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GOPAL DAS v. ALAF KHAN.

The petitioner appealed from this decision under s. 10 of the Letters Patent.

EDGE C. J., and TYRRELL, J.—We agree with the view taken by Mr. Justice Straight, and we think that he exercised a sound discretion in refusing to interfere under s. 622 of the Civil Procedure Code.

We dismiss the appeal with costs.

Appeal dismissed.

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April 9.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MUHAMMAD SAMI-UD-DIN KHAN (PLAINTIFF) *v.* MANNU LAL AND OTHERS (DEFENDANTS).*

Mortgage, usufructuary—Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption—Res judicata—Civil Procedure Code, s. 13—*Foreclosure—Act IV of* 1882 *(Transfer of Property Act), s.* 93—*Estoppel—Act I of* 1872 *(Evidence Act), s.* 115.

In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct.

Held, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct.

Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property.

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* Second Appeal No. 1182 of 1887 from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 30th March, 1887, confirming a decree of Maulvi Saiyad Muhammad, Subordinate Judge of Aligarh, dated the 6th April, 1886.

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The decision in *Sheikh Golam Hossein* v. *Musammat Alla Rukhee Beebee* (1) treated as not binding since the passing of the Transfer of Property Act. *Chaita* v. *Purum Sookh* (2) and *Anrudh Singh* v. *Sheo Prasad* (3) referred to.

Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem,—*held* that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from afterwards suing on his own account for redemption.

THE facts of this case are stated in the judgment of Straight, J.

Mr. *G. E. A. Ross* and Mr. *Hamidullah*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Pandit *Ratan Chand*, for the respondent.

STRAIGHT, J.—This second appeal raises questions of considerable difficulty, and in order to understand the method by which I have arrived at the conclusions I am about to pronounce, it is essential that I should state very fully the circumstances out of which this present litigation has arisen. In the year 1842 Dalip Singh and others mortgaged twenty biswas of mauza Karia Buzurg in the Aligarh district for a sum of Rs. 4,000 to one Khushwakt Rai. The mortgage was of a possessory kind, and the mortgagee was to take possession of the mortgaged twenty biswas and to satisfy the amount of the principal debt and the interest thereupon from the usufruct of the property. By various subsequent assignments the interests of the original mortgagee passed to other persons, and in the end they centred in the person of Mannu Lal, the defendant-respondent to the present appeal. Among the persons interested under the mortgage of 1842 as mortgagors were Musammat Khushalo and others, and the extent of their interests therein was four biswas seven biswansis ten kachwansis. On the 13th August, 1881, Musammat Khushalo and others under a registered instrument of that date assigned over to the plaintiff in the present suit their

(1) N.-W. H. C. Rep., 1871, p. 62. (2) N.-W. H. C. Rep., 1867, p. 256.
(3) I. L. R., 4 All., 481.

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interests in the four biswas seven biswansis ten kachwansis. From what I have said it will thus be seen that the plaintiff-appellant before us represents the interests of certain mortgagors, while the defendant Mannu Lal and those who are arrayed alongside of him in the litigation represent the interests of the mortgagees.

The present suit is a suit for redemption, and it has been dismissed by both the lower Courts, much upon the same ground, namely, that by the operation of a rule somewhat like that of *res judicata*, the plaintiff, having been a party to a suit which ended in a decree of this Court of the 27th August, 1883, in which Musammat Khushalo and others were the plaintiffs and the present defendant was a defendant, is by that decree passed in that suit barred from now coming into Court with his present claim. I have already stated that the mortgage of 1842 was of a usufructuary character, and that the term of it was that the mortgagees were to remain in possession so long as and until the principal money and the interest thereon were satisfied from the usufruct. In the suit which was brought by Musammat Khushalo and others in the year 1882, they claimed that not only had the mortgage been redeemed to the extent of their four biswas seven biswansis ten kachwansis share, but that, in addition, in proportion to the amount of that share, the mortgagees in possession had realized a considerable sum of money over and above what they were entitled to, and they claimed through the medium of the Court to receive a decree for that amount.

It is unnecessary for me to deal with the decree of the lower Court which dealt with that original suit as a Court of first instance. It is enough to say that in appeal this Court gave the plaintiffs a conditional decree subject to their paying into Court the sum of Rs. 1,999-10-6, which had been found to be the amount still remaining due and owing from the plaintiffs to the defendant-mortgagee in possession, and the decree of this Court went on to declare that if that amount was not paid within the time stated therein, the suit of the plaintiffs would stand dismissed. As a matter of fact that amount of money was not paid in, and consequently that suit

of Musammat Khushalo and others stood dismissed from the expiration of the fixed period.

