1902 JUNE 13 & 16.

APPELLATE CIVIL.

29 C. 797.

some reason or other entrusted with the management of the joint estate, must be such as would enable him to deal with it for the benefit of the co-parceners in cases of need. The assent of the other members, including that of the father or grandfather, if they be alive would be implied. Vrihaspathi, quoted in the Viramitorodya, says: "Should even a dependent member enter into a transaction for the need of the family, the head of the family should not set it aside."

The Courts below have not expressed any opinion as to the necessities of the zaripeshgi lease, and the sale effected by the defendants Nos. 4 to 8, and the question of the validity of those transactions is, therefore, left open. But the suit of the plaintiffs must fail on the findings as to the necessity of the loan covered by the zaripeshgi of the 19th January 1884.

This appeal is accordingly dismissed with costs.

Appeal dismissed.

---

29 C. 803.

[803] *Before Mr. Justice Hill and Mr. Justice Brett.*

KRISHNA GOPAL SADHANI *v.* A. B. MILLER.* [10th July, 1902.]

Mortgage—Accession to mortgaged property—Transfer of Property Act (Act IV of 1882) ss. 70, 82—Priorities—Contribution—Distribution of sale-proceeds.

Where after the execution of two simultaneous mortgages in respect of a house and certain lands appurtenant thereto, the mortgagor erected two other houses on the lands, and subsequently executed various mortgages in respect of the several houses, and the decree in the suit by the fourth mortgagee directed that the whole of the property should be sold free of incumbrances, in separate lots, and the sale proceeds to be distributed among the various mortgagees in accordance with their priorities and the property more or less pledged by each mortgage and the sale-proceeds were insufficient to pay off the mortgagees.

***Held*, that for the purposes of the security of the two prior mortgagees, the two new houses were accessions to the mortgaged property and became incorporated with the original subject of the security, as though they had been in existence at the time when the original security was given.**

***Held also*, that the sale-proceeds being insufficient to pay off the several mortgagees, they were respectively entitled to only such surpluses after payment of the two prior mortgagees as might be attributable to the property subject to the respective mortgages.**

KRISHNA GOPAL SADHANI and another, who were the assignees of the decree obtained by J. C. Chunder, the fourth mortgagee, appealed to the High Court.

One H. C. Chick purchased on the 28th September 1885 the premises then numbered 170, Lower Circular Road, in the suburbs of the town of Calcutta, consisting of one house and five bighas of land. The house was originally called Tiery Villa, but has subsequently been known as Susie Villa and numbered 170-2, Lower Circular Road. On the date of his purchase of the property, Mr. Chick executed two mortgages—one in favour of one **[804]** D. J. Bagram for Rs. 10,000 at 7½ per cent., securing for the repayment of the loan a moiety of the five bighas of land with the house thereon, and another in favour of the Trustees of the marriage settlement of Mrs. D. J. Bagram for Rs. 8,000 at 7½ per cent., securing likewise for

* Appeal from order No. 59 of 1902, against the order of Babu Bhagubutty Charan Mitter, Subordinate Judge of 24-Pergunnahs, dated the 28rd November 1901.

1902 JULY 10.

APPELLATE CIVIL.

29 C. 803.

repayment of the loan the other moiety of the property. Mr. Chick built, some time in 1887, two other houses on a portion of the above five bighas and called them May Ville and Ruby Ville. These two new houses were numbered 170 and 170-1, Lower Circular Road, respectively. On the 31st October 1887 Mr. Chick executed a third mortgage in favour of the Trustees of Mrs. Bagram's marriage settlement for Rs. 25,000 at 7½ per cent., securing for the payment of the loan the two new houses—May Ville and Ruby Ville—with the land thereunder. On the 16th February 1891 he executed a fourth mortgage in favour of one J. C. Chunder for Rs. 4,000 at 11 per cent., the security being the whole of the five bighas and the old house Tiery Villa. On the 25th July 1891 he executed a fifth mortgage in favour of one M. N. Bose for Rs. 7,000 at 8 per cent., the security being the whole of the lands and the three houses. In addition to the above mortgages there were three others executed subsequently by the said Mr. Chick, to which it is unnecessary to refer. The fourth mortgagee, J. C. Chunder, brought a suit in 1893 in the Court of the Subordinate Judge of 24-Pergunnahs to enforce his mortgage, making the mortgagor and the various incumbrancers parties thereto. The decree which was passed in that suit, after declaring the liens of the several incumbrancers, directed that the whole of the property should be sold free of all incumbrances in three losts, and that the sale-proceeds should be distributed among the various mortgagees in accordance with their priorities and the property more or less pledged by each mortgage. The properties were sold in accordance with the directions in the decree and they fetched a sum of Rs. 65,000 in all. This sum was, however, quite inadequate to discharge in full the amounts due upon the several mortgages, and consequently the matter came before the Court below for distribution of the sale-proceeds rateably among the mortgagees. The lower Court held that after the satisfaction of the debt due to the first and second mortgagees, the third mortgagee was entitled to be paid **[805]** in full of what was due at the time of distribution under his mortgage. The result was that the fourth and fifth mortgages got nothing.

