

complaint by a person aggrieved of an offence under section 494 of the Indian Penal Code. It is quite clear that no charge of bigamy has been preferred by either the husband of Musammat Nihalo or Gobardhan. In the case of bigamy the person aggrieved is either the first husband or the second husband. In the present case the first husband, though sixteen years of age, has preferred no complaint; neither has the second husband. I do not think that the father of the first husband can, under the circumstances of the present case, be deemed to be the person aggrieved. There is, therefore, no valid complaint of the offence under section 494 of the Indian Penal Code, and the provisions of section 198 of the Code of Criminal Procedure have not been complied with. The commitment, therefore, is bad and is hereby quashed. The Magistrate will proceed to deal with the complaint under section 498 according to law.

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 APPELLATE CIVIL.

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November 9.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

PARBHU DAYAL (PLAINTIFF) v. ALI AHMAD AND OTHERS (DEFENDANTS).^{*}
Civil Procedure Code (1882), section 583—Decree reversed on appeal—Restitution—Mesne profits—Jurisdiction of Court to which application for restitution is made.

It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A court of appeal does not necessarily enter into the question whether a decree it is about to reverse has been executed or not. *Huro Chander Roy Chowdhry v. Shooradhonee Debia* (1), *Dorasami Ayyar v. Annasami Ayyar* (2) and *Collector of Meerut v. Kalka Prasad* (3) referred to. *Kalka Singh v. Paras Ram* (4) distinguished.

A mortgagor obtained a decree for redemption and in execution thereof recovered possession of the mortgaged property. On appeal, however, the High Court enhanced the sum payable by the plaintiff mortgagor and on his failure to pay the suit was dismissed. The mortgagee thereupon applied to the Court of first instance asking to be restored to possession of the mortgaged property and also for mesne profits for the period during which he was out of possession. *Held* that the Subordinate Judge had jurisdiction, not only to make restitution by restoring possession, but also to award mesne profits, although the decree of the High Court did not specifically provide for mesne profits.

^{*} First Appeal No. 298 of 1907 from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 27th of September 1907.

(1) (1868) 9 W. R., 402.

(3) (1906) I. L. R., 26 All., 665.

(2) (1899) I. L. R., 23 Mad., 306.

(4) (1894) I. L. R., 22 Cal., 434.

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THE facts of this case were as follows :—

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On the 5th of February, 1863, Ram Bakhsh mortgaged with possession ten biswas of a village to Debi Das, for Rs. 7,700, the main stipulations of the mortgage being that the profits of the mortgaged property were to be set off against the interest of the mortgage-money after deducting Rs. 100 *malikana*, and that at the time of redemption arrears due from tenants and enhanced revenue, if any, were to be paid by the mortgagor, but no interest on these items. Zahur Ahmad Khan and his sons in 1866 and 1871 purchased an aggregate share of 9 biswas, 19½ biswansis from Ram Bakhsh, and the remaining ½ biswansi was purchased by the mortgagee Debi Das. After Zahur Ahmad Khan's death, his share was inherited by his widows, sons and daughters. These sons in 1877 brought a suit to redeem Debi Das. They were minors at the time and their mother acted as the next friend. On the 25th of May, 1878, the suit was decreed by the court of first instance, the plaintiffs being required to pay Rs. 6,967-1-4 to the mortgagee whose claim for arrears of rent and enhanced revenue was disallowed. On the 12th of June, 1878, Debi Das withdrew from court the money deposited to his credit by the plaintiffs and on the 17th of July the latter obtained possession over the mortgaged property. Debi Das, however, appealed and the appellate court awarded to him a further sum of Rs. 8,956-12-11 on account of arrears and enhanced revenue, but disallowed interest on this amount, and directed the plaintiffs to pay this amount within a month. There was no provision in the decree as to foreclosure or sale in the event of failure to pay in the money. The money was not paid in and Debi Das recovered possession from the plaintiffs on the 1st of April, 1880. Then he applied for mesne profits and on the 31st of March, 1881, the executing court made a decree for Rs. 5,615-14-10 in his favour, being mesne profits for 1879-80, and costs. In execution of this decree, on the 20th of August 1881, the mortgaged property was sold and purchased by the decree-holder (mortgagee). The sale was duly confirmed, certain objections taken by the judgment-debtors, thereto being disallowed and a certificate of sale was issued to Debi Das on the 11th of February, 1882, Zahur Ahmad's sons sold part of the property

to Parbhu Dayal who joined his vendors and their sisters in suing for redemption of the mortgage of 1863 in February 1902. This suit was eventually dismissed on the ground of non-joinder of parties in 1905 (I. L. R., 27 All., 570). Thereupon Parbhu Dayal instituted the present suit on the 16th of January, 1906. The Subordinate Judge dismissed the suit. The plaintiff appealed.

