

1903 the exact amount admitted to be due. If the defendant does not
 JUNE 19. pay in that amount and the plea is struck out in consequence, there
 APPELLATE remains the admission in general terms that money is due, and the
 CIVIL. result thereupon would be that the plaintiff would be entitled to a decree
 for his claim. That seems to me to be the effect of the words as they
 30 C. 947=7 stand in the section, if taken apart from the intention of the Legislature.
 C. W. N. 514. But I do not think that the Legislature can have intended to place an
 honest defendant in a worse position than a dishonest one; for if
 the defendant denies the whole of the plaintiff's case, the plaintiff is
 put to proof of it, and the defendant secures time before he is obliged
 to pay up any part of the claim; whereas according to the above
 construction an honest defendant who admits part of the plaintiff's
 claim would have the whole of the claim decreed against him unless
 he pays in the admitted sum at once.

It appears to me, therefore, that the construction must be modified,
 and it must be modified in the sense in which it has been taken by my
 learned colleague.

Appeals dismissed.

30 C. 953.

[953] APPELLATE CIVIL.

GANGA RAM MARWARI v. JAIBALLAV NARAIN SINGH.*

[4th March, 1903.]

Mortgage—Transfer of Property Act (IV of 1882) ss. 96, 97—Civil Procedure Code (Act XIV of 1882) s. 295, prov. (c)—Sale-proceeds, surplus of—Prior mortgage—Contract Act (IX of 1872) s. 44—Contribution as between co-mortgagors—Interest to date of realisation, rate of.

If a mortgagor receives any money out of the surplus sale-proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.

Johnson v. Bourne (1) followed.

The Court is quite competent to allow in a mortgage decree interest at the stipulated rate up to the actual date of realisation.

Rameswar Koer v. Mahomed Mehdi Hossein Khan (2) and *Maharaja of Bhartpur v. Rani Kanno Dei* (3) followed.

SECOND APPEAL by the plaintiff, Ganga Ram Marwari.

The plaintiff brought a suit for Rs. 4,851 on a mortgage bond dated the 31st October 1892. The suit was instituted on the 3rd February 1897, and it was alleged in the plaint that the defendants first party had executed the mortgage bond, on receipt of a loan of Rs. 1,865, in favour of the plaintiff, the property mortgaged being a 6 $\frac{3}{4}$ -anna share out of a 7-anna *putti* in mehal Arsand, bearing tauzi No. 4197, or that treating the *putti* as sixteen annas, the share mortgaged was 15 annas, 8 gandas, 2 cowries, 1 krant. It was further alleged that the whole *putti* had been leased out to one Lalit Narain Khaihari at the annual rent of

* Appeal from Appellate Decree No. 1929 of 1899, against the decree of C. M. W. Brett, District Judge of Bhagulpore, dated March 3, 1899, modifying the decree of Nafar Chandra Bhatta, Subordinate Judge of that district, dated April 27, 1898.

(1) (1843) 2 Y. & C. Ch. 268.

(2) (1898) I. L. R. 26 Cal. 39; L. R. 25 I. A. 179.

(3) (1900) I. L. R. 23 All. 181; L. R. 28 I. A. 35.

[954] Rs. 500, and that although the lease provided that a portion of the rent was to be paid to the plaintiff in satisfaction of a part of the interest due on the mortgage, the plaintiff could not realise anything, the lessee having complained that he had been dispossessed from a portion of the land by some of the defendants. The other defendants were described as interested in the mortgaged property, and the plaintiff prayed for future interest according to the terms of the bond up to the date of realisation and for other reliefs.

1903
MARCH 4.
—
APPELLATE
CIVIL.
—
30 C. 953.

The defendants put in different sets of written statements. Amongst other points, it was contended (i) that a fourth share in the *putti* had been mortgaged by the defendant Nand Kishore Singh and others in 1882 to one Zalim Chowdhry and another, upon which a suit had been brought on the 21st March 1892 and a mortgage decree obtained on the 31st May 1893; that in execution of that decree the said share was sold for Rs. 4,805 on the 3rd May 1897; that the plaintiff through his *mukhtear* withdrew the surplus sale-proceeds, amounting to Rs. 2,397-7, from the Court on behalf of the said judgment-debtors and appropriated the amount himself; and that in the circumstances he was bound to credit the sum towards satisfaction of the mortgage debt; and (ii) that the prescribed portion of the rent due from the lessee as aforesaid should be credited in part payment of the mortgage debt under the terms of the lease.

