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March 31.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.
NATHU SINGH AND OTHERS (DEPENDANTS) v. GUMANI SINGH AND
OTHERS (PLAINTIFFS).*

Act No. VII of 1877 (*Specific Relief Act*) section 42—Suit for a declaration—
Further relief.

The plaintiffs were purchasers at a sale held in execution of a decree for money, and had obtained possession. Before that decree had been executed the property in question was mortgaged to two other persons. After the purchase by the plaintiffs, the mortgagees, with knowledge of the auction-purchasers' rights, brought a suit for sale upon their mortgage without making the former auction-purchasers parties. They obtained a decree, and brought the mortgaged property to sale, and it was purchased by N. S. and another. The former auction-purchasers thereupon sued the purchasers under the decree upon the mortgage for a declaration that they and their interests were not affected by the suit for sale and by the decree for sale and the sale in execution of that decree.

Held, the plaintiffs in that suit were not bound either to tender the mortgage money, or to offer to redeem, or to frame their suit as a suit for redemption, and that their not having done so did not deprive them of their right to a declaration. *Bhawani Prasad v. Kallu* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri for the appellants.

Munshi Ram Prasad and Munshi Gobind Prasad for the respondents.

EDGE, C. J., and BLENNERHASSETT, J.—The plaintiffs were purchasers at a sale held in execution of a decree for money. Before that decree was executed the property which these plaintiffs purchased had been mortgaged by a deed of simple mortgage. After the plaintiffs' purchase, the mortgagee, with knowledge that the plaintiffs had purchased the rights and interests of the mortgagor in this property, brought a suit for sale under the Transfer of Property Act, 1882, and did not make the plaintiffs (or either of them) parties to that suit.

The mortgagees obtained a decree for sale. The property was put up for sale under the decree for sale, and was sold, and purchased by the defendants, who are appellants here. The defendants

* Second Appeal No. 30 of 1894 from a decree of Mir Jafar Husain, Subordinate Judge of Bareilly, dated the 4th October 1893, reversing a decree of Babu Banke Behari Lal, Munsif of Haveli Bareilly, dated the 7th June 1893.

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having purchased under the decree for sale sought possession. The plaintiffs, having previously obtained possession in virtue of their purchase at the sale in execution of the decree for money, brought this suit under section 42 of the Specific Relief Act, asking in effect for a declaration that they and their interests were not affected by the suit for the sale, and by the decree for sale and the sale in execution of that decree.

The first Court dismissed the suit: the second Court granted the plaintiffs a decree. The defendants have appealed.

It has been urged in appeal that the granting of a declaratory decree is discretionary with the Court, and that the Court ought not to exercise that discretion by giving a declaration, except on condition of the plaintiffs' discharging the money which was due under the mortgage. It has also been urged on behalf of the plaintiffs that the proviso to section 42 of the Specific Relief Act applies, the contention being that the plaintiffs could have asked for substantial relief by having framed their suit as a suit for redemption; and that not having done so the proviso deprives them of their right to a declaration.

There can be no doubt in law that the plaintiffs were persons who, within the meaning of section 85 of the Transfer of Property Act, had an interest in the property comprised in the mortgage, and who were known by the plaintiffs in the suit on the mortgage to have had an interest, and as such should have been joined in the suit. They had in fact what is known in England as an equity of redemption. Not having been made parties to the suit in which the decree for the sale was made, the decree under section 88 and the order for sale made under section 89, the sale and the subsequent proceedings could not in law bind or affect the plaintiffs or their interests, as they were not parties.

As to the two points which were urged on us in this appeal, we are of opinion that the plaintiffs were not bound either to tender the mortgage money, or to offer to redeem, or to frame their suit as a suit for redemption, and that their not having done so does not deprive them of their right to a declaration. The plaintiffs do not

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seek possession; they have got it. All they seek is to have their title cleared from the cloud which has been put on it by the decree for sale and the sale under that decree. For all we know, they may have some defence to a suit on the mortgage. This is not at all similar to that class of cases in which a Hindu or Muhammadan heir seeking to avoid a sale by a person purporting to act as guardian, but not having power, is bound to make restitution of the money advanced which has been employed for his benefit or for the benefit of his property.

A similar point as to the application of the proviso to section 42 of the Specific Relief Act was practically settled by the full Bench judgment in the case of *Bhawani Prasad v. Kallu* (1).

We dismiss this appeal with costs.

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April 7.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.
ABDULLAH KHAN AND ANOTHER (DEFENDANTS) v. ABDUR RAHMAN BEG
(PLAINTIFF).*

Contract—Sale of immovable property—Misdescription of area of property sold—Suit for damages—Fraud.

A purchaser of certain immovable property sued his vendors to recover compensation or damages on account of a deficiency in the actual area of land purchased by him as compared with the area stated in his sale-deed. There was no covenant in the sale-deed to make compensation in case of misdescription.

Held that the plaintiff in order to succeed must make out a fraudulent misrepresentation which he accepted as true, and which induced him to enter into the contract, and which caused him damage. *Derry v. Peek* (2) referred to.

THE plaintiff sued to recover damages on the ground of fraud. He alleged that the defendants had sold to him a certain house, the site of which was stated by them in the sale-deed, as the plaintiff averred, fraudulently, to consist of 107 square yards; that about six months before suit, on coming to measure the land, he discovered it to measure only 86 square yards. He accordingly claimed damages in respect of the alleged deficiency of 21 yards

* Second Appeal No. 40 of 1894, from a decree of Babu Sanwal Singh, Subordinate Judge of Saháranpur, dated the 6th June 1893, modifying a decree of Pandit Kanhaiya Lal, Munsif of Saháranpur, dated the 20th December 1892.

(1) I. L. R., 17 All., 537.

(2) L. R., 14 App. Cas., 387.