Dr. *Satish Chandra Banerji* (with him *Babu Jogindro Nath Chaudhri*), for the appellant:—The decree of the 31st of March, 1881, was passed without jurisdiction and the sale held under it was therefore a nullity. Under section 583, Civil Procedure Code, the decree-holder was entitled to make an application for restitution, but not for anything that was not granted to him by the appellate decree. The executing court was not competent to add anything to the High Court decree. It could, only execute that decree. The mortgagee's claim for interest on the additional sum awarded to him had been disallowed. He had got the principal amount of the mortgage-money in his pocket and he was not entitled to any mesne profits. He was entitled only to what he had lost and the court had no jurisdiction to grant him any additional relief under section 583; *Kalka Singh v. Paras Ram* (1). *Ishri Prasad v. Ram Narain* (2). Restitution is for what a party has lost; *Dorasami Ayyar v. Annasami Ayyar* (3), and by no straining of language could it be said that *Debi Das* was entitled to the benefit of mesne profits under the decree passed in appeal. Unless a valid sale was established the mortgagee's possession would retain its original character and if the mortgagor's right was not affected by the sale he was not bound to have it formally set aside; *Moti Lal v. Karrabuddin* (4).

The mortgagee's conduct was tainted with fraud. He had taken an undue advantage of his position and had abstained from placing the full facts before the court. The purchase was not made in good faith. The mortgagee stood in a fiduciary relation to the mortgagor and it was his duty to speak; silence therefore amounted to fraud. The case of *Carew v. Johnston* (2 Sch. and Lef. 280) cited in *Nistarini Dassi v. Nundo Lal Bose* (5), was in point. The daughters of *Zahur Ahmad* in any case were

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(1) (1894) I. L. R., 22 Cal., 434, 439. (3) (1899) I. L. R., 23 Mad., 306, 310.

(2) (1902) 6 C. W. N., 672. (4) (1897) I. L. R., 25 Cal., 179, 180.

(5) (1899) I. L. R., 26 Cal., 891, 913.

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entitled to redeem, as their equity of redemption had never been sold; *Khizaraj Mal v. Daim* (1).

The Hon'ble Pandit *Sundar Lal* (with him Babu *Durga Charan Banerji*, Maulvi *Ghulam Muftaba* and Pandit *Mohan Lal Nehru*) for the respondents, distinguished the case in I. L. R., 22 Calcutta and contended that the additional amount allowed by the High Court was part of the mortgage money, and so long as it was not paid, the mortgagor's representatives were not entitled to possession of the mortgaged property. The mortgagee was therefore entitled to mesne profits and even if he obtained more than he was entitled to, it could not be said that the court acted without jurisdiction. The decree for mesne profits was obtained in open court after notice to the opposite party and the decree had become final. There was no fraud, and this decree could not be challenged after a quarter of a century. An examination of the plaintiff's sale-deeds showed that the shares of the daughters of *Zahur Ahmad* had not passed to him.

Dr. *Satish Chandra Banerji*, in reply, submitted that the principle of the ruling of the Privy Council in I. L. R., 22 Calcutta applied. There the executing court had placed an erroneous construction on the decree and held that it awarded something to the decree-holder which, properly understood, the decree did not award. Here also the decree of the High Court had been misunderstood and the executing court had given in the guise of mesne profits what the appellate court had refused as interest. In neither case had the executing court jurisdiction to add to the decree or make a new decree.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit for redemption of a mortgage, dated the 5th of February 1863, executed by one *Ram Bakhsh* in favour of one *Debi Das*, in respect of a 10 biswa share of the village *Lodhamai*. The mortgage was usufructuary, and it was provided in it that the profits were to be appropriated in lieu of interest, except a sum of Rs. 100 per annum, which was to be paid to the mortgagor. There were other provisions in the mortgage which for the purposes of this appeal it is unnecessary to refer to. In 1866 *Ram Bakhsh* sold 7 biswas out of the 10 biswas, that is, his

(1) (1904) I. L. R., 32 Calc., 296, 312, 316.

