

Chintaman the plaintiff she could convey to him no interest in Sita Ram's estate. We allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

1902

SITA RAM  
v.  
CHINTAMAN.

*Appeal decreed.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*  
AMIR KAZIM AND ANOTHER (DEFENDANTS) v. DARBARI MAL AND OTHERS  
(PLAINTIFFS).\*

1902

May 1.

*Civil Procedure Code, section 316—Execution of decree—Sale in execution—Time from which the auction purchaser's title accrues.*

When immovable property is sold in execution of a decree the title of the auction purchaser to mesne profits or possession does not accrue until the sale has been confirmed. *Gobind Ram v. Tulsi Ram* (1) and *Prem Chand Paul v. Purnima Dasi* (2) followed.

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

Pandit *Sundar Lal*, for the appellants.

Pandit *Madan Mohan Malaviya*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The facts of this case are few and simple. One Ganeshi Lal was the owner of a village called Benipur. He mortgaged 15 biswas of the village to the plaintiffs on the 21st of March, 1892. Subsequent to this mortgage the entire village was sold at the instance of a creditor under a simple money decree on the 21st of September, 1896, and was purchased by the defendant Lakhpat Rai. Subsequently, on the 27th of January, 1897, the mortgagees instituted a suit for the sale of the 15 biswas of the village on foot of the mortgage of the 21st of March, 1892, and to this suit they made Lakhpat Rai a party. A decree was passed on the 5th of May, 1897. Before, however, the decree was obtained, namely, on the 27th of April, 1897, Lakhpat Rai granted a lease of the village to the defendants, Amir Kazim and Mohan Lal, for a term of ten years, at a rent of Rs. 1,800, and under this lease the defendants went into possession. After the date of the lease, namely, on the 20th of September, 1897, the 15 biswas share of the village was sold in execution of the decree of the 5th of May,

\* First Appeal No. 3 of 1900 from a decree of Lala Anant Prasad, Subordinate Judge of Moradabad, dated the 19th September, 1899.

(1) Weekly Notes, 1887, p. 217. (2) (1888) I. L. R., 15 Calc., 546.

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1897, and was purchased by the plaintiffs, who were the mortgagees. On the following 23rd of November, 1897, the sale was confirmed and a certificate granted.

The present suit was instituted by the purchasers against Lakhpat Rai and his lessees and others to set aside the lease of the 27th of April, 1897, for recovery of possession of the property and for mesne profits, the plaintiffs' case being that, inasmuch as the lease was granted during the pendency of the suit, it was not binding on the plaintiffs. It is admitted that, having regard to the provisions of section 52 of the Transfer of Property Act, it was not binding, and that the lease was properly set aside. The only two points which have been argued in appeal before us are, that the learned Subordinate Judge was in error, first, in calculating the mesne profits to which the plaintiffs are entitled from the date of the sale instead of from the date of the confirmation of the sale and grant of certificate; and, secondly, in awarding to the plaintiffs mesne profits calculated upon the basis of the recorded rental of the property instead of upon the actual receipts of the defendants lessees, or the amount of rent which they might have received if they had exercised due diligence.

That the plaintiffs are only entitled to mesne profits from the date of the certificate, appears to us to be clear beyond any question upon the provisions of section 316 of the Code of Civil Procedure. That section provides that when a sale of immovable property has become absolute, the Court shall grant a certificate to the purchaser, and that such certificate shall bear the date of the confirmation of the sale, and, so far as regards the parties to the suit and persons claiming through or under them, *the title to the property sold shall vest in the purchaser from the date of such certificate, and not before.* Words could not express more clearly the intention that a purchaser is only to be entitled to possession or to the rents and profits from the date of his obtaining a certificate. A number of authorities, however, have been quoted to us in order to show that, notwithstanding the clear and express provisions of the section, the purchaser under an auction sale acquires some equitable interest in the property, which will entitle him to mesne profits, not merely from the date on which his title accrues, but from the date on which

the purchase is made. We do not say that there may not be some equitable rights arising out of such a purchase, which could be enforced notwithstanding the provisions of this section, but what appears to us to be abundantly clear is, that the title to mesne profits (or possession) does certainly not accrue until the sale has been confirmed. If an authority for this were required, it is to be found in a decision of this Court reported in the *Weekly Notes of 1887*, p. 217, in the case of *Gobind Ram v. Tulsī Ram*. In that case Mr. Justice Brodhurst and Mr. Justice Mahmood, on an application to recover mesne profits by way of damages for a period anterior to the obtaining of a certificate of sale, held that "the plaintiffs appellants as auction purchasers had no title to the property before the sale was confirmed." "This view," the learned Judges say, "is borne out by the express provisions of section 316 of the Code of Civil Procedure, which regulates questions of this kind. The plaintiffs having no right to the property before the confirmation of the sale, they could not sue for the recovery of the mesne profits thereof in the nature of damages," etc. In the case, decided in the High Court at Calcutta, of *Prem Chand Paul v. Purnima Dasi* (1) Mr. Justice Norris, in dealing with this section, says:—"I think, having regard to the provisions of section 316 of the Code of Civil Procedure, that this contention is not sustainable," (that is the contention that a title dated back beyond the date of the certificate). "It has been urged that, although the section says that 'the certificate shall bear the date of the confirmation of sale, and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before,' yet as regards third parties the property vests in the purchaser from the date of sale. No doubt the Legislature does not introduce the words 'third parties' but if, as regards the parties to the suit and persons claiming through or under them, the title of the purchaser is not to be considered complete, nor the property to vest in him until the confirmation, we see no reason for holding that, as regards third parties, the title of the auction purchaser is complete, and the property vested in him