The learned Subordinate Judge gave the plaintiff a modified decree. With reference to the rent payable by the lessee of the property to the plaintiff, he held that under the terms of the lease the plaintiff must give credit for Rs. 222, the sum which the lessee was bound to pay to him for each of the five years at the end of each year. With reference to the plea as to the surplus sale-proceeds, he found that the sum was withdrawn by the defendants, Nand Kishore Singh and others, through the plaintiff's *mukhtear*, and it was wholly or in part made over to the plaintiff, who professed to receive it in satisfaction of another subsequent debt due to him from them, and he held that under the provisions of s. 97 of the Transfer of Property Act, the plaintiff was bound, as second mortgagee of the property sold, to take out the surplus sale-proceeds in satisfaction of his debt. He accordingly [955] held that a set-off should be allowed to the claim for Rs. 2,395-7. The decree allowed interest at the stipulated rate *i.e.*, Rs. 2 per cent. per mensem, on the principal sum from the date of suit, and at the rate of 6 per cent. per annum on the rest from the date of the decree to the date of the sale.

The plaintiff appealed to the District Judge who varied the decree as to costs and also as regards the surplus sale-proceeds aforesaid. In regard to the latter, he found that out of the sum withdrawn from the Court, the plaintiff accepted Rs. 1,318-14 in satisfaction of a money-debt due to him from the owners of the share sold. He did not think that the provisions of s. 97 of the Transfer of Property Act could apply to the case, but held that the plaintiff was in equity bound to apply the amount received by him as aforesaid to the satisfaction of his mortgage debt. With regard to the rent due under the lease, the learned District Judge saw no reason to differ from the finding of the Subordinate Judge that the plaintiff had in fact received the money, but omitted to credit in satisfaction of his mortgage debt.

Dr. Rash Behary Ghose, Babu Karuna Sindhu Mookerjee, and Dr. Ashutosh Mookerjee for the appellant.

1903
MARCH 4.
—
APPELLATE
CIVIL.
—
30 C. 953.

Babu Amarendra Nath Chatterjee and Babu Makhan Lal for the respondents.

BANERJEE AND HENDERSON, JJ. In this appeal which arises out of a suit for money due upon a mortgage bond, three points have been raised for determination in the argument on behalf of the plaintiff-appellant,—

(i) whether the Court of appeal below was right in holding that a certain sum of money received by the mortgagee from some of the mortgagors should be applied to the satisfaction of the mortgage debt, merely because it was part of the surplus sale-proceeds of the share of a portion of the mortgaged property, namely, the share of the mortgagor defendants, who paid the money, notwithstanding that the payment had been made by them in satisfaction of other debts due from them to the mortgagee ;

[956] (ii) whether the Court of appeal below was right in holding that certain rents received from the *mostajir* or lessee of the mortgagors should be applied in satisfaction of the mortgage debt ; and

(iii) whether the Court of appeal below was right in not allowing interest at the stipulated rate up to the date of realization, or, at any rate, up to the date of payment fixed by the decree.

Upon the first point this is how the matter stands. A portion of the mortgaged property, namely, the share of Nand Kishore Singh and others, which had been previously mortgaged to third party, was sold in execution of the mortgage decree obtained by him, the present plaintiff not being a party to that suit, as the mortgage in his favour was executed after the institution of the prior mortgagee's suit ; and out of the surplus sale-proceeds, namely, Rs. 2,395, a sum of Rs. 1,318 was paid by Nand Kishore Singh and others to the plaintiff in satisfaction of another debt due to him. This payment the learned Judge in the Court below has held should be applied in satisfaction of the mortgage debt ; and the main ground of the decision is that section 97 of the Transfer of Property Act makes it imperative that surplus sale-proceeds should be paid to any person proving himself interested in the property sold, that is, to any subsequent mortgagees, if there be any ; and that being so the plaintiff was entitled to apply this sum in satisfaction of the mortgage debt, and if he has not chosen to apply it in that way, he must be compelled to do so.

The learned vakil for the plaintiff-appellant contends that this view of the law is wrong. In the first place it is argued that section 97 of the Transfer of Property Act has no application to this case, as that section, as the context shows, applies only to cases under section 96, that is to cases in which the property sold is subject to a prior mortgage, which was not the case here.

