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in his suit that the property should be sold in accordance with the directions contained in the decree. He is, therefore, in my opinion, a representative of the judgment-debtors, mortgagors, within the meaning of section 244, and his suit has been rightly held to be barred by that section. I also would dismiss the appeal.

By THE COURT:—The order of the Court is that this appeal be dismissed with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

1908  
November 27.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

RAM PRASAD (PLAINTIFF) v. BHIKARI DAS AND ANOTHER  
(DEFENDANTS).\*

*Mortgage—Act No. IV of 1882 (Transfer of Property Act), section 88—Sale of mortgaged property in execution of a simple money decree—Subsequent sale in execution of decree on mortgage—Rights of the two auction purchasers inter se.*

Certain property subject to a mortgage was sold by auction in execution of a simple money decree, and the purchasers were put into possession. Subsequently the mortgagee brought a suit for sale on his mortgage, and the property was again sold, and was purchased by a third party. To these proceedings the previous auction purchasers were not made parties. *Held* on suit by the purchaser at the sale held in virtue of the mortgage decree asking for payment of the amount due under the mortgage or in default for possession of the mortgaged property, that the defendants must be allowed to redeem upon payment of what was found due upon the mortgage at the time the mortgage decree was passed; but if they did not pay within the time fixed by the decree, then the plaintiff was entitled to a decree for foreclosure of the defendants' rights and possession of the property. *Goverdhana Doss v. Veerasami Chetti* (1) referred to. *Hargu Lal Singh v. Gobind Rai* (2), and *Madan Lal v. Bhagwan Das* (3), referred to.

THE facts of this case are as follows:—

On the 26th of August 1891 one Lekha Singh mortgaged certain property in favour of Nath Mal. On the 15th of April 1895 Nath Mal instituted a suit for sale on his mortgage and a decree for sale was passed on the 2nd of May 1895. Prior to

\* Second Appeal No. 915 of 1901 from a decree of Maulvi Muhammad Shafi, Subordinate Judge of Moradabad, dated the 8th of July 1901, reversing a decree of Pandit Mohan Lal, Munsif of Chandausi, dated the 12th of February 1901.

(1) (1902) I. L. R., 26 Mad., 537. (2) (1897) I. L. R., 19 All., 541.

(3) (1899) I. L. R., 21 All., 235.

the institution of this suit, however, the mortgaged property had been attached in execution of a simple money decree, and in execution of that decree it was sold and purchased by Bhikari Das and Baldeo Sahai on the 20th of June 1895, and the auction purchasers obtained possession. On the 20th of December 1897 the property was again sold in execution of Nath Mal's mortgage decree, and was purchased by one Ram Prasad. Ram Prasad then sued Bhikari Das and Baldeo Sahai, who had not been made parties to the original suit brought by Nath Mal, claiming payment of the amount due under Nath Mal's mortgage or in default possession of the property. The Court of first instance (Munsif of Chandausi) passed a decree for sale of the property in dispute in satisfaction of the plaintiff's claim. On appeal by the principal defendants the lower appellate Court (Subordinate Judge of Moradabad) dismissed the plaintiff's suit, apparently on the ground that the plaintiff was not entitled either to recover the debt from the principal defendants or to recover possession of the property. The plaintiff thereupon appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal must be allowed. The suit was brought by Ram Prasad, who is a purchaser of the property in dispute, at an auction sale which took place on the 20th of December 1897 under the following circumstances. The property belonged to one Lekha Singh, who on the 26th of August 1891 mortgaged it in favour of Nath Mal. The latter instituted a suit for the sale of the mortgaged property on the 15th of April 1895, and the decree for sale was passed on the 2nd of May 1895, and the property was sold thereunder and purchased by the present plaintiff Ram Prasad on the 20th of December 1897. Prior to the institution of Nath Mal's suit the property was attached in execution of a simple money decree and sold on the 20th of June 1895, and purchased by the respondents Bhikari Das and Baldeo Sahai, who thereupon obtained possession of the property. The respondents were not impleaded in the suit which was instituted by Nath Mal, and consequently they were not bound by the

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proceedings in that suit. The position which they hold in regard to the property is that they cannot be prejudiced by any order which was passed in Nath Mal's suit, and therefore retain all the rights which they possessed and which they could have exercised if they had been impleaded in that suit. The right which they had was to redeem Nath Mal's mortgage, to remove the cloud from their title to the property and preserve it for themselves. That right they still retain.

