1903
MARCH 24.
APRIL 29.

PRIVY COUNCIL.

30 C. 738=5 Bom. L. R. 461=30 I. A. 139=7 C. W. N. 578.

Their Lordships are therefore of opinion that the appeal to the High Court should have been allowed, and they will humbly advise His Majesty that the decree of the Subordinte Judge dated the 18th January 1896 and that of the High Court dated the 6th December 1897 be discharged, and instead thereof an order be made dismissing the suit of Ram Narain, the first respondent, with costs, and that the first repondent pay the costs of the appeal to the High Court. He will also personally pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondent, Ram Narain Sahu: *Gordon, Dalbiac & Pugh.*

---

30 C. 755 (=7 C. W. N. 723).

[755] APPELLATE CIVIL.

HARI KISSEN BHAGAT *v.* VELIAT HOSSEIN.* [4th May, 1903.]

Mortgage—Transfer of Property Act (IV of 1882) s. 85—Non-Joinder—Apportionment of mortgage debt—Purchaser of mortgaged property—Release.

When a purchaser from the mortgagor of one of the mortgaged properties (subsequently released by the mortgagee from his lien), is not made a party to a mortgage suit brought by the mortgagee, the proper course is not to dismiss the suit for non-joinder, but to apportion the mortgage debt between the property so purchased and released, and the other mortgaged property. In such a case the mortgage should be treated as split up into two.

[Fol. 2 C. L. J. 202; 36 I. C. 530; Ref. 3 C. L. J. 577=28 M. 555=15 M. L. J. 442; 1 C. L. J. 337; 33 Cal. 613=10 C. W. N. 551=3 C. L. J. 576; 33 Cal. 1079; 5 C. L. J. 315=11 C. W. N. 403; 12 C. W. N. 911; 31 M. 333; 34 All. 606; 38 M. 310; 52 I. C. 512. Dist. 7 C. L. J. 274; 64 P. R. 1908=132 P. W. R. 1908.]

SECOND APPEAL by the plaintiff, Hari Kissen Bhagat.

The plaintiff sued on a mortgage bond, dated the 10th August 1884, executed by the defendants 1st party in his favour for a consideration of Rs. 800, the properties mortgaged being 3 annas 16 gundas share of mouzah Dighout Tetria, 3 annas 16 gundas share of mouzah Murkawa and 1 anna share of mouzah Rewai. It was alleged that the aforesaid share of mouzah Dighout Tetria had been subsequently sold by the defendants 1st party to Nawab Lutf Ali Khan of Patna, and as certain prior mortgages had been satisfied out of the sale proceeds, the plaintiff made no claim in the suit against the said property. The defendants 2nd party were other mortgagees and purchasers. The whole of the mortgage debt, amounting to Rs. 4,300, was claimed in the suit, and it was prayed that should the sale-proceeds of the two other mortgaged properties be found insufficient to meet the claim, the person and other properties of the defendants 1st party might be proceeded against.

The defendant No. 6 alone contested the suit. He was one of the defendants 2nd party and a prior mortgagee of the 1 anna [756] share of mouzah Rewai, who had purchased the said property in execution of his mortgage decree. He pleaded amongst other things that the suit

* Appeal from Appellate Decree No. 2656 of 1899, against the decree of W. H. Vincent, District Judge of Bhagalpore, dated Sept. 23, 1899, reversing the decree of Karunamai Banerjee, Subordinate Judge of Monghyr, dated Dec. 9, 1898.

1903
MAY 4.

APPELLATE CIVIL.

30 C. 755=7 C. W. N. 723.

must fail, as the heirs of the said Nawab Lutf Ali Khan had not been made parties ; that as the plaintiff, by an *ikrarnama* executed in favour of the said Nawab, had deliberately relinquished his mortgage lien over the property, mouzah Dighout Tetria, which was not sold for its full value, he (the plaintiff) had no right to give up that property and to proceed only against the other two properties for the satisfaction of his whole claim, and that on the principle enunciated in s. 82 of the Transfer of Property Act, the property, mouzah Rewai, was liable only for a proportionate portion of the plaintiff's claim.

The Subordinate Judge apportioned the whole of the mortgage debt between the two properties, Murkawa and Rewai, and passed a decree accordingly.

Both the plaintiff and the defendant No. 6 appealed to the District Judge. The learned Judge held that, in view of the provisions of s. 85 of the Transfer of Property Act, the suit could not proceed, as the heirs of the said Nawab of Patna were not made parties, though the plaintiff had notice of their interests ; and he accordingly dismissed the suit.

Dr. *Rash Behary Ghose* and Babu *Digambar Chatterjee* for the appellant.

Babu *Rajendra Nath Bose* for the respondents.

BANERJEE, AND PARGITER JJ. In this appeal, which arises out of a suit brought by the plaintiff-appellant to enforce a mortgage-bond, the only question raised for determination is whether the Court of Appeal below was right in dismissing the suit of the plaintiff by reason of the purchaser of one of the mortgaged properties from the mortgagor not having been made a party to the suit.

The learned vakil for the plaintiff-appellant contends that the suit should not have been dismissed altogether, but the mortgage debt should have been apportioned between the property purchased by the person who has not been joined as a defendant and the other mortgaged property. He urges that, having regard to the fact that the property purchased by the person who has not been [757] joined as a party has been released by the plaintiff-mortgagee, the mortgage must be treated as having been split up, and that property cannot strictly speaking be considered any longer as property comprised in the mortgage sought to be enforced so as to make him a necessary party within the strict meaning of section 85 of the Transfer of Property Act. The contention is that, all that the state of facts in this case requires is that the mortgage should be treated as having been split up, and the release of one of the mortgaged properties by the mortgagee should be held to have the same effect as if the mortgagee had himself bought it; and if that is done and the mortgage debt apportioned between that property and the other mortgaged property, that is all that the defendant-respondent is entitled to have. And in point of fact that is all that the learned vakil for the respondent, a subsequent purchaser from the mortgagor, really insists upon.

That being so, we think the proper course to take in this case is to set aside the decree of the Court below, and to send back the case to that Court in order that it may dispose it of after apportioning the mortgage debt in the manner stated above.

We think the parties in this appeal should bear their own costs.

Appeal allowed.