PRIVY COUNCIL.

1920

Feb. 3, 5 ; *March* 18.

GANPAT LAL

v.

BINDBASINI PRASHAD NARAYAN SINGH.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mortgage—Redemption—Effect of sale in execution of decree and purchase by mortgagee—Minors joined as defendants in mortgage suit but not represented by a guardian—Subsequent suit by them for redemption on ground that they were not properly parties to former suit—No claim to set aside decree or sale.

The head of a joint Hindu family governed by Mitakshara law mortgaged in 1896 immovable property belonging to the family for purposes for which he was admittedly able to bind the other members. The mortgage money was not repaid and in 1901 the mortgagee brought a suit on the mortgage against the mortgagor and his two brothers, and joining also as defendants the two sons of the mortgagor now represented by the first respondent. In that suit a decree was made on 20th January 1902, in execution of which the mortgaged property was sold and purchased by the mortgagee. In a suit in 1909 by the sons of the mortgagor in which they impeached neither the debt nor the mortgage but admitted that they were binding on them, and did not in their plaint seek to set aside the decree or the sale under it, but only claimed to be entitled to redeem the mortgaged property on the ground that they had been minors at the time of the suit on the mortgage, and not having been represented by a guardian had not been properly parties to that suit. It was found as a fact by the two Courts in India and upheld by the Judicial Committee that they had not been effectively joined in the mortgage suit :—

Held, that the right of redemption had been extinguished by the decree and sale in execution of it, and that until the sale had been set aside, it could not be exercised.

Appeal 85 of 1917 from a judgment and decree (25 March 1915) of the High Court at Calcutta which

°*Present* : Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

reversed a decree (18th May 1910) of the Court of the Subordinate Judge of Gaya.

The defendant was the appellant to His Majesty in Council.

For the purpose of this report the facts are sufficiently stated in the judgment of the Judicial Committee. The judgment appealed from was decided in the High Court by FLETCHER AND TEUNON JJ.

On this appeal, which was heard *ex parte*,

E. B., *Raikes* and *Palat*, for the appellant, contended that the father of the minor plaintiffs being the head of a Mitakshara joint family could represent his sons in a necessary mortgage properly made by him, notwithstanding section 85 of the Transfer of Property Act. Reference was made to *Nanomi Babuasin* v. *Modhun Mohun* (1), and Mayne's Hindu Law, 8th Ed., paragraph 311. The minors were therefore not necessary parties to the suit. The sale, moreover, was only voidable, and not void: see *Malkarjun* v. *Narhari* (2) and *Khiarajmal* v. *Daim* (3). The plaintiffs struck out the claim, originally in their plaint, to set aside the sale. The decision in *Bhawani Prasad* v. *Kallu* (4) that minors not made parties could prevent a sale, was dissented from in *Ramasamayyan* v. *Virasami* (5), *Palani Goundan* v. *Rangayya Goundan* (6), and *Ramkrishna* v. *Vinayak Narayan* (7). It was held in *Debi Singh* v. *Jia Ram* (8) and *Lal Singh* v. *Pulandar Singh* (9) that *Bhawani Prasad* v. *Kallu* (4) was not applicable if a sale had taken place. A case

(1) (1885) I. L. R. 13 Calc. 21, L. R. 13 I. A. 1.
(2) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.
(3) (1904) I. L. R. 32 Calc. 296; L. R. 32 I. A. 23.
(4) (1895) I. L. R. 17 All. 537.
(5) (1898) I. L. R. 21 Mad. 222.
(6) (1898) I. L. R. 22 Mad. 207.
(7) (1910) I. L. R. 34 Bom. 354.
(8) (1902) I. L. R. 25 All. 214.
(9) (1905) I. L. R. 28 All. 182.

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where the purchaser was the mortgagee was held to be distinguishable: *Ram Prasad* v. *Man-Mohan* (1). But in *Balwant Singh* v. *Aman Singh* (2) and *Kehri Singh* v. *Chunni Lal* (3) two cases similar to the present one, that was held to make no difference.

The judgment of their Lordships was delivered by LORD MOULTON. The facts leading up to the litigation out of which this appeal arises may be briefly stated as follows:—On the 5th April, 1896, one Jehangir Prashad Singh, the father of the first respondent. mortgaged to the present appellant's grandfather, Lala Ganpat Lal (hereinafter termed the mortgagee) certain immovable property forming part of the family property of an undivided Hindu family (of whom Jehangir Prashad Singh was the head) in order to secure the payment of a debt of Rs. 300. It is not now in controversy that this debt was rightfully incurred by him as head of the family in order to pay monies due to the Government in respect of the family property, and that therefore he had full power to mortgage or sell the said property in order to raise the funds necessary for that purpose.

The money due on the mortgage was not repaid, and on the 27th July 1901, the mortgagee instituted a mortgage suit against the mortgagor and his two brothers, joining also as defendants the two sons of the mortgagor, the elder of whom was one of the plaintiffs in the present action, Bindbasini Prashad Narayan Singh. The other defendant was his younger brother who has since died and whose interest is now represented by the plaintiff. These two sons were joined by reason of their being interested in the family property inasmuch as the joint family was governed by the Mitakshara Law.

(1) (1908) I. L. R. 30 All. 256. (2) (1910) I. L. R. 33 All. 7.
(3) (1911) I. L. R. 33 All. 436.

In this suit the usual mortgage decree was made on the 20th January 1902, and in execution of this decree the mortgaged property was sold on the 18th September 1902. At this sale it was purchased by the mortgagee. The sale proceeds were insufficient to cover the mortgage debt, and accordingly certain other property belonging to the joint family was also sold in execution of a personal decree which the mortgagee had obtained against the mortgagor under section 90 of the Transfer of Property Act, 1882. This property was also purchased by the mortgagee, who thereupon took possession of both properties.

