

The case is a hard one upon the respondent, for in bringing the suit he followed the ruling of the Subordinate Judge after the latter had refused to give him an order to which he was entitled. The appellant was represented at the hearing of that application, and must have acquiesced in, if he did not support, the ruling.

Under these circumstances we do not think that this is a case in which costs should be awarded to the appellant, and we accordingly make no order as to costs of this appeal.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.
DELHI AND LONDON BANK, LIMITED (PLAINTIFF), v. BHIKARI DAS
AND OTHERS (DEFENDANTS).*

1901
BANSIDHAR
v.
GAYA
PRASAD.

1901
December 19.

Act No. IV of 1882 (Transfer of Property Act), section 74—Mortgage—Rights of prior and puisne incumbrancers inter se.

The puisne mortgagees instituted a suit on their mortgage without making the prior mortgagees parties thereto, and got a decree for sale on the 6th April, 1895, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st September, 1896.

The prior mortgagees instituted a suit on their mortgage without making the puisne mortgagees parties thereto, and got a decree for sale on the 11th December, 1894, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st November, 1896, and obtained possession thereof on the 21st January, 1897.

The puisne mortgagees then sued the prior mortgagees, claiming possession of the property purchased by the latter on payment of the actual purchase-money, or of the sum which was due upon their mortgage at the date of the institution of their suit.

Held—(1) that the puisne mortgagees were entitled to be put into possession on payment to the prior mortgagees of the sum which was actually due upon the prior mortgage at the date upon which the prior mortgagees purchased, and (2) that such possession was, as to the property included in their own mortgage, proprietary; but, as to the property not so included, possession as mortgagees only: they were not entitled to the rights of the prior mortgagees as purchasers of the equity of redemption.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. W. M. Colvin (for whom Babu Durga Charan Banerji) and Mr. D. N. Banerji, for the appellants.

* First Appeal No. 258 of 1898 from a decree of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Shahjahanpur, dated the 15th August 1898.

1901

DELHI AND
LONDON
BANK,
LIMITED
v.
BHUKARI
DAS.

Pandit *Sundar Lal* (for whom Pandit *Madan Mohan Malaviya*), Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*) and Munshi *Jang Bahadur Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This is an appeal and a cross appeal from a decree of the Subordinate Judge of Shah-jahanpur. The suit was brought by the appellant Bank for possession of certain zamindari property situate in several villages on the ground that the defendants had acquired no right to it under a purchase made by them on the 21st of November, 1896, and in the alternative for redemption of the property on payment of the sum of Rs. 4,500, which sum represents the purchase-money paid by the respondents on the occasion of their purchase, or a sum of Rs. 7,450, which was the amount of the defendants' mortgage at the date of the institution of their suit. The facts are shortly these. One Suraj Mal borrowed Rs. 12,000 from the appellant Bank, and by way of security for the payment of this sum and interest, executed a deed of mortgage on the 16th of July, 1892. On foot of this mortgage the Bank instituted a suit for recovery of the moneys due to them, and obtained a decree for sale of the mortgaged property on the 6th of April, 1895, and at the sale, which was subsequently held in pursuance of that decree on the 21st of September, 1896, the Bank purchased the property which was included in its mortgage. It appears that Suraj Mal had, so long ago as the 29th of May, 1882, mortgaged the property which was comprised in the plaintiff's (the Bank's) mortgage with other property to one Narain Das, whose representatives the defendants are. The defendants instituted a suit on foot of their mortgage, and obtained a decree for sale of the mortgaged property on the 11th of December, 1894, and at the auction-sale they themselves purchased the property for a sum of Rs. 4,500. This was on the 21st of November 1896, and they got possession on the 21st of January 1897. Contrary to the provisions of section 85 of the Transfer of Property Act, the plaintiff Bank did not implead in their suit the defendants respondents, nor did the latter implead the Bank in the suit which they instituted. The present suit has been instituted by the Bank, as we have stated, to have it declared that the defendants acquired no right to the property under their purchase, and in the alternative for redemption. The

