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February 7.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.  
MANOHAR LAL AND ANOTHER (DEFENDANTS) v. RAM BABU (PLAINTIFF)\*.

*Mortgage—Prior and subsequent mortgages—Suit by first mortgagee without impleading second—Decree and sale—Subsequent suit by second mortgagee against purchasers under decree in first suit—Plaintiff held bound to redeem prior mortgagee.*

The plaintiff brought his suit for sale of certain property in satisfaction of a mortgage of the year 1877, which was a renewal of a mortgage of 1875.

The defendants were purchasers at a sale in execution of a decree on a mortgage which bore a later date in 1875 than the plaintiff's first mortgage, but was a renewal of a previous mortgage of 1869. To the suit in which this decree had been passed the plaintiff had not been made a party. The defendants had been in possession of the property so purchased by them for some twenty years.

•Held that the plaintiff had no absolute right to bring the property to sale in satisfaction of his mortgage subject to the mortgage of 1869, and that in the circumstances he ought to redeem that mortgage before bringing the property to sale. *Mata Din Kasodhan v. Kazim Husain* (1), *Ram Shankar Lal v. Ganesh Prasad* (2), *Har Prasad v. Bhagwan Das* (3), *Kanti Ram v. Kutubuddin Mahomed* (4), *Baldeo Prasad v. Uman Shankar* (5), *Muti-ullah Khan v. Banwari Lal* (6), *Kanha Lal v. Hulas Singh* (7), *Cangayam Venkataramana Iyer v. Henry James Colley Gompertz* (8) and *Har Pershad Lal v. Dalmarlan Singh* (9) referred to. *Debendra Narain Roy v. Ramtaran Banerjee* (10) discussed and doubted.

THE facts of this case are fully stated in the judgement of the Court.

Dr. *Satish Chandra Banerji*, for the appellants :

Secondary evidence of the mortgage of the 5th December, 1869, should have been admitted. The mortgage is recited in the later deed of the 8th November, 1875; presumably it was returned to the mortgagor. In any case the admission of the mortgagor is binding on the plaintiff, who is a subsequent transferee from him, and the certified copy of the deed produced by us was wrongly rejected by the court below.

The Hon'ble Pandit *Sundar Lal* (with him Mr. *M. L. Agarwala*), for the respondent :

\* First Appeal No. 261 of 1910 from a decree of Banke Bihari Lal, Subordinate Judge of Aligarh, dated the 23rd of January, 1910.

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| (1) (1891) I. L. R., 13 All., 432. | (6) (1910) I. L. R., 32 All., 138.   |
| (2) (1907) I. L. R., 29 All., 385. | (7) (1911) 9 A. L. J., 29.           |
| (3) (1882) I. L. R., 4 All., 196.  | (8) (1908) I. L. R., 31 Mad., 425.   |
| (4) (1894) I. L. R., 22 Calc., 33. | (9) (1905) I. L. R., 32 Calc., 891.  |
| (5) (1907) I. L. R., 32 All., 10.  | (10) (1903) I. L. R., 30 Calc., 599. |

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The defendants laid no foundation for the admission of secondary evidence; they adduced no evidence to prove that the original deed was either returned to the mortgagor or had been lost.

The court ruled that the certified copy of the mortgage-deed was admissible in evidence.

Dr. *Sitish Chanatra Banerji*, for the appellants, next contended that the decree should be one for redemption of the prior mortgage in the first instance and then for sale, and not one for sale subject to the prior mortgage. The uniform practice in the Allahabad High Court had been to direct redemption of a prior mortgage when the same was set up as a shield, and this wholly irrespective of the doctrine of *Matadin Kasodhan's case* (1), *Har Prasad v. Bhagwan Das* (2), *Mamraj v. Ramji Lal* (3), *Baldeo Prasad v. Uman Shankar* (4), *Mati-ullah Khan v. Banwari Lal* (5), *Kanhai Lal v. Hulas Singh* (6).

There was a distinction to be made between the position of a prior mortgagee and that of a purchaser in execution of a decree on the prior mortgage. The rights of the mortgagor and the first mortgagee are now vested in the purchaser, the whole property in fact, with the exception of the fragment of the equity of redemption transferred to the second mortgagee by the mortgagor. This has not been yet foreclosed, because the second mortgagee was no party to the suit on the first mortgage. Had he been duly impleaded in that suit, all he could have claimed was a right to redeem the first mortgage. His position did not improve because he was left out. He can claim no higher equity now nor oust the purchaser from possession without paying him up; *Kanti Ram v. Kumbuddin* (7), *Ram Narain v. Bandi Pershad* (8), *Har Pershad Lal v. Dalwardan Singh* (9), *Cangayam Venkataramana Iyer v. Gompertz* (10), *Dhondo Balkrishna v. Raoji Dadu* (11), *Debendra Narain Roy v. Runtaran Banerjee* (12), *Umesh Sirkar v. Zukur Fatima* (13), *Muhammad Usan Rowthan v. Abdulla* (14), *Chait Narain v. Gunga Pershad* (15), Ghose on *Mortgage*, ed. 4, 620—2.