On the 6th April, 1909, the first respondent and his brother instituted the present suit against the mortgagee, joining as defendants the mortgagor, and their uncle Mahindar Prashad Singh (who has since died and is now represented in this suit by two minors, acting by Partangir Prashad Singh) and Partangir Prashad Singh himself. The two defendants, Mahindar Prashad Singh and Partangir Prashad Singh, were the two brothers of the mortgagor who had been joined as defendants in the original mortgage suit.

The plaint in the present suit as first framed contained very wide allegations of fact, many of which have not been persisted in, and claimed very extensive relief, including a claim that the property should be handed over to the present plaintiffs, on the ground that the mortgagees' possession of it was and had always been unlawful. But on the 7th August, 1909, the plaint was radically amended, and it is this amended plaint which thereafter formed the foundation of the action and has alone to be considered

In this plaint the plaintiffs withdrew all objections to the validity of the mortgage bond, and formally admitted that they did not "object to the validity of

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the said bond and as to its being binding upon them in this suit." Accordingly in the relief prayed they raised no objection to the validity of the decree for sale granted in the mortgage suit, but claimed a declaration that their right of redemption had not been extinguished by it or by the sales that had taken place under it or under the decree passed under section 90 of the Transfer of Property Act, 1882.

The ground upon which the plaintiffs based their amended claim was that they were minors at the date of the original mortgage suit, and that they should have been represented therein by duly appointed guardians *ad litem* instead of being joined in their own names as being majors. It is on the issue of fact as to the age of the plaintiffs and the legal consequences thereof that the decision in this case wholly turns.

The plaintiffs originally added a prayer that the sales that had taken place under the decree should be set aside. But it was pointed out to them that in such case they would have to pay certain *ad valorem* Court fees, whereupon the plaintiffs elected to strike out their prayer to set aside the sales, and accordingly were not required to pay the fees in question.

At the hearing before the Subordinate Judge evidence as to the age of the plaintiffs was adduced by both parties. In the end the Subordinate Judge found in favour of the plaintiffs on this issue, though he has left a note to the effect that the plaintiff who gave evidence before him and who was then according to his evidence 24 years old, appeared to be a man of 30. It was of course admitted that upon this finding the plaintiffs had not been effectively joined in the original mortgage suit, and that if they had the right so to be joined the suit was irregularly constituted in that respect.

Before considering the conclusions of law of the Subordinate Judge, it will be convenient to add here that on the appeal to the High Court this finding of fact was supported, and their Lordships see no reason to doubt its correctness.

Turning to the legal questions that thereupon arise in this case, the appellant did not dispute the proposition that if a person interested in mortgaged property, who should have been joined as a party to a mortgage suit, but has not been so joined, comes in before foreclosure or sale, he has all the rights of redemption that his interest in the property gives him and may exercise them notwithstanding the decree.

But the present case is a very different one. Here the third party impeaches neither the debt nor the mortgage but, on the contrary, admits that they are binding on him in this suit. He admits that the mortgagor had the right to bind hisinterest in the property by the mortgage and that he did so, and that the debt was due and owing at the date of the mortgage decree. Nay, further, he does not seek either by his plaint or by his prayer to impeach the mortgage decree itself, and he has deliberately chosen not to impeach the sales that have taken place under it. His claim is therefore in effect a claim to come in and exercise a right to redeem the whole property without setting aside either the mortgage decree or the sales.

The Judge of the Subordinate Court took the view that unless the sales were set aside there could be no right to redeem. He held that the father had the right to mortgage the family property for the debt in question and had done so, so as to bind the whole property, including the plaintiffs' interest in it; that on the mortgage money being unpaid he had the right to sue the mortgagor and had done so, and had obtained a valid decree for sale against him of the

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property mortgaged and had proceeded to sale thereunder in the ordinary way; that the plaintiffs who never represented the family property could before sale have exercised such right to redeem as they possessed, though they could not at any time have questioned either the mortgage or the decree made upon it, seeing that it was for a lawful debt incurred by their father and chargeable on the mortgaged property, but that the sale extinguished their father's right of redemption and in so doing extinguished their own, and that unless that sale were set aside they could not redeem. He therefore gave judgment for the defendants.

An appeal from this decision was brought to the High Court of Judicature at Fort William in Bengal. The learned Judges of that Court agreed with the finding of the Judge of the Subordinate Court on the question of fact, but took a contrary view on the questions of law, and accordingly gave judgment for the plaintiffs. In their Lordships' opinion these learned Judges failed to appreciate the effect on the proceedings of the altered plaint and thus misunderstood the real issues involved in the action. The Subordinate Judge rightly says that the plaintiffs do not "impeach the mortgage decree." Their pleadings show that they could not at any time have done so and their prayer does not ask to do so. All that they ask is to exercise their alleged right to redeem. And here they have to face the fact that they refuse to seek to set aside the sales. Their Lordships have no doubt that while the decree for sale stands and sale has taken place under it, the right to redeem is extinguished unless the sale be set aside. After the sale has taken place the owner holds as purchaser, and is entitled to raise all the defences that belong to him as such, and unless the claim to set aside the sale is made in a

properly constituted action and properly raised in suitable pleadings in that action, the Court cannot interfere with the possession which has been given him by the purchase.

It follows, therefore, that the plaintiffs can no longer exercise any right of redemption that they may have possessed, so that it is not necessary to decide as to the extent of that right if they had properly asserted it.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the decree of the High Court should be set aside and that of the Subordinate Judge restored, and that the respondent, here the plaintiff Bindbasini Prashad Narayan Singh, should pay the costs in the Courts below and also the costs of this appeal.

Appeal allowed.

J. V. W.

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