

No. XV of 1877 came into force, and therefore the plaintiff was not entitled to the benefit of section 31 of Act No. IX of 1908.

Babu *Jogindro Nath Chaudhri*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

BANERJI and TUDBALL, JJ.:—This appeal arises out of a suit for sale upon a mortgage of the 26th of January, 1850. The question to be decided is whether the suit is barred by limitation. The mortgage deed provided that the mortgagee was to take possession and appropriate the rents and profits in lieu of interest. It has been found by the court below that in pursuance of this clause in the mortgage deed the mortgagee was in possession till the year 1889, when he was dispossessed. It is argued that the claim had become time-barred before Act XV of 1877 came into operation, and, therefore, the plaintiff was not entitled to the benefit of section 31 of the Limitation Act of 1908. Section 21 of Act IX of 1871 gave a fresh start for the computation of limitation from the date of payment of interest as such. The realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and, therefore, under section 21 of Act IX of 1871, the plaintiff was entitled to compute limitation from the year 1889, up to which year he has been found to have received interest. Before that date Act XV of 1877 had come into operation. Therefore in accordance with the provisions of section 31 of Act IX of 1908 the plaintiff was entitled to bring his suit within two years of the date on which that Act came into force. The suit having been brought on the 10th January, 1910, was well within time. The only point raised therefore fails. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

DHANPAL SINGH (PLAINTIFF) v. BUDH SINGH AND ANOTHER (DEFENDANTS)*
Act No. XVI of 1908 (Indian Registration Act), section 50—Registered and unregistered documents—Priority—Effect on rights of prior unregistered mortgagee of sale in execution of a decree on a subsequent registered mortgage.

When property is sold in execution of a decree on a subsequent registered mortgage taking priority over a prior unregistered mortgage such sale does not have the effect of invalidating the prior mortgage or of extinguishing altogether

* Second Appeal No. 637 of 1912 from a decree of H. W. Lyle, District Judge of Agra, dated the 22nd of February, 1912, reversing a decree of Mubarak Husain, Subordinate Judge of Agra, dated the 18th of July, 1911.

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the rights of the mortgagee thereunder, but his debt would still be recoverable from the surplus, if any, left after the satisfaction of the registered mortgage.

THIS was a suit by the holder of an unregistered mortgage for Rs. 95 executed on the 15th of December, 1887, by Budh Singh in favour of the defendants' predecessor in title. There had been another registered mortgage over the same property executed on the 5th of December, 1892, in favour of Sah Tejpal, in pursuance of which the mortgagee had caused the mortgaged property to be sold and had purchased it himself. Tejpal resisted the suit on the ground of such purchase. The court of first instance gave the plaintiff a decree conditional on his paying to Tejpal half the amount due to him under the decree in his favour. On appeal, however, the District Judge dismissed the suit in its entirety, holding that the plaintiff's rights under his unregistered mortgage were altogether extinguished by the proceedings in respect of Tejpal's registered mortgage. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* and *Munshi Benode Behari*, for the appellants.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

GRIFFIN and CHAMIER, JJ.:—The plaintiff in the suit sued to recover principal and interest on an unregistered mortgage deed, dated the 15th of December, 1887, to secure an advance of Rs. 95. The mortgage was executed by Budh Singh, defendant No. 1, in favour of the plaintiff's predecessor in title. Defendant No. 2 Sah Tejpal held a registered mortgage, also for Rs. 95, executed on the 5th of December, 1892, hypothecating the same property. Tejpal brought a suit on his mortgage and obtained a decree, in execution of which he purchased the property himself. The present suit was resisted by Tejpal on the ground that he was purchaser in execution of a decree obtained on a document which by reason of registration took effect against the unregistered document held by the plaintiff. The court of first instance gave the plaintiff a decree conditional on his paying half the amount due to Tejpal defendant No. 2, under the mortgage deed in the latter's favour. Tejpal defendant No 2 appealed to the lower appellate court. In his memorandum of appeal various grounds were taken. But the lower appellate court has decided the appeal on one ground only. Tejpal contended that as he was a purchaser at an auction sale held in execution of a decree on a

mortgage having priority over the mortgage in favour of the plaintiff the rights of the plaintiff were altogether extinguished. The lower appellate court upheld this contention and without considering the other pleas raised in the appeal decreed the appeal and dismissed the plaintiff's suit *in toto*. In second appeal it is contended that the view taken by the lower appellate court is wrong. Section 50 of the Registration Act provides that a registered document of the kind mentioned in clauses (a), (b), (c) and (d) of section 17 and clauses (a) and (b) of section 18 shall, if duly registered, take effect as regards the property comprised therein against an unregistered document relating to the same property. The defendant Tejpal relies on his purchase in execution of a decree obtained by him on a registered mortgage. What he purchased at the auction sale was the right, title and interest of his mortgagor. The mortgage held by the plaintiff, although not created by a registered document, was not invalid merely by reason of the document not being registered. If a valid mortgage was created by that document the debt secured was recoverable from the surplus, if any, left after the satisfaction of the registered mortgage held by Tejpal. As the only point decided by the lower appellate court was that the rights of the plaintiff were altogether extinguished, and as we are unable to agree with that view, we must allow this appeal, set aside the decree of the lower appellate court and remand the case to that court for decision of other questions raised in the appeal before that court.

Cost of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

PRIVY COUNCIL.

BASANT SINGH (DEFENDANT) v. MAHABIR PRASAD (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Vendor and purchaser—Sale to raise funds for litigation—Transfer whilst vendor was out of possession—Agreement depending on success of litigation—Transfer of undivided share in joint ancestral property—Interest in property giving right to sue—Vendee and provider of funds made co-plaintiffs.

The original plaintiffs in the two suits out of which these appeals arose were, in one suit the sons, and in the other the grandson of the heads and

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*Present:—Lord ATKINSON, Lord MOULTON, Sir JOHN EDGE and Mr. ANNER ALL.