

the testamentary law of England to be wholly unsuited to the wants and habits of the people of this country, and I think it wise to apply the rule laid down in *Tagore v. Tagore* (1) strictly. I, therefore, hold that the bequest now under consideration is a bequest to a class some members of whom could not legally take because they were not in being at the testator's death, and that for this reason the bequest is wholly void.

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Appeal dismissed.

Attorneys for the appellants : Messrs. *Ghose & Bose.*

Attorneys for the respondent : Messrs. *Swinhoe Law & Co.*

APPELLATE CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice
 McDonell.*

KALIPROSONNO GHOSE AND ANOTHER (PLAINTIFFS) v. KAMINI
 SOONDURI CHOWDHRAIN (DEFENDANT).*

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 July 20.

*Mortgage—Merger—Foreclosure Proceedings on the first of two Mortgages
 of the same property to the same Mortgagee.*

On the 26th of March 1872, *A* mortgaged to *B* certain properties for Rs. 12,000. On the 9th of May 1872, *A*, to secure a further advance of Rs. 24,000 made to him by *B*, executed a second mortgage to *B* of the same and certain other property. On the 29th of July 1873, *B* served *A* with notice to foreclose the properties mortgaged by the first deed. On the 23rd March 1874, and before the expiration of the year of grace, a portion of the properties subject to both mortgages was sold at an auction-sale subject to existing incumbrances, and *C* became the purchaser. *C*, thereupon, to protect the interests he had bought at the sale, purchased in the name of *D*, a trustee, all the interest of *B* in both mortgages, and after the expiration of the year of grace, filed, in the name of himself and *D*, a suit to declare his absolute right to the foreclosed properties, and afterwards filed another suit against *A* for a money-decree on the bond in the second mortgage.

* Regular Appeals, Nos. 128 of 1876 and 129 of 1877, against the decrees of the First Subordinate Judges of Zillas 24-Parganas and Nuddea, dated, respectively, the 29th of February 1876 and the 1st of March 1877.

(1) 9 B. L. R., 377.

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Held, that *C* being owner of portion of the property subject to both mortgages, and as such liable to contribute proportionately to the payment of both, could not foreclose the first mortgage, and then sue *A* for the whole debt due upon the second.

Quere.—Whether it would be equitable for *C* to foreclose the first mortgage?

Held further, that the bringing of the second suit had the effect of reopening the foreclosure proceedings, and that the Court could now make a decree in the whole case.

THESE were appeals in two suits instituted by the plaintiffs Kaliprosonno Ghose and Bhugoban Chunder Mitter under the following circumstances:—

On the 26th of March 1872, the defendant, Kamini Soonduri, borrowed Rs. 12,000 from one Grish Chunder Bannerjee, and, to secure that sum with interest, she mortgaged to him by way of conditional sale a half-share in five different properties—Katiara, Atghura, Danapur, Chupra, and Alampur. The loan was repayable with interest at four per cent. per mensem within one month from the date of the mortgage.

On the 9th of May 1872 (the first mortgage being unpaid), the defendant, in consideration of a further loan of Rs. 24,000, gave Grish Chunder Bannerjee another mortgage by way of conditional sale of the same five properties that were mortgaged by the former deed, and also of three other properties—Higli, Tarruf Ranaghat, and Dibi Santa. This sum of Rs. 24,000 was to be repaid with interest at Rs. 2-4 per mensem on the 9th of May 1873; and the deed provided that the mortgagee was to have his remedy, either by foreclosure or sale of the mortgaged properties, or by suit against the mortgagor for the mortgage money and interest.

On the 29th of July 1873, no part of the principal or interest secured by the two abovementioned mortgage-deeds having been paid, Grish Chunder Bannerjee served the defendant with the usual notice to foreclose the properties mortgaged by the deed of the 26th of March 1872. On the 23rd of March 1874, the defendant's half-share in Alampur was sold for arrears of revenue, and, at such sale, the plaintiff Kaliprosonno Ghose became the purchaser subject to the mortgages then existing on the property.

The plaintiff afterwards, to protect his interest in his newly

acquired property, arranged with Grish Chunder Bannerjee to purchase from him his entire interest in the two mortgages. Accordingly, on the 3rd of June 1874, an assignment was made by Grish Chunder Bannerjee of all his interest as mortgagee in the mortgaged properties to one Bhugoban Chunder Mitter, as trustee for Kaliprosonno Ghose, the assignment being expressly stated to have thus been made to a trustee to prevent a merger of the mortgagor's interest in that of the mortgagee as regards the estate of Alampur.

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In the meantime Chupra, one of the five properties comprised in the first mortgage, had been sold in execution of a decree obtained on a prior mortgage debt, and it was admitted on both sides that this property was not available under either mortgage.

On the 28th of April 1875, the plaintiff Kaliprosonno Ghose brought the first of these suits (making his trustee, Bhugoban Chunder Mitter, a co-plaintiff), and in this suit he sought to obtain possession of the three properties—Katiara, Atghura, and Danapur (mortgaged by the first deed)—by force of the foreclosure proceedings; and also to obtain a declaration that he, the plaintiff Kaliprosonno Ghose, was entitled by virtue of his purchase, as well of the foreclosure proceedings, to a proprietary right in Alampur.

