

*Before Mr. Justice Sir George Know and Mr. Justice Pigott.*

NAKTA RAM AND OTHERS (DEPENDANTS) v. CHIRANJI LAL (PLAINTIFF).<sup>\*</sup>  
*Civil Procedure Code (1882), section 13—Res judicata—Mortgage—Decree for redemption not providing for extinction of mortgagor's rights upon non-payment—Second suit for redemption.*

1910  
 January 19.

Where a mortgagor brings a suit for redemption and obtains a conditional decree but omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or he will be debarred of all his rights to redeem. *Rugad Singh v. Sat Narain Singh* (1) distinguished.

THE facts of this case were briefly as follows:—

One Karori Mal executed a usufructuary mortgage on behalf of himself and his minor brother, the plaintiff. Possession not having been given, the mortgagees sued both the brothers for possession. In that suit the defence on behalf of the present was that there was no legal necessity justifying the alienation of his share and that he had not been benefited thereby. The court found that there was legal necessity for only a portion, amounting to Rs. 91, of the consideration; and that the present plaintiff had benefited to the extent of one-half of it, and could, therefore, redeem his share on payment of Rs. 45-8-0. The plaintiff accordingly deposited the sum of Rs. 45-8-0, under section 83 of the Transfer of Property Act, but it was not accepted by the mortgagees. This deposit was subsequently withdrawn from court, but not by the mortgagees. The plaintiff, thereupon, brought, in 1884, suit for redemption and possession, and obtained a decree, but the decree omitted to specify what would be the consequence of non-payment by the decree-holder of the mortgage money. No steps were taken to execute this decree; but the present suit was brought in 1908 by the same plaintiff for redemption of the same property. The defendants objected, *inter alia*, that this suit was barred by section 244 and section 13, explanation II, of the Code of Civil Procedure of 1882. The court of first instance dismissed the suit. On appeal the judgment was reversed, and the suit was remanded for trial under order XLI, rule 23, of Act V of 1908. The defendants appealed to the High Court against the order of remand.

<sup>\*</sup> First Appeal No. 57 of 1909 from an order of H. W. Lyle, District Judge of Agra, dated the 12th of May 1909.

1910

NAKTA RAM  
v.  
CHIBANJI LAL.

Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*; Pandit *Moti Lal Nehru* with him) for the appellants contended that the plaintiff was not entitled to bring the present suit. Having obtained an unconditional decree for possession in the suit of 1884, the plaintiff should have proceeded to execute it; he had no other remedy. That suit was, in effect, one for possession pure and simple, on the ground that the mortgage had already been redeemed; for, as soon as the deposit was made, the mortgage was extinguished. The decree, properly interpreted, was one for immediate possession unconditionally; and in such a case the plaintiff's rights merged in the decree and the only remedy available to him was the execution of the decree; *Sita Ram v. Madho Lal* (1). Before the date on which the plaintiff brought the suit of 1884 he had done everything that was required to be done before he could get a decree for possession; the amount payable by him had already been judicially determined, and had been duly deposited by him for payment to the mortgagees; and thereby the mortgage had been fully discharged; *Rugad Singh v. Sat Narain Singh* (2). What remained for the court to do was only to give a decree for possession; and it accordingly gave a decree for possession unconditionally.

Dr. *Tej Bahadur Sapru*, for the respondent, contended that the whole question in the case was as to what the effect of the decree of 1884 was. A decree under section 92 of the Transfer of Property Act was not enough alone to extinguish the mortgage. Even if the decree of 1884 was regarded as one quite in form and in accordance with section 92, it was not by itself sufficient to put an end to the equity of redemption; *Dondh Bahadur Rai v. Tek Narain Rai* (3) and *Sita Ram v. Madho Lal* (1). The words "*bad dilai jame*" occurred in the relief claimed in the suit of 1884. That was not a relief proper to a suit for possession pure and simple. It showed that the plaintiff himself did not say that the mortgage had been extinguished. The mortgagees had declined to accept the amount deposited. Unless and until they had got the money, or an order under section 93 of the Transfer of Property Act had been passed, the equity of redemption would continue to

(1) (1901) I. L. R., 24 All., 44. (2) (1904) I. L. R., 27 All., 117

(3) (1899) I. L. R., 21 All., 251.

subsist. A deposit under section 83 was not equivalent to payment under section 93; and as a matter of fact payment was never made to the mortgagees. The language used in I. L. R., 27 All., 178, at page 181, relied upon by the appellants, was too wide. It was not intended to be laid down in that case that as soon as a deposit was made under section 83 the relation of mortgagor and mortgagee at once came to an end. If that were so, there would be no meaning in or necessity for the elaborate decree under section 92 or the provisions of section 93.

Babu Sarat Chandra Chaudhri, in reply:

By the words "*bad dilai jane*," etc., the plaintiff only meant that the mortgagees might be ordered to take the money which was lying in deposit at their credit; nothing further remained to be done by him, and therefore the contingency contemplated by section 93 did not arise. The wording of the decree was to be looked to and followed, and the terms of the decree clearly showed that it was one for possession.

