

vendor, because it is clear that a minor, under such circumstances as these, would have, and the minor in this particular case had, twelve years within which to exercise his option as to whether he would take possession or not, and during that time the vendor, who would be unable to sue for the purchase-money, would remain in possession of another person's property with certain obligations resting upon him, uncertain as to whether the transaction would ever be completed or not. There are possibly two answers to that. It may be said that a purchaser from a minor must take his chance, inasmuch as the law has set its face against minor entering into any obligations at all. Secondly, it may be presumed to be a somewhat rare occurrence that for a period of no less than two years there should be a purchaser who did not want the property and a vendor who did not want his money. There is probably something behind this case which further investigation will elucidate, and under the circumstances I am not sorry that the result of our decision is that the case goes down to the court of first instance for evidence to be taken on the merits and for the true facts to be investigated. I agree in the order passed.

Appeal allowed and cause remanded.

PRIVY COUNCIL.

PARBHU DAYAL (PLAINTIFF) v. MAKBUL AHMAD AND OTHERS
(DEFENDANTS)*

And another appeal, two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Civil Procedure Code, 1877, section 583—Decree for redemption reversed on appeal—Restitution—Jurisdiction of court to which application for restitution is made to award mesne profits which are not given by appellate court decree—Suit to redeem.

A mortgagor sued for redemption of a usufructuary mortgage and obtained a decree from the Subordinate Judge, under which, on payment of the sum decreed to the mortgagee, he was put in possession of the mortgaged property; but the mortgagee appealed to the High Court, which increased the amount payable on redemption by a sum which the mortgagor failed to pay, and the mortgagee thereupon applied to the Subordinate Judge for possession and for mesne profits for the period during which he had been out of possession.

*Present:—Viscount HALDANE, Lord FARMOR, Lord WRENCHURCH, Sir JOHN EDGAR and Mr. AMER ALI. J.

1915

NABAIN DAB
v.
MUMBAIAT
DHANIA.

P. C.
1915
November,
10, 11.
December,
14.

1915

PARBHU
DAYAL
B,
MAKBUL
AHMAD.

Held (upholding the decisions of the courts in India) that the Subordinate Judge had power under section 583 of the Code of Civil Procedure, 1877, to award mesne profits although they had not been expressly given by the decree of the High Court. If the decree was wrong, the parties aggrieved had their remedy either by appeal to the High Court or by an application for revision. The proceedings taken under the decree of the Subordinate Judge culminating in the sale at which the mortgagee purported to purchase the equity of redemption were valid, and the appellant, an assignee of the rights of the mortgagor, was held not entitled to redeem.

Two consolidated appeals 75 and 76 of 1913 from judgements and decrees (9th November, 1909,) of the High Court at Allahabad, which partly affirmed and partly reversed judgements and decrees (27th September, 1907,) of the Subordinate Judge of Aligarh.

The main question for decision in these appeals was whether the appellant was entitled to redeem a mortgage, dated the 5th of February, 1863.

The mortgage was a usufructuary one for Rs. 7,700, and was executed by one Ram Bakhsh of his 10 biswa share in a village called Lodhamai in favour of one Debi Das (the predecessor in title of the respondents) who was put in possession, it being agreed that he should take the profits of the mortgaged property in lieu of interest. Ram Bakhsh, on the 23th of June, 1866, sold his equity of redemption in a portion of the property to the sons of one Zahur Ahmad Khan; and another portion in 1871 to Zahur Ahmad Khan himself; and the remainder was purchased by Debi Das, the mortgagee. On the death of Zahur Ahmad Khan in 1873, leaving his sons and several daughters; his sons by their next friend sued in 1877 for redemption of the mortgage (without making the daughters parties to the suit) and obtained a decree in 1878 excluding the small share purchased by Debi Das. The amount found due to the mortgagee was paid to him and he delivered possession of the property to the mortgagor. Debi Das, however, preferred an appeal to the High Court, and the amount to be paid to the mortgagee on redemption was increased on the 2nd of June, 1879, by a sum, which the mortgagors being unable to pay, Debi Das applied in execution of the decree to be restored to possession as mortgagee, which application was granted. Debi Das then applied in execution of the decree for mesne profits for the period for which he had been out of possession,

and he obtained in March, 1881, an order for payment to him of Rs. 3,525 with interest. In August, 1881, the equity of the mortgagors was put up for sale in execution of that order and purchased by Debi Das for Rs. 5,748: the sale was confirmed and a sale certificate was granted to him. In 1886 Debi Das executed a mortgage of his proprietary rights in the village in favour of persons whose heirs brought a suit for sale on the mortgage, and the mortgaged property was sold in 1897, in execution of decree and purchased by Ali Ahmad and Dilsukh Rai (now represented by the respondents). The suits which gave rise to the present appeals were brought for redemption of the mortgage of 1863, the first suit (24 of 1906) by Parbhu Dayal as transferee from the heirs of Zahur Ahmad Khan, and the second suit (173 of 1906) by the heirs of Debi Das; the defendants in both suits being the purchasers of the interest of Debi Das (now represented by the respondents), and the appellant Parbhu Dayal was also made a defendant in the second suit.

