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this particular, and it is common ground also, as I stated above, that the holdings are tenures. This considerably diminishes the value of the record, and is a point which the learned District Judge has overlooked. It would be equally inconsistent to have two of the holdings, into which the parent tenure is now divided, held on fixed rents and the third on a rent liable to enhancement. Clearly the incidents of the holdings are the same in each case, and, having regard to the findings already arrived at in respect of the two cases, to the admitted payment at uniform rates for more than fifty years, to the judgment, Exhibit 3, and the manifest incorrectness of the record-of-rights as regards the nature of the holdings in suit, I am of opinion that the plaintiffs in this case also have rebutted the presumption and are entitled to the relief sought. I would, therefore, restore the decision of the learned Subordinate Judge and decree these three appeals with costs throughout.

ADAMI, J.—I agree.

Appeals decreed.

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February, 19, 20, 21. March, 5, 10.

Before Jwala Prasad and Ross, JJ.

BRIJMOHAN SINGH

v.

DUKHAN SINGH.*

Mortgage—subrogation, principles of—lessee, executing zamanatnama for the due performance of the engagement for payment of rent—whether a first mortgage—Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 79—*volunteer, whether entitled to subrogate—puisne mortgagee, failure of, to assert his priority—effect of failure—principles governing such cases.*

*Appeal from Original Decree no. 138 of 1927, from a decision of Babu Rambilas Sinha, Subordinate Judge of Shahabad, dated the 26th of February, 1927.

A took a lease of certain shares in a property from *B* and, to secure the due performance of the engagement for payment of rent, he executed a *zamanatnama* hypothecating property (*a*) in favour of B. The *zamanatnama* recited :

"I also hypothecate and mortgage the said share for realization of arrear of rent of each kist of each year till the subsistence of the aforesaid thica."

As the rent fell into arrears *B* brought a suit against *A* for the recovery of those arrears and got a mortgage decree for Rs. 5,519-9-6, and the property (*a*) was sold on the 2nd of December, 1919. On the 23rd of December, 1919, *A* borrowed a sum of Rs. 7,800 from *C* and mortgaged, *inter alia*, property (*a*). The mortgage bond recited the indebtedness of *A* to *B* for his rent and the sale in execution under the security-bond and the necessity for borrowing money to have the sale set aside.

A again fell into arrears of his rent and a suit was brought by *B*, *C* having been impleaded as a defendant as a subsequent mortgagee. *C* did not appear to contest the suit. *B* obtained a decree, which was also a mortgage decree on the basis of the *zamanatnama*, and in execution of that decree he purchased the mortgaged property.

In the suit brought by *C* on the basis of his mortgage, dated 23rd December, 1919, in which he claimed priority in respect of property (*a*).

Held, (*i*) that *B* had a first mortgage of the property covered by the *zamanatnama* for the entire rent due under the lease enforceable at the end of each kist;

Dalip Narayan Singh v. *Chait Narayan Singh*(1), followed.

(*ii*) that *C's* was only a second mortgage and he had only the right to redeem;

(*iii*) that *C* was only a volunteer : he was not compelled to make the payment for the preservation of any rights or properties of his own, because he took the second mortgage with notice of the first mortgage and with his eyes open and that, therefore, the doctrine of subrogation was not available to him.

Gurdeo Singh v. *Chandrikah Singh*(2), followed.

(1) (1912) 16 Cal. L. J. 401. (2) (1907) I. L. R. 36 Cal. 193.

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Held, further, on a review of *Radha Kishun* v. *Khurshaid Hussain*(1), *Srigopal* v. *Pirthi Singh*(2) and *Mahammad Ibrahim Hussain Khan* v. *Ambika Prasad Singh*(3).

(*i*) that when a party who is a prior mortgagee, and nothing more, is impleaded and nothing is alleged in derogation of his priority, he will be taken to have been impleaded under Order XXXIV, rule 12, Civil Procedure Code, 1908, and his priority is not affected;

(*ii*) that where the party impleaded is a prior mortgagee, and nothing more, but an allegation is made in the plaint derogating from his priority, his priority would be barred if the allegation is not controverted; and

(*iii*) that when the party impleaded is a puisne mortgagee and, therefore, a necessary party but claims priority, he must assert and prove his priority, otherwise he is barred.

