Privy Council Appeal No. 85 *of* 1930.
Bengal Appeal No. 21 *of* 1929.

Monohar Das Mohanta Moharaj - - - - - *Appellant*

v.

Hazarimull Babu and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD THANKERTON.
SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

This case, which comes before this Board on appeal from a judgment of the High Court at Calcutta reversing the judgment of the Subordinate Judge of Burdwan, raises the question whether the holder of a final decree for sale of mortgaged property is entitled to maintain a separate suit to enforce a further charge against such property for payments made to prevent a sale for arrears of revenue which fell due after the passing of the final decree and while execution proceedings were pending.

In 1918 the then *Mahant* of the Asthal Math instituted a suit on a mortgage executed in his favour on the 30th January, 1905, against the mortgagors, the Tewari family, who are represented in the present suit by defendants 1 to 6, joining the present seventh defendant, in whose favour they had executed subsequent mortgages, and also other members of his family, who were interested in an earlier usufructuary mortgage of some of the properties mortgaged to the *Mahant*. According to the finding of the lower Courts, prior to the institution of the present suit,

the sole interest in this usufructuary mortgage had become vested in the present seventh defendant.

The *Mahant* obtained a preliminary decree for sale on the 23rd June, 1919, and a final decree on the 6th June, 1920. Shortly afterwards he died and was succeeded in office by the present plaintiff, who took out execution proceedings in mortgage execution case No. 258 of 1922.

While these execution proceedings were pending the Tewari family, the mortgagors, allowed the Government revenue on some of the mortgaged properties for the years 1923 and 1924 to fall into arrears, and on each occasion the plaintiff, to protect his interest and stop the revenue sale, deposited the amount of the arrears under the provisions of Section 9 of Act XI of 1859, which is in the following terms :—

> " 9. *Deposits receivable from persons not proprietors.*—The Collector or other officer as aforesaid shall, at any time before sunset of the latest day of payment determined according to Section 3 of this Act, receive as a deposit from any person not being a proprietor of the estate or share of an estate in arrear, the amount of the arrear of revenue due, to be credited in payment of the arrear at sunset as aforesaid, unless before that time the arrear shall have been paid by a defaulting proprietor of the estate. And in case the person so depositing, whose money shall have been credited in the manner aforesaid, shall be a party in a suit pending before a Court of Justice for the possession of the estate or share from which the arrear is due, or any part thereof, it shall be competent to the said Court to order the said party to be put into temporary possession of the said estate or share, or part thereof, subject to the rules in force for taking security in the cases of parties in civil suit. And if the person so depositing, whose money shall have been credited as aforesaid, shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said person, which would have been endangered or damaged by the sale, or which he believed in good faith would have been endangered or damaged by the sale, he shall be entitled to recover the amount of the deposit, with or without interest as the Court may determine, from the defaulting proprietor. And if the party so depositing, whose money shall have been credited as aforesaid, shall prove before such a Court that the deposit was necessary in order to protect any lien he had on the estate or share or part thereo f, the amount so credited shall be added to the amount of the original lien."

On the 14th June, 1924, the plaintiff filed the present mortgage suit, No. 9 of 1924, to enforce a further charge for these payments against the mortgaged properties, impleading as defendants Nos. 1 to 6 the members of the Tewari family, the mortgagors, defendant No. 7, the subsequent mortgagee, and certain other members of the seventh defendant's family, who were found to have no interest in the mortgaged property. The mortgage deed of the 30th January, 1905, contained the following covenant by the mortgagors :—

> " We shall duly pay into the Collectorate revenues of the mortgaged property held in *zemindari* right. . . . If we do not pay, you shall be competent to pay the same into the Collectorate . . . if you so desire, and the money so paid shall continue to be realisable from the mortgaged property like the money of this bond."

The plaintiff claimed by virtue of these provisions in the mortgage bond and of the provisions of Section 9 of Act XI of 1859, set out above, to be entitled to add to the amount of the original lien the sums of money which he had deposited on account of arrears of Government revenue. He also claimed the same relief in respect of certain cesses which he had paid, but this claim has been disallowed and is not now in question.

The Subordinate Judge held that the payments of revenue had been made to protect the mortgage property and that both under the provisions of the mortgage deed and of Act XI of 1859 the plaintiff was entitled to add them to his lien.

He also held that the payments having been made after the passing of the final decree and before sale, there was no sufficient reason why the charge should not be enforced by a separate suit. As regards priority, he held that the plaintiff was entitled to priority over the subsequent mortgagee. He accordingly passed a preliminary decree for the amount of the revenue payments with interest at the contract rate until the date fixed for payment.

