

not amend his plaint and when his suit was dismissed, he valued his appeal at Rs. 4,500. It was accordingly held that the appeal lay to the District Judge. In this case it may, we think, be fairly said that the plaintiff did not definitely fix the amount of his claim at Rs. 9,000. He first fixed it at Rs. 2,000, then expressed a wish to alter it to Rs. 9,000 and finally reduced it to Rs. 4,500. In these circumstances, it was apparent that the real value of the suit was under and not over Rs. 5,000.

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In the present suit the plaintiff never definitely fixed the amount of his claim at Rs. 5,000. He did so only tentatively and from the first expressed an intention of claiming whatever sum might, on accounts being taken, be found due to him. This sum has been determined to be Rs. 5,756. Hence we consider this amount must be regarded as the value of the original suit and that the appeal has been rightly preferred to this Court.

We accordingly proceed to hear the appeal. . . .

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[370] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Brett.

GUNINDRA PROSAD v. BAIJNATH SINGH.*

[25th November, 1903.]

Mortgage—Lien on mortgaged property—Mortgagee, joint purchase of mortgaged property by—Mortgagor, objection to sale by—Transfer of Property Act (IV of 1882) s. 101.

Where the mortgagee purchases the mortgaged property along with other properties and jointly with other persons in undivided shares, his lien upon the property is not extinguished, but is existing, it being for his benefit within the meaning of s. 101 of the Transfer of Property Act.

A mortgagor is precluded from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgage suit is invalid by reason of the decree nisi in that suit not having been made absolute, if such objection is not raised at an early stage of the proceedings.

SECOND APPEAL by plaintiff Gunindra Prosad.

This appeal arose out of an action brought by the plaintiff to set aside a sale of the property in dispute in execution of a mortgage decree. The plaintiff's allegations were that one Chuni mortgaged a share of 8 pies in touzi No. 2067, and a share of 1 anna in Katof, to the defendants, that the mortgagees obtained a preliminary decree upon this mortgage on the 7th June 1895; that on the same day 2 annas 9 pies of touzi No. 2066 including the 8 pies above mentioned and some other properties were sold under section 54 of Act XI of 1859 for arrears of Government Revenue, and were purchased by the mortgagee defendant jointly with several other persons; that in January 1898, these properties were again sold for arrears of Government Revenue and were purchased by the plaintiff; that subsequently, in May of the same [371] year, the mortgagee defendants executed the said decree of 1895; that the mortgaged property Kalof was actually sold and the share in

* Appeal from Appellate Decree No. 1881 of 1901, against the decree of H. R. H. Cox, District Judge of Arrah, dated the 31st of May 1901, confirming the decrees of Lal Behary Dey, Subordinate Judge of Shahabad, dated the 22nd of September, 1900.

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touzi No. 2066 was advertised for sale. The plaintiff brought the present suit to have the said sale set aside and to prevent the proposed sale of the share in touzi No. 2066, on the ground that the mortgage and decree upon it were all fraudulent and collusive, and that he was induced to buy the property at the second revenue sale by the assurance of the mortgagee defendants that the property was unencumbered. The defence *inter alia* was that the mortgage decree was not discharged by the Revenue sale of 1895, and that the lien upon the property was kept alive. The Court of First Instance dismissed the plaintiff's suit, and on appeal the decision was confirmed by the Subordinate Judge of Shahabad.

Babu *Saligram Singh*, for the appellant, contended that the mortgagees having themselves purchased the mortgaged properties in the first revenue sale, their lien upon the disputed properties was extinguished under the provisions of section 101 of the Transfer of Property Act, and the mortgage decree was rendered incapable of execution. He further contended that the preliminary mortgage decree not having been made absolute, the sale of the mortgaged property was invalid.

Babu *Jogendra Chandra Ghose*, for the respondent, was not called upon.

BANERJEE AND BRETT, JJ. Two questions have been raised in this appeal on behalf of the plaintiff appellant, *first*, whether the Lower Appellate Court was right in holding that the mortgage lien of the mortgagee defendants was not extinguished by their purchase of the mortgaged property; and *second*, whether the Lower Appellate Court was right in holding that the plaintiff was precluded from raising the objection that the sale in execution of the decree in the mortgage suit was invalid by reason of the decree *nisi* in that suit never having been made absolute on the ground of the plaintiff not having raised the objection at any earlier stage of the proceedings.

In our opinion both these questions ought to be answered in the affirmative.

[372] With reference to the first question, our attention is called to the provisions of section 101 of the Transfer of Property Act, but those provisions evidently do not apply to the present case, because the purchase of the mortgaged property has been made, not by the mortgagees alone, but by the mortgagees jointly with other persons in undivided shares, and they have purchased other properties along with the mortgaged property. In that state of things it cannot be said that the provisions of section 101 of the Transfer of Property Act apply to the case, so as to extinguish the mortgage lien; and we think the Court of Appeal below was right in holding that the mortgage should be regarded as existing, it being evidently for the benefit of the mortgagee within the meaning of section 101 that it should be so regarded.

As to the second question, we think the Court below is right in the view it has taken. We may observe that the plaintiff is not materially prejudiced by the decision of the Court below, when that decision reserves to him the right of redemption, if he has any.

The appeal therefore fails and must be dismissed with costs.

Appeal dismissed.