Held, therefore, that *C* having failed to assert his priority in the second suit for rent brought by *B*, his priority, if any, was lost.

Appeal by the plaintiff.

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

Sambhu Saran and *C. P. Sinha*, for the appellant.

S. M. Mullick and *Rai T. N. Sahay*, for the respondents.

Ross, J.—This is an appeal from a decision of the Subordinate Judge of Shahabad in a suit on a mortgage. The appeal is by the plaintiff.

The plaintiff alleges that mahal Gundi, tauzi no. 214/7 in the district of Shahabad consists of ten parts set forth in Schedule A to the plaint. That Schedule shows that in tauzi no. 214/7 there are three thana numbers 55, 56 and 57 and seven khewat nos. 1/8, 1/9, 1/10, 1/16, 1/17, 1/20 and 1/21. This tauzi belonged to defendant no. 1, the father of

(1) (1919) I. L. R. 47 Cal. 662, P. C.
(2) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.
(3) (1912) I. L. R. 39 Cal. 527, P. C.

defendant no. 2. On the 23rd of November, 1914, the defendant no. 1 executed a *rehan* deed in favour of the defendant no. 3, Mahabir Prasad Missir, and it is alleged that this *rehannama* covered the properties set forth in Schedule B to the plaint, namely, 2 annas 3 pies out of 4 annas 6 pies in mauza Gundi, tanzi no. 214/7, thana no. 56, khewat no. 1/9 and thana no. 57, khewat no. 1/10. On the same day the defendant no. 1 took a lease of the *rehan* property and in security for the rent he executed a deed of *zamanatnama* by which he mortgaged the properties in Schedule C to the plaint, being the remaining 2 annas 3 pies share in the property specified in Schedule B. As the rent fell into arrears, the defendant no. 3 brought a suit for the rent from December, 1916, to December, 1917, and a mortgage decree was passed on the basis of the *zamanatnama* and the property was put up for sale and sold on the 2nd of December, 1919. On the 23rd of December, 1919, the defendant no. 1 borrowed Rs. 7,800 from the plaintiff mortgaging the entire property set forth in Schedule A and out of the consideration paid Rs. 5,519-9-6 to the defendant no. 3 and the sale was set aside. The defendant no. 1 again fell into arrears of his rent and a suit was brought by defendant no. 3 for the rent from March, 1918, to December, 1920, and the plaintiff was made a defendant as a subsequent mortgagee. In execution of that decree, which was also a mortgage decree on the basis of the *zamanatnama*, the properties in Schedule C were sold on the 10th of June, 1922, and purchased by defendant no. 3. Defendants 4 to 9 are subsequent purchasers of some of the mortgaged properties, but they do not contest the suit. The present suit was brought on the plaintiff's mortgage of the 23rd of December, 1919, and he claims a decree for sale of the properties nos. 3 to 10 in Schedule A as unencumbered and of the Schedule B properties as subject to the *rehannama* and of the Schedule C properties as a prior mortgagee.

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The suit was contested by defendant no. 3. His defence is that by the *rehannama* and *zamanatnama* aforesaid the entire property was hypothecated; that the plaintiff is not a prior mortgagee in respect of the *zamanatnama* properties with regard to which his lien has been lost; and that he is entitled only to a decree for sale of 2 annas 3 pies share in the mahal subject to the *rehannama*. This defence has been accepted by the learned Subordinate Judge whose decree is in accordance therewith.

