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and who must also be well conversant with the customs of Hindus with regard to adoption, appears to consider a simultaneous adoption to be illegal; he does not suggest that what is stated is in any way contrary to the habits of Hindus, or in conflict with their usages. But independently of this, and without placing any reliance upon this book as an authority, they are of opinion that by the Hindu law an adoption of this description was not allowed. Therefore, on both grounds, that the power given by the husband did not authorise the widows to make such an adoption as this, and also that the law did not allow it, even supposing the husband had intended to give such an authority, their Lordships are of opinion that the plaintiff has failed to make out his title to recover any portion of the rent which he has sued for.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be affirmed and the appeal dismissed, and the appellant will pay the cost of the appeal.

C. B. *Appeal dismissed with costs.*

Solicitors for appellants: Messrs. *Oehme & Summerhays.*

Solicitors for respondents: Messrs. *Watkins & Lattey.*

P. C.* 1885. *July* 8 & 9.

NILAKANT BANERJI (PLAINTIFF) *v.* SURESH CHANDRA MULLICK AND OTHERS (DEFENDANTS.)

[On appeal from the High Court at Fort William in Bengal.]

Possession, Suit for, by Mortgagee—Purchase by third parties of mortgagee's interest in portions of mortgaged property—Redemption and apportionment of liability of purchaser for the mortgage charge—Joinder of parties—Mortgage account—Form of Decree.

Purchasers of the right, title, and interest, of a mortgagor in certain portions of the mortgaged property, sold in execution of a prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to

* *Present:* LORD MONKSWELL, LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.

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pay the debt, his equity of redemption was sold, and was bought by the mortgagee.

In a suit brought by the mortgagee against the representatives of one of the said purchasers, who refused to deliver possession of the portion, *Held*, that (*a*), as this purchaser had disclaimed the right to redeem the portion, and had alleged a paramount title, causing the dismissal of the suit as against him, he, and those claiming under him, were precluded from afterwards claiming to redeem; and (*b*), the proportion of mortgage charge for which he was liable could not be apportioned by the taking an account as between him and the mortgagee alone, in the absence of the purchasers of the other portions. *Nawab Azmat Ali Khan* v. *Jowahir Singh* (1) referred to.

A decree which ordered that the defendants, without any account being taken at all, should retain possession of the portion purchased as above stated, clear of the proportion of mortgage debt chargeable thereon, on payment to the mortgagee of the sum for which he had bought the equity of redemption, was *held* to be incorrect, and was, accordingly, reversed.

APPEAL from a decree (16th March 1882) of the High Court, modifying a decree (27th June 1879) of the Subordinate Judge of East Burdwan.

The question now raised was, whether the respondents, who were the representatives of a purchaser of the right, title, and interest of a mortgagor in a portion of the mortgaged property, such purchase having taken place before the institution of a suit for enforcement of the mortgage by foreclosure or sale, were entitled to retain possession of the portion, as against the mortgagee, the present appellant, upon redemption by them of the mortgage charge upon it. Sale, in default of redemption or payment, having been decreed in the suit and default made, the mortgagee had purchased the right, title, and interest of the mortgagor in the mortgaged property. It was a fact materially affecting the respondent's rights that the purchaser, through whom they made title to redeem, having been made a party to the suit abovementioned, with other purchasers of similar portions (who were not joined in the present proceedings), had refused to accept the position of a party either to redeem or be foreclosed, and setting up a title paramount to the mortgage had obtained the dismissal of the suit as against himself, with costs.

The mortgage amounting to about Rs. 30,000, was effected by

(1) 13 Moore's I. A., 404.

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two instruments dated October and December, 1866, respectively. Before that, *viz.*, on the 29th August 1866, a decree was made in the original jurisdiction of the High Court against the owners of the estate afterwards mortgaged (who were the executors of Ashutosh Deb, deceased in 1856) for more than Rs. 1,32,406, and the decree-holder issuing execution (24th December 1866) a writ was delivered to the Sheriff of Calcutta (26th January 1867.)

