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KASTURI  
v.  
PANNA LAL.

substitute an order under order XLI, rule 25. The court of first instance will be directed, upon the evidence already on the record, to come to findings on the fifth and sixth issues and to return its findings on those issues to the lower appellate court. The learned Additional Judge after considering the findings will proceed to dispose of the appeal according to law. As regards costs we think the respondent is entitled to his costs in this Court.

*Decree modified.*

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May, 30.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.*

BHOJ RAJ (DEFENDANT) v. RAM NARAIN (PLAINTIFF)\*

*Pre-emption—Mortgage of property prior to the passing of Act No. IV of 1882.—Government revenue paid by mortgagee—Liability of pre-emptor to pay the amount of the revenue as a condition precedent to obtaining possession of property.*

Under a mortgage-deed the mortgagor was liable to pay the Government revenue, and if he failed to do so, the mortgagee was to pay it and was entitled to recover the sum from the mortgagor and his other property. The mortgagor failed to pay the revenue which accordingly was paid by the mortgagee. Subsequently the property was sold to the mortgagee for the amount of the mortgage plus the amount of the revenue paid by the mortgagee. In a suit to pre-empt this sale, held that the pre-emptor was bound to pay the amount paid by the mortgagee for the revenue as a condition precedent to his obtaining possession of the property as well as the amount of the mortgage.

In this case the property in suit was mortgaged with possession so far back as 1873 to Bhoj Raj, defendant, for a sum of Rs. 3,000. There was a clause in the mortgage deed which was to the effect that the mortgagor would pay the Government revenue and if he failed to do so, the mortgagee would pay it and would be entitled to recover the sum from the mortgagor and his other property. The mortgagor failed to pay the Government revenue, and it was paid by the mortgagee. In the year 1911 the mortgagor sold the equity of redemption to the mortgagee, when the present suit to pre-empt the sale was instituted. The court of first instance decreed the suit: the lower appellate court modified the decree. The defendant vendee appealed to the High Court,

\*Second Appeal No. 1882 of 1914, from a decree of H. E. Holme, District Judge of Aligarh, dated the 11th of September, 1914, modifying a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 20th of December, 1913.

where the question for decision was as to the liability of the pre-emptor to pay the whole of the sale money, which included the Government revenue paid by the vendee, in order to pre-empt the property.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

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

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit for pre-emption. The first court decreed the claim, the lower appellate court modified the decree. The defendant vendee has appealed. It appears that as far back as the year 1873, the property was mortgaged with possession to the vendee. On the 19th of October, 1911, the mortgagor sold his equity of redemption to the vendee defendant for the sum of Rs. 8,000. This sum of Rs. 8,000 was made up of Rs. 3,000, the original money advanced on the mortgage and Rs. 5,000, Government revenue which the vendee said he had paid in respect of the property. The mortgage-deed contained a clause that the mortgagor would pay the Government revenue, and that if he failed to do so, then the mortgagee should be entitled to recover the sum from the mortgagor and his other property together with interest at the rate of one per cent. per mensem. Both courts have found that as a matter of fact the mortgagee had to pay and did pay the Government revenue. The question which we have to consider in the present appeal is what sum the plaintiff should pay as a condition precedent to obtaining possession of the property. It may be taken as a fact that the property is not really worth Rs. 8,000. It is contended on behalf of the plaintiff that, having regard to the terms of the mortgage and also having regard to the fact that the mortgage was executed before the Transfer of Property Act came into operation, the mortgagee was not entitled to the benefit of section 72, which entitles a mortgagee in possession to pay money in order to save the mortgage property and to add it to its principal. On the other hand, it is contended that the principle underlying the provisions of section 72 of the Transfer of Property Act, is not new, that the same principle of equity existed before. There seems to us considerable force in this latter contention. In any event the mortgagor may well

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have considered that his property was really liable for the Government revenue which had been paid by the 'mortgagee and that therefore he could not redeem the property without paying that amount together with Rs. 3,000 the original advance. If therefore we assume the genuineness of the earlier mortgage and the *bona fides* of the parties, it seems to us that the plaintiff, in order to entitle him to be substituted for the vendee, must do what the vendor had agreed to do *viz.*, to discharge the claims that were made by the vendee and in consideration of which he transferred the equity of redemption. It is argued, however, that the mortgage in 1873 was really a sale and that the agreement by the mortgagor to pay Government revenue was fictitious. This argument is based upon the alleged fact that the property was never worth even the 3,000 rupees. The answer to this contention is that if the transaction of 1873 was really a sale, the suit ought to have been to pre-empt that, not the sale which took place in 1911. Such a suit is long barred by time. If the transaction was a fraud it can hardly be said that the pre-emptor did not know of it, because the presumption that it is a fraud, is based upon the fact that the property was not worth anything like the three thousand advanced. In our opinion the consideration must be Rs. 3,000 together with the Government revenue which have been found to have been paid by the mortgagee, but in calculating this amount interest will only be allowed at annas ten per cent. per mensem on the Government revenue so paid. We modify the decree of the court below accordingly. The interest will be calculated by the office on the amount paid for the Government revenue, that is to say, each time the mortgagee paid the Government revenue, he will be entitled to get annas ten per cent. per mensem upon each payment simple interest. We extend the time to six months from this date. If the plaintiff does not pay the amount ascertained within the time aforesaid, the suit will stand dismissed in all courts. The appellant must have his costs of this appeal.

*Decree modified.*