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question of what interest should be payable to the co-mortgagor paying the debts, on what amount, and from what date, is one at the discretion of the Court; and the plaintiff is not entitled to claim as a matter of right that interest should be calculated at the rate specified in the bond—*Digamber Das v. Harendra Narayan Pande*(1). The limited right of subrogation created by section 95 of the Transfer of Property Act must not be treated as if in fact it entitled the co-mortgagor to enforce the terms of the mortgage bond; and in the present case I consider that interest should be allowed at the rate of six per cent. per annum only from the date at which the plaintiff became entitled to the charge which is now to be enforced.

I would accordingly amend the decree of the Subordinate Judge by disallowing interest for the period from the 28th of January, 1921, to the 1st of April, 1926. In other respects I would affirm the decision of the lower court and dismiss this appeal with costs. Hearing fee in this Court may be assessed at Rs. 250.

The cross-objection is dismissed.

AGARWALA, J.—I agree.

Appeal and cross-objection dismissed.

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APPELLATE CIVIL.

Before Khaja Mohamad Noor and Agarwala, JJ.

BHEKDHARI MAHTON

v.

SRIMATI RADHIKA KOER.*

Mortgage—certificate for arrears of cess—service of notice on certificate-debtor—charge, whether created in favour of Secretary of State—purchaser at the certificate sale, position

* Appeal from Appellate Decree no. 1160 of 1930, from a decision of F. G. Rowland, Esq., I.C.S., District Judge of Patna, dated the 21st of February, 1930, upholding a decision of Babu Jugal Kishore Narayan, Munsif of Patna, dated the 18th of March, 1929.

(1) (1910) 14 Cal. W. N. 617.

of—Public Demands Recovery Act, 1914 (B. & O. Act IV of 1914), sections 7 and 8—Transfer of Property Act, 1882 (Act IV of 1882), section 100—mortgage suit instituted after service of notice on mortgagor certificate-debtor—Secretary of State and purchaser at the certificate sale not impleaded—mortgage sale, whether binding—right of redemption, whether remains unaffected—mortgage debt, when is deemed to be split up—mortgagee omitting to implead persons interested in portion of mortgaged property—property brought to sale—purchase by mortgagee—persons interested in portion of properties, whether can redeem such portion on payment of proportionate amount.

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The effect of service of notice under section 7 of the Public Demands Recovery Act is to create a charge on the properties of the certificate-debtor in favour of the Secretary of State for the arrears of cess due in respect thereof.

Where, after the service of such notice, the mortgagee instituted a suit to enforce his mortgage against his mortgagor, the certificate-debtor, and the mortgaged properties, which were subject to the charge in favour of the Secretary of State, were sold up and purchased by the mortgagee who had failed to implead in the mortgage action the Secretary of State or the purchaser at the certificate sale.

Held, that under section 8 of the Public Demands Recovery Act, 1914, read with section 100 of the Transfer of Property Act, 1882, the Secretary of State was, for all practical purposes, a simple mortgagee of the properties of the certificate-debtor and, therefore, that he and the purchaser at the certificate sale, who were entitled to all the rights of a puisne mortgagee including the right to an opportunity to redeem, were not bound by the mortgage sale and their right of redemption remained absolutely intact.

Sheo Narain Sahu v. Ram Nirekhan Ojha(1), *Amirchand v. Moti Pande*(2), *Musammut Azizunnissa v. Komal Singh*(3) and *Raghunath Prasad Singh v. Sadhu Saran Prasad Singh*(4), followed.

Under ordinary circumstances a mortgage is indivisible but this indivisibility is for the protection of the mortgagee who by his own act can create a situation under which the

(1) (1919) 52 Ind. Cas. 512.

(2) (1931) 12 Pat. L. T. 759.

(3) (1930) I. L. R. 9 Pat. 980.

(4) (1926) 5 Pat. L. T. 912.

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integrity of the mortgage debt must be deemed to have broken up. One of the circumstances under which a mortgage debt is split up is when the mortgagee himself acquires the equity of redemption in respect of a portion of the mortgaged properties. In that case the persons interested in the remaining portion can insist upon redemption of that portion only by paying up the proportionate mortgage debt.

Where, therefore, the mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings the property to sale and purchases it himself, he is bound to allow the redemption of the portion concerned on payment of the proportionate amount.

Balli Singh v. Bindeshwari Tewari(1), followed.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J

Manohar Lal and B. N. Sahu, for the appellants.

