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then alone would have jurisdiction to execute the decree and put the property to sale. In this view, it is unnecessary to go into any other point in the appeal. We allow the appeal, set aside the sale and direct the record to be returned to the court below with instructions to proceed with the execution of the decree, according to law. The appellants will have her costs of the appeal.

Appeal allowed.

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November, 21.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

NARSINGH SINGH AND OTHERS (DEFENDANTS) v. ACHHAIBAR SINGH AND OTHERS (PLAINTIFFS).*

Mortgage—Purchase by mortgagees of part of mortgaged property—Tender of proportionate part of mortgage money by purchasers of the residue—Tender refused on ground of subsequent mortgages affecting the property—Suit for redemption—Form of decree.

Tender of payment under section 83 of the Transfer of Property Act was made by the purchasers of part of the property comprised in a mortgage (the rest of the property having been purchased by the mortgagees themselves) who paid into court what they believed to be the proportionate amount due on the share purchased by them and within the period limited by the mortgage-deed. This tender was, however, refused upon the ground that there were two subsidiary mortgages affecting the property under which further sums were due. The mortgagors thereupon brought a suit for redemption expressing their readiness to pay what might be found by the court to be the proper proportionate amount due by them in respect of the property which they had purchased.

Held, on the finding that the plaintiffs when they made their original tender were unaware of the existence of the two subsidiary bonds, that the court below was right in giving a decree for redemption on payment of the amount due under the three mortgages in respect of the share purchased by the plaintiffs and for possession at the corresponding period of the following year.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are set forth in the judgement under appeal, which was as follows:—

“The facts out of which this appeal arises are as follows: The predecessors in title of the plaintiffs respondents executed a usufructuary mortgage in favour of the predecessors of the defendants appellants, dated the 19th of May, 1852, of a one anna four pie share in mauza Bisapur for Rs. 499 ‘with *sir*, *khudkasht* lands and *sair* items and all zamindari rights and cesses.’ The mortgage was redeemable on payment of the mortgage money in the

*Appeal No 117 of 1913 under section 10 of the Letters Patent.

month of Jeth of any year. The defendants' predecessors subsequently in 1876 purchased a one anna share in the village, so that the integrity of the mortgage was broken up, and the plaintiffs claimed to be entitled to redeem the remaining four pie share on payment of the proportionate amount of the mortgage money, that is, Rs. 124-12-0. The plaintiff who had purchased the equity of redemption of the four pie share from the representatives of the original mortgagors, accordingly, on the 5th of June, 1909, deposited this sum in court under section 83 of the Transfer of Property Act, 1882, for payment to the defendants. The usual notice was issued to the defendants and the 11th of November, 1909, was fixed for disposal of the application. On that date the defendants did not appear and the plaintiffs' application was consequently struck off. They then brought this suit for redemption of the four pie share, alleging that their cause of action arose on the 11th of November, 1909, when their application under section 83 was struck off, owing to the non-appearance of the defendants, and they asked, on payment of Rs. 124-12-0, already in court, or such other sum as might be determined by the court, for possession of the four pie share mentioned above. They also prayed for a decree for Rs. 45, mesne profits for 1317, and half of 1318 Fasli, and for future mesne profits.

"The defendants resisted the suit on two main grounds. Firstly, that the original mortgagors or their representatives, borrowed further sums on the same security under two mortgages, dated respectively the 14th of August, 1869, and the 4th of January, 1871, so that the aggregate amount of the mortgage money secured by the one anna four pie share was Rs. 808. They allowed credit for Rs. 450 under the sale-deed by which they purchased the one anna share; and they claimed, therefore, that the amount due on the property in dispute was Rs. 358. As the plaintiffs had not tendered or paid the amount due under the mortgage at the proper time, the suit should be dismissed. Secondly, that they had built a *pucca* well on the mortgaged property and claimed that its costs Rs. 400 should be added to the sum payable by the plaintiffs.

"The learned Additional Munsif found that the two later bonds were 'tacking bonds' and that the aggregate sum borrowed, namely, Rs. 808 was charged on the entire one anna four

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pie share and he held only one-fourth of that sum was now due on the deed in suit, that is, Rs. 202, namely, Rs. 124-12-0, on the first mortgage, and Rs. 77 in all on the two later ones. With regard to the well, he found that it had been constructed on the defendants' *khudkash* land. The defendants, who had the benefit of it and in whose share on partition it would be allotted, were not entitled to recover anything on this account from the plaintiffs. He, accordingly, held that the plaintiffs were entitled to get possession in Jeth next, on payment to the defendants of Rs. 202, but that as the plaintiffs had failed to deposit the full amount, they must bear the costs of the suit and were not entitled to mesne profits.

“ On second appeal three grounds are taken :—(1) that the suit was premature ; (2) that the courts below were wrong in making a conditional decree in the terms employed ; and (3) that the plaintiffs were not entitled to redeem without paying for the construction of the well.