On 10th June 1867, the present appellant, as mortgagee under the instruments of 1866, sued the same representatives of Ashutosh Deb for the payment of the mortgage debt, and in default of payment, for foreclosure or sale of the mortgaged premises. Meantime, the Sheriff had sold a portion of the mortgaged property, in execution of the writ above mentioned, to Khogendra Nath Mullick, the father of the present respondents, and had made similar sales to other purchasers. All of these persons, by an order of the High Court, (28th August 1867) were added as defendants to the suit upon the mortgage. Khogendra Nath Mullick, not choosing to assert any right in the mortgaged property as a purchaser of the equity of redemption on a portion thereof, but claiming an adverse interest, urged that he had been added as a defendant without due cause. The High Court (12th February 1868) ordered that the suit should be dismissed with costs as against the added defendants. But the decree in that mortgage suit (27th April 1868) ordered that, upon non-payment of the sum that might be found to be due, the right, title and interest of the mortgagors should be sold. The result was that, at a sale which took place in execution of the decree, the mortgagee purchased the right, title and interest of the mortgagors, obtaining a certificate of sale on 27th September 1870.

From the representatives of Khogendra Nath Mullick, who about that time had died, the mortgagee could not obtain delivery of possession, and the suit, out of which this appeal arose, was brought (20th May 1879) for the possession of a moiety of a certain lakheraj mehal in the Burdwan district, a portion of the mortgaged property, the claim being valued at Rs. 9,900. The defence was that there was a superior title obtained by the purchase at the Sheriff's sale above mentioned. The Subordinate

Judge adverted to the dismissal of the mortgagee's suit in 1868 as against Khogendra Nath Mullick, and held that those who claimed under him had no title to redeem after what had occurred, their claim to possession failing together with their right to redeem.

The High Court on appeal (CUNNINGHAM and TOTTENHAM, JJ.) modified the decree of the Court below and gave the respondents, who were defendants in the suit, liberty to redeem the portion of the mortgaged lands within six months, on payment of Rs. 1,600 and costs, with interest, only awarding to the plaintiff, now appellant, possession upon default of such redemption. *Chunder Nath Mullick* v. *Nilakant Bannerjee* (1).

On this appeal,—

Mr. *J. Graham, Q.C.*, and Mr. *Woodroffe*, for the appellant, argued that the decree of the High Court had wrongly given to the respondents liberty to redeem on the terms specified. Khogendra Nath's purchase of the portion of the mortgaged property having been made, after the institution of the suit for foreclosure, at an execution sale upon a writ delivered after the date of the mortgage, the property mortgaged, or any part of it, could not be withdrawn from the operation of the decree made in the foreclosure suit. Khogendra Nath having been made a party to that suit, repudiated any right to redeem, alleged a paramount title, and obtained the dismissal of the suit, with costs. Under these circumstances, it could not be argued that his purchase had withdrawn the property, purchased by him, from the operation of the decree, made in the foreclosure suit, under which decree, it being for sale of the mortgaged premises, the plaintiff had himself bought. The respondents, claiming through Khogendra Nath, were precluded from now asserting any right to redeem. They could only assert a title, if any, paramount to that of the mortgagee, and if they were entitled to redeem, the terms on which they were to be allowed to do so by the decree were obviously inequitable. According to those terms, the respondents were to have the property in suit absolutely on paying to the appellant the price which he had paid in order to get in the equity of redemption.

(1) I. L. R., 8 Calc., 690, 696.

