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COLLIERY.

In my judgment Becharam Mallik is not entitled to compensation on the facts of this case and I would answer the reference accordingly.

CHATTERJI, J.—I entirely agree.

S.A.K.

*Order accordingly.*

HARRIES,  
C.J.

### APPELLATE CIVIL.

*Before Rowland and Chatterji, JJ.*

PRABHU RAM

v.

MAHARAJADHIRAJ SIR KAMESHWAR PRASAD  
SINGH BAHADUR.\*

*Landlord and Tenant—mortgage of eight-annas share in a tenure in favour of landlord—mortgage decree—rent decrees by landlord for rent of entire tenure—execution of mortgage decree—rent charge notified—purchase by landlord—sale, effect of—whole liability under decrees for rent, whether discharged—decree-holder, whether entitled to proceed against the other half of the tenure—Transfer of Property Act, 1882 (Act IV of 1882), sections 60 and 82—matters relating to discharge, execution and satisfaction of decree must be determined by executing court—separate suit barred—Code of Civil Procedure, 1908 (Act V of 1908), section 47.*

The appellants had an eight-annas share in a certain tenure the other half of which had been mortgaged by their co-sharers to the landlord who obtained a mortgage decree. The landlord also obtained rent decrees against the appellants and their co-sharers for the rent of the entire tenure, and when he executed his mortgage decree, he put up the half share of his mortgagors to sale and notified at the time of the sale that the properties were being sold subject to a charge for rent under four decrees. The decree-holder himself became the purchaser of that eight-annas share. Thereafter

\* Appeals from Appellate Order nos. 247 and 248 of 1939, from an order of Maulavi Saiyid Ahmad, Subordinate Judge at Monghyr, dated the 31st May, 1939, modifying an order of Babu Tribhuwan Nath Singh, Munsif of Monghyr, dated the 8th February, 1939.

he applied to execute the rent decrees against the half share of the appellants for the full amount of the decrees. An objection was taken that by the sale of the other half share in execution of the decree-holder's own mortgage decree, the entire rent charge had been satisfied and execution could not proceed. The lower appellate Court held that the rent decrees should be deemed to have been satisfied to the extent of one-half, because the decree-holder had purchased half of the tenure with notice of the encumbrance of the rent-decrees;

*Held*, (i) that the mere fact that the whole amount of the rent charge had been notified in the sale proclamation, had not the effect of passing the whole liability to the portion purchased by the decree-holder so as to relieve the other portion from liability;

(ii) that the effect of the auction-purchase by the decree-holder was to discharge and extinguish that portion of the decretal debt which was chargeable to the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the property charged;

(iii) that the decree-holder was, therefore, entitled to execute the decrees to the extent of one-half by proceeding against the half share of the appellants in the tenure.

*Lakshmidas Ramdas v. Jannadas Shankarlal*(1), *Nand Kishore v. Raja Hari Raj Singh*(2), *Bisheshur Dial v. Ram Sarup*(3), *Fakiraya v. Gadigaya*(4), *A. A. R. Ponnambala Pillai v. Annamalai Chettiar*(5) and *Krishnachandra Bhoumik v. Pabna Model Company, Limited*(6), followed.

*Nripendra Nath Chatterjee v. Kuldip Misra*(7), *Sailaja Prosad Chatterjee v. Gyani Das*(8) and *Haradhan Chattorraj v. Kartik Chandra Chattopadhyaya*(9), distinguished.

*Held*, further, that it was not permissible for the executing Court to hold in the present case that the decree-holder should first satisfy his own decree, because that could

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(1) (1896) I. L. R. 22 Bom. 304, F. B.

(2) (1897) I. L. R. 20 All. 23, F. B.

(3) (1900) I. L. R. 22 All. 284, F. B.

(4) (1901) I. L. R. 26 Bom. 88, F. B.

(5) (1920) I. L. R. 45 Mad. 872, F. B.

(6) (1931) I. L. R. 53 Cal. 76.

(7) (1938) I. L. R. 17 Pat. 694, F. B.

(8) (1912) 13 Cal. L. J. 29.

(9) (1902) 6 Cal. W. N. 877.

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not be done without at the same time allowing him the right of contribution against his co-sharers by means of a separate suit; but as under section 47, Code of Civil Procedure, 1908, all matters relating to the discharge, execution and satisfaction of the decree are to be determined in execution and not by a separate suit, it was the Court's duty in a proceeding like the present to give effect finally to the rights of the parties.