On the other hand, the learned vakil for the respondents, the defendants Nos. 8 to 10 who are the contesting defendants, so far as this question is concerned, relies upon the case of *Padmanabh Bombshenvi v. Khemu Komar Naik* (1) as authority for holding [957] that section 97 of the Transfer of Property Act may have application to a case like this. But be that as it may, section 295 of the Code of Civil Procedure, proviso (c), clause (3), would show that the plaintiff was entitled to claim the surplus sale-proceeds in satisfaction of the mortgage

(1) (1898) I. L. R. 18 Bom. 684.

1908
 MARCH 4.
 APPELLATE
 CIVIL.
 30 C. 953.

debt due to him, and it is not disputed that he had that right. The question is whether, although he had that right, he was under an obligation to the defendants Nos. 8 to 10, or any of the co-mortgagors to apply for payment of the money to him and appropriate the surplus sale-proceeds in satisfaction of the mortgage debt. If he was not under any legal obligation to do so, although according to the highest moral standard he ought to have done so, it could not be said that the money should be applied to the satisfaction of the mortgage debt notwithstanding that it has already been appropriated in some other way. The only ground upon which it could be said that he was bound to apply for the money and to appropriate it in satisfaction of the mortgage debt was that he had the right, and that his not exercising the right might work to the prejudice of the co-mortgagors. But on the other hand if the respondent's contentions be given effect to, it might work to the prejudice of the mortgagors, out of the sale-proceeds of whose property the payment is made, and might give their co-mortgagors an undue advantage; for the surplus may be more than their share of the mortgage debt and may exceed the whole of the mortgage debt itself, in which case the entire mortgage debt may be paid out of the surplus proceeds of the other mortgagors, the objecting co-mortgagors not having to pay a single pice. It may be said in answer that they would be liable in a suit for contribution by their co-mortgagors. But so may it be said, if the objecting co-mortgagors had not obtained any deduction of the mortgage debt out of the surplus sale-proceeds of their co-mortgagor's property, they may also obtain contribution from the latter. According to the law of this country, "Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to other joint promisor or promisors" (section 44 of the Indian Contract Act). If the release of [958] one of several joint promisors does not affect the rights of the promisee as against the other promisors, the qualified release of a part of the mortgage security in favour of some of several joint mortgagors, resulting from the mortgagee not seeking to enforce his right as against any surplus sale-proceeds of such part when sold in satisfaction of a prior mortgage, ought not to affect the mortgagee's right.

Moreover, the observations of Vice-Chancellor Knight Bruce in *Johnson v. Bourne* (1) go to show that it is open to the mortgagee to forego his security if he has confidence in his debtor. Then, again, it should be observed that if any such obligation in the mortgagee, as the respondent contends for, were to be inferred from the existence of his right to claim the surplus sale-proceeds, it would relate to the whole of the available surplus sale-proceeds, and not merely to the portion that may come to his hand, to which the Court of appeal below thinks it ought to be limited.

If there be any hardship to any of the co-mortgagors, it is always open to them, when entering into the mortgage contract, to insert a stipulation that the security, or its equivalent in money, if it should be converted into money by any enforced sale, should be primarily answerable for the mortgage debt, and that their personal liability should arise

(1) (1848) 2 Y. & C. Ch. 268, 277.

1903
MARCH 4. only in the event of the security, or its equivalent proving insufficient. There is no such stipulation in the mortgage deed in this case.

APPELLATE
CIVIL.
30 C. 953.

For all these reasons we are of opinion that the rule of law laid by the learned District Judge as the basis of his judgment, namely, that the moneys received by the mortgagee from certain of the mortgagors out of the surplus sale-proceeds of their share of the mortgaged property should be appropriated to the satisfaction of the mortgage debt merely because it was part of such surplus, notwithstanding that it had been paid in satisfaction of their debts, cannot be accepted as correct. But this does not dispose of the question. It remains to be considered whether the amount received has been received by the mortgagee by means of or by virtue of the security. If it was so received, it should be appropriated to the satisfaction of the mortgage debt. This is [969] the rule laid down in the case of *Johnson v. Bourne* (1) just referred to, and it is in our opinion a just and equitable rule which ought to be followed.