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The respondents did not appear.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—In this case the appellant was the plaintiff and the respondents were the defendants in the first Court. The case raised between them was of this nature: In the month of October 1866, the plaintiff advanced money to the representatives of one Ashutosh Deb on mortgage of his estate. There was a further charge afterwards, and the total amount advanced was Rs. 30,000. In the month of December 1866 a writ of *fieri facias* was issued by some creditors of Ashutosh Deb upon a decree obtained by them prior to the mortgage. It does not appear at what date the seizure was effected under that *fieri facias*, but the Sheriff sold the property mortgaged, amongst other property, in the month of July 1867, and the portion now in dispute was purchased by one Khogendra Nath Mullick. The present respondents claim under Khogendra, but the issues in the suit have not been varied by the transmission of title, and the matter may be treated in precisely the same way as if Khogendra was himself before the Court. In the meantime, before the sale in July 1867, and in the month of June 1867, the plaintiff had instituted a suit in the ordinary form for the realisation of his mortgage by foreclosure or sale. When he learnt of the purchase by Khogendra he applied to the Court to make Khogendra a party to the suit as a person having an interest in the mortgaged property. Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable, that was, *primâ facie* at all events, a right thing to do. An order was made by Mr. Justice Macpherson in the High Court, adding Khogendra as a party to the suit, and directing an amendment in the prayer of the plaint accordingly. When Khogendra was brought before the Court he put in a plea or written statement by which he claimed a title paramount to the mortgage. We have not got that written statement before us. We have only got statements of it by the Courts below. The Subordinate Judge says of it: "Khogendra Nath having entered appearance, raised divers other questions adverse to the plaintiff's title. He, however, did not set up a defence as claiming through the mortgagors." The High Court makes a similar statement of Khogendra's position. So that the result was this, that Kho-

gendra, being brought there as having purchased subsequent to the mortgage, sets up a paramount title, and does not accept his position as a person who is either to redeem or be foreclosed. Upon that defence being raised the case came on for settlement of issues before Mr. Justice Markby, and he, finding a defence raised which was quite foreign to a mortgage suit, considered that he had no option but to dismiss Khogendra, which he did with costs. It may be mentioned that there were several other purchasers of other portions of the mortgaged property who were made parties, and who also alleged paramount titles in themselves, so that the suit would have been multifarious and confused in the highest degree if it had gone on in that shape. They were all dismissed with costs. The High Court then went on to make the ordinary decree for mortgage accounts and for sale in default of redemption. It appeared to one of the dismissed defendants, the Subordinate Judge states that it was Khogendra himself, that the ordinary decree was calculated to prejudice the paramount title which he claimed. While it was being drawn up, he appeared to contest it, and persuaded the Court to vary its terms in a way which he thought to be more favourable to himself. In the month of September 1880 the property now in suit was put up to sale, and the mortgagee himself, the plaintiff, purchased the equity of redemption for Rs. 1,600. At that time Khogendra was in possession. It is to be presumed that he got it under the Sheriff's sale, but it is not exactly known how he got it; and why the plaintiff did not then sue him for possession does not appear. There was considerable delay in bringing this suit for possession, but it has been held in both Courts that the delay is not such as attracts the law of limitation. Therefore the suit may be brought and the legal questions are just the same as if it were brought the day after the plaintiff purchased.

This suit being brought against Khogendra's representatives, a written statement is put in by the only adult representative to this effect. He pleads that the mortgage was fraudulent, that it does not comprise the lands in suit, and that he has a preferential title. Then he puts in the extraordinary plea that the matter was decided in his favour in the suit of 1867. Finally he com-

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plains that, being entitled to the equity of redemption, no opportunity has been afforded him to redeem the mortgage.

All the issues raised by the defendants, excepting the right to redeem if it can be said they have raised that issue, have been found against them; or in other words, it has been found that the preferential title which they alleged but did not disclose in the suit of 1867, is an entirely false and fictitious title, and that Khogendra, so far from being improperly made a party to that suit, was a person who had a right of redemption and no other right at all. If the truth had been known when the matter was before Mr. Justice Markby in the suit of 1867, it is clear he would have held either that Khogendra was rightly a party to that suit, or was not so simply because he had purchased *pendente lite*, and that in either case the decree must go against him, that when the mortgage accounts had been taken he must redeem or be bound by the sale.