The first question for decision is, what was mortgaged to the plaintiff? The Khewat shows that thana no. 55 is village Sheopur (which is also called Babhangaon) and it contains tauzi no. 214/7, khewat no. 1/8, in the name of Dukhan Singh (defendant no. 1) with an area of 2.72 acres and khewat no. 1/9, shamilat of Dukhan Singh and others, with an area of 1.47 acres. The tauzi no. of this shamilat khewat is not stated. Thana no. 56 of mauza Gundi consists of tauzi no. 214/7, khewat no. 1/9, in the name of Dukhan Singh with an area of 135.31 acres, and of tauzi no. 214, khewat no. 1/16, shamilat with an area of 134.90 acres, khewat no. 1/17, shamilat with an area of 5.71 acres and khewat no. 1/20, shamilat with an area of 36.86 acres, these being shamilat khewats of Dukhan Singh and others. The tauzi no. of the last two shamilat khewats is not stated. Thana no. 57, also of mauza Gundi, consists of tauzi no. 214/7, khewat no. 1/10, in the name of Dukhan Singh with an area of 615.52 acres and of khewat no. 1/20, shamilat with an area of 165.88 acres, being shamilat khewat of Dukhan Singh and others and of tauzi no. 214, khewat no. 1/21, with an area of 159.68 acres, being shamilat of the village. It thus appears that in the estate there are three thana nos. 55, 56 and 57 and three khewats of Dukhan Singh alone 1/8, 1/9 and 1/10 though khewat no. 1/9 is also a shamilat khewat in thana no. 55, and that there are shamilat khewats 1/16, 1/17, 1/20 and 1/21, the tauzi no. of khewats 1/16 and 1/21 being 214,

and the tauzi no. of the other two shamilat khewats 1/17 and 1/20 as of the shamilat khewat 1/9 not being stated. The total area of the lands in the khewats of Dukhan Singh alone is 753.55 acres, while the area of the shamilat khewats is 541.56 acres. The mortgage bond executed by Dukhan Singh in favour of the plaintiff hypothecates:

"4 annas 6 pies share of mahal Gundi original with dependencies along with mauzas Gundi Kalan and Gundi Khurd and mauza Babangaon *alias* Sheopur, etc., pargana and thana Arrah, without any exclusion of any milkiat right";

and in the Schedule the property is described as follows:

"4 annas 6 pies share of mahal Gundi original with dependencies along with mauzas Gundi Kalan and Gundi Khurd and Sheopur, pargana and thana Arrah, P. O. Gundi, tauzi no. 214, khata no. 7, the jama sadr of the entire mahal being Rs. 4,907-11-9 and that of the said khata Rs. 1,380-4-10, thana nos. 57, 56 and 55, khewat nos. 1/10, 1/9 and 1/8 shamilat along with zerat, bakasht, kasht and homestead lands of tenants and orchards and all the zamindari rights."

It seems clear on this document that the entire property included in tauzi no. 214/7 was mortgaged to the plaintiff, whatever that may be, a point which there are no sufficient materials on the record to decide, no distinct issue on the question having been framed. There is no dispute now that the mortgage was duly executed for consideration and that the plaintiff is entitled to a mortgage decree on the basis of that instrument.

The next question is, what was mortgaged to defendant no. 3? The *rehannama* contains a Schedule of the properties to which it relates as follows:

"2 annas 3 pies out of 4 annas 6 pies (which share of 4 annas 6 pies according to private partition has been formed into a takhta of 16 annas, 8 annas share) in mauza Gundi, pargana Arrah, thana and sub-registry office Arrah, district Shahabad, tauzi no. 214, khata no. 7 and thana nos. 56 and 57."

There is no Schedule to the *zamanatnama*, but it recites the *rehannama* and hypothecates:

"the remaining 2 annas 3 pies share being my milkiat owned and possessed by me in mauza Gundi, tauzi no. 214."

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It thus appears that what was mortgaged to defendant no. 3 was 2 annas 3 pies out of 4 annas 6 pies being tauzi no. 214/7, thana nos. 56 and 57, i.e. half of the mortgagor's interest in tauzi no. 214/7 except Sheopur thana no. 55. The other half was covered by the *rehannama*. The only difference between the extent of the interests of plaintiff and of defendant no. 3 was that the plaintiff had a mortgage of thana no. 55, tauzi no. 214/7, while defendant no. 3 had not.

