APPELLATE CIVIL.

1930.

June, 30, July, 1, 4.

Before Ross and Chatterjee, JJ.

DHANA KOERI

v.

RAM KEWAL AHIR*

Mortgage—prior mortgage suit on—decree and sale—puisne usufructuary mortgagee not made party—suit for redemption by prior mortgagee against usufructuary mortgagee—prior mortgage redeemed by usufructuary mortgagee—redemption, effect of—suit for redemption by mortgagor—equity of redemption, whether revives in favour of mortgagor.

B, a prior mortgagee, brought a suit against the mortgagor on the foot of his simple mortgage. He obtained a decree and got the mortgaged property sold. In the mortgage action, however, the puisne usufructuary mortgagee was not made a party. *B* having failed to obtain possession of the property because of the usufructuary mortgage, he brought another suit against the heirs of the mortgagor and the usufructuary mortgagee praying that the usufructuary mortgagee be given an option to redeem him, and if he failed to do so, then the plaintiff might be permitted to redeem him. A decree was made in terms of the prayer and the usufructuary mortgagee paid up *B*. In the suit by the heirs of the mortgagor for redeeming the usufructaury mortgage by payment of the amount due thereunder and the amount which the usufructuary mortgagee had paid to *B*,

Held, that *B* having taken alternative positions resting either on his mortgage or on his equity and the usufructuary mortgagee having redeemed the prior mortgage of *B*, the effect of the redemption was that the mortgage of *B* was satisfied and, ipso facto, the decree and sale were vacated, and that, therefore, the equity of redemption revived in favour of the original mortgagor.

* Appeal from Appellate Decree no. 1368 of 1928, from a decision of Babu Ram Bilas Sinha, Additional Subordinate Judge of Arrah, dated the 10th of September, 1928, reversing a decision of Babu Priya Lal Mukharji, Munsif of Sasaram, dated the 16th of July, 1924.

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Lockhart v. *Hardy*(1), *Kinnaird* v. *Trollope*(2) and *In re Hoyles*(3), applied.

Appeal by the plaintiffs.

The plaintiffs owned 6.01 acres of land in mauza Babhandi. Their father gave a usufructuary mortgage to the father of defendants 1 and 2 on the 19th of November, 1900, in consideration of Rs. 285. It was stated in paragraph 5 of the plaint that after the aforesaid rehan the father of the plaintiffs borrowed some money from one Barhamdeo Rai under a simple mortgage bond. Barhamedo Rai brought a suit on this mortgage and in execution of the decree purchased the property. As he was unable to obtain possession because of the usufructuary mortgage, he instituted a suit, being suit no. 19 of 1911, against the present plaintiffs who were defendants 1 to 5 and the present defendants who were defendants 6 to 9; and in that suit a decree was passed that the present defendants should redeem Barhamdeo and, if they failed to do so, Barhamdeo should redeem them. Barhamdeo was redeemed by the defendants, and the plaintiffs now brought this suit for redemption of the usufructuary mortgage by payment of the amount due thereunder and the amount which the usufructuary mortgagees had paid to Barhamdeo Rai.

In paragraph 7 of the written statement of defendant no. 1 it was said that he did not admit the allegations made by the plaintiffs in "paragraph 4" of the plaint. The context showed that this was a mistake for "paragraph 5", because paragraph 7 of the written statement dealt with the allegations made in paragraph 5 of the plaint. In this paragraph the defendant alleged that the present plaintiffs and Barhamdeo Rai had combined against him, but he stated the decree that was passed in Barhamdeo's suit and his own deposit of Barhamdeo's dues. The question in the present suit was, what were the relative rights of the parties?

(1) (1846) 9 Beavan 349. (2) (1888) 39 Ch. Div. 636.
(3) (1911) 1 Ch. 179.

