

The respondents now before us cannot complain that because the representatives of the two deceased decree-holders are not parties to this appeal, they may be subjected by such legal representative to another suit, for the decree of the lower appellate Court would bar such a suit. Nor can they complain that they are entitled to have the representatives of the deceased upon the record in order to get an order for costs against them, as under no circumstances could they have got costs against them if they had been made respondents within the time limited.

I am not prepared to say whether section 544 would apply to this case. Possibly not, as it applies in terms to a case where the decree appealed against proceeds on a ground common to all the appellants or all the respondents, and here the decree, it may be said, proceeded upon a ground common to the appellants and two of the respondents in the Court below.

I would overrule the preliminary objection.

BURKITT, J.—I concur in overruling the preliminary objection.

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RAM.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

KUDRAT-ULLAH (PLAINTIFF) v. KUBRA BEGAM (DEFENDANT).

Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—Prior and subsequent incumbrancers, rights of—inter se—Sales in execution of decrees separately obtained—Rights of auction purchasers.

Umrao Singh in 1879 mortgaged 10 biswansis of a certain village to Kanhai Singh. In 1885 the mortgagee sued upon the mortgage, obtained a decree, and brought the mortgaged property to sale, and it was purchased by Kubra Begam for Rs. 425-2-0 of which Rs. 296-13-6 was due to and paid to the mortgagee.

At a subsequent date in 1879 Umrao Singh and his brother Muuna Singh mortgaged to one Shambhu Nath a larger share in the same village, including the share which had been mortgaged to Kanhai Singh. Shambhu Nath was not made a party to the suit on the first mortgage.

In 1886 Shambhu Nath, without making the first mortgagee a party thereto, instituted a suit on his second mortgage, and, in 1887, obtained a decree, in execution of which the mortgaged property was put up to sale, and purchased by Kudrat-ullah for Rs. 3,000. Both the mortgages in question were registered.

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* Second Appeal No. 879 of 1897, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 23rd August 1897, reversing a decree of Babu Upendra Nath Sen, Officiating Mansif of Bijnor, dated the 30th April 1897.

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In 1896 Kudrat-ullah deposited in Court Rs. 296-13-6, the amount which had been due, and paid, upon the first mortgage to the first mortgagee, to the credit of Kubra Begam, and upon her refusal to accept that sum, filed a suit against her seeking to redeem the 10 biswansis purchased by her at the auction sale in execution of the decree on the first mortgage.

Held that such a suit would lie, and that the plaintiff was entitled to redeem the first mortgage.

Maladin Kasodhan v. Kazim Husain (1), *Janki Prasad v. Kishen Dat* (2), and *Mehrbano v. Nadir Ali* (3), distinguished. *Sheo Charan Lal v. Sheo Sewak Singh* (4), *Rewa Mahton v. Ram Kishen Singh* (5), *Mukhoda Dassi v. Gopal Chunder Dutta* (6), *Mohan Manor v. Togu Uka* (7), and *Desai Lallubhai Jethabai v. Mudas Kuberdas* (8) referred to.

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

Mr. *Amir-ud-din*, for the appellant.

Mr. *M. Ishaq Khan*, for the respondent.

HENDERSON, J.—In this case one Umrao Singh, on the 23rd of January, 1879, mortgaged 10 biswansis of mauza Jagri Bangar to one Kanhai Singh. On the 12th of January, 1885, the mortgagee sued upon the mortgage, and obtained a decree on the 30th of January 1885, under which the property mortgaged was subsequently, on the 30th of November 1886, sold to Kubra Begam, the defendant-respondent, for Rs. 425-2-0 of which Rs. 296-13-6 was due to and paid to the mortgagee.

It appears that Umrao Singh and his brother Munna Singh, on the 5th of June, 1879, mortgaged 3 biswas 6½ biswansis of mauza Jagri Bangar (including the 10 biswansis already mortgaged), together with certain other property, to one Shambhu Nath. Shambhu Nath was not made a party to the suit on the first mortgage.

On the 13th of November, 1886, after the decree in the previous suit and before the sale under that decree, Shambhu Nath instituted a suit on his mortgage without making the first mortgagee a party, and he obtained a decree on the 26th March, 1887, for sale of the mortgaged properties, which were put up for sale, and purchased by the plaintiff-appellant for Rs. 3,000

(1) (1891) I. L. R., 13 All., 432.

(2) (1894) I. L. R., 16 All., 478.

(3) (1900) I. L. R., 22 All., 212.

(4) (1896) I. L. R., 18 All., 469.

(5) (1886) L. R., 13 I. A. 106.

(6) (1839) I. L. R., 26 Calc., 731.

(7) (1885) I. L. R., 10 Bom., 224.

