

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burdett.

1905
December 4.

BRIJ KISHORE AND ANOTHER (DEFENDANTS) v. MADHO SINGH
AND OTHERS (PLAINTIFFS).*

Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgage—Purchase of part of the mortgaged property—Mortgage foreclosed, purchaser not being made a party—Right of purchaser to redeem part of the mortgaged property.

The plaintiffs' father purchased some sir land which, along with other property, was the subject of a mortgage by conditional sale. The mortgagees subsequently instituted a suit for foreclosure, in which they obtained a decree and an order absolute for foreclosure. But the mortgagees, although they had notice of his interest in the mortgaged property, did not join the purchaser as a party to their suit. *Held* that there was no bar to the plaintiffs suing to redeem that portion of the mortgaged property in which their father had acquired an interest, and that they were not bound to redeem the whole mortgage.

THE facts of this case are thus stated in the judgment under appeal. Sheo Prasad and Daya Ram were owners of two and a half biswas of mauza Ganauli. In 1884 and 1885 they mortgaged this share, together with a share in another village, by deeds of conditional sale to Kunwar Dharam Singh for an aggregate sum of Rs. 5,000. The mortgagee then sold his rights to Brij Kishore and Rup Kishore. On the 19th of March 1898 they sued to foreclose the mortgages. They obtained a decree on the 26th of April, 1898, which was made absolute on the 28th of January, 1899. Before the institution of the suit for foreclosure, one Lachman Singh had in execution of a simple money decree against the mortgagors purchased their zamindari rights in a portion of their sir land in mauza Ganauli. The mortgagees, though aware of this purchase, did not make Lachman Singh a party to their suit for foreclosure. After the death of Lachman Singh his sons brought a suit to redeem the portion of the mortgaged property purchased by their father upon payment of a proportionate amount of the mortgage money. The Court of first instance (Munsif of Phaphand) gave the plaintiffs a decree for redemption, and this decree was affirmed on appeal by the Subordinate Judge of Mainpuri. The defendants then appealed to the High Court, where their appeal coming on for hearing

* Appeal No. 33 of 1905 under section 10 of the Letters Patent.

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before a single Judge of the Court was dismissed.* The defendants thereupon filed the present appeal under section 10 of the Letters Patent of the Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellants.

The respondents were not represented.

STANLEY, C.J. and BURKITT, J.—We think that the view expressed by our brother Aikman in his judgment is correct. Little can be usefully added to that judgment. Mr. *Sundar Lal* forcibly argued that the plaintiffs were not entitled to ignore the foreclosure decree which was made absolute on the 28th of January 1899 for one purpose and treat it as binding for another. His argument is no doubt logical. If a party seeks to have a judgment set aside he must have it set aside *in toto*: he cannot take advantage of it for one purpose whilst repudiating it in other respects. In this case, however, the defendants appellants could not have the foreclosure decree set aside as against the mortgagors who were parties to the suit. That decree is binding as between them and the mortgagees. This being so, the defendants appellants under that decree are, and must be, treated as the absolute owners of the shares in the villages in dispute with the exception of the portion of sir land which was sold to the plaintiffs. If the plaintiffs were bound, as Mr. *Sundar Lal* contends, to redeem the whole mortgage, the result would be that immediately on redemption they would be entitled, in view of section 82 of the Transfer of Property Act, to claim and recover from the defendants appellants rateable contribution to the mortgage debt, and so obtain by two suits substantially the same relief as that which they ask for in the suit out of which this appeal has arisen. The question then is, are two suits necessary? Clearly not, we think, in view of the provisions of section 60 of the Transfer of Property Act. The defendants appellants have by their foreclosure decree acquired from their mortgagors a share of the mortgaged property. The plaintiffs respondents are interested also in a share of that property, and therefore, as it appears to us, are in the terms of the section entitled to redeem their own share only on payment of a proportionate part of the amount.

* See Weekly Notes, 1905, p. 133.

remaining due on the mortgage. We therefore dismiss the appeal but without costs, as the plaintiffs respondents are not represented before us.

Appeal dismissed.

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APPELLATE CIVIL.

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December 4.

Before Mr. Justice Knox and Mr. Justice Aikman.

MADHO SINGH AND ANOTHER (PLAINTIFFS) v. SURJAN KUNWAR
AND ANOTHER (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), schedule II, art. 142—Limitation.—Adverse possession—Government revenue—Defaulter—Share of defaulter let on farming lease—Share not claimed on expiry of lease.

One Mulchand, who owned an eight anna zamindari share in mauza Rajipur, disappeared in 1857 leaving Government revenue unpaid. His share was thereupon made over to Mangu Lal, and afterwards to one Pahalwan Singh, on a farming lease, which expired in 1871. On the expiry of this lease Pahalwan Singh still retained possession of the property, and ultimately in 1891 it was sold in execution of a decree against him and purchased by the predecessor in title of the answering defendants. In 1903 a suit was brought for recovery of possession by the purchasers of Mulchand's rights from his representatives. *Held* that after 1871 Pahalwan Singh's possession became adverse to Mulchand and the suit was barred by limitation. *Nihal Singh v. Dula Singh* (1) approved.

. THE facts of this case are as follow :—

One Mulchand owned an 8-anna zamindari share in mauza Rajipur. He disappeared during the Mutiny leaving the Government revenue in arrears. His share was accordingly farmed out, first to his brother, Mangu Lal and then to one Pahalwan Singh. Pahalwan Singh held possession under the farming lease till 1871 and subsequently to 1871 retained possession, neither Mulchand nor any representative of Mulchand having appeared to claim the property. In 1884 Pahalwan Singh mortgaged the property to one Bhaggi Lal, the predecessor of the answering defendants. Bhaggi Lal brought a suit for sale, and having obtained a decree brought the share to sale

* Second Appeal No. 281 of 1904, from a decree of A. Sabonadiere, Esq., District Judge of Jhansi, dated the 7th of January 1904, reversing a decree of Babu Jogendronath Chaudhri, Munsif of Orai, dated the 22nd of September 1903.

(1) Panj. Rec., 1885, C. J. No. 88, p. 71.