(1) (1891) I. L. R., 13 All., 432.

(2) (1882) I. L. R., 4 All., 196.

(3) (1909) 7 A. L. J. R., 15, 18.

(4) (1907) I. L. R., 32 All., 1.

(5) (1909) I. L. R., 32 All., 138.

(6) (1911) 9 A. L. J. R., 29.

(7) (1895) I. L. R., 22 Calc., 33, (45).

(8) (1904) I. L. R., 31 Calc., 737, (742).

(9) (1905) I. L. R., 32 Calc., 891.

(10) (1903) I. L. R., 31 Mad., 425.

(11) (1895) I. L. R., 20 Bom., 390.

(12) (1903) I. L. R., 30 Calc., 599.

(13) (1890) I. L. R., 18 Calc., 164.

(14) (1900) I. L. R., 24 Mad., 171.

(15) (1876) 25 W. R., 216.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

The law defines the rights respectively of the prior and puisne mortgagees. The latter has the privilege to redeem, but it is not a legal duty. Referred to section 74, Transfer of Property Act. The puisne mortgagee has also the right to sell the property mortgaged to him. It is not necessary that the prior mortgagee should be impleaded, but, if he is, then the subsequent mortgagee may sell subject to the first mortgage. If the latter wants to sell free from mortgage, then he must redeem. The nature of his right will depend upon the form of his suit or his prayer. According to section 67 of the Transfer of Property Act the ordinary right of a mortgagee is either to foreclose the property or to sell the property. The term 'property' means the *property mortgaged to the mortgagee*. It follows, therefore, that a subsequent mortgagee can sell what is mortgaged to him, that is, the equity of redemption, and leave the prior mortgage outstanding. His position would not be worse if he is not made a party. Where the puisne mortgagee is made a party to a prior mortgagee's suit, the object is to bind him by the decree which is passed. See 1 Daniell, *Chancery Practice*, 6th ed., 217. Fisher, *Law of Mortgage*, ed. 6., para. 1670.

Where the subsequent incumbrancer has been omitted from the suit by a prior mortgagee, the decree does not bind him. Hence, he may sell or he may redeem. In the first case he can sell such rights as he possesses; if he redeems he can sell the entire estate. But there is no case except the case of *Mata Din Kasodhan*, which would compel him to redeem. He may choose to sell subject to the first mortgage. The view of the Calcutta High Court favours this position; *Debendra Narain Roy v. Ramtaran Banerjee* (1). *Ram Narain Sahoo v. Bandi Pershad* (2) is distinguishable. The right to redeem is the right which a subsequent mortgagee has as against a prior mortgagee who has obtained a decree behind his back, but that does not do away with the right which is available against the mortgagor, viz., the right to sell the property. By compelling him to redeem only one side of the question is looked at and not the other, and a right is converted into a duty, which is contrary to principle. The latest case in Madras in which the view was

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(1) (1903) I. L. R., 30 Cal., 599, (605).

(2) (1904) I. L. R., 31 Cal., 737.

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adopted is *Malla Vittil Seelhi v. Kurambath* (1). Reference was also made to *Ram Shankar Lal v. Ganesh Prasad* (2).

Dr. *Satish Chandra Banerji*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiff sought to realize the amount of a mortgage, dated the 4th of June, 1877, by sale of the mortgaged property. The plaintiff alleged that the mortgage was in renewal of another mortgage of the 12th of June, 1875, and he claimed priority for his mortgage as of that date. He further set forth in his plaint that the ancestor of the defendants first party had made a mortgage of the 8th of November, 1875, in favour of the ancestor of the defendants 9—11, that a suit had been instituted on foot of this mortgage of the 8th of November, 1875, and the property sold, but he submitted that this mortgage of the 8th of November, 1875, must under the circumstances, be deemed to be puisne to his mortgage, but that if any part of the defendant's mortgage should be held to have priority over his mortgage, then he asked that the property might be sold subject to the debt that had priority.

The defendants 9—11 pleaded, amongst other things, that the mortgage of the 8th of November, 1875, was a renewal of a still earlier mortgage bond of the 5th of December, 1869, and that consequently they had priority, and that the plaintiff could not have a sale of the mortgaged property without redeeming them.