The plaintiff cannot recover possession of the property under the decree obtained by Nath Mal, except he first give an opportunity to the respondents to redeem his mortgage, that is, of doing that which they might have done if they had been impleaded in Nath Mal's suit. The present suit gives the respondents the opportunity of so redeeming. The suit is in terms a suit for foreclosure, although the word "foreclosure" is not used in the prayer. The plaintiff after setting out in the plaint all the circumstances connected with the property, the purchase under Nath Mal's decree as well as the purchase by the defendants respondents under the decree obtained by the creditor of the mortgagor, asks for the following relief, *viz.*, that the principal defendants (*i.e.*, the respondents) be directed to pay the principal amount due on foot of the plaintiff's mortgage, or whatever sum the Court may think proper, on a date to be fixed by the Court, and in default of payment the plaintiff may be put in possession of the property in dispute. This amounts to a claim for foreclosure of the defendants' rights. The Court of first instance passed a decree for sale of the property in dispute in satisfaction of the plaintiff's claim. That decree was clearly wrong. On appeal the learned Subordinate Judge reversed that decree and dismissed the plaintiff's suit, apparently on the ground that the plaintiff was not entitled either to recover the debt from the defendants (respondents here) or to recover possession of the property. We are unable to agree with him in the view which he took. The case is unlike the two cases which have been cited in argument and strongly relied on by the learned vakil for the respondents, namely, the cases of *Hargu Lal Singh v. Gobind Rai* (1), and *Madan Lal*

(1) (1897) I. L. R., 19 All., 541.

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v. *Bhagwan Das* (1). The relief which was sought in both those cases is different from that which is prayed for in the present case. In both those cases the suit was instituted for recovery of possession of the mortgaged property to which the Courts held the plaintiffs had no present title. In the present case the suit is one, as we have said, for foreclosure of the mortgaged property, and it is the duty of the Court to work out the equities between the parties and to give the respondents the opportunity which ought to have been afforded them, when the decree for sale was passed in Nath Mal's suit, of redeeming his mortgage. The respondents are entitled to redeem, but they are not entitled to anything further by reason of the fact that the plaintiff in that suit omitted to implead them as defendants. The omission to implead them can neither improve their position nor the reverse. The plaintiff appellant, who purchased the property at a Court sale in a suit in which the mortgagee Nath Mal was the plaintiff and the mortgagor was the defendant, purchased the property, that is, whatever rights the mortgagor and mortgagee then possessed, subject to the infirmity that the present respondents had not been impleaded, and consequently he must suffer by reason of the neglect of the plaintiff to implead the respondents. He did not get a clear title to the property, but he got all the title which Nath Mal and the mortgagor could give, and that was a title subject to the equity which the respondents had of redeeming Nath Mal's mortgage and preserving the property for themselves. That right will still be secured to them. The case is very similar in its facts to the case of *Goverdhana Dass v. Veerasami Chetti* (2) in which a decree was passed similar to that which is sought in this appeal by the plaintiff appellant. We accordingly shall pass a decree declaring the plaintiff entitled to the amount of his mortgage debt as ascertained at the date of the decree for sale, on the 2nd of May 1895, and we shall allow the defendants-respondents to redeem the property by payment of that amount. In default of their doing so their right will be foreclosed and the possession of the property delivered to the plaintiff. Accordingly we allow the appeal, set aside the decree

(1) (1899) I. L. R., 21 All., 235. (2) (1902) I. L. R., 26 Mad., 537.

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of the lower appellate Court, and direct that the defendants respondents do pay to the plaintiff appellant the sum of Rs. 100 with interest at the rate of 6 per cent. per annum from this day to the day of payment, on or before the 1st of March 1904; and in default of payment we order that the right of the respondents to redeem the mortgaged property be foreclosed and the plaintiff appellant placed in possession thereof. We allow costs throughout to the appellant.

*Appeal decreed.*

1903  
 November 27.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

RANI KISHORI (PLAINTIFF) v. RAJA RAM AND ANOTHER  
 (DEFENDANTS).\*

*Res. judicata—Decision of question of title by a Court of Revenue.*

The decision by a Court of Revenue of a question of title, though such decision was necessary for the disposal of the case before it, cannot prevent the same question being again litigated between the same parties in a Civil Court. *Debi Prasad v. Jafar Ali* (1), *Husain Shah v. Gopal Rai* (2), *Ajullia Prasad v. Sheodra* (3) and *Gomti Kuwar v. Gudri* (4) referred to. *Rai Krishn Chand v. Mahadeo Singh* (5) and *Subarni v. Bhagwan Khan* (6) distinguished.

THE facts of this case are as follows :—

On the 21st of July 1893 one Girdhari Lal mortgaged certain land to one Raja to secure an advance of Rs. 200. The mortgagee obtained a decree on his mortgage and caused the mortgaged property to be advertised for sale on the 20th of September 1900. The plaintiff Rani Kishori, within whose zamindari the land in dispute was situate, thereupon brought the suit out of which the present appeal arises asking for a declaration that the land was her property and not liable to be sold in execution of Raja Ram's decree. Her allegation was that the mortgagor Girdhari Lal was merely the tenant of a cultivatory holding in the village, that that holding did not consist of resumed muafi plots as alleged by the mortgagee,

\* Second Appeal No. 873 of 1901, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Mainpuri, dated the 13th of August 1901, reversing a decree of Khwaja Muhammad Abdul Ali, Munsif of Mainpuri, dated the 11th of February 1901.

(1) (1880) I. L., R., 3 All., 40.  
 (2) (1879) I. L. R., 2 All., 428.  
 (3) (1884) I. L. R., 6 All., 403.

(4) Weekly Notes, 1902, p. 220.  
 (5) Weekly Notes, 1901, p. 49.  
 (6) (1893) I. L. R., 19 All., 101.