Appeals by the judgment-debtors.

The facts of the case material to this report are set out in the judgment of Rowland, J.

*S. M. Mullick* (with him *Sarjoo Prasad* and *R. K. Sahay*), for the appellants.

*R. Misra*, for the respondents.

ROWLAND, J.—The appellants are eight-annas co-sharers in a tenure of which the other eight-annas co-sharers mortgaged their interest to the landlord of the tenure. The landlord obtained a mortgage decree against that half share. He also obtained rent decrees against the appellants and their co-sharers for the rent of the entire tenure and when he executed his mortgage decree, he put up the half share of his mortgagors to sale and notified at the time of the sale that the properties were being sold subject to a charge for rent under four decrees. The amount of the charge was stated to be Rs. 7,780/15/1½. The decree-holder himself became the purchaser of that eight-annas share. Thereafter he applied to execute the rent decrees against the half share of the appellants for the full amount of the decrees. An objection was taken that by the sale of the other half share in execution of the decree-holder's own mortgage decree, the entire rent charge had been satisfied and execution could not proceed. The Munsif dismissed the objection, holding that the rent decree had not been satisfied or the charge extinguished. On appeal the Subordinate Judge has held that the rent decrees should be deemed to have been satisfied to the extent of one-half, because

the decree-holder had purchased half of the tenure with notice of the encumbrance of the rent decrees from which decision which governed two execution cases, appeals have been presented by the judgment-debtors claiming that the decrees should be considered to be fully satisfied and cross-objections by the decree-holder claiming that he should be permitted to execute his decrees for the entire amount.

In the appeal reliance is placed on the Full Bench decision of this Court in *Nripendra Nath Chatterjee v. Kuldip Misra*(1). It was there held that when in a sale proclamation it was notified that the arrears of rent for subsequent years were an incumbrance, the result would be that the auction-purchaser purchased the holding subject to the incumbrance. It was held further that a landlord auction-purchaser was in no better position than a stranger purchaser and, therefore, he was debarred from bringing a suit for rent for the years of which the rent was stated to be a charge on the holding. That decision follows a decision of the Calcutta High Court in *Sailaja Prasad Chatterjee v. Gyani Das*(2) where it was held that a landlord, who purchases the defaulting tenure in execution of his money decree subject to rent charge, cannot execute his decree for rent as the judgment-debt in his favour for rent is extinguished.

The principle on which these decisions proceed was laid down in an earlier decision of the Calcutta High Court in *Haradhan Chattoraj v. Kartik Chandra Chattopadhyaya*(3) the effect of which is that where a tenure or holding is purchased subject to the notification of its liability to arrears the purchaser will be liable for the arrears in question

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(2) (1912) 18 Cal. L. J. 29.

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and to hold otherwise would be to make him a gainer at the expense of the defaulting tenant, because the bidding at the sale may be presumed to be affected by the notification.

All those, however, were cases in which the entire tenancy was sold up and the case before us was where the auction purchase was of half the property only. To decide the rights of the parties in such a case, we shall have to go beyond the Tenancy Act and consider the principles applicable in the case of mortgages where the mortgagee has acquired a part of the mortgaged property. The principles applicable can be deduced from sections 60 and 82 of the Transfer of Property Act. The rule in the last portion of section 60 recognises the right of a person interested in a share of the mortgaged property to redeem his own share on payment of a proportionate part of the amount remaining due on the mortgage when the mortgagee has acquired the share of another mortgagor; and in section 82 it is laid down that where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are liable to contribute rateably to the debt. The effect of the purchase by a mortgagee of a part of the mortgaged property has been considered in a series of cases. In *Lakmidas Ramdas v. Jamnadas Shankarlal*<sup>(1)</sup> the Bombay High Court said: "When the plaintiff purchased the equity of redemption in the house, he purchased it subject to its due proportion of the mortgage debt. That proportion of the mortgage debt thus ceases to exist and the plaintiff's right as mortgagee to recover the money secured by his mortgage was reduced to that extent. What proportion of the mortgage debt was thus wiped out depends on the proportion of the value of the house

(1) (1896) I. L. R. 22 Bom. 304, F. B.

to the value of the rest of the mortgaged properties.