The Munsif evidently taking the view necessitated by the form of the decree in the suit of 1911 that Barhamdeo was a mortgagee prior to the present defendants, passed a decree in favour of the present plaintiffs upon certain conditions which had been complied with. The Subordinate Judge in appeal definitely stated that Barhamdeo was a previous mortgagee; and he confirmed the decree of the Munsif. When the case came to the High Court, there was a misstatement of the facts by both sides which was clearly due to the error in paragraph 5 of the plaint. It was taken as a fact that Brahamdeo's mortgage was subsequent to the usufructuary mortgage. The learned Judges were, therefore, at a loss to understand the form of the decree that was passed in the suit of 1911; and, taking the view that the facts had not been found in the lower appellate Court, remanded the case for a fresh decision. The Subordinate Judge on remand merely reproduced the pleadings and repeated the judgment of the High Court. He did not come to any independent findings of fact.

Susil Madhab Mullick and *S. N. Bose*, for the appellants.

Sambhu Saran (with him *C. P. Sinha* and *Harinandan Singh*), for the respondents.

Ross, J. (after stating the facts set out above proceeded as follows): It is unnecessary to remand the case, because it is now plain on the documents, as it is plain from the form of the decree in the suit of 1911, that Barhamdeo Rai was a prior mortgagee. It is true that there is this mistake in the plaint; but it is to be remembered that the plaint was presented by the sons of the mortgagor and that the mortgage was before 1900 and the facts may not have been fully known to the plaintiffs. In any case the allegations in paragraph 5 of the plaint were traversed in the written statement and the decree of 1912 was relied upon which sufficiently showed the priority of Barhamdeo's mortgage.

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The decision of the present appeal turns ultimately on the nature of the litigation in 1911 and the judgment in that suit has been read to us. This makes the situation perfectly clear. As I have said, the suit was brought by Barhamdeo Rai against the present plaintiffs who were defendants nos. 1 to 5 and the present defendants who were defendants nos. 6 to 9. The plaintiff, having purchased the property in execution of his mortgage decree and being unable to obtain possession, evidently found that his purchase was of little value to him and he, therefore, brought this suit praying that the usufructuary mortgage

" might be declared to be fraudulent and collusive or at least subject to the prior lien of plaintiff of which defendants 6 to 9 had notice, and the latter might be ordered to pay the debt due on the plaintiff's mortgage, and on their failing to do so within a time to be fixed by the court plaintiff might be allowed to redeem the rehan of defendants 6 to 9 by payment of the debt due thereon and recover possession of the land ".

Disregarding the claim to have the rehannama declared fraudulent which was without substance, it is clear that what the plaintiff in that suit desired in the first instance was that he should be redeemed and that only if the usufructuary mortgagee failed to redeem him, he should redeem them. About the priority of Barhamdeo's mortgage there can be no question. As I have stated, the rehannama was executed on the 19th of November, 1900, and this judgment shows that Barhamdeo's decree on his mortgage was passed on the 28th of June, 1901. The view that the Subordinate Judge took in that case was perfectly correct, that as the defendants nos. 1 to 5 of that suit were bound by the decree and sale in favour of Barhamdeo Rai, he, standing in the shoes of the mortgagor, was entitled to redeem the usufructuary mortgagees

" unless the latter choose to pay off the money due on plaintiff's bond ";

and that was the decree that was passed. The usufructuary mortgagees were given the option of redeeming or being redeemed. This clearly shows

that Barhamdeo Rai in that suit against the usufructuary mortgagees who had not been made parties to the suit on his bond took up, as he was entitled to do, alternative positions resting either on his mortgage or on his equity. But it seems to me that when the usufructuary mortgagees redeemed Barhamdeo Rai, the equity revived in favour of the original mortgagor. The learned Advocate for the respondents was asked where the equity of redemption was now; and it was claimed that it was either in Barhamdeo Rai or in the defendants. Barhamdeo Rai has no further interest in the property and it is difficult to see on principle how after he accepted the dues under his mortgage he could claim to retain the equity of redemption. It is also clear that the present defendants have not got the equity because they never purported to acquire it. All that they did was to pay off the prior charge. The equity must, therefore, be in the original mortgagor. The consequence of redemption by the usufructuary mortgagee was that the mortgage was satisfied and, therefore, *ipso facto* the decree and the sale were vacated. The decree for redemption by the usufructuary mortgagees was meaningless unless it was based on the assumption that the sale had gone; and the effect of the redemption was that the equity came again into the hands of the original mortgagor because the second mortgagee paid only for the first mortgage. Barhamdeo Rai could have got in the whole of the estate by redeeming the second mortgagees, but if he did not take that course, then he fell back on his mortgage and thus revived the equity in the original mortgagor. The case is then governed by section 74 of the Transfer of Property Act and the second mortgagee obtains the rights and powers of the first mortgagee by redeeming him. The decree that has been passed in this suit by the Munsif gives effect to that position. It seems to me clear as a matter of principle that this must be the position; and, as this is a matter of principle depending ultimately on the equitable view that a mortgage is a security for