Parbhu Dayal's suit was dismissed by the Subordinate Judge; but in the suit by the heirs of Debi Das he made a decree for redemption.

On an appeal in each suit by Parbhu Dayal the High Court (Sir JOHN STANLEY, C. J., and BANERJI, J.) dismissed both appeals with costs.

The judgement of the High Court will be found in the report of the cases in I. L. R., 32 All., 79, where the facts, pleadings, and arguments are fully stated.

On this appeal—

Sir H. Erle Richards, K. C., and *Kenworthy Brown* for the appellants contended that the Court of the Subordinate Judge in execution of the decree of the High Court of the 2nd of June, 1879, had no jurisdiction to make an order or decree for the payment of mesne profits; such an order or decree could only be made under section 583 of the Code of Civil Procedure, 1877, in a case where the applicant was entitled to mesne profits under the decree of the High Court, which was not the case here. The decree of the High Court not only did not award mesne profits; but impliedly negatived the mortgagee's right to them. The order or decree made by the

1916

 PARBHU
 DAYAL
 v.
 MAHBUL
 AHMAD.

1915

PARBHU
DAYAL
v.
MAKBUL
AHMAD.

Subordinate Judge, it was submitted, was without jurisdiction, and made all the proceedings taken on the footing of it invalid and void. Nor had the Subordinate Judge power to order the sale of the equity of redemption for realization of the sum so decreed; and the mortgagee was not entitled to bring the equity of redemption to sale in execution of such decree, and the sale, it was contended, was void being without jurisdiction. Reference was made to section 244, Civil Procedure Code, 1877, and *Kalka Singh v. Parasram* (1). The mortgagee, after he had received payment in 1878 of the mortgage debt, retained it and entered into possession again as mortgagee. By purchasing the mortgaged property in execution of a money decree, the mortgagee, it was submitted, could not under the circumstances of the present case get rid of his liability to be redeemed, and notwithstanding his purchase his possession was still that of a mortgagee. *Khizarajmal v. Daim* (2) was referred to. The daughters of Zahur Ahmad Khan were not parties to, or in any way represented in the suit of 1877, and the sale certificate of the 11th of February, 1882, did not purport to affect their right to redeem, and the appellant was entitled to enforce that right.

De Gruyther, K. C., and *B. Dube*, for the respondents, were not called on.

1915, December 14th:—The judgement of their Lordships was delivered by MR. AMEER ALI:—

The facts on which the two suits that have given rise to the present appeals were brought in the court of the Subordinate Judge of Aligarh, are fully set out in the judgement of the High Court of Allahabad. It is sufficient, therefore, to state shortly the circumstances which form the basis of the appellant Parbhu Dayal's claim. He was the plaintiff in one of the actions (24 of 1906), which was a suit for the redemption of a mortgage, whilst in the other (173 of 1906) he was joined as a defendant. Both suits, however, related to a village called Ledhamai. A half share of this property, in the nomenclature in vogue in this part of the country described as a 10 biswa share, belonged originally to one Ram Bakhsh. In the year

(1) (1894) I. L. R., 22 Calc., 434; L. R., 22 I. A., 68.

(2) (1904) I. L. R., 32 Calc., 296 (312); L. R., 32 I. A., 23 (33).

1863, Ram Bakhsh executed a usufructuary mortgage in respect of this share for a term of eleven and a half years in favour of one Debi Das, since deceased. It may be noted here that just as 16 annas constitute the integral unit in Bengal and other places, 20 biswas form the unit in most parts of Upper India; 20 biswansis going to a biswa. The mortgage deed in favour of Debi Das provided that the mortgagee should remain in undisturbed possession of the mortgaged property and take the rents and profits in lieu of interest. The principal money secured by the mortgage was never repaid and Debi Das continued to hold the share after the expiration of the term for repayment. In the meantime, Ram Bakhsh was dealing with the equity of redemption; in 1866, he assigned his right in 7 biswas of his 10 biswas to the minor sons of a person named Zahur Ahmad; a little later he sold to Zahur Ahmad himself 2 biswas, 19. biswansis, and subsequent thereto the remaining fraction left in his hands to the mortgagee Debi Das. The outstanding equity of redemption in respect of 9 biswas, 19 biswansis thus vested in Zahur Ahmad and his sons. Zahur Ahmad died shortly after, leaving as his heirs, besides his sons, several daughters and two widows. His estate, including the right to redeem the mortgage to Debi Das, accordingly devolved on his heirs. In 1877 his sons under the guardianship of their mother brought a suit for redemption against Debi Das; and in May, 1878, they obtained a decree for possession on payment to the mortgagee of a specified sum. This money appears to have been paid into court, and the plaintiffs obtained possession of the property in July, 1878. The decree of the court of first instance was, however, varied on appeal by the High Court, which directed payment by the plaintiffs of a further sum of Rs. 9,000. This they failed to do, and the mortgagee was restored to possession by an order of the court in April, 1880. Debi Das then applied to the court for an order for mesne profits for the period during which he was out of possession, and in March, 1881, he succeeded in obtaining a decree for a sum of over Rs. 5,000. In execution of this decretal order he caused the outstanding equity of redemption to be attached and sold, and at the auction sale purchased the same himself. After his purchase as aforesaid he purported to deal