(8) (1895) I. L. R., 20 Bom., 390.

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Both mortgages were registered, and according to a decision of a Full Bench of this Court (which, however, has not been followed by the High Courts of Calcutta and Madras) the first mortgagee must be taken at the time of instituting his suit to have had constructive notice of the second mortgage—*Matadin Kasodhan v. Kazim Husain* (1), *Janaki Prasad v. Kishen Dat* (2),—and he was therefore bound to have made the second mortgagee a party to his suit.

On the 15th of December, 1896, the plaintiff-appellant deposited Rs. 296-13-6, the amount which had been due and paid upon the first mortgage to the first mortgagee, in Court to the credit of the defendant-respondent, under section 83 of the Transfer of Property Act. She refused to accept this sum, and the plaintiff-appellant thereupon brought this suit seeking to redeem the 10 biswansis of Jagri Bangar purchased by her.

The Court of first instance dismissed the suit, but the lower appellate Court has given the plaintiff a decree for redemption, but, apparently overlooking the fact of the deposit, has made that decree conditional upon his paying to the defendant-respondent Rs. 296-13-6 with interest up to the 30th September 1897, (a day fixed by the Court), when on payment of that amount with interest, he should get possession.

The plaintiff has appealed against so much of the decree as deals with the interest, and it is admitted that if his suit will lie, his appeal must succeed.

Cross objections, however, have been filed by the respondent, who contends that the suit will not lie on the ground that nothing passed to her, the plaintiff, under her purchase. In support of this proposition the Full Bench case of *Matadin Kasodhan v. Kazim Husain* (1) has been cited as an authority to show that Shambhu Nath, the second mortgagee, could not bring to sale under the mortgage the property mortgaged to him, or at all events so much of it as had already been mortgaged, without first redeeming the prior mortgage, and we were referred to a passage in the judgment of Edge, C. J., at p. 453. That passage is as follows:—"The decisions to which I have referred show, and I think rightly, that as well before as since Act No. IV of 1882

(1) (1891) I. L. R., 13 All., 432.

(2) (1894) I. L. R., 16 All., 478.

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came into force, a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgagee, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale, on his mortgage, the other mortgagees, whether prior or subsequent, were necessary parties; and further that the property which might effectively be brought to sale under a decree for sale in a mortgage suit was the specific immovable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property." Another case has also been cited—*Janki Prasad v. Kishen Dat* (1) before a Division Bench of this Court. There one Tika Ram, the second mortgagee, brought a suit upon his mortgage without making the prior mortgagee Kishen Dat a party, obtained a decree for sale, and put up the mortgaged property for sale, and it was purchased by Janki Prasad on the 22nd of June, 1891. Kishen Dat then brought a suit upon his mortgage, not making either Tika Ram or Janki Prasad a party to that suit. He obtained a decree on the 10th of September 1889, for sale, and proceeded to sell the property, when Janki Prasad objected that the property could not be sold under the decree. The Division Bench in its judgment said—"A first mortgagee cannot sell except under a decree which has given a right to redeem within a time fixed by the Court, which in the event of the second mortgagee not redeeming the first mortgage forecloses the second mortgagee's right to redeem. The first mortgagee's right to sell under the decree arises only on the second mortgagee having failed to redeem and being foreclosed by the decree. There is no such decree in the case before us, that is to say, there is no decree giving the second mortgagee a right to redeem. * * * All we need say is that under the decree of the 10th of September 1889, Kishen Dat is not entitled to bring the mortgaged property, the subject of this appeal to sale." As to this last mentioned case it is sufficient to say that it deals with the case of an attempt by a first mortgagee to bring to sale the mortgaged property under a decree in a suit to which a second mortgagee was not a party, and I am not disposed to extend the finding of the Court to the case of a second mortgagee who, under analogous circumstances, has

(1) (1894) I. L. R., 16 All., 478.