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In *Nand Kishore v. Raja Hari Raj Singh*<sup>(1)</sup> the question arose whether the purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage had the effect of fully discharging the mortgage. There had been an opinion expressed in an earlier decision of the same Court that such a purchase would extinguish the whole mortgage debt; but the Full Bench held otherwise and said that this was not necessarily the result, but that a person interested in a share only of the property could redeem his own share on payment of a proportionate part of the amount remaining due on the mortgage. This they said was a clear recognition that the mortgage debt in part still subsists.

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This pronouncement was followed and amplified in *Bisheshur Dial v. Ram Sarup*<sup>(2)</sup> where the purchase by a mortgagee of a part of the mortgaged property was said to have the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. This decision was accepted in *Fakiraya v. Gadigaya*<sup>(3)</sup> where the contention that the entire mortgage had been extinguished was rejected and it was held that the house in the hands of the first defendant was liable for a proportionate share of the mortgage debt. This was a case in which the mortgagee had purchased a part of the mortgaged property at auction sale after notifying its liability for the mortgage debt.

A similar view was taken by a Full Bench of the Madras High Court in *A. A. R. Ponnambala Pillai*

(1) (1897) I. L. R. 20 All. 23, F. B.

(2) (1900) I. L. R. 22 All. 234, F. B.

(3) (1901) I. L. R. 26 Bom. 68, F. B.

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v. *Annamalai Chettiar*(<sup>1</sup>) overruling a former decision of the same Court in which the view had been taken that the purchase by a mortgagee at auction of a part of the property, the entire amount of the mortgage debt having been notified as an incumbrance on the property, would have the effect of extinguishing the entire mortgage. Wallis, C. J. said that the rights of parties are those set forth in the last clause of section 60 which recognises the mortgagor's right to redeem his own share in such a case upon payment of a proportionate amount of the mortgage debt. To the same effect is the view taken in the Calcutta High Court in *Krishna handra Bhoumik v. Pabna Model Company, Limited*(<sup>2</sup>).

We cannot, therefore, accept the argument that the whole amount of the rent charge having been notified in the sale proclamation, the result would be that the whole liability passed to the property auction purchased so as to relieve the other property from liability. To accept that argument would be unsound in principle for the whole of the rent is a charge on both the properties; but if the whole charge is enforced against either of the properties the holder of that property would have the right of contribution to the extent of half against the holder of the other property. Therefore if we were to say in this case that the Maharaja must first satisfy his own decree we must at the same time allow him the right of contribution to the extent of half against the appellants, his co-sharers. It has been argued in reply by Mr. Sarjoo Prasad that on the view we take of the rights of the parties this should be the result and that the Maharaja should be required to enforce his claim against the appellants by a separate suit, but that would be contrary to the salutary provisions of section 47 which says in the clearest terms that all questions between the decree-holder and the judgment-debtor relating to the discharge, execution

(1) (1920) I. L. R. 43 Mad. 872, F. B.

(2) (1931) I. L. R. 59 Cal. 76.

and satisfaction of the decree are to be determined in execution and not by a separate suit. It is the court's duty in a proceeding like the present to give effect finally to the rights of the parties.

The decision of the Subordinate Judge was correct and I would dismiss the appeals and cross-objections, parties bearing their own costs in this Court.

CHATTERJI, J.—I agree.

S.A.K.

*Appeals and cross-objections dismissed.*

### FULL BENCH.

*Before Wort, Dhavle, Varma, Manohar Lall and Chatterji, JJ.*

UPENDRA NATH BASU

v.

PANDAYA GULAB SARKAR.\*

*Code of Civil Procedure, 1908 (Act V of 1908), section 122 and Order XXI, rule 90—amendment made by Patna High Court to rule 90, whether ultra vires—amendment, whether relates to matter of procedure—subordinate Courts, duty of, in the matter of demanding security.*

The amendment made by the Patna High Court to Order XXI, rule 90, Code of Civil Procedure, 1908, making the deposit of 12½ per cent. of the amount of the sale proceeds or the furnishing of security as a condition of the admission of the application under the rule, is not *ultra vires* the rule-making powers of the High Court under section 122 of the Code.

The amendment relates to a matter of procedure and the effect of the amendment is nothing more than putting the party on terms.

\*Appeal from Original Order no. 59 of 1938, from an order of Babu Bhuban Mohan Lahiri, Subordinate Judge of Patna, dated the 8th of January, 1939.

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