In the petition for execution of the first mortgage decree (Exhibit 1) details are given of the 2 annas 3 pies share in mauza Gundi as consisting of (*1*) 2 annas 3 pies share in thana no. 57, khewat no. 1/10, with an approximate area of 615 acres; (*2*) 2 annas 3 pies share in thana no. 56, khewat no. 1/9, with an approximate area of 135 acres and (*3*) 2 annas 3 pies share in Babangaon *alias* Sheopur, thana no. 55, khewat nos. 1/8 and 1/9, with an approximate area of 4 acres. This third item is beyond the terms of the deed. It will be seen that these details agree with the khewats as set forth above. I refer to this document, not because it has any immediate bearing on the question, but in further explanation of the sale certificate granted to defendant no. 3 after his purchase at the second mortgage sale with which we are immediately concerned. The final decree for sale in that suit (Exhibit D) was for the sale of the immovable properties mentioned in the decree " or so much thereof as may be necessary "; and the certificate of sale (Exhibit A) shows that out of the 4 annas 6 pies share in mauza Gundi what was sold was 2 annas 3 pies milkiat share of mauza Gundi Kalan, thana no. 57, khewat no. 1/10, the approximate area being 615 acres, and 2 annas 3 pies share in mauza Gundi Khurd, thana no. 56, khewat no. 1/9, the approximate area being 135 acres. These two properties correspond with the first two of the three properties mentioned in the petition for execution of

the first mortgage decree. This sale certificate is the document of title of the defendant no. 3 and it is clear that his interest by purchase is limited to the properties set forth in Schedule C to the plaint, that is, one-half of the first two properties mentioned in Schedule A.

It is contended that the detailed description of the properties in the certificate should be rejected as false demonstration; but there is no ground for this, as there is no contradiction beween the general and the particular description and no false demonstration. Moreover, the detailed description is consistent with the Schedule to the *rehannama* which clearly refers to a " partitioned takhta ".

I now turn to the question whether the plaintiff has priority over the defendant no. 3 to the extent of Rs. 5,519-9-6 in respect of these two properties. This priority is claimed by right of subrogation. Now the general principle of subrogation is that where *A* makes a payment to *B* which benefits *C*, although *A* has no legal remedy against *C*, he is in equity subrogated to *B's* rights against *C* and stands in the shoes of *B*. Here it was defendant no. 3 who had rights against defendant no. 1. The plaintiff made a payment which benefited defendant no. 1; but this would not give him the right to stand in the shoes of defendant no. 3 against defendant no. 3 himself. It is not a true case of subrogation at all.

The matter may be looked at in another way. The *zamanatnama* (Exhibit 9) recites the lease and its term from 1322 to 1328 and the annual rent of Rs. 2,676-12-0, and that the executant has to execute a security bond in favour of Mahabir Prasad Missir for further satisfaction as regards the thica rent. Therefore, he gave in security the remaining 2 annas 3 pies share of mauza Gundi and said :

" I also hypothecate and mortgage the said share for realization of arrear rent of each kist of each year till the subsistence of the aforesaid thica."

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This is clearly a first mortgage of the property in question for the entire rent due under the lease, enforceable at the end of each kist. Section 79 of the Transfer of Property Act provides that

> "If a mortgage, made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage."

The meaning of this section was considered in *Dalip Narayan Singh* v. *Chait Narayan Singh*(1) with reference to the words "expresses the maximum to be secured thereby". In that case a security bond was executed by the lessees in favour of the lessors hypothecating two properties to secure the due performance of the engagement for payment of rent. Their Lordships observed: "The deed states that a lease had been granted for a term of nine years upon an annual rental of Rs. 12,125 and that the proprietor's lessors wanted reliable security for the payment of the annual rent; it then recites that the lessees hypothecated their properties for the payment of the annual rent and interest on defaulted instalments. Even if we assume for a moment that the amount of interest was not sufficiently specified, there can be no question that the aggregate rent payable under the lease could be determined by a simple arithmetical calculation. We hold, therefore, that the prior mortgage expressed the maximum to be secured thereby within the meaning of section 79 of the Transfer of Property Act." It is clear, therefore, that the defendant no. 3 had a first mortgage on these two properties for the entire rent. Thereafter the plaintiff took his mortgage and that mortgage recited the indebtedness of defendant no. 1 to defendant no. 3 for his rent and the sale in execution under the security bond and the necessity for borrowing money to have the sale set aside; and

(1) (1912) 16 Cal. L. J. 401.