Mr. *A. M. Dunne*, Dr. *Ashutosh Mookerjee*, and Babu *Charu Chunder Ghose* for the appellants.

Mr. *J. T. Woodroffe* (Advocate General), Babu *Salegram Singh* and Babu *Shiva Prosonno Bhuttacharjee* for the respondents.

HILL AND BRETT, JJ. This is an appeal against an order of the Subordinate Judge of the 24-Pergunnahs, dated the 23rd November 1901, dealing with the distribution of a portion of the sale proceeds of certain mortgaged property. The property appears to have been subject to eight several mortgages of various dates, but the 6th, 7th and 8th mortgagees have no enforceable rights against the fund, which is now under distribution. The mortgagor, one Mr. Chick, was the owner of a plot of land in the outskirts of Calcutta, containing five bighas, and at the time of the first in the series of the mortgages, a house stood upon it which was then numbered 170. While the land was in that condition, he executed a mortgage on the 28th of September 1885 to one D. J. Bagram, for a sum of ten thousand rupees, bearing interest at 7½ per cent. per annum. This mortgage extended to a moiety of the land, and, as we understand, of the house. On the same date, the mortgagor executed another mortgage to the trustees of Mrs. Bagram's marriage settlement for a sum of eight thousand rupees, bearing interest at the same rate: that mortgage extending to the other moiety of the house and land in

1902
JULY 10.

APPELLATE CIVIL.

29 C. 803.

question. There appears to be some difference of opinion as to which of these two mortgages was actually prior in point of time, but we think that under the circumstances of this case, that question is immaterial. Mr. Chick next, on the 21st of October 1887, executed a mortgage to the trustees of Mr. Bagram's marriage settlement for the purpose of securing a sum of twenty-five thousand rupees, bearing interest at 7½ per cent. per annum. It appears that prior to this last-mentioned mortgage, two additional houses had been erected upon the land; that at the time of this third mortgage, they with the land on which they stood were [806] treated as separate holdings and bore distinct numbers, namely, 170 and 170-1, and that the third mortgage extended only to these two new houses and to the lands which were appurtenant to them. Then on the 16th of February 1891, the mortgagor mortgaged to one J. C. Chunder the whole of the five bighas of land, of which he was the owner, and the old house which had originally stood upon the land and which at that time had had its number altered from 170 to 170-2, for the purpose of securing the payment of a sum of four thousand rupees, bearing interest at 11 per cent. per annum. On the 25th of July 1891, there was a fifth mortgage to M. N. Bose, which comprised the whole of the five bighas of land and the three houses, and which was given for the purpose of securing a sum of rupees seven thousand, bearing interest at the rate of 8 per cent. per annum. We need not, as we have already indicated, refer to the mortgages of subsequent dates more particularly. The holder of the fourth mortgage instituted a suit in the year 1893, for the enforcement of his security, making all the other mortgagees, both prior and subsequent, parties to the suit, and on the 27th of July of the same year the Court pronounced its decree. By that decree it was declared that the plaintiff's mortgage extended to the whole five bighas of land and to the building 170, as it was originally numbered, that is to say, 170-2 according to the new numbering, and the amount due in respect of the mortgage-debts, and so forth, were likewise declared. It was further declared that the first and the second mortgages extended to moieties of the land and of the building No. 170 (170-2, according to the new numbering), and that the third mortgage comprised the whole of the same five bighas of land and the two new houses erected thereupon. In the course, however, of the proceedings in the Lower Court, which have resulted in this appeal, it was admitted as a matter of fact that the declaration contained in the decree with respect to the area comprised in the third mortgage was incorrect and, that in point of fact, the 3rd mortgage covered only an area of one bigha and seven cottahs of land, together with the houses Nos. 170 and 170-1 standing upon it. The decree then proceeded to direct that the whole of the property should be sold in three lots, and that the [807] sale-proceeds should be distributed among the various mortgagees in accordance with their priorities and the property more or less pledged by each mortgage. It is in these circumstances that the matter came before the Court below, for the distribution of the sale-proceeds, the properties having been sold, as directed, in three separate lots, Nos. 170, 170-1 and 170-2, and a sum of sixty-five thousand rupees having been realised by the sale. The sum realized was, however, quite insufficient to discharge in full the amount due upon the mortgages now before us, and it accordingly became incumbent upon the Court to apportion the proceeds of the sale among the different mortgagees. The first and second mortgagees, it was thought by the Lower Court, were entitled to be paid in full all that

was due to them at the time of the distribution, and, with respect to that finding, there is no dispute. Both parties are agreed that the first and the second mortgagees were entitled to be paid in full, in priority to the other mortgagees out of the proceeds of the sale, but the contest is in respect of the interest in the balance remaining of the third and the fourth mortgagees. In the opinion of the Lower Court, the third mortgagee was entitled to be paid in full what was due at the time of the distribution under his mortgage, and the result of that, apparently, was that the fourth mortgagee got nothing.