While this suit was still pending, another suit was brought by Kaliprosonno Ghose on the 7th of February 1876 against the same defendant, to recover the amount of the mortgage debt and interest due under the second mortgage.

The two suits were heard by the same Subordinate Judge and were dismissed.

In the first suit the Subordinate Judge held that, as the plaintiff Kaliprosonno Ghose had purchased the mortgagor's interest in Alampur, and the mortgagee's interest in the whole of the mortgaged properties, he had become both the payee and receiver of the mortgage debts, and that consequently those debts and the remedies for them had become extinguished; and he considered that, looking into the real substance of the transaction, the fact that the plaintiff had taken the assignment of the mortgage in the name of a trustee (although he did so expressly to avoid the merger), made no difference in his legal position.

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The second suit was dismissed on two grounds—1st, that by the purchase of Alampur, the mortgage debt had become extinguished; and 2nd, that, notwithstanding the terms of the mortgage-deed, the plaintiff could have no personal remedy against the defendant for the debt until all his remedies against the property had been exhausted.

Against this decision the plaintiffs appealed to the High Court. The two suits were heard together.

The *Advocate-General* Mr. Evans, Baboo Hem Chunder Banerjee, Baboo Mohini Mohun Roy, and Baboo Taruchnath Dutt for the appellants.

Mr. J. D. Bell, Baboo Bhowani Churn Dutt, Baboo Rash Behary Ghose, and Baboo Oopendro Chunder Bose for the respondent.

For the appellants it was contended that the doctrine laid down by the Subordinate Judge, that the effect of the assignment of the entire interest of the mortgagee to a trustee for the purchaser of a portion of the mortgaged property was to cause a merger and to extinguish the mortgage debt, could not be supported—*Adams v. Angell* (1), *Watts v. Symes* (2), *Greswold v. Marsham* (3), *Mocattu v. Murgatroyd* (4); and that the plaintiffs were entitled to a decree in the first suit.

If the mortgage of the 26th of March 1872 had been to *A*, and the mortgage of 9th of May 1872 had been to *B*, it is quite clear that *A* after default could have absolutely foreclosed the five, or rather the remaining four out of the five, properties mortgaged to him, leaving *B* to have recourse to the three additional properties included in his mortgage, and the personal security of the defendant, without any hardship or injustice to either the defendant or *B*, as either of them could, if he had pleased, have prevented the foreclosure by paying to *A* within the year of grace the amount due to him under the mortgage to him. This being so, no possible hardship could have been caused to the defendant if the two mortgages had been made, not to two

(1) L. R., 5 Ch. Div., 634.

(2) 1 De Gex M. & G., 240.

(3) 2 Ch. Cas., 170.

(4) 1 P. Wm., 393.

different, but to one and the same person, say *C*, and *C* had assigned all his interest under the first mortgage to *D*, and under the second to *E*. Surely in the latter case *D*, as the assignee of the mortgagee's interest under the first mortgage, could have obtained an absolute foreclosure of the properties comprised in it, unless paid off within the year of grace by either the defendant or *E*. But if *D* could, as it is submitted he could, so obtain an absolute foreclosure, it cannot be maintained that the mortgagor is damnified if a mortgagee, who has in him two perfectly separable sets of rights, under two mortgages of different dates, instead of assigning one set of rights to one assignee and the other set of rights to another, retains both sets of rights in his own hands, and elects to enforce first his rights under the mortgage of earlier date without prejudice to his rights under the later instrument.

If then, as it is submitted, Grish Chunder Bannerjee was entitled if he pleased to enforce his rights under the first mortgage, treating it, as it in fact was, a separate and independent transaction; the position of the parties immediately after the purchase of the defendant's half-share in Alampur, was this — the plaintiff Kaliprosonno was as such purchaser entitled to the equity of redemption in Alampur, and was liable to contribute to the entire debt, secured by the two mortgages, a sum which bore the same proportion to the entire debt secured, that the value of the half-share purchased by him bore to the value of all the mortgaged properties. And this liability was not a personal liability, it amounted to nothing more than this, namely that, in case of a foreclosure being prevented by the payment of the mortgage debt due on the first mortgage-deed either by himself or by any one else, he would, on adjustment of these several liabilities, between him and the defendant, be liable to contribute his proportion of the sum paid; and so, with the second mortgage; but he was not either legally or morally bound to pay any portion of the debts secured by either mortgage: and if the properties pledged under the first mortgage, including the one in which he had purchased a half-share, were foreclosed, the only consequence to him would be that he would lose his equity of redemption, that is to say, the right pur-

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chased by him at the auction-sale would be extinguished; but so also would his liability to contribute to the amount payable under the second mortgage.