equity of redemption in the 7 biswas, to Abdul Rashid, Abdul Aziz and Mahmud Khan, defendants, sons of Zahur Ahmad Khan. In 1871 Zahur Ahmad Khan purchased at auction 2 biswas 19 biswansis 10 kachwansis out of the remainder of the mortgaged property. The remaining 10 kachwansis were purchased by Debi Das, who thus broke up the integrity of the mortgage. Zahur Ahmad Khan died in 1873 leaving him surviving the three sons above mentioned, five daughters, and two widows. In 1877 the three sons, under the guardianship of their mother, brought a suit for redemption of the mortgage of 1863 against Debi Das. On the 25th of May, 1878, the suit was decreed by the Court of first instance, the decree providing that the plaintiffs should pay to the mortgagee Rs. 6,967-1-4. On the 17th of July, 1878, the plaintiffs to that suit obtained possession of the mortgaged property in execution of that decree. Debi Das preferred an appeal to this court, and on the 2nd of June, 1879, this Court held that the mortgagee was entitled to a further sum amounting to nearly Rs. 9,000 and varied the decree of the court below by directing payment of the above sum in addition to the amount which the decree of the court of first instance had ordered the plaintiffs to pay. The additional sum so awarded was not paid by the plaintiffs and the result was that the decree became infructuous. Debi Das thereupon applied for and resumed possession on the 1st of April, 1880. He then asked the Court to grant him mesne profits for the period during which he was out of possession by reason of the plaintiff's having executed the decree obtained by them from the court of first instance. On the 13th of March, 1881, the court awarded to him Rs. 5,615-14-10 as mesne profits. For the realisation of this amount Debi Das caused the equity of redemption of the plaintiffs to that suit to be sold by auction on the 20th of August, 1881, and himself purchased it. In 1886, he mortgaged the 10 biswas to Sagar Mal and Jamna Das, who obtained a decree on their mortgage and caused 9 biswas 10 biswansis 10 kachwansis to be sold by auction. This was purchased by Dilsukh Rai and Ali Ahmad, defendants, first party. On the 7th of December, 1901, the three sons of Zahur Ahmad Khan sold 4 biswas of the property to the present plaintiff Parbhu Dayal. In 1902, Parbhu Dayal, his vendors,

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namely, the three sons of Zahur Ahmad Khan, and the daughters of Zahur Ahmad Khan brought a suit to redeem the mortgage of 1863. That suit was dismissed by this Court in 1905 on the ground, among others, that the heirs of Debi Das had not been joined as parties to the suit. On the 7th of September, 1905, Abdul Rashid, Abdul Aziz and Mahmud Khan sold to Parbhu Dayal a further one biswa share and on the 16th of January, 1909, Parbhu Dayal instituted the suit out of which this appeal has arisen for redemption of the mortgage of 1863.

The court below has dismissed the suit on the ground that the equity of redemption of the mortgagors had validly passed to the mortgagee Debi Das under the auction sale which took place in 1881 and that therefore the plaintiff acquired no right under his purchase to redeem the mortgage.

The plaintiff has preferred this appeal. It is not denied that if the equity of redemption was acquired by the mortgagee the plaintiff's suit must fail, but it is urged by the learned advocate for the appellant that the Court had no jurisdiction to award mesne profits; that the auction sale held in 1881 for the realisation of the mesne profits so awarded was a nullity, and that the equity of redemption of the plaintiff's vendors did not pass to the mortgagee, Debi Das. This contention is based on the argument that the decree of the High Court varying that of the court below did not direct the award of mesne profits. Reliance is placed on the terms of section 583 of the Code of Civil Procedure, 1882. We are unable to accede to the contention of the learned advocate. In our opinion a decree of reversal by an appellate court contains, by necessary implication, a direction to the court below to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the court of first instance. As observed by SIR BARNES PEACOCK, C. J. in *Hurro Chunder Roy Chowdhry v. Shoorodhonce Debia* (1), "it is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of appeal does not necessarily enter into the question whether a decree it is about to reverse has been executed or not."

A similar view was held by the Madras High Court in *Dorasami Ayyar v. Annasami Ayyar* (1) and by this High Court in the *Collector of Meerut v. Kulka Prasad* (2). The absence of a specific direction in the decree of the High Court for payment of mesne profits did not deprive the court, which made the order of the 31st of March, 1881, of its jurisdiction to award mesne profits by way of restitution. It is clear that the court which could enforce the liability of the defeated plaintiffs to make restitution was the court of first instance. That court had jurisdiction not only to restore to the mortgagee the possession which he had lost, but all other benefits of which he had been deprived. As we have stated above, the decree of the High Court awarded to the mortgagee a further sum in addition to that awarded by the court of first instance and the effect of the non-payment of this additional sum was that the suit stood dismissed. The mortgagee contended that under the terms of the mortgage he had the right to continue in possession and to receive the rents and profits so long as any amount remained due to him under the mortgage and was therefore entitled to the rents and profits which he did not obtain during the period of his dispossession. The only Court which could determine the question thus raised, and had jurisdiction to decide that question, was the court of the Subordinate Judge. It had jurisdiction to decide whether mesne profits should or should not be awarded. Whether its decision was correct or erroneous is immaterial, as the court had jurisdiction to decide rightly and to decide wrongly. Even if it be assumed that it erred in awarding mesne profits, it cannot be said that it acted without jurisdiction. Dr. *Satish Chandra Banerji*, the learned advocate for the appellant, strenuously relied on the ruling of their Lordships of the Privy Council in *Kalka Singh v. Paras Ram* (3). That ruling is in our judgment wholly inapplicable to the present case. There a court had made a decree for possession but not for mesne profits. The court executing the decree, in spite of the absence of a direction in the decree itself as to the payment of mesne profits, awarded such profits to the decree-holder and sold the judgment-debtor's property for the realisation thereof. It was held that the order of the court, executing the decree for the award of mesne