KNOX and PIGGOTT, J. J. :—This was a suit for redemption of a mortgage. During the minority of the plaintiff there had been certain litigation between the parties which resulted in a finding that the mortgage debt due from the plaintiff amounted to only Rs. 45-8-0. Upon this the plaintiff deposited this sum under section 83 of the Transfer of Property Act, and brought a suit for possession by redemption of the mortgage. This suit resulted in a decree, the correct interpretation of which is the main point for determination in this case. Execution of this decree was never taken out, and the deposit of Rs. 45-8-0 is found to have been withdrawn from the Civil Court by some person other than the mortgagee. These transactions took place in the year 1884 A.D. The plaintiff having now attained majority brings a fresh suit for redemption on payment of Rs. 45-8-0. The question is whether this suit is maintainable in view of the fact that the decree of 1884 has been allowed to become time-barred. We were referred in the course of argument to the following rulings of this Court :—*Dondh Bahadur Rai v. Tek Narain Rai* (1), *Sita Ram v. Madho Lal* (2) and *Rugad Singh v. Sat Narain Singh* (3).

(1) (1899) I. L. R., 21 All., 251. (2) (1901) I. L. R., 21 All., 44.  
(3) (1904) I. L. R., 27 All., 178.

1910

NAKTA RAM  
v.  
CHIRANJI LAL.

On the essential point of law involved we think that the general effect of these rulings is very accurately stated by the learned District Judge in the following words:—"Where a mortgagor brings a suit for redemption and obtains a conditional decree, but omits to fulfil the conditions imposed upon him, he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or he will be debarred from all right to redeem." We have ourselves in a recent case reaffirmed the law in the above sense. Reliance was placed in the course of argument on certain expressions used by the learned Judges who decided the case of *Rugad Singh v. Sat Narain Singh* above referred to. It is necessary to remember what was the precise point for determination in the above case. The equity of redemption in respect of a certain mortgage had been broken up and acquired by different persons at different times and in various proportions. One of these deposited the entire sum due to the mortgagee under section 83 of the Transfer of Property Act and brought a suit for possession by redemption in respect of the whole mortgaged property. The question before the Court was whether in this same suit a person who had acquired another portion of the equity of redemption could be given a decree in respect of his own share. This was held to be impossible for various reasons, and amongst others because the original plaintiff in that case had already satisfied the mortgagees, so that nothing remained due to the latter from the moment the deposit under section 83 of the Transfer of Property Act was made. We do not think the learned Judges intended to lay down any such general proposition as that a person making such a deposit is bound to sue the mortgagee simply for possession, and not for possession by redemption, subject to payment—that is to say, to actual delivery to the mortgagee under the orders of the court—of the sum deposited, or such other amount as may be found due to him.

As a matter of fact, however, we are not so much concerned with the kind of suit which ought to have been brought by the present plaintiff in 1884, or with the kind of decree which ought to have been passed, as with the suit actually brought and the decree in which it resulted. The suit was not one for possession

pure and simple, it was for possession subject to payment of the sum deposited and to an order by the court directing the mortgagee to receive the same. The decree passed is an anomalous one and not in strict conformity with the provisions of the Transfer of Property Act. No doubt, as the learned District Judge remarks, this is due to the fact that the said Act had only recently come into force and the courts were not fully acquainted with its provisions. No period is fixed within which the sum of Rs. 45-8 is to be paid to the mortgagee and nothing is said as to the possible effect of non-payment. At the same time the decree as it stands is not one for possession pure and simple, and cannot be treated as such. The relief sought is thus described:—"That after payment of Rs. 45-8 due on account of the mortgage in respect of the plaintiff's share, one-half share in the mortgaged property herein-after specified be redeemed and possession thereof delivered to the plaintiff." It is provided that a decree "for redemption of the mortgage" is passed in favour of the plaintiff. The mere omission of the court to fix a time for payment does not seem to us to bring this case outside the principle already laid down.

We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Tudball.*

EMPEROR, v. SHEO SARAN LAL.\*

*Criminal Procedure Code, sections 283—236, 239—Misjoinder of charges—Illegality—Act No. XLV of 1860 (Indian Penal Code), sections 408 and 467.*

The accused was charged and tried at one and the same trial for three offences under section 408 of the Indian Penal Code committed within a period of one year, and three offences of forgery under section 467 of the Code and was convicted and sentenced in respect of all the six offences.

*Held* that this was an illegality not covered by section 537 of the Code of Criminal Procedure. *Subrahmanya Ayyar v. King Emperor* (1) followed. *In re Bal Gangadhar Tilak* (2) referred to and discussed.

IN this case one Sheo Saran Lal, clerk of the Kasia Co-operative Bank in the district of Gorakhpur, was charged with and

\* Criminal appeal No. 799 of 1909, from an order of F. D. Simpson, Sessions Judge of Gorakhpur, dated the 14th of July 1909.

(1) (1901) I. L. R. 25 Mad., 61. (2) (1908) I. L. R., 33 Bom., 221.

1910

NAKTA RAM  
v.  
CHIRANJI.  
LAL.

1910

January 19.