Lagan set aside. On the 15th December 1914, Rs. 4,192-11-9 was actually deposited by Bisheshwar in Court and a receipt was granted to the appellants by Bisheshwar in respect of the money which was advanced by the appellants to Bisheshwar, in

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which it was distinctly stated by Bisheshwar that out of the money which was advanced by the appellants to Bisheshwar he had deposited the decretal money due to Ram Lagan Singh, decree-holder. There cannot be the slightest doubt that the money actually advanced by the appellants went to satisfy the mortgage bond of Ram Lagan. The question, therefore, arises, was the charge in favour of Ram Lagan extinguished, or was it kept alive by the transaction which took place between the appellants and Bisheshwar? In my opinion there cannot be the slightest doubt that the charge was kept alive. It was manifestly to the interest of the appellants that the charge should be kept alive and there is no reason at all to hold that they did not intend that which was manifestly to their advantage and for their benefit.

The learned Subordinate Judge has taken the view that the allegation that Ram Lagan's debt was satisfied out of the consideration money of the appellants' bond is not supported by any reliable evidence. In my opinion it is supported by the recitals of the bond and also by the receipt *Exhibit A* to which I have already referred. Then the learned Subordinate Judge says that there is no argument in the appellant's bond that the debt of the appellants will have priority over the plaintiffs' mortgage. Of course there is no such agreement nor could there be any such agreement. The question that the learned Subordinate Judge should have considered was this: was the mortgage bond of Ram Lagan extinguished or kept alive? and had the learned Subordinate Judge referred to the numerous authorities on the point, he would have had no sort of difficulty in coming to a proper conclusion on this point.

It was lastly argued by the learned Vakil for the respondents that the Judicial Committee, in the case of *Het Ram v. Sadi Ram* (1), has taken the

(1) (1918) L. R. 45 I. A. 130; I. L. R. 40 All. 407.

view that upon an order absolute for sale being passed under section 89 of the Transfer of Property Act, the security is entirely extinguished and cannot be kept alive for any one's advantage. It is of course conceded in this case that an order absolute for sale was passed in Ram Lagan's suit and that thereafter a sale of the property actually took place. If the decision of the Judicial Committee in *Het Ram v. Shadi Ram* (1) be the last word on the subject, then there can be very little doubt that the respondents will be entitled to succeed. But this case was considered by the Judicial Committee in the case of *Sukhi v. Ghulam Safdar Khan* (2). It was pointed out that various cases which have taken the opposite view were not brought to the notice of the Board in *Het Ram's* case (1) and that whatever the difficulty might have been under the Transfer of Property Act, the position is entirely different now that we are governed by the Civil Procedure Code and not by the Transfer of Property Act. Their Lordships in the course of their judgment said as follows :—

“Now the words being gone”, namely, the concluding words in section 89 of the Transfer of Property Act which gave rise to a conflict of authorities on the subject, “their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, namely, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield”. In my opinion this decision is conclusive on the point.

I hold that the decision of the learned Subordinate Judge on the question that has been argued before us

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(2) (1921) L. R. 48 I. A. 465; I. L. R. 43 All. 469.

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cannot be supported. I must accordingly modify the decree which has been passed by the learned Subordinate Judge and direct that the sale of the 4-annas share in Mauza Parmanandpur, bearing *Touzi* No. 126, must be subject to the prior mortgage lien of the appellants to the extent of Rs. 4,192-11-9.

The appellants will be entitled to their costs both in this Court and in the Court below from the plaintiffs.

ADAMI, J.—I agree.

Decree modified.

LETTERS PATENT.

Before Dawson Miller, C. J. and Jwala Prasad, J.

GOPAL RAI

v.

RAMBHAJAN RAI.*

1922.

Jan. 18.

Execution of Decree—decretal amount paid to decree-holder by one judgment-debtor and payment certified—decretal amount again deposited in court by another judgment-debtor and withdrawn by decree-holder—application for recovery of second payment, maintainability of—Code of Civil Procedure 1908 (Act V of 1908), section 47, Order XXI, rule 2.

Where one of the judgment-debtors paid the decretal amount into court, not knowing that another of the judgment-debtors had already paid the full amount to the decree-holder, and that the payment had been certified under Order XXI, rule 2, of the Code of Civil Procedure, 1908, and the decree-holder withdrew the amount so paid, *held*, that the judgment-debtor was entitled to succeed in an application made to the court for recovery from the decree-holder of the amount paid although the payment had not been recorded by the court, and that a separate suit was not necessary inasmuch as the application fell within the scope of section 47 of the Code.

Collector of Jaunpur v. Bithal Das(1), applied.

* Letters Patent Appeal No. 9 of 1921.

(1) (1902) I. L. R. 24 All. 291.