The question remains then, was the sum of Rs. 1,318 received by means of or by virtue of the security? Upon this point the first Court in its judgment says at page 33 of the paper-book: "On the 4th June 1897, the defendants Nos. 8 to 10 made a petition to this Court stating that the plaintiff, in collusion with the defendants Nand Kishore Chowdhry and others, whose share was so sold, was not withdrawing that sum in part satisfaction of his dues under the bond (Exhibit I in suit); that an injunction should be issued against those defendants restraining those defendants from withdrawing that amount; the plaintiff should be required to take out that sum and a *robokari* should be sent to that Court not to pay out that sum to the defendants. That petition was shown to the plaintiff's pleader, who wrote the word 'object' on the petition. I fixed the 7th June for hearing that petition. On 5th June, however, those defendants applied through the plaintiff's *mukhtear* who is conducting the suit on his behalf to withdraw the money, and the money was withdrawn, and it was wholly or in part made over to the plaintiff who professes to have received it in satisfaction of another subsequent debt due to him from them." And this the Subordinate Judge characterises as "a piece of nasty dodge of the plaintiff." Now it should be borne in mind that the present suit was instituted on the 3rd of February 1897, and the application for payment of the money was made on the 5th of June following, through the plaintiff's *mukhtear* who was conducting the present suit; and if the money was paid in these circumstances upon an application being made by the plaintiff's *mukhtear*, it would follow that the money was received by virtue of the security, and the case will come within the rule laid down in *Johnson v. Bourne* (1), and the appropriation in part satisfaction of the security would be right. Upon this point, however, the Lower Appellate Court has neither expressly affirmed nor expressly negatived the finding of the first Court. What the learned District Judge in the Court of appeal below says is this:—"Money [960] was due to him (the plaintiff) from the proprietors of the share sold on a simple money bond. He allowed those persons to take out the sale-proceeds and then accepted from them Rs. 1,318-14 in satisfaction of that debt. The Subordinate Judge stigmatizes this conduct as 'atrocious' and 'a nasty dodge,' and though perhaps the terms

(1) (1848) 2 Y. & C. Ch. 268.

applied are a little too forcible, there can be no doubt that the plaintiff allowed the sale-proceeds to be withdrawn for his own advantage."

The learned vakil for the respondent contends that this negatives the first Court's finding. We are not prepared to accept this view as correct. It is true that the District Judge tones down the stringency of the remark as to the plaintiff's conduct but that is done in a very qualified way. The learned Judge merely says that the strictures are "a little too forcible." That being so, we think that the case must go back to the Lower Appellate Court in order that it may determine whether the finding of the first Court upon this point in the passage of its judgment quoted above is correct. If it is not, the conclusion arrived at by the Lower Appellate Court will stand. If it is not, the deduction of Rs. 1,318-14 allowed will have to be disallowed.

The second point as was practically conceded is concluded by the finding of fact arrived at by the Lower Appellate Court.

As to the third point the learned pleader for the respondent very properly conceded that upon the authority of the case of *Rameswar Koer v. Mahomed Medi Hossein Khan* (1) and the case of the *Maharaja of Bhartpur v. Rani Kanno Dei* (2) interest must be allowed at the stipulated rate up to the date of realization; but he contended that as the first Court did not allow that, and there was no appeal against the decree of the first Court on that point by the plaintiff, it was not open to the plaintiff to raise that question now. That no doubt is so, but as the decree of the Lower Appellate Court must, upon the first ground taken in this appeal, be set aside and the case sent back to that Court and a new decree will have to be made by the Lower Appellate Court after the remand; if that decree is not a mere re-affirmance of the decree already made, but is to be a different decree by reason of the [961] disallowance of the deduction of Rs. 1,318, in that case interest will have to be allowed at that stipulated rate up to the date of realization.

The decree of the Lower Appellate Court is accordingly set aside and the case sent back to that Court to be disposed of with reference to the directions contained in this judgment. Costs will abide the result.

Appeal allowed. Case remanded.

30 C. 961.

APPELLATE CIVIL.

HARISH CHANDRA TEWARY v. CHANDPORE COMPANY, LIMITED.*
[25th March, 1903.]

Execution of decree—Civil Procedure Code (Act XIV of 1882) ss. 234, 372—Decree for money—Limited Company, debts and liabilities of—Transfer of the properties of the Company to a third party—Dissolution of Limited Company—Legal representative.

A obtained a decree for money against a certain limited Company. The Company had sold all their properties to a third person who again sold his rights to another limited Company. On an application for execution of the

* Appeal from Original Order Nos. 160 and 161 of 1902 against the order of Jadu Nath Das, Subordinate Judge of Murshidabad, dated Jan. 25, 1902.

(1) (1898) I. L. R. 26 Cal. 39; L. R. 25 I. A. 179. (2) (1900) I. L. R. 23 All. 181; L. R. 28 I. A. 35.