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case in which there is neither any ingenious device nor any attempt to defeat the policy of the Encumbered Estates Act which does not prohibit the taking of loans. As I have already pointed out, the covenant to repay the money borrowed is implied in the mortgage and it is open to the plaintiff to enforce this covenant without in any way interfering with the policy of the Act.

I would, therefore, allow this appeal, set aside the judgment and the decree of the lower appellate Court and restore the decree of the first Court. The plaintiff will be entitled to his costs throughout.

DAS, J.—I agree.

Appeal allowed.

S. A. K.

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, JJ.

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June, 25.
July, 5.

v.

SRIDHAR LAL ADITYA DEB.*

Mortgage—decree for sale—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV—purchaser of a share of mortgagor's interest—not made party to suit—right of redemption—payment of proportionate mortgage-debt—calculation to be made on the basis of the mortgage bond.

A purchaser of a share of the mortgagor's interest who was not made a party to a suit of the mortgagee, who had obtained a decree under the Code of Civil Procedure, 1908,

*Second Appeal no. 92 of 1926, from a decision of Babu J. C. Bose, Subordinate Judge of Purulia, dated the 30th October, 1925, modifying a decision of Babu Ram Prasad Ghosal, Munsif of Purulia, dated the 30th July, 1924.

is entitled to redeem the mortgage on payment of his proportionate share of the mortgage-debt, the basis of the calculation being the terms of the original mortgage bond and not the mortgagee's decree.

Umesh Chunder Sircar v. Zahur Fatima (1), and *Ganga Prashad Sahu v. The Land Mortgage Bank* (2), followed.

Matru Lal v. Durga Kunwar (3), *Het Ram v. Shadi Ram* (4), *Bibi Jan Bibi v. Sachi Bewa* (5), *Sukhi v. Ghulam Safdar Khan* (6) and *Ram Narain Sah v. Sahdeo Singh* (7), referred to.

Appeal by the defendants 1 and 2.

This appeal arose out of a suit brought by the plaintiff for a declaration of his title to a 5 annas $1\frac{1}{2}$ pies share in mauza Rautara and for recovery of possession thereof with an alternative relief for a decree for redemption. The facts found were shortly these:—

Two brothers Kanchan Lal Singh and Gobinda Singh held a 9 annas $1\frac{1}{2}$ pies share in mauza Rautara in niskar right, the share of Kanchan Lal Singh being 5 annas $1\frac{1}{2}$ pies and that of his brother Gobinda, 4 annas. On the 7th of Phagun, 1301, B.S. (18th of February, 1895) Kanchan Lal Singh (who, it appeared, had inherited his brother's share) settled the entire 9 annas $1\frac{1}{2}$ pies share with Guhi Ram, the father of the defendants 1 and 2, at an annual mukarrari rental of Rs. 74. On the same date he executed an usufructuary mortgage in favour of Guhi Ram for an advance of Rs. 1,200. It was agreed that the mortgagee should set off a sum of Rs. 50 out of the mukarrari rent of Rs. 74 towards the repayment of the mortgage money Rs. 1,200 and by this arrangement the entire amount was to be repaid within a period of twenty-four years from 1302-1325, B.S.

(1) (1891) I. L. R. 18 Cal. 164, P. C.

(2) (1894) I. L. R. 21 Cal. 366, P. C.

(3) (1920) I. L. R. 42 All. 364, P. C.

(4) (1918) I. L. R. 40 All. 407, P. C.

(5) (1904) I. L. R. 31 Cal. 868, F. B.

(6) (1921) I. L. R. 48 All. 469, P. C.

(7) (1922) I. L. R. 1 Pat. 888.

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The mortgagee Guhi Ram thus became the mukarrari-dar of the 9 annas $1\frac{1}{2}$ pies interest and the usufructuary mortgagee thereof with the right to appropriate Rs. 50 per year out of the mukarrari rent, and the balance Rs. 24 was to be paid every year to the proprietor Kanchan Lal Singh.

Kanchan Lal had two sons, Ramchandra and Pitamber. Ramchandra predeceased his father leaving a son Baidyanath who was also dead and was represented by his widow Srimati Durgamani Babi (defendant no. 3). Pitamber was also dead and the defendants 4-7 represented his interest.