“ On the first point, it was argued that the suit was premature. Redemption could only be had on payment of the whole of the mortgage money in Jeth. The plaintiffs' tender, though made at the proper time, (*Note.*—5th June, 1909, was first Asarh, but the 4th June, the last day of Jeth, was a holiday owing to a lunar eclipse) was insufficient and was, therefore, not a valid tender, and the defendants were justified in ignoring it. Great stress was laid on the case of *Bansi v. Girdhar Lal* (1). The facts of that case, however, are very different. There the plaintiff claimed possession of land by ejectment of the defendants. The plaintiff had purchased the mortgagor's interests in the land at an auction in execution proceedings. The defendants were usufructuary mortgagees under a mortgage prior to the attachment under the decree under which the plaintiff had bought. The first court gave him a clear decree for possession. On appeal by the defendants, the lower appellate court varied this decree by making it a decree for possession on redemption of the usufructuary mortgage, that is, on condition of the plaintiffs' paying to the defendants Rs. 240 within fifteen days. The condition for redemption in the mortgage bond was the payment of Rs. 240 in the month of Jeth in any year. This Court held the plaintiff never tendered Rs. 240 in Jeth nor offered to

(1) Weekly Notes, 1894, p. 143.

redeem in Jeth, or at any other time. Never having made a tender or offer of payment in Jeth, it was, consequently, held that he had no cause of action at the date of suit, and that the suit was, therefore, premature. Now in this case the plaintiffs did make a tender of the amount they believed due under the mortgage of which they had purchased the equity of redemption. They were apparently ignorant of the fact that by two subsequent deeds further sums had been tacked on to the original mortgage debt. In any case the defendants claimed that the entire sums secured by the two later bonds were recoverable from the four pie share, and the court held that this was incorrect, and that only one-fourth of this sum was chargeable to that share. In this state of things a suit was inevitable, in order to ascertain what was the actual amount of the mortgage money. The plaintiffs made their tender, the defendants ignored it: and when, in consequence, the plaintiffs' application was struck off, they had, I think, a good cause of action, and they undertook to pay whatever sums the court should determine over and above the sums already deposited. The defendants admitted receipt of notice of plaintiffs' tender and also admitted that they did not appear. They then can hardly be heard to say that the plaintiffs showed no readiness to pay the mortgage money at the proper time, and so had no cause of action. The facts of this case are very similar to those in *Manorath Das v. Madho Das and others* (1), in which Lyle, J. took the same view.

"On the second point, I can not see what the defendants have to complain about. Under the mortgage, the mortgagees are entitled to be redeemed in Jeth. Under the decree of the court, their possession is maintained till Jeth and then if payment is made they must give up possession. The condition imposed by the court is for the benefit of the defendants.

"On the third point, it has been found as a fact that the well is in the defendants' own *khudkasht* land. The plaintiffs do not lay any claim to it, and as they derive no benefit from it, they are not liable to pay any thing towards its cost. I dismiss the appeal with costs. I extend the time for payment within four-months from this date, and delivery of possession of the property will be made in next Jeth."

(1) S. A. No. 1102 of 1912, decided on the 27th of May, 1913.

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The defendants appealed.

Babu *Benoy Kumar Mukerji*, for the appellants.

The respondents were not called on to defend the appeal.

RICHARDS, C. J. and BANERJI, J.—We think that the view taken by the learned Judge of this Court was correct and we dismiss the appeal.

Appeal dismissed.

FULL BENCH.

1913
November, 8

Before Justice Sir Pramada Charan Banerji, Mr. Justice Tudball and Mr. Justice Piggott.

RAGHUBIR PRASAD AND OTHERS (DEFENDANTS) v. SHANKAR BAKHSI SINGH (PLAINTIFF.)*

Act No. VII of 1870 (Court Fees Act), section 7 (ix) ; schedule I, article (1) —Suit for redemption or foreclosure of a mortgage—Appeal—Court fee.

The criterion laid down in section 7 (ix) of the Court Fees Act, 1879, for determining the court fee payable in respect of a suit for redemption or foreclosure of a mortgage does not apply to the appeal in such a suit.

In the case of appeals or cross objections in suits for redemption or foreclosure, in all cases in which the amount declared by the court to be due at the date of the decree can be ascertained by reference to the judgement and the decree, it is that amount at which the appeal or cross objections should be valued, and future interest should not be taken into account.

The rule in *Baldeo Singh v. Kalka Prasad* (1) modified.

THE question raised in this appeal, so far as the present report is concerned, was as to the proper amount of the court fee payable in respect of cross objections filed in an appeal from the decree in a suit for foreclosure of a mortgage. The material facts appear from the following office report :

The plaintiff in this case claimed to recover Rs. 1,830 due on foot of mortgage, dated the 28th of July, 1880, *plus* costs of the suit and *pendente lite* and future interest at Rs. 3-2-0 per cent. per mensem, or in the alternative to have the mortgaged property foreclosed

A court fee of Rs. 11-4-0 was paid on the plaint on Rs. 150, the principal amount of mortgage.

At the trial of the suit the court of first instance held that there was a prior mortgage subsisting on the property, and decreed

*Stamp Reference in Second Appeal No. 548 of 1912.

(1) (1913) I. L. R., 95 All., 94.