actually brought the mortgaged property to sale. With regard to the Full Bench case, it is an authority for the proposition that "a mortgagee has no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgage, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, so that on a suit by a mortgagee for sale on his mortgage, the other mortgagees, whether prior or subsequent, are necessary parties," and so far as it is an authority for these propositions, it is binding upon a Division Bench of this Court. In my opinion, however, it is not an authority for the proposition that where a sale *has actually taken place* under a decree obtained by a mortgagee in a suit to which he has not made a prior mortgagee a party, nothing passes to the purchaser. It may be that under the decisions of this Court a mortgagee under the circumstances mentioned by the Full Bench has no right to bring the mortgaged property to sale. Here, however, the mortgaged property has been sold. It was competent to the mortgagor after the first mortgage to deal with the interest remaining in him, whether we call that interest the equity of redemption, as in the case of an English mortgage, or not. ~~The~~ interest the present mortgagor dealt with when he mortgaged the property to the second mortgagee, and the effect of the mortgage was that the second mortgagee acquired as against the first mortgagee the right of redemption. The mortgaged property having been brought to sale under a decree *in suit* on the second mortgage against the mortgagor, although the entire property may not have passed to the purchaser, it is clear that whatever rights the mortgagor and second mortgagee had passed to the purchaser, and there can be no question that Shambhu Nath, the second mortgagee in the case before us, acquired by his mortgage an interest in the property mortgaged. It is true that the Full Bench in the case of *Mata Din Kasodhan v. Kasim Husain* has said that the term "property" in the Transfer of Property Act means the actual physical property, and does not include what is known as "the equity of redemption." Here under the decree on the second mortgage, although it was the mortgaged property that was sold, nothing more could pass to the purchaser than the mortgagor and mortgagee had between them to dispose of, yet that much did pass, and that certainly included the right to redeem. The sale took

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place at a sale duly held—see *Sheo Charan Lal v. Sheo Sewak Singh* (1)—and a purchaser at an auction sale is not bound to look behind the decree to see whether the decree, under which the sale is held, was rightly made. It is sufficient that the decree of a competent Court directs the property to be sold. In the case of a sale in execution of a decree, their Lordships of the Privy Council said:—“To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues” *Rewa Mahton v. Ram Kishen Singh* (2). As pointed out in *Mukhoda Dassi v. Gopal Chunder Dutta* (3), there is no real distinction between the case in which a sale takes place in execution of a money decree, and that in which a sale takes place in execution of a decree on a mortgage, by reason of the order for sale in the one case being distinct from the decree, and in the other case being part of the decree itself. The sale in the case before us has never been set aside, and in my opinion the plaintiff-appellant by that sale acquired an interest in the property mortgaged, entitling him under the Transfer of Property Act to redeem.

If the contention raised before us, that the plaintiff-appellant acquired nothing by purchase be correct, the result, apparently, would be that the defendant-respondent who purchased the 10 biswansis in mauza Jagri Bangar, which at the time was subject to a subsequent mortgage, would be in the same position as if there had been no such mortgage upon it. This is a result which I cannot conceive was ever contemplated by the Courts which decided the cases referred to. In my opinion these cases are not applicable to the circumstances of the present case.

When mortgaged property is brought to sale upon a first mortgage, the purchaser takes it as it stood at the time of the mortgage, that is, free from all subsequent incumbrances, but a subsequent mortgagee who was not a party to the suit in which the sale

(1) (1896) I. L. R., 18 All., 469. (2) (1886) L. R., 13 I. A. 106; I. L. R.,
14 Calc., 18 p. 25.

(3) (1899) I. L. R., 26 Calc., 734 p. 737.

took place, if he so wish, is still entitled to redeem the property *Mohan Manor v. Togu Uka* (1), *Desai Lallubhai Jethabai v. Mundas Kuberdas* (2). Therefore in the case before us the second mortgagee, not having had an opportunity to redeem, would have been entitled to do so, and I see no reason why the defendant respondent should be in a better position when redemption is sought by the purchaser at a sale under a decree on the second mortgage than he would have been if the second mortgagee himself had sought to redeem. The claim put forward by the defendant respondent is not one which upon merely equitable grounds is entitled to consideration.

I consider that there is nothing to bar the plaintiff's suit, and that he is entitled to redeem, and I would allow the appeal, that is to say, I would set aside so much of the decree as directs the appellant to pay interest upon the deposit of Rs. 296-13-6.

It may be mentioned that in the objections filed by the defendant respondent no objection was taken to the fact that whereas he paid Rs. 425-2-0 for the property purchased by him, the decree directed that the property should be redeemed on payment of only Rs. 296-13-6, the amount which was due, and paid to the first mortgagee. I desire to express no opinion as to whether the plaintiff-appellant in making a deposit under section 83 of the Transfer of Property Act, after the first mortgage decree had been satisfied, adopted the proper course.

Since writing the above, I have been referred to the case of *Mehrbanoo v. Nadir Ali* (3). This case was not reported when the appeal was heard by us, and was not referred to in argument. In my opinion this case also has no bearing on the circumstances of the present appeal. It follows the case of *Janki Prasad v. Kishen Dat* (4), which I have already distinguished.

BURKITT, J.—I concur in the order proposed by my learned brother, and would set aside the decree under appeal to the extent suggested by him.

Decree modified.

(1) (1885) I. L. R., 10 Bom., 224.

(2) (1895) I. L. R., 20 Bom., 290.

(3) (1900) I. L. R., 22 All., 212.

(4) (1894) I. L. R., 16 All., 478.

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