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 SADHU
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to the litigation. It is no part of the duty of a law Court to issue notices round the world to persons to come in to make claims, if any, or take objections if any, to the plaintiffs' evicting the persons who are in actual possession of the plaintiffs' property.

I think therefore that this appeal ought not to succeed and should be dismissed but without costs.

MITTER J. I agree.

B. M. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Rankin C. J. and Mitter J.

BHODAI SHAIK

v.

LAKSHMINARAYAN DUTT.*

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 July 20.

Mortgage—Suit for possession by second mortgagee, if it can decide the right between the first and second mortgagee.

The question whether the plaintiff, second mortgagee, is entitled to a decree for possession against the defendant, first mortgagee, without any condition or only on redeeming the first mortgagee can be determined in a suit by the plaintiff for possession and relief given accordingly.

A second mortgagee who has obtained a decree on his mortgage can recover possession of the property in execution against the first mortgagee, who has already obtained possession in execution of a decree obtained by him, only on redeeming the first mortgagee.

Sheikh Kalu Sharip v. Abhoy Charan Karmokar (1) and Bhagaban Chandra Kundu v. Tarak Chandra Basak (2) referred to.

*Appeal from Appellate Decree, No. 722 of 1925, against the decree of B. Mukerji, District Judge of Murshidabad, dated Feb. 10, 1925, affirming the decree of Tarak Nath Bose, Munsif of Jangipur, dated Dec. 18, 1923.

(1) (1920) 25 C. W. N. 253.

(2) (1926) 45 C. L. J. 4.

APPEAL FROM APPELLATE DECREE on behalf of the defendant.

This appeal arose out of a suit for recovery of possession of one plot of land on establishment of the plaintiff's title by purchase thereto.

Jhabn mortgaged four plots of land with Bogdad Biswas. About eight years later Jhabu mortgaged one of these plots (the plot in suit) with the plaintiff. The plaintiff sued on his mortgage in 1915, obtained a decree and purchased the mortgaged property himself in 1916. He took delivery of possession through Court in 1918. The first mortgagee Bogdad brought a suit on his mortgage bond, obtained a decree, purchased the property himself and took delivery of possession in 1920. The plaintiff, who was in possession by virtue of his prior auction-purchase of the plot in suit, was dispossessed therefrom in consequence of Bogdad's taking delivery of possession. So he filed a petition for restoration of possession under Order XXI, rule 100 of the Civil Procedure Code. Bogdad did not oppose that application and the plaintiff was ordered to be restored to possession. During the pendency of this miscellaneous case, Bogdad and his brother executed a *kabala* in favour of the defendant Bhodai. The defendant managed to dispossess the plaintiff from the land in suit sometime after that. The plaintiff brought a possessory suit under section 9 of the Specific Relief Act, but it was dismissed. Then he brought the present suit.

The defendant contended *inter alia* that the suit was not maintainable in its present form, that it was barred by limitation and that the plaintiff had no right to the land in suit.

The Court of first instance decreed the plaintiff's suit. The appeal by the defendant was unsuccessful.

Hence this appeal in the High Court.

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The original plaintiff having died, his heirs and legal representatives were substituted as respondents.

Dr. Jadu Nath Kanjilal (with him *Babu Subodh Chandra Datta* and *Babu Tridibnath Roy*), for the appellant. The first mortgagee did not make the second mortgagee a defendant, so the right of redemption still remained. The second mortgagee also did not make the first mortgagee or person claiming under him a party to his suit. The lower Courts held that the purchaser in execution of the second mortgagee was entitled as a plaintiff to recover possession and it was for the dispossessed person claiming under the first mortgage to bring a suit on the first mortgage, giving the person claiming under the second mortgage a right of redemption. My contention is that the plaintiff-respondent can only obtain possession conditional on his redeeming the first mortgage under which the defendant-appellant now claimed.

I rely on *Sheikh Kabu Sharip v. Abyoy Charan Karmokar* (1).

Babu Gopendra Nath Das, for the respondents, contended, in the first place, that the plaintiff succeeded in his application under Order XXI, rule 100, Civil Procedure Code, and the question as to who is entitled to possession is now concluded under Order XXI, rule 103, Civil Procedure Code, the defendant not having sued within one year of the date of the adverse order under Order XXI, rule 100, Civil Procedure Code. Secondly, the question as to whether a second mortgagee in possession, who was no party to the first mortgagee's suit for sale, is entitled to maintain that possession in a suit by the first mortgagee has been answered in the affirmative in a series of cases: See *Krishtopada Roy v. Chaitanya*

(1) (1920) 25 C. W. N. 253.

Charan Mandal (1) and the cases cited there. With regard to the converse proposition, viz., whether such a second mortgagee may maintain an ejectment suit against the first mortgagee, the authorities in the several High Courts are inconsistent. There are two cases in the Calcutta High Court which directly support my contention: *Grish Chunder Mondul v. Iswar Chunder Rai* (2), *Habibullah v. Jugdeo Singh* (3). But the decision in *Sheikh Kalu's case* (4) cited by the appellant is against me. A recent decision of this Court in *Bhagaban Chandra Kundu v. Tarak Chandra Basak* (5) has also followed *Kalu's case* (4) and refused to follow the two Calcutta cases in my favour. I submit that the present case relates to a mortgage before the passing of the present Code of 1908 and should be governed by the earlier cases which proceed on the principle that the mortgage charge is extinguished by the mortgage-sale and the first mortgagee is then relegated to his title as purchaser. In any case, the proper procedure would be to direct a resale of the property, *vide* Ghose's Mortgage, 4th Ed., pp. 622-623.