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(1) (1899) I. L. R., 23 Mad., 306. (2) (1906) I. L. R., 28 All., 665.

(3) (1894) I. L. R., 22 Cal., 454.

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profits, was without jurisdiction. That is not the case here. As we have pointed out above, the court of first instance was competent to determine the question of restitution. It had therefore jurisdiction to award mesne profits by way of restitution and it cannot be rightly contended that in so awarding it, it acted without jurisdiction. We are therefore of opinion that the sale which took place in execution of the decree for mesne profits so far back as the year 1881 was a valid sale and conveyed to the purchaser the equity of redemption of the vendors of the plaintiff.

The next contention on behalf of the appellant is that the order of the 31st of March 1881 was procured by the mortgagee by fraud. We are not satisfied that any fraud was perpetrated. It is true that the mortgagee had withdrawn from court the amount awarded to him under the decree of the court of first instance but that circumstance did not in any way affect his right to claim mesne profits, upon the decree of the court of first instance being varied and superseded by the decree of the lower appellate court. There was nothing which he concealed from the court, and we fail to see in what respect it can be said that he acted fraudulently to the injury of the interests of the mortgagors.

The third contention on behalf of the appellant is that the court below ought not to have dismissed the suit totally, and that the whole of the equity of redemption had not passed to the mortgagee Debi Das. It is said that after the death of Zahur Ahmad Khan a portion of his interest in the mortgaged property was inherited by his five daughters, two of whom died in 1897. The brothers of those daughters, it is urged, inherited a portion of their share, and as this share was acquired after the auction sale, and as the sisters were no parties to the suit in which mesne profits were awarded, the share of the sisters, inherited by the plaintiff's vendors, was saved to them and as purchaser of such share the plaintiff is entitled to claim redemption. As we have already stated, Abdul Rashid, Abdul Aziz and Mahmud Khan sold 4 biswas to the plaintiff on the 7th of December, 1901. The sale-deed distinctly refers to the 4 biswas as being part of the 7 biswas mentioned in the *khewat* as *khata* No. 1. The 7 biswas share was purchased by Abdul Rashid, Abdul Aziz and Mahmud Khan from the original mortgagor Ram Bakhsh in 1866.

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Therefore, so far as the 4 biswas share conveyed by the sale-dee of the 7th of December, 1901, is concerned, it was the property which was owned by the three brothers before the auction sale of 1881. As for the 1 biswa sold to the plaintiff under the sale-deed of the 7th of July, 1905, it is described in the sale-deed as being part of *khata*s Nos. 2 and 3. The *khata* No. 2, consists of 1 biswa 9 biswansis 15 kachwansis, which, it is admitted in the plaint, was given by Zahur Ahmad Khan in his life-time to his three sons. The third *khata*, no doubt, comprises property left by Zahur Ahmad at his death and inherited by his heirs, but as only 1 biswa out of *khata*s 2 and 3 was sold to the plaintiff and the plaintiff's vendors owned a larger share than 1 biswa in those *khata*s in their own right, and not as heirs to their sisters, we see no reason to presume that they intended to include in the sale a part of the share inherited by them from their sisters. We are therefore not satisfied that the sale to the plaintiff comprised any part of the property which his vendors may have acquired by right of inheritance to their sisters.

The last contention on behalf of the appellant is, that he is also a lessee from the three sons of Zahur Ahmad Khan and as such is entitled to claim redemption. The nature of the so-called lease is set forth in paragraph 5 of the plaint. It is manifest that the lease has not come into force and that in reality what is called a lease is only an agreement to grant a lease, which would come into operation in the event of the lessors recovering possession of the property now in the hands of transferees from the mortgagee. By virtue of a transaction of this nature the plaintiff is not entitled to claim redemption.

For these reasons we agree with the court below in holding that the plaintiff's suit was untenable and accordingly dismiss the appeal with costs.

Appeal dismissed.