S. N. Rai and B. N. Rai, for the respondents.

KHAJA MOHAMAD NOOR, J.—The facts leading up to the present appeal are these. By a mortgage deed dated the 9th of March, 1915, one Narayan Prasad mortgaged certain properties to one Rajendra Prasad, one of the properties being mauza Chak Pahar, tauzi no. 7399. Later on one Bhagwan Hajam in execution of his simple money decree against him purchased the interest of Narayan Prasad in the mortgaged properties and obtained possession of them. Rajendra Prasad brought a suit against Bhagwan Hajam for a declaration that the latter's purchase was subject to the mortgage in favour of the former. That suit was decreed. Rajendra Prasad then brought a mortgage suit and in due course put the mortgaged properties to sale and purchased them on the 25th of January, 1926. Delivery of possession was formally given to him on the 16th of June, 1926. Subsequently he sold five

(1) (1916) 1 Pat. L. J. 133.

out of seven properties which he had purchased to the plaintiffs by a sale deed dated the 2nd of August, 1926. One of the properties so sold was Chak Pahar, the subject-matter of the present litigation. In the meantime Bhagwan Hajam who was in possession of the mortgaged properties by virtue of his purchase in execution of the simple money decree, fell into arrears of cesses and notice under section 7 of the Public Demands Recovery Act was served on him on the 26th of September, 1923. Chak Pahar was sold in execution of that certificate and was purchased by one Angnu on the 19th of March, 1924, but later on he transferred it to the present defendant. The plaintiffs not being able to get their names recorded in the Collectorate Register by expunging the name of the defendant who had already got his name recorded in respect of Chak Pahar, brought the present suit for confirmation of possession or for recovery of possession of the property in suit, basing their title on the purchase by Rajendra Prasad in execution of the mortgage decree. On behalf of the defendant it was urged that the effect of the service of notice under section 7 of the Public Demands Recovery Act on Bhagwan Hajam was that a charge was created on his properties in favour of the Secretary of State for the arrears of cesses due to Government. The suit having been instituted in January, 1924, some three months after the service of notice, the Secretary of State was a necessary party to the mortgage suit, and Angnu who purchased the property which was subject to the charge, was not bound by the mortgage sale; and the plaintiffs were not, therefore, entitled to recover possession from the defendant who had acquired the right, title and interest of Angnu in the village in suit. The first Court decreed the plaintiffs' suit, but on appeal the learned District Judge has allowed the defendant the option of redeeming all the mortgaged properties by paying up the entire mortgage dues of Rajendra Prasad. The defendant has preferred this second appeal.

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The only question involved in the present appeal is the position of the defendant who bases his title upon the certificate sale for arrears of cesses notice of which was served upon Bhagwan on the 26th of September, 1923. In other words, the question is whether the mortgage sale was binding upon Angnu and therefore upon the defendant.

Section 8 of the Public Demands Recovery Act runs thus :

" From and after the service of notice of any certificate under section 7 upon a certificate-debtor--

* * * * *

the amount due from time to time in respect of the certificate shall be a charge upon such property, to which every other charge created subsequently to the service of the said notice shall be postponed."

It is clear that by the operation of law, on the 26th of September, 1923, a charge was created on the property in dispute in favour of the Secretary of State in respect of the amount due under the certificate. Section 100 of the Transfer of Property Act enacts that

" Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinafter contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

The effect of section 8 of the Public Demands Recovery Act and section 100 of the Transfer of Property Act is that for all practical purposes the Secretary of State became a simple mortgagee of the properties of Bhagwan Hajam including Chak Pahar. This simple mortgage was of course subject to the simple mortgage in favour of Rajendra created in 1915 and the respective rights of the two purchasers at the two mortgage sales, namely, Rajendra and Angnu, must be governed by the provision of law which governs the rights of the two mortgagees, the prior and the subsequent. It is obvious that the purchaser at the certificate sale is entitled to all the rights

of the puisne mortgagee at whose instance the property which he purchased was sold, namely, a right to an opportunity to redeem.