After the death of Kanchan Lal his grandson Baidyanath and his son Pitamber executed a simple mortgage in favour of Guhi Ram on the 20th Bhadra 1305 (4th September 1898) mortgaging their interest in the entire 9 annas $1\frac{1}{2}$ pies share in the village. On the 11th Paus, 1305, B.S. (25th December 1898) Baidyanath and Pitamber sold 5 annas $1\frac{1}{2}$ pies share in the village to Jadab Lal Aditya Deb, the father of the plaintiff, for a sum of Rs. 2,499-2-0. The sale comprised other properties also with which we are not concerned. The 5 annas $1\frac{1}{2}$ pies share of mauza Rautara was on this date held by Guhi Ram under the usufructuary mortgage of February 1895 and hence it was stipulated that the purchaser would be entitled to take possession of this 5 annas and $1\frac{1}{2}$ pies share after the expiry of the term of the usufructuary mortgage and thus his possession was to accrue from 1326 B.S.

The plaintiff's case was that out of the mukarrari rent of Rs. 74 payable by Guhi Ram under the mukarrari of the 18th of February, 1895, he was entitled to realize Rs. 41-1-15 $\frac{1}{2}$ as his rent proportionate to the 5 annas $1\frac{1}{2}$ pies share purchased by him from 1326, B.S. The defendants 1 and 2, the representatives of Guhi Ram, however, refused to pay the rent to the plaintiff after the expiry of the term of the usufructuary mortgage on the ground that they

had purchased the interest of Baidyanath and Pitamber in execution of a mortgage decree against them. The plaintiff's case was that he was not aware of the mortgage or of the mortgage decree and on enquiry he had come to learn that a suit had been instituted upon the simple mortgage of the 4th of September, 1898, and decree obtained thereon in execution whereof the mortgaged property was sold and purchased by Guhi Ram himself, who obtained delivery of possession from Court. The plaintiff's case was that he was entitled to possession in any event on redemption of his mortgage as he was not made a party to the mortgage suit.

The mortgage suit of Pitamber was instituted in 1908 and a decree was made on the 14th of July, 1908, and the mortgaged property was sold in execution of that decree on the 19th of February, 1912.

The defence of the defendants 1 and 2 was that the purchase alleged to have been made by the plaintiff's father was not a real transaction, but that it was a benami transaction, and that their father Guhi Ram had acquired a valid title by his purchase in execution of his mortgage decree.

The Munsif before whom the suit came on for trial held that the purchase under which the plaintiff claimed, was a real and bona fide purchase for consideration. He further held that the mortgage of Guhi Ram was a real transaction and that the plaintiff was a necessary party to the mortgage suit of Guhi Ram, and as he had not been made a party he was still entitled to redeem. A question arose as regards the terms upon which redemption should be allowed, and the Munsif directed that the plaintiff should be allowed to redeem by paying the defendants 1 and 2 his share of the mortgage debt with interest. He directed an account to be taken of the money that might be due to the defendants 1 and 2 proportionate to the 5 annas $1\frac{1}{2}$ pies share of the mortgaged property purchased by the plaintiff on the basis of the mortgage

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bond with interest thereon at the bond rate till the date of the decree in the mortgage suit of Guhi Ram less the profit enjoyed by the defendants 1 and 2 and their father during the period commencing from 1326 to the date of the institution of the suit, as the plaintiff's right to possess the purchased share accrued in 1326, B. S. On the account being taken, the amount found due proportionate to the 5 annas $1\frac{1}{2}$ pies share purchased by the plaintiff was Rs. 1,306-13-6, and the Munsif accordingly made a decree for redemption on payment of this sum.

The defendants 1 and 2 went in appeal before the Subordinate Judge and the plaintiff preferred a cross-appeal as regards the amount which he ought to pay to redeem the mortgage. The Subordinate Judge upheld the decree of the Munsif as regards the plaintiff's right to redeem, but he altered the decree as regards the amount which he reduced to the sum of Rs. 30-14-9.

The present appeal was filed by the defendants 1 and 2 and two points were raised on their behalf :

(1) that Guhi Ram was not bound to make the plaintiff a party in his mortgage suit of 1908; and

(2) that the amount on the payment whereof redemption should be decreed has been erroneously calculated by the Subordinate Judge and that the amount fixed by the Munsif was the correct amount.