Upon these circumstances the Subordinate Judge held that Khogendra was bound by the decree he himself had asked to have; that he had virtually asserted in the suit of 1867 that he could not be put to redeem but had a paramount title which could not be tried in that suit; that he was dismissed and got his costs on that ground; that he could not now be heard to say that he wished to redeem; and therefore he gave the plaintiff a decree for possession.

It may here be mentioned that the case is a little confused by the introduction of s. 13 of the Code of 1877. That section has nothing to do with this case. This is not a question whether a person is bound by a decree made in some other suit. The question is whether he is bound by the decree made in this very suit of 1867 in which the plaintiff bought the land, and whether after that decree was passed his rights were not entirely gone.

The High Court have reversed the decree made by the Subordinate Judge, and it must be asked on what grounds they do so. The grounds are these: First they say that the suit of 1867 did not override the interest acquired by Khogendra at the execution sale, and then they draw this inference: "We think, therefore, that the plaintiff is not entitled in virtue of having filed

his suit previous to the defendants' *fieri facias* purchase, to ignore that purchase and to hold the mortgaged property free from any right which the defendants acquired by the *fieri facias* sale. We think that we are bound to give effect to the well-recognised rule that the interest of a person who has purchased the mortgagor's equity of redemption is not affected by any decree in a suit to which he is not a party, and to hold accordingly that the defendants having purchased the mortgagor's interest in the estate, *viz.*, the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit against the representatives of Asutosh." Whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted, but it is not worth while to pursue that question, because, assuming that they are right, the fact is that the plaintiff did not ignore the purchase by Khogendra. So far from ignoring it, he assigned to Khogendra the precise position which the High Court now assign to him in their judgment, and, doing so, made him a party to the suit of 1867 in order that he might redeem if he were so minded, and if he were not so minded he might be for ever shut out. It is not the case that the equity of redemption is affected by a decree in a suit to which the owner of it is not a party. He was a party to the suit, and he declined to accept the position of a party to the suit, and he insisted upon it that the Court should dismiss him and treat him as if he were not a person who could be put to redeem at all. He even did more. He insisted on being present when the order for sale was settled, and on having a voice in its terms, and he actually got them varied to his satisfaction. That is the first ground taken by the Court.

Then they go on: "The next question is, whether the defendants having been joined in the mortgage suit on the plaintiff's motion, and having got the suit dismissed as against them, are now precluded from setting up their claim to the mortgaged premises. We are of opinion that the orders passed in that suit, so far as regards the present defendants, had no effect beyond deciding that whatever their claims might be, they could not conveniently be tried in that suit."

It was the paramount claims that could not be conveniently

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tried in that suit. If Khogendra had accepted the position of a person who was entitled to redeem, then, so far from his claims not being conveniently tried in that suit, he was (apart from the doctrine of *lis pendens*) a necessary party to that suit, and his claims could not be conveniently or properly tried in any other suit; but, not accepting that position, his claims were tried in that suit so far as concerned the question whether or no he was entitled to redeem, and it was held on his own showing that he was not entitled to redeem, and on that ground he was dismissed.

The next ground is this: "An objection has also been grounded on the form of the present suit, and it has been urged that the plaintiff, having sued for direct possession, the suit ought, if he be found not entitled to direct possession, to be simply dismissed. We think, however, that we are at liberty to follow the course taken in a very analogous case regarding the same property by Pontifex, J., in *Khasimunnissa Begum* v. *Nilrutton Bose* (1) and to give the plaintiff a decree for possession conditional on the defendants' failure to redeem, and that we are at liberty to decide what are the equitable terms on which the defendants may be permitted to redeem. The plaintiff has himself purchased several of the mortgaged properties, and he cannot therefore throw more than a proportionate share of the mortgage charge on another portion of the mortgaged premises." That doctrine of apportionment is stated somewhat broadly, and is not applied correctly. The true application of it is this, that the Court may direct accounts, to which the purchasers of fragments of the equity of redemption must be parties, with a view of settling between them all what is the proportion to be charged on each fragment. This is shown by the case which the High Court cite from Moore (2) as an authority for their decision. In that case an equity of redemption had been sold in parcels, and the mortgagee had purchased some. The purchaser of a parcel then sued the mortgagee alone for redemption of that parcel alone on payment of its proportion of the debt; and his suit was dismissed because he was bound to add the other purchasers as parties, and to offer to redeem their parcels.