It is said by the learned Judge in his judgment in this case, that by the order of this Court passed in that suit, the right of redemption of Musammat Khushalo and others was extinguished, and that consequently with that extinguishment disappeared all or any rights that the present plaintiff possessed. It is suggested in the pleas taken in the present suit that that litigation was practically the litigation of the plaintiff, that he found the money for it, that he took a prominent part in promoting it, and that although in name he was not joined as a party, he was in fact a party thereto. I may say at once, that from the way in which I look upon this matter, it is wholly indifferent to the decision of the case whether he was or was not a party to that suit. If I understand the law of mortgage as now more or less embodied in the Transfer of Property Act by which we are governed in these Provinces, there is nothing to prevent a person who has usufructuarily mortgaged his property from making a second usufructuary mortgage with a condition that the second mortgagee shall take all the necessary steps to effect and bring about the redemption of the first mortgage so as to obtain possession of the mortgaged property. I also understand the law to be that if a usufructuary mortgagor brings a suit against his usufructuary mortgagee, alleging that the mortgage has been satisfied out of the usufruct for his principal and interest, and in that suit it is found that at the time of the determination of that suit, the mortgage has not been so satisfied, then there is no bar in law to his subsequently instituting a second suit after a further expiration of time when by further enjoyment of the profits of the property by the mortgagee, the mortgagor can come into Court and say the mortgage-debt has now been discharged. This is the distinction which places simple mortgagors and mortgagees and usufructuary mortgagors and mortgagees upon a distinct and different footing. It is unnecessary for me in the present case to do more than discuss the question in so far as it relates to usufructuary mortgages. It seems to me that even if it could be said

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that these usufructuary mortgagors wrongly brought their suit in the year 1882, and still more wrongly refused, or declined to, or refrained from paying into Court the amount they were called upon to pay, there was nothing to prevent them at a subsequent period from bringing another suit in which they might allege and prove that the Rs. 1,999-10-6 had been satisfied out of the usufruct. From this it would be apparent that my view is that *quoad* the decree of this Court of the 27th August, 1883, all that that decided was that in order to redeem and get possession of the property, the plaintiffs must pay the sum of Rs. 1,999-10-6; and if the present plaintiff can be held bound by that decree, this is all that can be held to have been decided against him. I may observe in passing that no question arises in this case as to the right of the plaintiff to maintain this suit for redemption as to the four biswas seven biswansis ten kachwansis share, part of what was originally mortgaged. By that I mean it is not suggested that he was under the ordinary legal obligation regulating these matters of mortgage to come into Court and offer to redeem the *whole* mortgage. It is admitted that so far this suit is maintainable.

Looking then at this as a suit brought by the plaintiff for redemption of mortgage as against the defendant-mortgagee in possession, is it barred by any rule of law such as *res judicata* or estoppel as enunciated in s. 115 of the Evidence Act, or by any other principle of equitable estoppel which we as a Court of equity ought to apply? It seems to me that altogether apart from anything that may have taken place between the plaintiff and the assignors to him of an interest by way of subordinate charge, as to who should have instituted the suit which was originally brought, the plaintiff is, under the Transfer of Property Act, a person who at this time is interested in and has a charge upon the four biswas seven biswansis ten kachwansis. It would be protracting this judgment to unnecessary length were I to go in detail into the terms of the instrument of transfer of the 13th August, 1881. It, in my opinion, constitutes a perfectly good document of title to sanction the plaintiff's maintaining his present suit.

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For a moment to revert to the point as to whether the plaintiff is barred by the rule of *res judicata*. It is clear from the array of parties in the former litigation, that he was no party to that litigation; but as I have already said, even if he were bound by what was done in that particular suit, all that the decision therein amounted to was a declaration of a Court that if the plaintiffs in that suit wanted to get possession of the property, then they must pay a sum of Rs. 1,999-10-6. Although in the course of the hearing of this appeal this was not the ground on which the case was argued, and consequently no authorities bearing upon this point were referred to, I have been at pains to look into the matter. The reason why I said at the outset that it is not without difficulty is because of the circumstance that there is a Full Bench ruling of this Court, *Sheikh Golam Hossein* v. *Musammat Alla Rukhee Beebee* (1) in which it was held in effect that where a person by his own neglect has lost a remedy by process of execution to which he became entitled by an adjudication in a former suit, he cannot be permitted to revert to the position which he held prior to the institution of that suit, and to bring a fresh suit. In that judgment the first learned Chief Justice of this Court, Sir Walter Morgan, joined, and it was a ruling of the year 1871. I confess, upon referring to another ruling, *Chaita* v. *Purum Sookh* (2), I find it difficult to reconcile the view which in the first mentioned case he concurred in, with that expressed by him in the second case, in which it was held that where a person has obtained a decree for redemption but has not executed it within the prescribed period for execution, the mortgagee does not by omission of the mortgagor to execute the decree cease to be mortgagee, but the mortgagor or his representative may still maintain a fresh suit for redemption. I confess with the most profound respect that these two rulings appear to my mind irreconcileable. My brother Mahmood and I in the case of *Anrudh Singh* v. *Sheo Prasad* (3) followed the Full Bench ruling of 1871, but what I have now to say with regard to it, is this; in the first place, when it was passed, the Transfer of Property Act,