The contention of the fourth mortgagee, the appellant, is that that was not a just and equitable principle on which, under the circumstances of the case, to make the distribution, and he urges before us that the interest of the third mortgagee in the divisible balance can be proportionate only to the value of the land, which was subject to his mortgage, and that the fourth mortgagee is entitled, on the same principle, to be paid out of the sum which represents the balance attributable to the land, which was subject to his mortgage. In our opinion this contention is correct and should prevail. The case has been very fully placed before us and argued by the learned Advocate General on the part of the respondent, but we have heard nothing from him, which in our opinion ought to induce us to depart from the principle, which we think equitable, on which the appellant insists. The learned Advocate General has taken us into numerous cases in relation to the law of marshalling of securities; but so far as we are able to perceive, those cases are not applicable in the circumstances of [808] the present case. It appears to us that the case may be dealt with on a simple enough footing: What we have to deal with here is the fund, which is the product of the sale of the mortgaged property as a whole. The first and second mortgagees have been paid off out of the proceeds of the sale, and we think that all that we have now to consider is, having regard to the position, respectively, of the third and fourth mortgagees, in what proportions or on what principle they are entitled to take part in the distribution of the remaining balance. Besides this question of marshalling, to which the learned Advocate General referred, we may observe that there has been a good deal of argument in reference to accessions to property subject to a mortgage. If we understand the learned Advocate General aright, his contention was that the houses Nos. 170 and 170-1, which have been erected upon the mortgaged property since the execution of the first and the second mortgages, though no doubt accessions to that property, are to be regarded as though they had been added to the security in the same sense as when a mortgagee takes additional and independent property by way of and additional security for his mortgage debt. That, however, is not, in our opinion, the correct view of the matter. We think that where an accession takes place, it becomes, so to speak, incorporated in the original subject of the security as though it had been in existence at the time when the original security was given, just as young trees growing upon land, which is subject to a mortgage, when they grow into timber create a valuable accession to the land and therefore to the security, but cannot be regarded in any sense as separate or independent from the land, upon which they stand. We have therefore to deal simply with one homogeneous security, of which the houses Nos. 170 and 170-1 form an integral part. Another matter to which the learned Advocate General adverted was that the property had been put up for sale in several lots. But we think it unnecessary to

1902 JULY 10.

APPELLATE CIVIL.

29 C. 803.

follow his argument based upon that consideration. The property no doubt was under the directions of the decree sold in different lots, but, so far as we are able to perceive, this can make no material difference in regard to the rights of the parties so far as the question of distribution is concerned, so that the question really now is as between the [809] third and the fourth mortgagees, what are their respective rights in regard to the divisible balance. The blance at the time when the order against which this appeal has been preferred was made appears to have been Rs. 32,059-4-1, and the amount due at that time under the third mortgage appears to have been Rs. 33,440-11-11, and under the fourth mortgage Rs. 9,158, so that it is obvious that the sum now distributable is insufficient to meet in full the claims of the third and the fourth mortgagees. The principle on which we consider it proper and equitable that the sum now to be divided should be apportioned is this: We think that the third mortgagee is not entitled to claim anything which may not properly be attributed to the sale of the property to which his mortgage is confined, namely, properties Nos. 170 and 170-1. In so far as the divisible balance represents any portion of the sum realized by the sale of these properties, we think he is entitled in priority to the fourth mortgagee to be paid out of that sum, and it appears from the figures that have been laid before us that in respect to the property No. 170, there is now a surplus after satisfaction of the first and the second mortgages of Rs. 12,639, and in respect of property No. 170-1, a surplus of Rs. 9,665, making in the aggregate Rs. 22,304. To that sum, as representing the property in which alone, the third mortgagee was interested under his mortgage, we think he is entitled. Then the surplus in respect of the property No. 170-2 remaining after satisfaction of the first and the second mortgagee, was Rs. 10,161-7 annas. Out of that sum, in which the third mortgagee had, under his mortgage, no interest, the fourth mortgagee, we think, is entitled to be paid. What is now due to him amounts, as we have stated to Rs. 9,158, and after he has been paid, there will be a balance of about a thousand rupees which, we think, ought to be paid to the fifth mortgagee, who, we may state, had adopted in this Court the argument of the appellant.

The appeal, therefore, must succeed and the order of the Court below modified in accordance with what we have said above. The appellant is entitled to be paid his costs of this Court by the respondent, the third mortgagee.

Appeal allowed.

29 C. 810.

[810] *Before Mr. Justice Ghose and Mr. Justice Geidt.*

BENODE LAL PAKRASHI *v.* BRAJENDRA KUMAR SAHA.*
[4th June, 1902.]

Decree—Execution of decree—Instalment decree—Agreement before decree not to enforce payment of an instalment—Part payment—Civil Procedure Code (Act XIV of 1882) s. 244—Limitation.

A decree being once made, it must be taken to be conclusive between the parties. When an instalment decree was duly made, neither an agreement that the payment of a certain instalment would not be enforced, alleged to

* Appeal from order No. 51 of 1902, against the order of Babu J. N. Roy, Subordinate Judge of Pubna, dated the 11th of January 1902.