(1) I. L. R., 8 Calc., 79.

(2) *Nawab Azmat Ali Khan* v. *Jowahir Singh*, 13 Moore's I. A. 404.

It is quite a new thing to hold that the purchaser of a single fragment of the equity of redemption may come, without bringing the other purchasers before the Court, and have an account as between himself and the mortgagee alone, so that the mortgagee may be paid off piecemeal. Such a law would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created.

But so far from contemplating accounts between all the parties concerned, the High Court do not direct any account at all; not even the ordinary account on which a redemption decree must be founded. They go at once to say of their own discretion what shall be the price paid for this mortgaged property. They say: "In the present instance the plaintiff paid Rs. 1,600 as the price of the mortgaged property. And we think that the equities of the case will be met by giving the defendants six months within which to redeem by payment of this sum, together with interest at 6 per cent. from the date of the plaintiff's purchase, 27th April 1870; the plaintiff in default of such redemption within six months to be entitled to *khas* possession." So a sale having taken place with the knowledge of Khogendra under the decree which gave him his costs and dismissed him as one having no interest subordinate to the mortgage, and the plaintiff having paid Rs. 1,600 for the equity of redemption at that sale, he is to have the whole property taken away from him by Khogendra on receipt of what he has paid for the equity of redemption alone, and not to have a single farthing for that proportion of his mortgage debt which the Court themselves say ought to be charged upon the property. Nor is he to have anything for Khogendra's costs which he paid, or for his own costs of that suit which failed by Khogendra setting up a fictitious title. The hardship of such a decree upon the plaintiff is apparent in stating the facts. Their Lordships think that it is founded

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upon entirely wrong grounds. It is not consistent with itself, because it does not give to the mortgagee what the Court says he is entitled to have, but besides the inconsistency it is founded upon wrong grounds. Their Lordships hold that Khogendra is bound by the decree in the suit of 1867, and that he could not, after that decree was passed, ever come in to redeem this property.

The result is, that in their Lordships' judgment the High Court ought to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to make that decree, reversing the decree of the High Court, and so restoring the decree of the Subordinate Judge. The costs of this appeal must be paid by Chunder Nath Mullick, who appears on his own behalf and also as next friend of the minor respondents.

With reference to the costs their Lordships have to observe that the bulk of the record has been unduly swelled by the insertion of a schedule upwards of 80 pages in length, containing particulars of either the property in suit or the whole of the property mortgaged, it does not matter which; in either case they are particulars which could not by any possibility have come into controversy or have aided the controversy in this present appeal. They will therefore intimate their opinion to the Registrar that in taxing the costs of this appeal he shall disallow all costs occasioned by that bulky schedule.

C. B. *Appeal allowed.*

Solicitors for the appellant: Messrs. *Watkins and Lattey.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Macpherson.

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August 13.

TRAILOKYA NATH GHOSE (DEFENDANT) *v.* CHUNDRA NATH DUTT *alias* SINGH (PLAINTIFF).*

Cause of action—Defamation—Slander—Damages—Consequential Damage.

A suit for damages for defamation of character involving loss of social position and injury to reputation will lie without proof of special damage.

* Appeal from Appellate Decree No. 451 of 1883, against the decree of Baboo Nuffer Chundra Bhutto, First Subordinate Judge of 24-Pergunnahs, dated the 6th of December 1882, reversing the decree of Baboo Janoki Nath Dutt, Munsiff of Alipore, dated the 17th November 1881.