it was on these terms that the plaintiff's advance was made. This is a second mortgage. The position was that the plaintiff lent money on a second mortgage; but this money did not pay off the first mortgage. It did indeed have the effect of giving fresh life to the first mortgage when the sale was set aside. But this was a voluntary act on the plaintiff's part. The plaintiff as second mortgagee was entitled either to redeem the first mortgage or to share in the surplus sale-proceeds. But that was all. As was pointed out by their Lordships of the Calcutta High Court in *Gurdeo Singh* v. *Chandrikah Singh*(1), "The doctrine of subrogation is not applied for a mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own." Clearly the plaintiff was not compelled to make this payment for the preservation of any rights or properties of his own, because he took the second mortgage with notice of the first mortgage and with his eyes open. I am of opinion, therefore, that the doctrine of subrogation is of no assistance to the plaintiff in the present suit.

Assuming, however, in favour of the plaintiff that he was entitled by subrogation to priority over the mortgage of defendant no. 3 to the extent of Rs. 5,519-9-6, the question is further to be considered whether this priority has been lost. The plaint in the second rent suit (Exhibit C), in which the present plaintiff was made defendant no. 2, contains the following paragraph (6):

"Defendant no. 2 is a subsequent mortgagee in respect of the property given in security. So to guard against any defect in future he has been made a party. If he has no objection to the claim set forth by the plaintiff, he should not enter into defence, nor shall the plaintiff be liable for costs."

The defendant no. 2 did not enter into defence in that suit. The allegation in the present plaint is that the

(1) (1907) I. L. R. 36 Cal. 193

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defendant no. 3 had full knowledge of the plaintiff's priority and accordingly when he brought this suit for rent, he gave out to the plaintiff that he (the plaintiff) was in fact the prior mortgagee to the extent of Rs. 5,519-9-6, but was a subsequent mortgagee to the extent of Rs. 2,280-6-6 and the sale would be subject to the prior encumbrance. This allegation was denied by the defendant and the learned Subordinate Judge has found that it is not established and it was not contended in appeal that this finding was wrong; and it is plainly negatived by paragraph (6) of the plaint itself.

In this connection there are three decisions of the Judicial Committee which have to be considered. In *Radha Krishna* v. *Khurshaid Hussain*(1) the plaintiff sued on a mortgage of 1892. The Sahu defendants had a usufructuary mortgage of 1891 and a simple mortgage of 1894. In 1906 the Sahus had brought a suit, to which the plaintiff's assignor was a party, on the mortgage of 1894 and in the plaint reference was made to the mortgage of 1891. The plaintiff's assignor did not appear and there was a decree for sale subject to the usufructuary mortgage of 1891. When the plaintiff brought his suit on the mortgage of 1892, it was argued that he was barred by his failure to defend the suit of 1906; but it was held that the plaintiff was outside that suit, inasmuch as he was a prior mortgagee and that in order that he should be affected by the doctrine of res judicata it was necessary that the Sahus should have shown that they sought to displace his priority and to allege a title in derogation thereof. But this had not been done and the impleading of the plaintiff's assignor as a prior mortgagee was explained with reference to section 96 of the Transfer of Property Act (Order XXXIV, rule 12). It is to be noticed that the plaintiff's assignor in the earlier litigation was cited as a prior mortgagee, pure and simple, and no allegation in derogation of his priority was made in the suit.

(1) (1919) I. L. R. 47 Cal. 662, P. C.

The next case is *Srigopal* v. *Pirthi Singh*(1). In that case there were five mortgages, the first, third and fourth being in favour of the predecessor of the appellant to England and the second and fifth in favour of other persons. On these five mortgages five suits were successively brought, the first and third by the appellant or his predecessor and the second by the second mortgagee; and in all these suits the mortgagors only were impleaded. The fourth suit was brought by the assignee of the fifth mortgagee who impleaded not only the mortgagors, but also all the prior mortgagees, but he alleged priority over them as having by his mortgage discharged encumbrances previous to 1871 when the first of the five mortgages above referred to was executed. He failed to prove his priority and a decree for sale was made subject to the first two mortgages, but the decree did not specify the third mortgage as having priority. Then came the last of the five suits, brought by the appellant to England on the third mortgage. That suit was against the mortgagors and the purchasers under the last-mentioned decree who pleaded section 13 of the Civil Procedure Code. It was held that as this third mortgage was not set up in the suit above referred to, it could not be set up in the litigation then under appeal and that the appellant was barred by res judicata. It is to be noticed that in that case the appellant was a prior mortgagee, pure and simple, but that the respondent had in his suit derogated from his priority; and from the absence of any mention of the appellant's security in the decree it was held that his priority had not been established then and, therefore, could not be set up in the later suit.