A. K. Ray, for the appellants.

Abani Bhushan Mukerjee and *U. N. Banerji*, for the respondent.

KULWANT SAHAY, J. (after stating the facts as set out above, proceeded as follows :)

As regards the first point reliance is placed upon the terms of section 85 of the Transfer of Property Act. The contention is that the mortgage suit was instituted by Guhi Ram in the year 1908 when the Civil Procedure Code (Act V of 1908) with the provisions contained in Order XXXIV had not come into

force and section 85 of the Transfer of Property Act had not been repealed. The suit of Guhi Ram was, therefore, governed by the Transfer of Property Act as it stood before its amendment by the Code of Civil Procedure of 1908. Section 85 of the Transfer of Property Act provided: subject to the provisions of the Code of Civil Procedure (1882), section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter relating to such mortgage: provided that the plaintiff has notice of such interest. (This proviso does not find a place in Order XXXIV, rule 1, of the Code of Civil Procedure, 1908.) It is therefore contended that Guhi Ram was not bound to make the plaintiff or his father a party to his mortgage suit unless it was shown that he had notice of his purchase. This contention requires a finding on the question whether or not Guhi Ram had knowledge of the purchase of the plaintiff's father. It requires a finding on a question of fact which does not appear to have been raised in either of the Courts below. Both the Courts below proceeded on the assumption that the plaintiff's father was a necessary party in the mortgage suit of Guhi Ram. It is too late now for the appellants to contend that it had not been shown that Guhi Ram had notice of the plaintiff's purchase. The question ought to have been raised in the Courts below so that evidence might have been given on the point. The appellants, therefore, cannot be allowed to raise this question for the first time in Second Appeal.

The second question relates to the amount on payment whereof the plaintiff ought to be allowed to redeem. The learned Subordinate Judge has held that the plaintiff must pay his proportionate share of the mortgage debt due under the mortgage decree in favour of Guhi Ram minus the profits which he would have received in respect of his share from the year 1326 when he was entitled to possession in terms of his kebalā. The amount due under the mortgage

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This view was taken by the Privy Council in *Umes Chunder Sircar v. Zahur Fatima* (1). In that case Lord Hobhouse said: "Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties." And then in considering the question on what terms the redemption was to be made his Lordship observed: "the decree" which the prior mortgagee had obtained in the absence of the subsequent mortgagee "can only operate between the parties to the suit, and those who claim under them. The plaintiff getting the security of a decree has his

(1) (1891) I. L. R. 18 Cal. 164, P. C.

interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is, that as to him Zahur is still but a mortgagee, and if so, she should be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit." The same view was taken by the Privy Council in *Ganga Prashad Sahu v. The Land Mortgage Bank* (1).

The plaintiff-respondent, however, relies upon the decision of the Privy Council in *Matru Lal v. Durga Kunwar* (2). In this case the decree on the mortgage of the prior mortgagee to which the second mortgagee was not a party had been passed before the year 1909 when section 89 of the Transfer of Property Act was repealed by the Civil Procedure Code of 1908. In this case it was held that an order made under section 89 of the Transfer of Property Act for the sale of the mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. Where, therefore, a first mortgagee brought a suit for sale under the Transfer of Property Act on his mortgage without making a second mortgagee of the same property a party to his suit, and obtained a decree for sale and purchased the property under that decree, and the second mortgagee afterwards sued on her mortgage, the amount to be paid by the second mortgagee was to be calculated on the basis of the decree and not with regard to the amount due on the prior mortgage, and their Lordships followed a previous decision of the

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Privy Council in *Het Ram v. Shadi Ram* (1). These two decisions of the Privy Council proceeded on a construction of section 89 of the Transfer of Property Act under which on the making of the order absolute for sale the security as well as the defendant's right to redemption were held to be extinguished and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. In none of these two decisions the several rulings of the High Courts in India on the interpretation of section 89 of the Transfer of Property Act was brought to the notice of their Lordships. It was held under section 89 of the Transfer of Property Act that the right to redeem was not extinguished on the making of the order absolute for sale under section 89 of the Act but upon the actual sale and confirmation thereof by Court [vide the Full Bench decision of the Calcutta High Court in *Bibi Jan Bibi v. Sachi Bewa* (2) and several rulings of the Madras, Bombay and Allahabad High Courts referred to therein]. In *Sukhi v. Ghulam Safdar Khan* (3) Lord Dunedin referred to *Vanmikalinga Mudali v. Chidambara Chetty* (4) and observed that this case does not seem to have been brought to the notice of the Board in *Het Ram's* case (1). In *Ram Narain Sah v. Sahdeo Singh* (5) Das, J., doubts that the decision of the Judicial Committee in *Het Ram v. Shadi Ram* (1) is the last word on the subject. The difficulty created by the words

