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ANANT DAS v. UDAI BHAN PARGAS.

to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

In explanation (1) "former suit" is defined as denoting a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto. It cannot for one moment be contended that the decree in the suit in which both Sundar Das and Anant Das were defendants has not now become final as against Anant Das. Beyond all question the issue as to whether the plaintiff was or was not the *mahant* was decided in that suit and we are now called upon to decide the same issue in the present appeal. The result might be that if we were now to hear the appeal, there would be one binding decree declaring that Udai Bhan was the *mahant*, and another equally binding decree declaring that he was not, both decrees being in suits to which Anant Das was a party. It seems to us that it was to prevent anomalies of this description (amongst other reasons) that section 11 was enacted. No doubt it is somewhat unfortunate in the present case that the appellant is unable to have the question decided by this Court by reason merely of the fact that he did not appeal against the decree in the other suit. This view of the rule of *res judicata* was taken in the Full Bench case of *Zaharia* v. *Debia* (1), a decision which is of course binding on us.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

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February, 7.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

KUNWAR SEN AND OTHERS (DEFENDANTS) *v.* JWALA PRASAD AND OTHERS (PLAINTIFFS).*

Act No. XIX of 1873 (*North-Western Provinces and Oudh Land Revenue Act*), *sections* 146, 148 *and* 167—"*Proprietor*"—*Mortgage by* muafidar—*Sale of mahal for default in payment of Government revenue—Rights of purchaser and mortgagees of the* muafi.

Where certain *muafidars*, whose rights as such accrued before the year 1870, and were not shown to have been created by the zamindars of the *mahal* in which the *muafi* land in question was situate, executed a usufructuary mortgage of such land, and thereafter the *mahal* was sold for default in

* Second Appeal No. 152 of 1912 from a decree of H. Dupernex, District Judge of Farrukhabad, dated the 14th of December, 1911, reversing a decree of Gauri Shankar, Subordinate Judge of Fatehgarh, dated the 16th of May, 1911.

(1) (1910) I. L. R., 33 All, 5.1.

payment of Government revenue, it was *held* that the rights of the mortgagees were not extinguished in favour of the purchaser.

KUNWAR SEN v. JWALA PRASAD.

THE facts of this case were as follows:—

The plaintiffs brought a suit for the recovery of money or for possession on two mortgages in respect of land belonging to defendants 1 to 3. The *mahal* in which the land in question was situate was sold for arrears of revenue on the 24th of December, 1892, and purchased by one Jagan Bihari Lal, who again sold all his rights in the property to one Tara Chand, who was represented by defendants 4 to 6. These defendants contested the suit of the plaintiffs on the ground that they were the exclusive owners of the property having derived their title from Jagan Bihari Lal, to whom the whole *mahal* was sold at auction in default of arrears of revenue, and that even if defendants 1 to 3 (mortgagors) and the plaintiffs had any right as co-sharers, their right was extinguished after the sale of the property, in view of the provisions of section 167 of Act XIX of 1873. The first court, relying upon sections 146 and 148 of Act XIX of 1873, held that the plaintiffs were entitled to a decree for recovery of possession of the land in dispute. The lower appellate Court, however, found that the land in dispute was really *nankar* land and that no exproprietary tenancy had been created so far as the occupiers of the *nankar* land were concerned, and held that the plaintiffs' rights in the land were in no way affected by the sale of the *mahal* and gave the plaintiffs a decree for sale of the mortgaged property. The defendants appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Munshi *Gulzari Lal*), for the appellants:—

As the entire proprietary rights in the village were sold the mortgage in suit was extinguished and could not be enforced. The land in dispute is described in the wajib-ul-arz as being *sir bila lagan bataur malikana wa bila mundarja khewat*. The word 'proprietor' used in section 146 of Act XIX of 1873 was not used in any restrictive sense, and under the provisions of that section all proprietors and the entire *mahal* were liable for the revenue for the time being assessed on the *mahal*. And the entire *mahal* having been sold in default of arrears of revenue the rights of the mortgagees came to an end and the first court was right in dismissing the plaintiffs' claim in view of the provisions of section 167 of Act XIX of 1873.