The third case is *Muhammad Ibrahim Hussain Khan* v. *Ambika Prasad Singh*(2). The facts of that case are that the plaintiff's assignor took a mortgage on the 17th of February, 1888, of eight properties in consideration of Rs. 12,000 by which the mortgagor

(1) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.
(2) (1912) I. L. R. 39 Cal. 527, P. C.

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paid off a mortgage of these eight properties of the 20th of November, 1874. These eight properties included three properties which I shall refer to as (*a*), (*b*) and (*c*). Between these two mortgages four others had been executed which affected these three properties. Before the plaintiff's suit in 1900 there had been three suits by these intermediate mortgagees. In the first suit which affected property (*c*) the plaintiff's assignor had not been impleaded, but in the two later suits which affected properties (*a*) and (*b*) the plaintiff's assignor had been impleaded but had not appeared. In the High Court in Calcutta the plaintiff's suit was dismissed as regards all three properties on the ground of res judicata. With regard to property (*c*) the Judicial Committee held that the plaintiff's priority was not affected because his assignor had not been a party to the suit relating to that property; but with regard to properties (*a*) and (*b*), he was held to be barred because his assignor as a puisne mortgagee was a necessary party to the previous two suits and having been impleaded was bound to set up her alleged priority.

From these three decisions three principles appear: (*1*) that when a party who is a prior mortgagee, and nothing more, is impleaded and nothing is alleged in derogation of his priority, he will be taken to have been impleaded under Order XXXIV, rule 12, and his priority is not affected; (*2*) where the party impleaded is a prior mortgagee, and nothing more, but an allegation is made in the plaint derogating from his priority, his priority is barred; and (*3*) when the party impleaded is a puisne mortgagee and, therefore, a necessary party but claims priority, he must assert and prove his priority, otherwise he is barred. The third principle governs this case. It follows that even if the plaintiff had priority over defendant no. 3 in respect of the properties mortgaged to him, that priority has been lost.

The result of the above findings is that the plaintiff has established a mortgage of mahal Gundi,

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tauzi no. 214/7; that his security has been lost so far as the Schedule C properties are concerned; and that it is subject to the *rehannama* of defendant no. 3 so far as the Schedule B properties are concerned. The decree of the Subordinate Judge requires modification. There will be the usual mortgage decree for the sum claimed with interest and costs as decreed by the Subordinate Judge: the period of grace being extended up to six months from the date of this decree. The mortgaged property, being mahal Gundi, tauzi no. 214/7, will be sold save and except the properties covered by the sale certificate of defendant no. 3, viz., 2 annas 3 pies share out of 4 annas 6 pies share in mauza Gundi Kalan, thana no. 57, khewat no. 1/10, and a similar share in mauza Gundi Khurd, thana no. 56, khewat no. 1/9, and as to the rest of the tauzi the sale will be subject to the *rehan* of defendant no. 3 except as to thana no. 55, khewat no. 1/8, which will be sold free of encumbrances. The order of the Subordinate Judge as to the costs of defendant no. 3 will stand. As the appellant has partly failed each party will bear its costs of the appeal.

JWALA PRASAD, J.—I agree.

Appeal allowed in part.

APPELLATE CIVIL.

1930.

February, 20, 21. March, 18.

Before Macpherson and Fazl Ali, JJ.

SYED EKRAM HUSSAIN

v.

MUSAMMAT UMATUL RASUL.*

Execution—decree of first court affirmed on appeal—appellate court decree only capable of execution—decree-holders seeking to execute mandatory part of first court decree as affirmed by appellate court—execution, whether bad—court executing transferred decree, whether has power to

*Appeal from Original Order no. 256 of 1928, from an order of Babu Norendranath Banerji, Subordinate Judge of Palamau, dated the 11th October, 1928.