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before the date of the confirmation of the sale." We fully concur in the view taken by the learned Judges in these cases. Several cases have been cited in which it appeared that the Court had not granted the certificate at the time of confirmation, in fact had failed to perform the duty cast upon it by the Legislature, and notwithstanding mesne profits had been allowed from the date of confirmation of sale; but we do not think that the decisions come to in cases of that kind govern cases such as the present. For these reasons we must modify the decree of the learned Subordinate Judge, and dismiss the claim for mesne profits between the 20th September, 1897, and the 23rd November, 1897, the date on which the sale was confirmed and the certificate was granted.

The other question for our determination is in respect of the calculation of mesne profits. The learned Subordinate Judge has allowed the plaintiffs as mesne profits the entire amount of the rental of the property irrespective of the consideration whether the entire amount was collected or not, or might, with reasonable diligence, have been collected, and this he has done by way of penalty, as he states "by reason of the improper conduct of the lessees in accepting the lease of the property, and in keeping the plaintiffs out of possession." We have asked the learned counsel for the respondents if he could point out to us any evidence in the case going to show that the lessees were guilty of either collusive or fraudulent conduct, and we have been unable to elicit from him anything to satisfy us that they were guilty of such misconduct. The learned Subordinate Judge, in issue No. 6, in which he decided that Lakhpat Rai, the lessor, granted the lease at an undervalue, and granted it collusively, does not venture to state that the lessees colluded with him, or acted wrongfully in the matter, nor does he show that the lessees had any knowledge of the pending suit. The rent which they are paying under the lease is a substantial rent. It may not be, having regard to the evidence, a full rent. This, however, does not justify, as it seems to us, the penalising of the lessees by exacting from them rents and profits which they may not have received. Section 211 of the Code of Civil Procedure explains what mesne profits should be awarded in a case of this kind, *i. e.*,

in suits for recovery of possession of immovable property, as follows—"Mesne profits mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom together with interest on such profits." We have not materials before us to enable us to say what amount should be allowed for mesne profits in this case; and moreover we do not know when the plaintiffs got possession of the disputed property. We shall, therefore, leave the actual amount of profits to which the plaintiffs are entitled for the determination of the execution department, directing attention, however, to the true criterion for estimating the mesne profits as laid down in section 211. In calculating such mesne profits the execution department should not award the gross rental of the property unless it is satisfied that the entire rental was received by the lessees defendants, or with ordinary diligence might have been received by them. We may also point out that the ordinary collection expenses ought to be allowed to the defendants in this case, if any have been incurred. We accordingly so far modify the decree of the Court below with costs.

*Decree modified.*

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

DEBI PRASAD (DECREE-HOLDER) v. JAI KARAN SINGH AND OTHERS  
(JUDGMENT-DEBTORS).\*

1902  
May 28.

*Act No. IV of 1882 (Transfer of Property Act), sections 88, 89—Mortgage—Decree for sale after redemption of prior mortgages—Payment of money due on the prior mortgages after the time limited by the decree—Effect of such payment.*

In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the plaintiff obtained a decree for sale conditioned on his redeeming the prior mortgages within two months. He did not do so, but about four months after the date of the decree paid the money due on the prior mortgages into Court. *Held*, that the defendant having taken no steps to redeem, the plaintiff was entitled to the benefit of this payment, though made after time, and to a decree absolute for sale. *Nihali v. Mittar Sen* (1), *Raham Ilahi Khan v. Ghasita* (2), and *Sita Ram v. Madho Lal* (3), referred to. *Ram Lal v. Tulsa Kuar* (4) distinguished.

\*Second Appeal No. 378 of 1900 from a decree of H. E. Holme, Esq., District Judge of Azamgarh, dated the 26th January 1900, confirming a decree of Munshi Rai Izzat Rai, Munsif of Azamgarh, dated the 18th November 1899.

- (1) (1898) I. L. R., 20 All., 446.      (3) (1901) I. L. R., 24 All., 44.  
(2) (1898) I. L. R., 20 All., 375.      (4) (1896) I. L. R., 19 All., 180.