"and thereafter the defendant's right to redeem and the security shall both be extinguished"

occurring at the end of section 89 of the Transfer of Property Act does not arise under the present law contained in Order XXXIV, rule 1, of the Code of Civil Procedure, 1908, and it is clear that if the decree had been passed under the Civil Procedure Code of 1908 the plaintiff could not be heard to say

(1) (1918) I. L. R. 40 All. 407, P. C.

(2) (1904) I. L. R. 31 Cal. 863, F. B.

(3) (1921) I. L. R. 43 All. 469, P. C.

(4) (1906) I. L. R. 29 Mad. 37.

(5) (1922) I. L. R. 1 Pat. 392.

that the redemption should be ordered on the basis of the mortgage decree obtained by Guhi Ram and not on the basis of the mortgage bond. In the present case it has not been shown when the final order for sale was passed in Guhi Ram's case. We have got the date of the decree, viz., the 14th of July 1908. The Civil Procedure Code of 1908 came into force from the 1st January 1909, and it is possible that the order absolute for sale, which under the Code of 1908 has to assume the form of a final decree for sale, might have been passed after the Civil Procedure Code of 1908 came into force. The sale actually took place in February 1912 long after the Code of 1908 had come into force, and it can reasonably be contended that the present case is governed by the provisions of the Code of 1908 and not by section 89 of the Transfer of Property Act.

Under the circumstances of this case it is clear that the order made by the Subordinate Judge was incorrect and redemption should be allowed only on payment of the amount due under the mortgage of September 1898, with interest calculated thereon at the bond rate up to the date of redemption, from which should be deducted the sum of Rs. 41-1-9 per year being the amount which the plaintiff was entitled to recover from the defendants 1 and 2 from the year 1326, B.S. This account was taken under orders of the Munsif and the amount found due was Rs. 1,306-13-6 and the plaintiff would be bound to pay this sum before he can be allowed to redeem. The appellants, however, have valued their appeal at Rs. 617 only, and, therefore, the amount must be limited to the value of the appeal. The decree of the Subordinate Judge is, therefore, varied and it is declared that the plaintiff is entitled to redeem on payment of the sum of Rs. 617 instead of the sum of Rs. 30-14-9 as ordered by the Subordinate Judge. With this variation of the amount the decree of the Subordinate Judge will stand. The plaintiff will have two months to deposit this amount in Court, otherwise the suit will stand dismissed.

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As each party has succeeded to a certain extent the parties will bear their own costs in this appeal.

ADAMI, J.—I agree.

Decree varied.

APPELLATE CIVIL.

Before Das and Fazl Ali JJ.

THAKUR GOBARDHAN LAL

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Guardian and Wards Act, 1890 (Act VIII of 1890), sections 28, 29 and 31—contract by guardian to sell minor's property—District Judge, sanction of, obtained subsequently—contract, whether can be specifically enforced—certificated guardian, sale by, in contravention of sections 28 and 29, whether void—sanction under section 31, effect of.

A certificated guardian may enter into a contract with an intending purchaser to sell the minor's property, but such a contract is subject to sanction being accorded by the District Judge to the proposed transaction, and, when the sanction has been accorded, the transaction becomes a completed contract by virtue of that sanction and can be specifically enforced.

Chhitar Mal v. Jagan Nath Prasad (1) and *Shaikh Abdul Haq v. Mohammad Yehia Khan* (2), distinguished.

A sale by a certificated guardian in contravention of sections 28 and 29, Guardian and Wards Act, 1890, is not void but voidable at the instance of any other person affected thereby.

*Second Appeal no. 407 of 1926, from a decision of M. S. Hasan, Additional Subordinate Judge of Ranchi, dated the 23rd February, 1926, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Daltonganj, dated the 16th June, 1924.