It appears from the evidence that the defendants 9—11 brought a suit on foot of the mortgage of the 8th of November, 1875, in the year 1887. A decree was obtained upon foot of that mortgage, the property was sold and purchased by the defendant, 3rd party, and they have been in possession ever since 1892 or thereabouts. It appears, however, that the mortgagors of the mortgage of the 4th of June, 1877, were not parties to the suit. The present suit was instituted in the year 1909. The original amount secured was Rs. 350, the interest being 13 annas per cent. per mensem compound interest. The amount due on this bond at the date of the institution of this suit was Rs. 7,000, but the plaintiff only claimed Rs. 6,000, because the property was not value for the full amount. The learned Subordinate Judge gave the plaintiff a decree for so much of the mortgage debt and interest as was due under the

(1) (1911) M. L. J., 213.

(2) (1907) I. L. R., 29 All., 385, (397, 405).

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mortgage of the 12th of June, 1875. He disallowed the rest of the claim as being puisne to the plaintiff's mortgage of the 8th of November, 1875, and the plaintiff waived his claim thereto. The learned Subordinate Judge also disallowed the defendants' pleas wherein they sought to take advantage of the earlier mortgage of the 5th of December, 1869, on the ground that this bond of the 5th of December, 1869, was not produced and that secondary evidence to prove it was not admissible.

In our opinion secondary evidence was admissible, and we have allowed an application of the appellant to admit a copy. Under ordinary circumstances the bond of the 5th of December, 1869, might have been given back. It was fully recited in the later mortgage of the 8th of November, 1875.

The position, therefore, necessary for the disposal of the appeal may be shortly stated as follows:—The answering defendants are and have been in possession of the property since about year 1892. They must be deemed to have had a mortgage in their favour, which is prior to the mortgage of the plaintiff. On the other hand the plaintiff has a puisne incumbrance, and his rights under that incumbrance have never been foreclosed by the prior incumbrancers. The answering defendants contend that having a prior incumbrance and being in possession of the mortgaged property, their possession cannot be disturbed unless the plaintiff pays the amount due upon their prior incumbrance. On the other hand the plaintiff contends that he has the right to realize his security and that he is accordingly entitled to have the property sold subject to the mortgage of the 5th of December, 1869, and that the decree in the suit brought on foot of the mortgage of the 8th of November, 1875, is an absolute nullity against him, because he was not made a party thereto. We think that the plaintiff ought to be ordered to redeem the mortgage of the 5th of December, 1869. The present suit is brought on foot of a mortgage of the 4th of June, 1877, which is, on the face of it, puisne to the mortgage of the 8th of November, 1875, and the plaintiff has to ask us as a court of equity to allow him priority as of the 12th of June, 1875. He comes to this Court seeking equity. Had the answering defendants made the plaintiff or his predecessor in title a party to the suit on foot of the mortgage of the 8th November, 1875, the sole right of the latter would have been to redeem

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the mortgage of the 5th of December, 1869. By allowing the plaintiff to redeem the mortgage of 1869 we are able now to place the plaintiff in exactly the same position as he would have been in if he had been made a party to that suit. If, in the present case, we were to direct that the property should be sold subject to the mortgage of 1869, the result would probably be that the appellants, who have been in undisputed possession ever since about the year 1892, would be put out of possession, and it is doubtful if they could ever bring a fresh suit against the plaintiff having regard to the law of limitation. There is no doubt that where a puisne incumbrancer is in a position to ignore the prior incumbrancer and does not make him a party to his suit, the puisne incumbrancer is entitled to realise his security, or, in other words, to have the property sold subject to the prior incumbrance. It was held in the case of *Mata Din Kasodhan v. Kazim Husain* (1) that the expression "property" in the Transfer of Property Act meant the actual property itself and did not include rights and interests in such property and that accordingly a puisne incumbrancer could never bring the property to sale without redeeming all prior incumbrances. This view was dissented from in the Full Bench case of *Ram Shankar Lal v. Ganesb Prasad* (2), and the question has been finally settled by order XXXIV, rule 1, of the Code of Civil Procedure, which expressly provides that a prior incumbrancer is not a necessary party to the suit. It is true that in the present case the plaintiff only claims to sell subject to the prior incumbrance, but he has made the prior mortgagees parties. He had to do so because they were in possession. In England it would seem to be the rule that where the prior mortgagee is made a party, the plaintiff (that is the mortgagor or the puisne incumbrancer) must be ready to redeem him. See Daniell's Chancery Practice, 7th ed., p. 217.