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Dr. *Satish Chandra Banerji*, for the respondents, was not called upon.

KNOX and MUHAMMAD RAFIQ, JJ.:—The plaintiffs to the suit out of which this second appeal has arisen describe themselves as mortgagees from certain persons whom they have arrayed as defendants 1 to 3. It appears that the *mahal* in which the land in dispute is situate was sold for arrears of revenue which were due from the *mahal*. On the 24th of December, 1892, the *mahal* was sold at a revenue sale and purchased by one Jagan Bihari Lal. Jagan Bihari Lal in turn sold all the rights he had purchased to one Tara Chand and defendants 4 to 6 are the representatives in interest of Tara Chand. The mortgagees are now seeking to enforce their rights and ask that the mortgage money may be awarded to them by sale of the mortgaged property. The suit was defended only by defendants 4 to 6. The contention is that as the whole of the *mahal*, including the area in dispute, was sold to Jagan Bihari Lal, even if defendants 1 to 3 and the plaintiffs had any right as co-sharers, that right became extinct under section 167 of Act XIX of 1873. The land in dispute, they say, though known as grove land, is not actually a grove, but has been actually under cultivation from a long time prior to the execution of the mortgage set up by the plaintiffs. The Subordinate Judge of Farrukhabad, before whom the suit came in the first instance, relying upon sections 146 and 148 of Act No. XIX of 1873, held that the plaintiffs might be granted a decree for recovery of possession of the land in dispute. In appeal the learned Judge found that the land in dispute was really *nankar* land and no exproprietary tenancy had been created so far as the occupiers of the *nankar* land were concerned. He further held that their rights in the land were in no way affected by the sale of the zamindari. He therefore decreed the suit, against the first three defendants, for recovery of possession of the land in suit by the plaintiffs as usufructuary mortgagees of these defendants' interests as exproprietary tenants of the land in suit, for Rs. 800-0-0. But he dismissed the rest of the suit. Defendants 4 to 6 have appealed to this Court and they again contend that as the entire proprietary rights in the village Neknampur were sold, the mortgage in suit was extinguished and could not be enforced.

Apparently the confusion into which the Subordinate Judge fell arose from the words in which the land in dispute is described in the wajib-ul-arz at the settlement of 1870. There the land is set out as being *sir, bila lagani bataur malikana wa bila mundarja khewat,* and it has been strongly argued before us that the terms used in sections 146 and 148 of Act XIX of 1873 justify the contention. It is true that in section 146 it is said that in the case of every *mahal* the entire *mahal* and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the *mahal,* and that section 148 provides that any sum not so paid becomes thereupon an arrear of revenue and the persons responsible for it become defaulters. We are also referred to section 53 of the same Act. The learned counsel was asked whether he could produce any precedent in support of his contention that persons in a *mahal* who are generally known by the term *muafidars* and are, as in this case, persons who are not entered as payers of revenue to the Government for the time being, are, in the event of the *mahal* falling into arrears of payment of revenue, responsible for payment under section 146 and their rights, if the *mahal* is brought to sale, extinguished in favour of the seller. The rights of the mortgagors in the present case were rights which came into existence before the settlement of 1870. It is not shown, and it is in the highest degree improbable, that they were rights created by the zamindars who were responsible for the arrears under which the *mahal* in which the property in dispute was situate was brought to sale. In our opinion the word 'proprietor' used in sections 146 and 148 refers only to those who in the wajib-ul-arz are set out as being the persons on whom the revenue has been at the time of settlement assessed jointly or severally. The wajib-ul-arz of 1870 shows no such payment of revenue by the mortgagors in the present case. The contention raised in this appeal is in our opinion without force, and the view taken by the learned Judge is the correct view. It is not for us in the present case to say what precise position the mortgagee held in the *mahal.* All that we have to decide is what rights were sold in default of arrears of revenue. The appeal fails and is dismissed with costs.

Appeal dismissed.