(1) N.-W. P. H. C. Rep., 1871, p. 62. (2) N.-W. P. H. C. Rep., 1867, p. 256.
(3) I. L. R., 4 All., 481.

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which embodies and defines the precise legal nature of the rights and obligations of mortgagors and mortgagees, and as to the procedure to be adopted in suits between them, was not in force, and further it does not appear to me, if I can form my opinion from the judgment of the Full Bench, that the question as to what was the precise nature of the rights of a usufructuary mortgagor and his usufructuary mortgagee was discussed. Taking the definition of the Transfer of Property Act as to what this latter's rights are, we find he is entitled to remain in possession and enjoyment of the property mortgaged according to the terms of the instrument, until such time as (in the case before me) the principal sum with interest thereupon shall have been satisfied and discharged from the usufruct. It is a noticeable matter in the Transfer of Property Act that in s. 93 which is to be found in the particular portion of the statute relating to redemption of mortgage, it is laid down in paragraph 2 that where a sum has been ordered by a Court to be paid in a suit for redemption of mortgage and is not paid, certain consequences will follow, or to quote the words of that paragraph, it is enacted:—"If such payment is not so made, the defendant may *(unless the mortgage is simple or usufructuary)* apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem." Therefore I presume from that indication in the statute itself that it was not contemplated that in a suit brought by a usufructuary mortgagor against a usufructuary mortgagee for possession upon the ground that he had been satisfied and discharged out of the usufruct, and having been ordered to pay something because the mortgagee had not been so satisfied, therefore the decree passed against him would have the effect of foreclosing him for all time from redeeming the property. It seems to me from what is stated in the Transfer of Property Act as to the relations of a usufructuary mortgagor and mortgagee and their rights in reference to one another that I am not constrained to follow that ruling of the Full Bench of this Court, and consequently I cannot hold that any doctrine or principle of *res judicata* applies to the present case.

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Then arises the question: Is there any principle such as s. 115 of the Evidence Act lays down, or any other equitable principle of estoppel that should bar the plaintiff from maintaining his present suit? I find nothing in the course of the proceedings in the former litigation of 1882 to lead one to the conclusion that the defendant was in any way induced to alter his position or to do any act in consequence of any conduct on the part of the plaintiff. I need scarcely say, it is not enough that he should have put forward or consented to have put forward the original mortgagors as the persons entitled to redeem. It would no doubt have been far more satisfactory under all circumstances had he been joined as a party in that litigation, but by his action and his abstinence from asking to be joined therein, I cannot hold that there was any conduct on his part in respect of which it can be reasonably inferred that the defendants were led to do anything they would otherwise not have done. I am of opinion that there is no estoppel of any kind to bar the suit. This being the view that upon a very anxious and careful consideration of the whole matter I have arrived at, I have come to the conclusion that the appeal should be allowed and that the decree of the lower Court should be set aside. That decree practically being passed upon a preliminary ground, this case must be dealt with under s. 562, Civil Procedure Code, and must be remanded to the Court of the Judge of Aligarh for restoration to the file of pending appeals and disposal upon the merits according to law. Costs to abide the result.

BRODHURST, J.—I concur. *Cause remanded.*

CRIMINAL REVISIONAL.

1889
May 3.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* KHALAK.

Criminal Procedure Code, s. 35—"*Distinct offences*"—*Act XLV of* 1860 *(Penal Code), ss.* 75, 411—*Practice.*

A person convicted under ss. 411—75 of the Penal Code is not convicted of "distinct offences" within the meaning of s. 35 of the Criminal Procedure Code. *Queen-Empress* v. *Zor Singh* (1) explained.

(1) I. L. R., 10 All., 146; Weekly Notes, 1888, p. 5.