This would seem to have been the practice in this Court even before the case of *Mata Din Kasodhan v. Kazim Husain* was decided. See also *Har Prasad v. Bhagwan Das* (3). In the case of *Kanti Ram v. Kutubuddin Mahomed* (4) a Bench of the Calcutta High Court held that the puisne incumbrancer was entitled to have the property sold subject to the prior incumbrance even where the prior incumbrancer was a party. The attention of the Court was

(1) (1891) I. L. R., 18 All., 492.

(2) (1907) J. L. R., 29 All.,

(3) (1882) 17 L. R., 4 All., 196.

(4) (1895) I. L. R., 22 Cal., 33.

called to the case of *Har Prasad v. Bhagwan Das* and other rulings of the various High Courts. The learned Judges say, at p. 45 :—" It will be found upon examination of the facts of those cases that the first mortgagee, had subsequent to the second mortgage, purchased the equity of redemption of the mortgagor, and it was held that the second mortgagee was bound to redeem the earlier mortgage. In that state of facts we should be disposed to say that the second mortgagee is not entitled to bring to sale the mortgagor's interest, because it no longer exists in the mortgagor ; it has already passed into the hands of the first mortgagee."

In the present case the prior incumbrancers have acquired the equity of redemption by virtue of the proceedings in 1878 just as effectually as they would have done if they had purchased it by private treaty. See also *Baldeo Prasad v. Uman Shankar* (1), *Mati-ullah Khan v. Banwari Lal* (2) and *Kanhai Lal v. Hulas Singh* (3). The very question which arises in this case was decided in favour of the prior incumbrancer in the case of *Cangayam Venkataramana Iyer v. Henry James Colley Gompertz* (4).

The respondent contends that he has an absolute right to bring the property to sale subject to the prior incumbrances and that the decree and sale to which he was no party cannot take away that right. His learned advocate relies on the case of *Ramshankar Lal v. Ganesh Prasad*. We do not think that this case applies to the facts of the present case. There the question was whether, having regard to the decision in *Mata Din Kasodhan v. Kazim Husain*, a sub-mortgage (a mortgage of mortgagee rights) was valid. It was held in the affirmative, and the decision is no longer of much importance having regard to the order XXXIV, rule 1 of the Code of Civil Procedure, to which we have already referred. It was not necessary to decide, nor did the court decide, that in a suit brought by a puisne incumbrancer, to which a prior mortgagee who was also in possession of the property after acquiring the equity of redemption the court was bound to make a decree for sale of the mortgaged property subject to the prior mortgage and could not direct the puisne incumbrancer to redeem the earlier mortgage.

(1) (1910) L. L. R., 32 All., 10.

(3) (1911) 9 A. L. J., 29.

(2) (1910) L. L. R., 32 All., 138.

(4) (1908) L. L. R., 31 Mad., 426.

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The judgement in the case of *Debendra Narain Roy v. Ram-taran Banerjee* (1) no doubt supports the contention of respondent. With all respect we cannot agree with the learned Judges if in that case they intended to decide that in all cases, irrespective of whether the prior incumbrancer is or is not a party and irrespective of whether the prior incumbrancer has or has not obtained possession of the mortgaged property by acquiring the equity of redemption, the court is bound to grant a decree at the suit of the puisne incumbrancer for the sale of the property subject to the prior incumbrance.

A somewhat contrary view seems to have been taken by two learned Judges of the same court in *Har Pershad Lal v. Dalmardan Singh* (2).

It is unnecessary to decide in the present appeal that in all suits by a puisne incumbrancer to which the prior incumbrancer is a party, the court is bound to direct redemption of the prior incumbrance, but we think that, as a general rule, if the prior incumbrancer is a party and so desires, it will be convenient to direct redemption.

Such a course will avoid multiplicity of suits and will give the puisne incumbrancer what he is equitably entitled to. In a mortgage suit the court ought to have the fullest power to direct what is right and equitable having regard to the circumstances of the case and the interests of all the parties to the suit in the property. In the present case the appellants have a strong claim to defend a possession extending over a period of nearly 20 years by insisting that the plaintiff should be directed to redeem them by payment of the amount due on foot of the mortgage of 1869.

Before passing a final decree it will be necessary to refer issues to the lower appellate court. We accordingly refer the following issues:—(1) At what date did the appellants or their predecessors in title obtain possession of the property? (2) What is the amount due on foot of the mortgage of the 6th of December, 1869, up to the date of obtaining such possession?

The court will take such additional evidence as the parties may tender. On receipt of the findings the usual ten days will be allowed for filing objections.

*Issues remitted.*

(1) (1903) I. L. R., 30 Cal., 599.

(2) (1905) I. L. R., 32 Cal., 89.