

as the date on which such repudiation finally took place. The plaintiffs would have been justified in waiting for a reasonable time before electing to re-sell, and they were bound under section 107 of the Indian Contract Act to allow a reasonable time to elapse between the date of their giving notice to the buyer of their intention to re-sell, and that of the actual re-sale. We hold that under the circumstances of this case the reasonable time after which the shares in question should have been re-sold expired on the 31st of December 1891, and that the plaintiffs are entitled to recover as damages the difference between the contract price and the price of the shares which prevailed on the 1st January 1892. There is no evidence on the record which can enable us to ascertain the value of the shares on the date last mentioned. The Subordinate Judge in our opinion improperly excluded an important piece of evidence, namely, the register of the transfer of shares of the Cawnpore Cotton Mills Company, Limited. We accordingly refer to the Court below the following issue under section 566 of the Code of Civil Procedure:—

What was the value of the shares in question on the 1st of January 1892?

The Court below will receive such further evidence as may be tendered by the parties. On receipt of the finding ten days will be allowed for objections.

Issue referred.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

HARGU LAL SINGH (PLAINTIFF) v. GOBIND RAI AND ANOTHER
(DEFENDANTS).*

Mortgage—Sale by mortgagor of part of the mortgaged property—Suit by mortgagee for sale without joining vendee—Subsequent suit to eject mortgagor's vendee—Cause of action.

A mortgagor, who had given a simple mortgage over certain land, sold some of the mortgaged property. The mortgagee, after such sale had taken

* Second Appeal No. 452 of 1896, from a decree of J. W. Muir, Esq., District Judge of Saharanpur, dated the 2nd May 1896, reversing a decree of Pandit Kanhaya Lal, Munsif of Saharanpur, dated the 3rd August 1895.

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place and without making the vendees parties to his suit, brought a suit for sale on his mortgage, and having caused the mortgaged property to be sold, including that portion which had been sold by the mortgagor, purchased it himself. The mortgagee then sued to eject the vendees of the mortgagor. *Held* that the suit would not lie inasmuch as the plaintiff mortgagee had at its commencement no title to present possession of that particular portion of the mortgaged property as against anyone.

THE facts of this case sufficiently appear from the judgment of the Full Bench.

Mr. *Abdul Raof*, for the appellant.

Pandit *Moti Lal*, for the respondents.

The judgment of the Court (EDGE, C.J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.,) was delivered by EDGE, C. J. :—

The plaintiff obtained a simple mortgage from one Abdul Kadir in 1879. On the 18th of September, 1886, the mortgagor sold 27 bighas of the mortgaged property to Gobind Rai and Tulshi Rai, the defendants in the suit. Mr. *Abdul Raof* for the plaintiff, appellant, informs us that the plaintiff brought a suit for sale, on his mortgage of 1879 against Abdul Kadir after the 18th of September, 1886. To that suit Gobind Rai and Tulshi Rai were not parties. On the 28th of March, 1891, the plaintiff obtained a decree for sale in his suit against Abdul Kadir; he brought the property to sale, got permission to buy, and purchased the property at the sale held in execution of his decree. He has now brought this suit, claiming to eject Gobind Rai and Tulshi Rai from a portion of the 27 bighas above-mentioned, the equity of redemption in which had been sold to them in 1886 by Abdul Kadir by a registered deed. The Court of first instance gave the plaintiff a decree for possession with a conditional right to these defendants to redeem. The lower appellate Court in appeal dismissed the plaintiff's suit.

The plaintiff can only succeed in this suit for possession on proof of title to a present possession at the date of his suit. His simple mortgage did not entitle him to possession as against any one. His decree for sale, being in a suit to which these defendants were not parties, had no effect as against them, and his purchase

at the sale held under the decree conferred on him no title as against these defendants. The result is that the plaintiff had no title to possession at the commencement of the suit against these defendants, and his suit was properly dismissed, though on other grounds. We dismiss the appeal with costs.

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Appeal dismissed.

APPELLATE CIVIL.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

HIRA LAL (OPPOSITE PARTY) v. KISHAN LAL AND ANOTHER
(APPLICANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—Prior and subsequent mortgages—Effect of non-joinder in a suit on a mortgage of persons interested in the mortgaged property.

Certain mortgagees holding a second mortgage obtained a decree against their mortgagor and a subsequent mortgagee, one H. L., for sale of the mortgaged property. At the time of the suit there was subsisting on the same property a prior mortgage held by one D. P. D. P. was not made a party to that suit. After the decree in that suit was passed, but before execution, D. P. brought a suit for sale on his mortgage, but did not make the second mortgagees parties to that suit. In that suit D. P. obtained a decree in execution of which he brought a portion of the mortgaged property to sale, and some of it was purchased by H. L. On application by the second mortgagees for an order absolute for sale in execution of their decree it was held that the property purchased by H. L. in execution of D. P.'s decree on his prior mortgage could not be brought to sale in execution of the second mortgagee's decree. *Mata Din Kasodhan v. Kazim Husain* (1) referred to.

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

Pandit *Sundar Lal*, for the appellant.

Mr. *Banerji*, for the respondents.

BANERJI and AIKMAN, JJ.—The respondents brought a suit for sale upon a mortgage of 1873 and obtained a decree for sale in 1891 against their mortgagor and against Hira Lal, the present

* Second Appeal No. 556 of 1895 from a decree of Babu Bopin Bahari Mukerji, officiating Subordinate Judge of Aligarh, dated the 19th February 1895, reversing a decree of Muhammad Abdur Razzak, Munsif of Koel, dated the 21st April 1894.