

1895  
February 19.

Before Mr. Justice Aikman.

THAKURI (PLAINTIFF) v. KUNDAN AND ANOTHER (DEFENDANTS).\*

*Practice—Appeal—Decision of Court based upon ground not specifically urged by appellant—Act No. IV of 1882 (Transfer of Property Act) s. 41.*

Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.

THE plaintiff, who was the widow of one Chajju, sued for possession of a half share in a certain house on the allegations that the house had been built by her deceased husband and his uncle Khushi jointly and inhabited by them; that after the death of Khushi and Chajju, Murli the son of Khushi had wrongfully mortgaged the whole house in his own name, and that subsequently the house had been brought to sale by the mortgagees. The defendants, auction purchasers, resisted the suit chiefly on the ground that the sole title to the house had been in Khushi and that the plaintiff's husband was separate, and that the plaintiff herself had been out of possession for more than twelve years.

The Court of first instance (Munsif of Muzaffarnagar) found that the house had been built by Khushi and Chajju jointly, and that though the plaintiff had on the death of her husband gone to live with her father's family, she occasionally came to live in the house in dispute, and he gave the plaintiff a decree as claimed.

The defendants, auction purchasers, appealed, and the lower appellate Court (District Judge of Saharanpur), holding that the case was one to which s. 41 of Act No. IV of 1882 would apply, inasmuch as it appeared that Murli the son of Khushi had for some time been left in ostensibly sole ownership of the house, referred two issues based on that section to the Munsif.

The Munsif returned a finding to the effect that Khushi and his son had since the death of Chajju remained in ostensible owner-

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Second Appeal No. 576 of 1894, from a decree of H. Bateman, Esq., District Judge of Saharanpur, dated the 15th March 1894, reversing a decree of Maulvi Maula Bakhsh, Munsif of Muzaffarnagar, dated the 26th February 1894.

ship of the house and that there were no circumstances indicating fraud or concealment in the matter of the mortgage by Murli and the subsequent sale.

The lower appellate Court accordingly on the above finding applying s. 41 of Act No. IV of 1892 dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Munshi *Viddya Charan Singh* for the appellant.

Mr. *Abdul Raof* for the respondents.

AIKMAN, J.—Musammat Thakuri, the appellant in this case, brought a suit for possession of one-half of a dwelling-house. Her case was that the house had been jointly built by her husband Chajju and his uncle Khushi; that after Chajju's death, which took place some 18 or 19 years ago, Khushi's son, Murli, mortgaged the whole of the house to one Chiranji Lal. Chiranji Lal got a decree on his mortgage, in execution of which the house was brought to sale and purchased by the defendants Kundan and Chota, the respondents before me. The Court of first instance (the Munsif of Muzaffarnagar) gave the plaintiff a decree, which was reversed on appeal by the learned District Judge of Saharanpur. The learned Judge was of opinion that s. 41 of the Transfer of Property Act applied to the case and referred to the Munsif for trial two issues based on the terms of that section. The finding of the Munsif was in favour of the respondent. In second appeal it is urged that as s. 41 of the Transfer of Property Act was not expressly pleaded, the learned Judge had no power to take it into consideration in disposing of the case. I cannot accede to this contention. The respondents were, *prima facie*, *bona fide* purchasers for value; and where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. Here it is found that for a long term of years no ostensible act of ownership was exercised by the plaintiff over the house, but that, on the contrary, she allowed her husband's cousin to appear and deal with the

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house as ostensible owner, and that in consequence of his conduct the respondents have been induced to purchase. I observe that plaintiff allowed upwards of four years to elapse from the date of the auction-sale before she took any step to assert her right, and in doing so, although she has made her husband's cousin a defendant to the suit, she has not asked for any relief against him. I think, under the circumstances stated above, the learned Judge was right in dismissing the suit. I dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Aikman.*

DURGA SINGH (PLAINTIFF) v. NAURANG SINGH (DEFENDANT).

*Mortgage—Prior and subsequent mortgagees—Right of prior mortgagees to add to the amount secured by his mortgage outlay incurred in the preservation of the mortgaged property—Act No. IV of 1882 (Transfer of Property Act), s. 53.*

Where a mortgagee of agricultural land had with the consent of his mortgagors spent money in repairing a well on the property which had been rendered useless from natural causes, it was *held* that such mortgagee was entitled, in a suit by a subsequent mortgagee against him for redemption, to add the amount so expended to the mortgage-debt to be paid by the plaintiff before he could obtain the decree for redemption claimed by him.

THE plaintiff in this case, being a puisne mortgagee, sued for redemption of a prior mortgage on the property mortgaged to him by payment of Rs. 197. The prior mortgagee admitted that the amount due on the original mortgage was Rs. 197, but pleaded that certain other money was due to him under a subsequent bond and that the plaintiff was also bound, before he could redeem, to pay Rs. 600, the cost of a well which he had, with the permission of his mortgagors, built upon the land for its benefit.

The mortgagors also filed a written statement to the effect that they had given permission to the defendant-mortgagee to build the well, and that the amount claimed by that defendant was correct.

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Second Appeal No. 614 of 1894, from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 13th April 1894, modifying a decree of Babu Pramotha Nath Banerji, Munsif of Jaunpur, dated the 29th January 1894.