Dr. Kanjilal, in reply. The terms of redemption should be on the basis mentioned in *Kalu's case* (4).

MITTER J. This is an appeal from a decision of the District Judge of Murshidabad, dated the 10th of February, 1925, which affirmed a decision of the Munsif of Jangipur, dated the 18th of December, 1923.

The appeal arises out of a suit commenced by the plaintiff to recover possession of a plot, 2 *bighas* 6 *cottas* and odd in area. The case of the plaintiff is that this land originally belonged to one Jhabu

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(1) (1922) I. L. R. 49 Calc. 1048.

(3) (1901) 6 C. L. J. 600.

(2) (1898) 4 C. W. N. 452.

(4) (1920) 25 C. W. N. 253.

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Sheikh, who mortgaged this plot along with three other plots to one Bogdad Biswas in the year 1900. In 1908, Jhabu mortgaged plot No. 1 with the plaintiff. The plaintiff instituted a suit on his mortgage and obtained a decree in the year 1915 and in execution of that decree he purchased plot No. 1 on the 19th of August, 1916. Sometime in 1920, Bogdad obtained a decree on his mortgage with reference to the four plots mortgaged to him and in execution of that decree he purchased the mortgaged property, namely, the four plots. On the 9th of December, 1920, he sold this property to the present defendant. The plaintiff alleges that he was dispossessed by Bogdad, the first mortgagee. There was a proceeding under Order XXI, rule 100 of the Code of Civil Procedure at the instance of the plaintiff in which he succeeded. On the 7th of March, 1921, the plaintiff recovered possession, but he was again dispossessed in June, 1921. He brought a suit under section 9 of the Specific Relief Act in which he failed. Consequently he commenced the present suit for possession of the property, now in suit.

Both the Courts below have decreed the plaintiff's suit and granted him possession in respect of the disputed land.

In this second appeal it has been contended by the learned advocate for the defendant that the plaintiff can only obtain possession conditional on his redeeming the first mortgage in which Bogdad, the original mortgagee, was interested and whose right has now passed to the defendant by his purchase. The question which we have to determine is whether the plaintiff is entitled to a decree for possession without any condition, or whether he can only succeed on his redeeming the first mortgagee or the defendant, who now stands in the shoes of the first mortgagee. Both

the lower Courts seem to think that this relief cannot be given to the defendant in the present suit. I think that the Courts below are clearly wrong. It is not necessary to have another suit in which the right between the plaintiff and the defendant as purchasers in execution of the two mortgage decrees respectively should be determined. The matter can be determined in the present litigation and to avoid multiplicity of suits it is desirable that the matter should be determined in the present suit.

In these circumstances, I think that the decree of the trial Court, as affirmed by that of the lower Appellate Court, should be varied by an order that the plaintiff would be entitled to recover possession conditional on his redeeming the first mortgage within a certain time to be fixed by the trial Court. The case, therefore, is remitted to the Court of first instance for the purpose of fixing the time during which the plaintiff would be allowed to redeem the first mortgage of the year 1900 and also for determining upon what terms he would be allowed to redeem.

RANKIN C. J. I agree. I should like to say that in my opinion, the true law in this matter is laid down in the case of *Sheikh Kalu Sharip v. Abhoy Charan Karmokar* (1) and in the case of *Bhagaban Chandra Kundu v. Tarak Chandra Basak* (2). As regards the point about the order under Order XXI, rule 100, Code of Civil Procedure, the plaintiff at that time was in possession and the order under that rule was made originally in his favour because he could not have been ejected by the first mortgagee. There was no need to bring a suit to set aside that order which was perfectly right. Since then the plaintiff got out of possession and he failed under section 9 of the Specific

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Relief Act and, therefore, he has come before the Court not merely on the basis of his own possession which is gone, but on the merits of the claim which, makes all the difference. That makes applicable the two cases to which I have referred.

In this case the Munsif's order giving the plaintiff the costs of the trial must be varied and the order for costs before the Munsif will be that each party will bear his own costs. But the plaintiff must pay the costs of the two appeals and those costs will be added to the sum due on the mortgage. So that the plaintiff would have to pay those as a condition of redeeming. If the plaintiff, however, in the end fails to redeem, then he must pay the costs in all the Courts.

S. M.

Decree varied.

APPELLATE CIVIL.

Before Page and Graham Jj.

JUGAL KISORI DEBI

v.

BAIDYA NATH ROY.*

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July 25.

Execution of Decree—Applications for execution not made in accordance with law and in proper Court, whether will save limitation—Joint decree—Discharge given by an adult without the concurrence of minors, whether will be sufficient—Limitation Act (IX of 1908), Art. 182 (5), ss. 6, 7—Civil Procedure Code (Act V of 1908), ss. 37, 38, 39, O. XXI, r. 6.

On December 6, 1920 a decree on appeal was passed by the High Court of Patna in a suit which was decided by the Subordinate Judge of Purnia. Two applications on April 15, 1921, and on January 11, 1924, respectively, were made without success in the Court of the Subordinate Judge of Dhanbad to execute the decree. Subsequently the appellants applied on March 23, 1925 to the Court of the Subordinate Judge of

*Appeal from Original Order No. 361 of 1925, against the order of J. K. Mukherjee, Subordinate Judge, Asansol, dated Aug. 7, 1925.