1904 JULY 6.

APPELLATE CIVIL.

31 C. 974=9 C. W. N. 32

Lower Appellate Court as regards the share which the plaintiff No. 1 inherited from her father, and restore the findings of the Court of First Instance.

It has, however, been pointed out to us that there has been a small error in the calculation by which $\frac{4}{936}$ too much has been [974] allowed to the plaintiff on account of her mother's share. The learned vakil for the appellant admits that this error has been committed, and the decree of the Court of First Instance will therefore be restored with this modification that the share to which the plaintiff No. 1 is entitled will be declared to be $\frac{473}{936}$ instead of $\frac{477}{936}$.

We therefore decree the appeal with this slight modification with costs.

Appeal allowed.

31 C. 975.

[975] APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Mookerjee.

RAKHOHARI CHATTARAJ *v.* BIPRA DAS DEY.*

[17th June, 1904.]

Mortgage—Lien on mortgaged property—Mortgage-debt, addition to—Civil Procedure Code (Act XIV of 1882), s. 310A.

A mortgagee making payments to save the mortgaged property from being sold in execution of a rent decree has an additional lien on the property for the sums so paid by him.

Upendra Chandra Mitter v. *Tara Prosanna Mukerjee* (1) followed in principle.

[Appl. 14 I. C. 718 ; Ref. 21 C. L. J. 284=28 I. C. 571 ; 16 C. L. J. 148=17 I. C. 48.]

SECOND APPEAL by Rakhohari Chattaraj, the defendant No. 5.

The plaintiff, Bipra Das Dey, the mortgagee, brought this suit for the realization of the mortgage-debt secured by two bonds executed by the defendant No. 1 and the father of the defendants Nos. 2 and 3. The claim included also an amount deposited by the plaintiff under s. 310A of the Code of Civil Procedure, in order to prevent the sale of the mortgaged property in the execution of a decree for rent due in respect of that property.

The property was sold in execution of a rent decree against the mortgagors, and a portion of the property was again privately sold by the auction-purchaser to the defendant No. 5, who pleaded that the bonds in question were collusive and fraudulent transactions, and that the plaintiff's alleged deposit being a voluntary payment, the mortgaged properties were not liable for it.

The Munsif held that both the bonds were true; but the claim based upon the deposit was not maintainable, and he accordingly decreed the suit in part.

[976] The District Judge, on appeal, decreed the plaintiff's claim in full, holding that both the bonds were duly executed for valuable consideration and that he (plaintiff) had a charge on the mortgaged property for the amount deposited by him for setting aside the sale of the property in execution of the rent decree.

* Appeal from Appellate Decree No. 1534 of 1902, against the decree of K. N. Roy, Officiating District Judge of Bankura, dated March 26, 1902, affirming the decree of Dinanath Sirkar, Munsif of Bankura, dated Dec. 18, 1900.

(1) (1903) I. L. R. 30 Cal. 794.

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The defendant Rakhohari Chattaraj appealed to the High Court.

Babu *Digambar Chatterjee* for the appellant. There is no legal evidence of the payment of consideration for the bonds, and the finding of the Courts below on that point is erroneous. The lower Appellate Court was wrong in holding that the plaintiff had a charge on the morgaged property for the amount deposited by him to save the property from being sold in execution of a rent decree; ss. 171 and 174 of the Bengal Tenancy Act do not contemplate such a charge on mortgaged property, nor does s. 72 of the Transfer of Property Act.

Babu *Lal Mohan Das* (Babu *Sarat Chandra Dutt* with him) for the respondents. The only question to be considered is,—Has this deposit the effect of a mortgage? By this deposit the tenure was saved from sale. When a mortgagee deposits in the Collectorate the revenue and cesses payable by the defaulting mortgagor, he is entitled to be recouped by the mortgagor, and the amount so deposited is to be added to the amount of the original lien: see *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (1); s. 501, Civil Procedure Code. The general principle about "charge" on mortgaged property is laid down in *Nugender Chunder Ghose* v. *Kaminee Dossee* (2); and there is no decision which has differed from that principle on which I repy.

Babu *Digambar Chatterjee*, in reply.