From this preliminary decree the seventh defendant, the subsequent mortgagee, preferred an appeal to the High Court. The learned Judges of the High Court agreed with the lower Court that the deposits were made with a view to protect an interest which would have been endangered or damaged by the revenue sale within the meaning of Section 9 of Act XI of 1859, but held, as their Lordships read the judgment, that in respect of such deposits the plaintiff was not entitled to priority over the subsequent mortgagee unless he could tack them on to the mortgage debt in a suit on his mortgage, which, of course, he could not do in the case of deposits made after the passing of his mortgage decree.

They accordingly, in modification of the decree of the Subordinate Judge, dismissed the suit as against the seventh defendant, the subsequent mortgagee, and directed that the decretal amount should be a charge on the surplus sale proceeds of the properties, if any, after satisfying the mortgage decrees of the plaintiff and of the seventh defendant, and should be recoverable from defendants 1 to 6 personally.

In dealing with this question their Lordships think it desirable to refer in the first place to the decision of the Board in *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 M.I.A. 241. The deposit of Government revenue to prevent a sale of the mortgaged properties in that case was governed by Section 9 of Act I of 1845, which was in the same terms as Section 9 of Act XI of 1859, omitting the last sentence as to the amount of the deposit being added to the amount of the original lien. The High Court had expressed the opinion that the depositor had no lien, but was confined to the personal remedy given by the section as it then stood. Their Lordships, however, expressed the opinion

that the effect of the section was to give a personal remedy in addition to the lien, and observed at page 258 :—

> " Considering that the payment of the revenue by the mortgagee will prevent the *Talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *Talook* as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the *Talook* against all persons interested therein."

They were, however, of opinion that the suit out of which the appeal arose was not a suit to enforce such a lien, but to enforce the personal liability created under Section 9 of Act I of 1845. It appears from the judgment that no suit had been brought in that case to enforce the mortgage, and the case therefore is not a direct authority as to the effect of a deposit under Section 9 by the holder of a mortgage decree for sale in respect of arrears of revenue which had fallen due after the mortgage decree and before the sale of the security. It appears to their Lordships, however, that the interest of the decree holder in the security directed to be sold is pending sale at least as great as that of a mortgagee before decree, and that the fact of his having obtained a mortgage decree before his claim to a lien arose is no sufficient reason for depriving him of such lien in respect of what are really subsequent salvage payments in the absence of a statutory provision to that effect. Accordingly the deposit in the present case was necessary to protect the appellant's lien, and the effect of the new provision in Section 9 of Act XI of 1859 is to enable him to add the amount of the deposit to his original lien.

For the respondent much reliance has been placed on the decision of this Board in *Rani Sunder Koer* v. *Rai Sham Krishen*, 34 I.A. 9, which was followed in *Jagannath Prosad Singh* v. *Surajmal Jalal*, 54 I.A. 1. In their Lordships' opinion, all that was decided in the earlier case was that under the Transfer of Property Act the effect of the preliminary decree is to convert the mortgage claim into a judgment debt, and the mortgagee, as stated in the judgment, into a judgment creditor or decree holder, and consequently to deprive him of any right to further interest at the contract rate in respect of his mortgage claim covered by the decree. As regards the present question, the only effect of the preliminary decree was to make the mortgaged property security for the judgment debt pending realisation by sale as provided in the decree, and, pending such realisation, the plaintiff, as a secured decree holder, was just as much interested in the preservation of the security as he had been under his mortgage while it subsisted, and their Lordships see no reason why he should not be entitled, in accordance with the opinion of the Board in the case already cited, to a first charge in respect of the payments of revenue made after the passing of the final decree, which were really in the nature of salvage payments on behalf of all persons interested.

In the present case the same result is reached as to subsequent encumbrances by reference to the mortgage deed itself. The authority conferred upon the mortgagee by that deed to pay the Government revenue in respect of which the mortgagors make default is not limited in point of time. It is necessarily intended to continue so long as the mortgagee remains interested under the mortgage in the mortgaged properties. When the payment is so made it becomes by the very terms of the deed a further charge upon the properties which, presumably, is enforceable as such.

For these reasons their Lordships are of opinion that the appeal should be allowed and the decree of the Subordinate Judge restored, with this modification—that instead of a decree for sale the plaintiff should have a declaration that he is entitled to a first charge on the sale proceeds in the mortgage suit, and they will humbly advise His Majesty accordingly. The respondents will pay the appellant's costs both here and in the Appellate Court.

In the Privy Council.

MONOHAR DAS MOHANTA MOHARAJ

v.

HAZARIMULL BABU AND OTHERS.

DELIVERED BY SIR JOHN WALLIS.

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