1915

PARBHU
DATAL
v.
MAKBUL
AHMAD.

1915

PARBHU
DAYAL
v.
MAKBUL
AHMAD.

with the property as absolute owner; he mortgaged the property to one Sagar Mal, who obtained a decree on his mortgage, and in execution of that decree the defendants in suit 173 of 1906 purchased the share in question in 1897. In suit 173 of 1906, which has given rise to appeal 75, the heirs of Debi Das are the plaintiffs, and they seek to redeem the property on the ground that although Debi Das after his purchase in 1881 became the absolute owner, the defendants had in the auction sale held in 1897 only acquired his mortgagee right.

The sons of Zahur Ahmad, on the other hand, continued to deal with their right to the equity of redemption as still subsisting in them; and, by two deeds of sale, assigned to Parbhu Dyal, the appellant, a 5 biswas share of the property. Parbhu Dayal, after failing in one suit in 1905 on the ground of non-joinder of parties, brought in 1906 the present action to redeem the mortgage executed by Ram Bakhsh in 1863 and for ancillary reliefs. He contended in the courts below, as has been contended before this Board on his behalf, that the decree for mesne profits and all the proceedings thereunder, culminating in the sale at which Debi Das purported to purchase the equity of redemption, were made without jurisdiction and conveyed no title to the purchaser; and as they were mere "nullities" the right of his assignors was unaffected, and by virtue of the assignment to him he is entitled to redeem.

Both courts have overruled his contentions and dismissed his suit. Their Lordships fully concur in the reasons given by the High Court for disallowing the plaintiff's claim. As the learned Judges point out, the court which awarded the mesne profits had full jurisdiction in that behalf; if it exercised the jurisdiction wrongly, the persons aggrieved had their remedy under the provisions of the Indian Code of Civil Procedure, either by appeal to the High Court or by an application for revision. Objection was in fact taken under section 311 of the Code of Civil Procedure (1882) to the sale for mesne profits, which was disallowed, and there was no appeal from that order. The present action, in their Lordships' opinion, is wholly misconceived. It was further urged on appellant's behalf that he was at any rate entitled to redeem the share of Zahur Ahmad's daughters, who were no

parties to the suit of their brothers or to the subsequent proceedings held therein. Their Lordships are not satisfied that any right was in fact conveyed to Parbhu Dayal by those ladies, or that if any right was conveyed as alleged what its extent was.

The appeal will be dismissed with costs to be paid by the appellant, Parbhu Dayal, to the respondents who are represented at the hearing.

It is admitted that this judgement will govern appeal 75, which arises out of suit 173 of 1906, brought by the heirs of Debi Das. This appeal will also be dismissed.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondents 1 and 2: *Barrow, Rogers and Nevill.*

J. V. W.

REVISIONAL CRIMINAL:

Before Mr. Justice Tudball and Mr. Justice Piggott.

EMPEROR v. BHAWANI DAS.*

Criminal Procedure Code, section 195 (1) (c)—Sanction to prosecute—Offence alleged to have been committed in respect of a document produced in a Civil Court by a party, but before the person producing it had become a party to any suit.

The words used in section 195 (1) (c) "when such offence has been committed by a party to any proceeding in any court" refer not to the date of the commission of the alleged offence, but to the date on which the cognizance of the Criminal Court is invited.

Hence when once a document has been produced or given in evidence before a court the sanction of that court, or of some other court to which that court is subordinate, is necessary before a party to the proceedings in which the document was produced or given in evidence can be prosecuted, notwithstanding that the offence alleged was committed before the document came into court, at a time when the person complained against was not a party to any proceeding in court.

Girdhari Merwari v. King-Emperor (1), King-Emperor v. Raja Mustafa Ali Khan (2) and Emperor v. Lalta Prasad (3) referred to. Noor Mahomed Cassum v. Karkhosru Maneckjee (4) not followed.

*Criminal Revision No. 813 of 1915.

(1) (1908) 12 O. W. N., 322.

(3) (1912) I. L. R., 34 All., 654.

(2) (1905) 8 Oudh Cases, 313.

(4) (1902) 4 Bom. L. R., 268.

1915

PARBHU
DAYAL
v.
MAKBUL
AHMAD.

1915
December, 10.