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money lent, there can be no difference in this matter between the law of England and the law of India. In *Lockhart* v. *Hardy*(1) Lord Langdale, M. R. said: "If a mortgagee obtains a foreclosure first, and alleges that the value of the estate is insufficient to pay what is due to him, he is not precluded from suing on the bond; but if he thinks fit to do so, he must give the mortgagor a new right to redeem notwithstanding the foreclosure, and the mortgagor may file a bill to redeem". This authority may not be strictly applicable to India in view of the provisions of Order 34. But the principle seems to be applicable in the circumstances of the present case and in view of the nature of the litigation in 1911. Similarly it was held in *Kinnaird* v. *Trollope*(2) that a mortgagor who had absolutely assigned his equity of redemption in the mortgaged property, acquired, when sued by the mortgagee upon the covenant to pay principal and interest contained in the mortgage, a new right to redeem. Stirling J. observed: "I think, therefore, that a mortgagor who has entirely parted with the equity of redemption nevertheless acquires upon being sued by the mortgagee a new right to redeem, in the same way as a mortgagor who has been absolutely foreclosed acquires upon being sued a new right of redemption". These authorities were referred to *In re Hoyles*(3) where Cozens-Hardy, M. R. said: "But apart from authority, I should have arrived at the same conclusion from considering the nature and extent of the rights of a mortgagee of free-hold land. If he sues on the covenant to pay he must re-convey the land on payment". It is contended that the principle of these decisions cannot apply, because the suit of 1911 was not a suit against the mortgagor on the covenant. It was a suit against the original mortgagor and the second mortgagee and the plaintiff in that suit claimed to recover his mortgage debt. It seems to me that the principle of these

(1) (1846) 9 Beav. 349.
(2) (1888) 39 Ch. Div. 636, 645.
(3) (1911) 1 Ch. 179, 184.

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decisions is clearly applicable in the present case and that by the reliefs which he claimed in the suit of 1911 Barhamdeo Rai revived the equity of redemption in the original mortgagor.

The result is that the decision of the Munsif was right and the appeal must be decreed and the decree of the Subordinate Judge on remand set aside and the decree of the Munsif restored. The appellants are entitled to their costs of the appeal.

CHATTERJEE, J.—I agree.

Appeal decreed.

APPELLATE CIVIL.

Before Ross and Chatterjee, JJ.

RUPAN SINGH

v.

AKHAJ SINGH.*

1930.

July, 2, 3, 8.

Crown lands—whether Transfer of Property Act, 1882 (Act IV of 1882) applies to grant of Crown lands—Crown Grants Act, 1895 (Act XV of 1895)—21 and 22 Vict., C. 106, section 40—22 and 23 Vict., C. 41—deed, whether necessary in order to transfer the ownership of Crown lands.

Under section 40, 21 & 22 *Vict., C.* 106 the Secretary of State in Council was empowered to sell and dispose of all real and personal estate vested in Her Majesty under that Act; and any conveyance or assurance of or concerning any real estate to be made by the authority of Secretary of State in Council might be made under the hands and seals of three members of the Council. Doubts having arisen " as to the proper mode of the execution of contracts entered into by the Secretary of State in Council pursuant to the provision of

* Appeal from Appellate Decree no. 1078 of 1928, from a decision of Maulavi Amir Hamza, Subordinate Judge of Gaya, dated the 28th of May, 1928, setting aside a decision of Mr. Saiyid Raziuddin, Munsif of Jehanabad, dated the 22nd of April, 1927.