Now under the law, viz., Order XXXIV, rule 1, Code of Civil Procedure, it was incumbent upon Rajendra to implead in the mortgage suit the Secretary of State who held a subsequent mortgage of the property in question, the mortgage having been created by the operation of law prior to the institution of the mortgage suit. This not being done the Secretary of State and Angnu who purchased the property in enforcement of that mortgage are not bound by the proceedings which took place in the suit instituted by Rajendra. Nor is the sale of the property in any way binding upon them and their right of redemption remains absolutely intact. This is the view which has been taken by this Court in a fairly large number of cases. Among them I may mention the following: *Sheo Narain Sahu v. Ram Nirekhan Ojha*⁽¹⁾, *Amirchand v. Moti Pande*⁽²⁾, *Musammat Azizunnissa v. Komal Singh*⁽³⁾ and *Raghunath Prasad Singh v. Sadhu Saran Prasad Singh*⁽⁴⁾.

Now the learned District Judge has allowed the defendant the right of redemption but he has done so in respect of the entire mortgaged property by paying up the entire mortgage debt. Presumably he relied upon the doctrine of indivisibility of the mortgage debt. No doubt under ordinary circumstances a mortgage is indivisible but this indivisibility is for the protection of the mortgagee and the mortgagee by his own act can create a situation under which the integrity of the mortgage debt must be held to have broken up. One well-known circumstance under which a mortgage debt is split up is when the mortgagee himself acquires the equity of redemption in respect of a portion of the mortgaged properties.

(1) (1919) 52 Ind. Cas. 512.

(2) (1931) 12 Pat. L. T. 769.

(3) (1930) I. L. R. 9 Pat. 980.

(4) (1928) 5 Pat. L. T. 812.

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In that case the persons interested in the remaining portion can insist upon redemption of that portion only by paying up the proportionate mortgage debt. The cases referred to above clearly show that if the mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings about the property to sale and purchases it himself, he is bound to allow the redemption of the portion concerned on payment of the proportionate amount. In this particular case the mortgagee Rajendra omitted to implead the Secretary of State who, as I have said, was a puisne mortgagee in respect of the certificate debt, and purchased the mortgaged property himself. Now at the time when the purchaser in execution of the certificate sale claims redemption it is found that the equity of redemption in respect of the remaining property is vested in the mortgagee himself; the defendant, therefore, can in equity claim to be allowed to redeem that portion of the property only in which he is interested. The plaintiffs are the representatives of Rajendra and the defendant of Angnu.

In my opinion the decree of the learned District Judge must be varied by allowing the defendant to redeem the property in suit by paying up the proportionate amount due in respect of the property in suit as was ordered in the case of *Balli Singh v. Bindeshwari Tewari*(1). I would, therefore, allow the appeal and order the trial Court to take an account of the amount due under the mortgage of March, 1915, up to the 16th of June, 1926, the date on which Rajendra Prasad the mortgagee auction-purchaser was formally given possession of the property. Then the value of the several mortgaged properties on the date of the mortgage should be ascertained and the mortgage debt found due as above should be distributed on them proportionately and the amount due from the village in suit should thus be ascertained. Thereafter the defendant will be given three months' time to redeem the property by paying up to the plaintiffs the amount so found due

(1) (1916) 1 Pat. L. J. 133.

in respect of the property in suit. In that event the plaintiffs' suit for possession will be dismissed. If he fails to do so within the time aforesaid, the property in suit will be put up for sale. Out of the sale proceeds the mortgage debt due upon the property will be satisfied first and the amount will be paid to the plaintiffs as the representatives of the mortgagee and the balance, if any, will go towards the satisfaction of the mortgage decree if it still remains unsatisfied; otherwise it will be paid to the defendant. The plaintiffs are not entitled to a decree for possession as on the date of the present suit they were not entitled to possession as the sale at which they purchased was not binding upon the defendant. The only right they had was a right on failure of redemption to bring the property to sale. We understand that since the order passed by the learned District Judge the plaintiffs are in possession of the property in suit and are enjoying the usufruct thereof. We have, therefore, not directed the taking of the account of the mortgage debt for the period after the 16th of June, 1926.

Under the circumstances it is directed that the parties will bear their own costs throughout.

AGARWALA, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

LACHMINARAYAN TEKRIWALA

v.

JOGESH CHANDRA LAHARE.*

Code of Civil Procedure, 1908 (Act V of 1908), section 33—Rule 11, Chapter V of the Patna High Court Circular Rules and Orders—rule 11, whether ultra vires—decree not prepared

* Appeal from Appellate Order no. 149 of 1933, from an order of S. C. Mukharji, Esq., District Judge of the Santal Parganas, dated the 30th January, 1933, reversing an order of Babu B. N. Singh, Subordinate Judge of Deoghar, dated the 10th October, 1931.

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