

FULL BENCH.

1899
February 16.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

MADAN LAL (DEFENDANT) v. BHAGWAN DAS (PLAINTIFF).*

Mortgage—Prior and subsequent mortgages—Mortgaged property sold twice in execution of decrees in suits in each of which the other mortgagee was not a party—Suit for ejectment by one auction purchaser against the other—Form of decree.

B mortgaged a house, first to *D* and subsequently to *M* and *C*. *M* and *C* brought a suit on their mortgage without making *D* a party to it, obtained a decree, and put the house up to sale, and it was purchased by *ML*. Subsequently to the date of the decree in the above suit *D* brought a suit on his mortgage, without making *M* and *C* parties thereto, obtained a decree and put the house up to sale, and it was purchased by *BD*. *BD* then sued *MJ* for ejectment and damages. *Held* that the plaintiff's suit must be dismissed, and that it was not competent to the Court to grant a decree in favour of the plaintiff conditioned on the failure of the defendant to redeem the mortgage upon which the plaintiff's title was ultimately based. *Hargu Lal Singh v. Gobind Rai* (1), followed and explained.

THE facts of the case, as stated in the judgment of the lower appellate Court, were as follows :—

“Baij Nath, the owner of a house in Allahabad, mortgaged it first to Dina Nath, a minor, on 26th June 1891, for Rs. 200.

“On 2nd February 1892, he made a second mortgage of the same house for Rs. 150 to Maina Bibi and Mul Chand.

“Dina Nath's mortgage was repayable in 10 years, with interest at 12 per cent. There was a covenant in the deed that so long as the mortgage was not satisfied, the house will not be sold, gifted or mortgaged, and there was a further provision—‘if, God forbid, the mortgagee entertained, within the period fixed for payment, in any way, a doubt, whether, weak or strong, with regard to the realisation of his money, he was at liberty to realise at once his money, principal and interest, by the cancelment of

*Second Appeal No. 644 of 1896, from a decree of Babu Brij Pal Das, Subordinate Judge of Allahabad, dated the 9th June 1896, reversing a decree of Mr. H. David, Munsif of Allahabad, dated the 17th February 1896.

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the term fixed for repayment: I, my heirs, my representatives have no objection to it.'

"Both the mortgages were registered. Maina Bibi and Mul Chand, the second mortgagees, instituted on 11th May 1894, a suit on their mortgage, without making the first mortgagee a party to it, and obtained a decree on 25th June 1894. The house was sold in execution of that decree on 21st December 1894, and purchased by Madan Lal, defendant, for Rs. 72.

"On 28th September 1894, Dina Nath instituted a suit on his mortgage, and obtained a decree on 8th November 1894. Maina Bibi and Mul Chand, the second mortgagees, who had obtained the decree on 25th June 1894, on their mortgage, were not made parties to this suit.

"The house was sold on 25th June 1895, in execution of Dina Nath's decree and purchased by the plaintiff for Rs. 265.

"Plaintiff, attempting to take possession of the house, was resisted by the defendant; therefore plaintiff brought this suit for possession and for Rs. 11-4-0 compensation."

The Court of first instance dismissed the claim. On appeal the lower appellate Court reversed the decree of the first Court and decreed the plaintiff's claim, but subject to the condition that if the principal and interest of Dina Nath's mortgage, from the date of the deed to the date of payment, less Rs. 60 received in lieu of interest, should be paid by the defendant within four months from the date of the decree, the plaintiff's suit would stand dismissed.

The defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandar Mukerji*, for the appellants.

Pandit *Sundar Lal* and Babu *Datti Lal*, for the respondent.

STACHEY, C. J.—We do not think that we ought to allow the questions decided by the Full Bench of this Court in *Hargu Lal Singh v. Gobind Rai* (1), so recently as July 1897, to be now reopened. The only question therefore upon which we have heard

the learned pleaders on both sides is whether the present case is distinguishable from that decided by the Full Bench. The conclusion at which we have arrived is that there is no material distinction in principle between the two cases. Certain differences have been suggested in reference to the title set up by the defendant here; but these cannot make the cases distinguishable, for the decision of the Full Bench was necessarily irrespective of any view of the defendant's title, and based exclusively upon the failure of the plaintiff to prove a title to present possession at the date of his ejection suit. Here, as there, the only title of the plaintiff was derived from a simple mortgage which did not entitle the mortgagee to possession as against any one, and a purchase under a decree for sale in a suit to which this defendant was not a party. Here, as there, the suit was an ordinary suit for ejection, the plaintiff claiming to recover possession from the defendant absolutely and not subject to any condition. Here, as there, one of the Courts below—there the Court of first instance, here, the lower appellate Court—gave the plaintiff a decree for possession with a conditional right to the defendant to redeem. Before us the learned advocate for the plaintiff respondent has admitted that his client is not entitled to an absolute decree for possession. He has, however, argued that the case is distinguishable from *Hargu Lal Singh v. Gobind Rai*, on the ground that here it is the lower appellate Court which has given his client a decree for possession with a conditional right to the defendant to redeem, and that there is nothing in the Full Bench decision which necessarily implies that such a decree is wrong or requires this Court in second appeal to set it aside. From the paper-book in the Full Bench case it appears that there the plaintiff, in his memorandum of appeal in this Court against the lower appellate Court's decree, absolutely dismissing the suit, pleaded that he was entitled, if not to an absolute, at least to a qualified, decree for possession, such as the first Court had given him. The Full Bench nevertheless dismissed the appeal, and did not give the plaintiff the qualified decree for possession

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which he asked for. It is suggested that that particular plea in the memorandum of appeal may not have been pressed before the Full Bench, as the judgment does not refer to it. However this may be, it appears to us that the Full Bench did distinctly indicate their opinion that, in a suit for ejection, such as the present, a decree for possession, with a conditional right to the defendant, should not be passed. They say that the plaintiff's suit "was properly dismissed, though on other grounds;" in other words, that the lower appellate Court acted properly in setting aside the qualified decree for possession passed by the first Court, and in substituting for it a decree absolutely dismissing the suit, though it gave wrong reasons for doing so. It is impossible to suppose that they would have said that and proceeded to confirm the lower appellate Court's dismissal of the suit if they had thought that a qualified decree for possession, such as the first Court had passed, was right in such a suit. We cannot see any substantial distinction between this case and that. We must follow the decision in *Hargu Lal Singh v. Gobind Rai*, and the result is that we allow this appeal, set aside the decree of the lower appellate Court, and restore that of the first Court, dismissing the suit with costs in all Courts. KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ. concurred.

Appeal decreed.

APPELLATE CIVIL.

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February 18.

Before Mr. Justice Blair and Mr. Justice Burkitt.

KISHAN LAL (PLAINTIFF) v. GARUBUDDHWAJA PRASAD SINGH AND
OTHERS (DEFENDANTS) *

Hindu law—Pious duty of son to pay his father's debts—Civil Procedure Code, section 317—Execution of decree—Sale in execution—Benami purchase—Suit by creditor on the ground that the certified purchaser is not the real purchaser.

Held that the provisions of section 317 of the Code of Civil Procedure are subject to no limitation other than such as is contained in the section itself.

* First Appeal No. 93 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 23rd December 1896.