Subordinate Judge passed a decree in favour of the Bank, and directed that on payment of a sum of Rs. 13,638-10-0, which was the amount then actually due to the respondents for principal and interest on foot of their mortgage at the date of their purchase, the Bank should have proprietary possession of the property included in its mortgage, and possession as mortgagee of the property which was not included in that mortgage, but which was included in the respondents' mortgage, and which had passed to them under their purchase. The Bank has appealed against this decree on two grounds. First, on the ground that it should not have been directed to pay a larger sum for redemption of the property than the actual amount of the purchase-money, namely Rs. 4,500, or, at least, the sum for which the respondents had instituted their suit. This contention was not, however, seriously pressed. It appears to us perfectly clear on the authorities that the prior mortgagees were entitled on redemption to be paid the sum which was actually due to them for principal and interest at the date when they obtained possession of the property under their purchase. The Bank also contend that it is entitled not merely to a decree for proprietary possession of the property comprised in its mortgage, but also to a decree for proprietary possession of the residue of the property which was not included in that mortgage. The respondents say that the Bank is not entitled to any modification of the decree in this respect. The Bank contends that, inasmuch as it paid the first mortgagees the full amount of their claim, it was entitled, under section 74 of the Transfer of Property Act, to all the rights and powers of the first mortgagees in the mortgaged property; and that, inasmuch as the mortgagor's interest in the property had passed to the mortgagees upon their purchase made on the 21st of September, 1896, the Bank was entitled to stand in the shoes of the mortgagees, and to have their rights not merely as mortgagees, but also as purchasers of the equity of redemption, that is, of the mortgagor's interest. The respondents, on the other hand, contend that when the Bank paid the entire mortgage debt due to the first mortgagees, the Bank merely placed itself in the position of the first mortgagees who were so redeemed, and acquired a right to treat the mortgagor as its mortgagor, and to hold that portion of the

1901

DELHI AND
LONDON
BANK,
LIMITED
".
BEHKAH
DAS.

1901

DELHI AND
LONDON
BANK,
LIMITED
v.
BHIKARI
DAS.

property, in which it would have no interest but for the payment, as a security only for any surplus payment it may have made. The sale by the first mortgagees was impeached in this suit by the Bank, and is undoubtedly invalid in law as against the puisne incumbrancers, inasmuch as they were not impleaded in the suit which resulted in the sale. It appears to us that the Bank, though it impeaches this sale, yet seeks in the appeal, which is now being prosecuted, to obtain an advantage under it to which it is not entitled. The sale by the first mortgagees was undoubtedly not binding upon the puisne mortgagee, inasmuch as the Bank was not impleaded as required by the provisions of section 85 of the Transfer of Property Act. This being so, the Bank retained its ordinary right as a puisne mortgagee to redeem the property. Having elected to redeem the property and having paid off the prior mortgagees' claim, the Bank undoubtedly acquired, under section 74 of the Act to which we have referred, all the rights and powers of the first mortgagees; but, in the words of the section, "as such," i.e. "mortgagees." But the section does not give the Bank any right or interest which the first mortgagees may have acquired otherwise than as such mortgagees. This, it appears to us, left outstanding the equity of redemption in the property which was not included in the Bank's mortgage. The mortgagor's equity of redemption either passed to the first mortgagees under the sale made to them, or it did not. If it did pass to them, they acquired it at the auction-sale held in execution of their decree, as purchasers and not as mortgagees. If it did not pass to them the equity of redemption remains outstanding in the mortgagor who has not been made a party to this suit. We are of opinion, therefore, that the contention which has been so ably put forward by Mr. *Malaviya* is correct, and that the rights of the parties, as they have been presented to us by him, are consonant with the principles which govern the relations of mortgagors and successive mortgagees in cases in which their respective rights and obligations are involved. We, therefore, hold that the contention of the Bank in this respect is not well-founded. The decision of the lower Court must, therefore, be affirmed, and the appeal dismissed with costs.

Appeal dismissed.