GEIDT AND MOOKERJEE, JJ. The plaintiff brought this suit to realize a debt secured by two mortage-bonds executed by defendant No. 1 and by the father of the defendants Nos. 2 and 3. After the execution of those bonds, the property passed into the hands of defendants Nos. 4 and 5. Defendant No. 5 is the [977] appellant here. That portion of the property, which is in his possession, was sold in execution of a money decree against the mortgagors in January 1897, and was again sold privately by the auction-purchaser to defendant No. 5 in January 1899. The plaintiff sought to realize by the sale of the mortgaged property not only the amount of the original debt, but also an amount which he had paid under the provisions of section 310A of the Code of Civil Procedure to save the property from being sold in execution of a rent decree, while it was in the possession of the vendor of defendant No. 5, the payment being made a few days before the defendant No. 5 purchased the property.

The District Judge, on appeal, has decreed the plaintiff's claim.

It is urged in the first place by the learned pleader, who appears for the appellant, that the District Judge has fallen into an error in finding that the bonds in suit were executed for valuable consideration. The finding is based partly on the oral testimony of the plaintiff himself and partly on some account books. Now these account books were not produced until after the case both of the plaintiff and the defendant had been closed; and, though the plaintiff in his evidence stated that he had the account books both of his own and of his father's time, he was not recalled to prove that the account books, which he subsequently filed, were those to which he referred in his evidence. Undoubtedly this defect in the chain of proof does exist. But we find from the list of documents prepared in the Munsif's Court that the account books were admitted without objection; and though one of the grounds of appeal before the District Judge was that there had been no proof of these documents, we do not find in the judgment appealed from a single word to

(1) (1913) I. L. R. 30 Cal. 794. (2) (1867) 11 Moo. I. A. 241, 267.

1904 JUNE 17. APPELLATE CIVIL. 31 C. 975.

show that this objection was pressed before him. The defect was apparently regarded as of a formal nature. If the objection had been pressed before the District Judge it would have been very easy for that Court to have remedied the defect by calling the plaintiff and requiring him to testify formally whether the books which he produced in Court were those to which he referred in his deposition before the Munsif. We are, therefore, of opinion that this objection pressed in this Court for the first time is without substance and that it should not be upheld.

[978] The next objection taken to the judgment under appeal is that the District Judge was wrong in allowing the plaintiff to add to his mortgage debt the amount which he had paid to save the property from being sold in execution of a rent decree. It is clear that the payment was made under section 310A of the Code of Civil Procedure, and, therefore section 171 of the Bengal Tenancy Act has no application. The charge, too, cannot be supported by the provisions of section 72 of the Transfer of Property Act. These provisions of law, however, though they enumerate certain cases in which payments made to save property from sale for arrears of revenue or rent may be secured by a charge on the property, do not profess to be exhaustive. The point now before us was considered in *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (1), and it was there held that a mortgagee making payments to save a mortgaged property from being sold for arrears of revenue has, according to the general principles of justice, equity and good conscience, a lien on the property for the sums so paid by him. We think it right to follow the principle laid down in that case; and we are, therefore, of opinion that the District Judge was not in error in allowing the plaintiff to add to his mortgage-debt the amount which he had paid to save the property from being sold in execution of the rent decree.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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31 C. 979 (=9 C. W. N. 72.)

[979] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

MATUK DHARI TEWARI *v.* HARI MADHAB DAS.*

[June 1st and 2nd, 1904.]

Public Nuisance—Public way obstruction in—Bona fide claim of title—Reasonable and proper order—Jury—Verdict—Criminal Procedure Code (Act V of 1898), ss. 133, 139.

Where in a proceeding under s. 133 of the Criminal Procedure Code the opposite party, in showing cause why an obstruction should not be removed from a public way alleged that the way was the private property of his employer and asked for a jury to be appointed, and the Magistrate instead of first satisfying himself as to the *bona fides* of the claim referred the following question to the jury—

"Is there a public right-of-way at the points where stand the buildings whose removal has been ordered?"

Held that this was not a proper reference. What the jury had to try was whether the Magistrate's order was reasonable and proper.

[Ref. 10 C. W. N. 845=4 Cr. L. J. 42; 42 Cal. 158; Ref. 61 I. C. 175=22 Cr. L. J. 351.]

*Criminal Revision No. 512 of 1904, made against the order passed by A. Bentinck, Sub-divisional Magistrate of Sitamarhi, dated April 25, 1904.

(1) (1903) I. L. R. 30 Cal. 794.