On the 29th of July 1874 (the expiration of the year of grace), therefore, the right of the plaintiff Kaliprosonno to Alampur as purchaser at the auction-sale, ceased, and the four foreclosed properties belonged to him absolutely through his trustee; and in the same way he had all the rights of a first mortgagee in the properties included in the second mortgage, and was perfectly entitled to enforce those rights in conformity with the provisions of that mortgage-deed itself.

For the respondent it was contended that the Court below had been right in its decision, and the following authorities were relied upon:—*Toulmin v. Steere* (1), *Squire v. Ford* (2), *Parry v. Wright* (3), *Smith v. Phillips* (4), *Tyler v. Lake* (5), *Sugden's Vendors and Purchasers*, p. 615, and *Dart's Vendors and Purchasers*, 917.

The judgment of the Court was delivered by

GARTH, C. J. (who, after shortly stating the facts, continued as follows):—We consider that the view which the lower Court has taken of these cases is not altogether correct.

In the first place, the Subordinate Judge was wrong in supposing that, by taking an assignment of the mortgages *bonâ fide* in the name of a trustee, the plaintiff could not prevent the merger of the mortgagor's and mortgagee's interests, and consequently the extinguishment of the mortgage debt. The assignment was taken in the trustee's name expressly for the purpose of preventing the merger, and keeping alive the two estates; and there is ample authority that this object may properly and legally be carried out by means of an assignment of this nature.—See *Watts v. Symes* (6) and *Adams v. Angell* (7).

The real objection to these suits, in an equitable point of view, appears to us to be this—that the plaintiff, who is the

(1) 3 Mer., 210.

(4) 1 Keen, 694.

(2) 9 Hare, 47.

(5) 4 Sim., 351.

(3) 5 Russell, 142.

(6) 1 De. G., M. and S., 240.

(7) L. R., 5 Ch. Div., 634.

beneficial owner of Alampur, subject to the mortgages, and as such, liable, conjointly with the owners of the other mortgaged properties, to pay his proportion of the entire mortgage debts, has attempted to foreclose Alampur and the other properties comprised in the first mortgage, for a part only of the mortgage debts (that part which was due under the first mortgage), and has then sued the defendant personally for the remainder, to the payment of which he himself, as the owner of Alampur, is bound to contribute. We have great doubt whether, under such circumstances, he had any right to foreclose at all under the first mortgage. Grish Chunder, the original mortgagee, had, by accepting the second conditional sale of the properties, consented to charge them with an additional mortgage debt, and having done so, it appears to us that it would have been inequitable on his part to foreclose the property under the first mortgage and so deprive the defendant of that, which both parties had agreed to look to as the primary means of satisfying the sum due upon the second mortgage.

But even assuming, for the sake of argument, that the plaintiff could thus have foreclosed under the first mortgage, it is clear that he had no right, (being himself the beneficial owner of Alampur, and as such, liable to contribute proportionately to the payment of both mortgages) to foreclose the first mortgage in order to satisfy the debt due under that, and then to sue the defendant personally for the debt due upon the second mortgage, as though that debt were not a charge upon the mortgaged property at all, and he himself were not liable for his proportion of it.

Even assuming that he could have foreclosed the first mortgage, which we much doubt, we are clearly of opinion that he had no right to bring the second suit, and that the bringing of that suit had the effect (by analogy to the English rule of Equity in such cases), &c., of re-opening the foreclosure or preventing the foreclosure proceedings being confirmed or sanctioned by this Court, and of enabling us to make a decree, which will at once secure to the plaintiff his just rights, and, at the same time, oblige him to do equity as regards the defendant.—See 2 Fisher on Mortgages, pp. 1054 to 1059, and cases there cited.

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We think, therefore, that under the circumstances the proper decree in both suits will be—

First.—That the first suit be dismissed, except as regards Alampur, and that the plaintiff's right to Alampur be decreed, the plaintiff Kaliprosonno and the defendant being subjected to the following conditions.

Second.—That, as between the plaintiff Kaliprosonno and the defendant, the properties mortgaged by both deeds, (except Chupra), be valued by the lower Court.

Third.—That the debt secured by the first mortgage be borne by the plaintiff Kaliprosonno and the defendant in the proportion of the aggregate values of the properties Katiara, Atghura, and Danapur to the value of Alampur.

Fourth.—That the debt secured by the second mortgage be borne by the plaintiff Kaliprosonno and the defendant in the proportion of the aggregate values of all the properties mortgaged by that deed (except Chupra) to the value of Alampur.

Fifth.—That the defendant be at liberty to redeem all the properties, except Alampur, upon repaying the proportion of the mortgage debts and interest due from her, corresponding with the proportionate value of the other mortgaged properties to Alampur, until fresh proceedings for foreclosure or for sale of the mortgaged properties (except Alampur) shall have been taken in due course by the plaintiff.

Sixth.—That, until the mortgaged debts and interest shall be fully satisfied, the said mortgaged properties in the hands of the defendant shall be considered as charged with the proportion of the mortgage debts, which she is hereby declared liable to pay.

Seventh.—That each of the parties do bear and pay his and her own costs of the first of these suits, and that the costs of the second suit in both Courts be paid by the plaintiff Kaliprosonno.

Appeal allowed.