

by the defendants. This finding was *res judicata* between the parties in the present suit and should have been recognized as such, *vide Ghulappa bin Balappa v. Raghavendra Swamirao* (1) *Raja Simhadri Appa Row v. Ramachandrudu* (2). In this connection I may note that the latter of these two decisions was not overruled by a Full Bench of the same Court in I. L. R., 29 Mad., 195, on the specific point on which the decision proceeds. I think there can be no doubt that the Munsif who decided the suit for possession under the Specific Relief Act was competent to try the present suit for damages within the meaning of section 11 of the Code of Civil Procedure. What the court below had to do in the present case was to treat the finding in the previous suit as decisive in favour of the plaintiffs so far as it went. If it had done this, and had then found against the plaintiffs on the other questions involved, I should not have felt inclined to interfere. As it is, I accept this application, set aside the decree of the court below, and order the record to be returned to that court with directions to re-admit the suit on to its file of pending suits and dispose of it with due regard to the above observations. Costs of this application will abide the result.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

FAKIR CHAND (PLAINTIFF) v. BABU LAL AND OTHERS (DEFENDANTS).^{*}
Act No. IV of 1882 (Transfer of Property Act), sections 83 and 84—Mortgage—Redemption—Right of owner of a share in property mortgaged to redeem the entire mortgage.

The owner of a portion only of the equity of redemption is competent to maintain a suit for redemption of the entire mortgage even against the will of the mortgagee

Norender Narain Singh v. Dwarka Lal Mundur (3), *Huihasanan Nambudri v. Parameswaran Nambudri* (4), *Velayadain Chetty v. Alangan Chetty* (5) and *Mustafa Khan v. Shadi Lall* (6) referred to. *Girish Chunder Dey v. Juramoni De* (7) dissented from.

^{*} Second Appeal No. 293 of 1916, from a decree of H. E. Holmes, District Judge of Aligarh, dated the 29th of September, 1915, confirming a decree of Zorawar Singh, Munsif of Kasganj, dated the 14th of June, 1915.

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| (1) (1904) I. L. R., 28 Bom., 338. | (4) (1898) I. L. R., 22 Mad., 209. |
| (2) (1902) I. L. R., 27 Mad., 63. | (5) (1912) 15 Indian Cases, 605. |
| (3) (1877) L. R., 5 I. A., 18. | (6) (1907) 10 Oudh Cases, 81. |

(7) (1900) 5 C. W. N., 83.

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THE facts of this case were as follows:—

There was a mortgage in favour of the plaintiff appellant of a certain house, by two joint owners of the same, the aforesaid owners being, according to the recital in the mortgage deed, owners of equal shares and each of them in possession of his own share. One of these mortgagors subsequently sold his one-half share to the present respondent, Musammat Lachmi Kunwar. The latter thereupon deposited in court, for payment to the mortgagee, under section 83 of the Transfer of Property Act (No. IV of 1882), what was found to have been the full amount due on the mortgage, both principal and interest. The mortgagee refused to accept this deposit, although he suggested that he would have no objection to allowing Musammat Lachmi Kunwar to redeem one-half of the house upon payment of one-half of the mortgage debt. Musammat Lachmi Kunwar subsequently acquired the remainder of the equity of redemption and the mortgagee then sued her for sale of the mortgaged property. Both courts below decreed the claim, subject, however, to the enforcement of the penalty imposed on the mortgagee by section 84 of the Transfer of Property Act, 1882. The plaintiff mortgagee appealed to the High Court.

Babu Girdhari Lal Agarwala, for appellant.

Munshi Panna Lal, for the respondents.

PIGGOTT and WALSH, JJ.:—The main point for determination in this second appeal is a simple question of law. There was a mortgage in favour of the plaintiff appellant of a certain house, by two joint owners of the same, the aforesaid owners being, according to the recital in the mortgage deed, owners of equal shares and each of them in possession of his own share. One of these mortgagors subsequently sold his one-half share to the present respondent, Musammat Lachmi Kunwar. The latter thereupon deposited in court, for payment to the mortgagee, under section 83 of the Transfer of Property Act (No. IV of 1882), what has been found to have been the full amount due on the mortgage, both principal and interest. The mortgagee refused to accept this deposit, although he suggested that he would have no objection to allowing Musammat Lachmi Kunwar

to redeem one-half of the house upon payment of one-half of the mortgage debt.

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The deposit having been refused by the mortgagee, the court could take no further action, pending the institution either of a suit for redemption or of a suit for sale on the mortgage. Musammat Lachmi Kunwar subsequently acquired the remainder of the equity of redemption and this suit has been brought against her for sale on the mortgage. The courts below have decreed the claim, subject, however, to the enforcement of the penalty imposed on the mortgagee by section 84 of the Transfer of Property Act. The real question is whether Musammat Lachmi Kunwar, as owner of one-half of the mortgaged property, was not merely compellable at the option of the mortgagee to redeem the entire mortgage, but was entitled to do so, whether the mortgagee liked it or not. There is authority for the appellant in a decision of the Calcutta High Court, *Girish Chunder Dey v. Joramoni De* (1). That decision purports to found itself upon a pronouncement of their Lordships of the Privy Council in a case reported in 13 Moor's Indian Appeals at page 415. We have examined that report and it does not seem to us to bear the construction put upon it by the learned Judges of the Calcutta High Court. On the other hand, in the case of *Norender Narain Singh v. Dewarka Lal Mundur* (2), their Lordships have laid down in unqualified terms that each and every one of the mortgagors who owned separate shares in certain mortgaged property was not merely interested in the payment of the mortgage money and the redemption of the estate, but "had a right by payment of the money to redeem the estate, seeking his contribution from the others." The Madras High Court has interpreted and applied this *dictum* in cases very similar to the present, in which the owner of a portion only of the equity of redemption has been permitted to maintain a suit for redemption of the entire mortgage even against the will of the mortgagee; *vide* I. L. R., 22 Mad., p. 209 and 15 Indian Cases, page 605. The same view has been taken by the court in Oudh; *vide* *Mustafa Khan v. Shadi Lal* (3). In our opinion the balance of authority is in favour of the view taken by

(1) (1900) 5 C. W. N., 83.

(2) (1877) L. R., 5 I. A., 18 (27).

(3) (1907) 10 Oudh Cases, 81 (84); and 21 Indian Cases, 251.

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the courts below, and on the wording of sections 83 and 84 of the Transfer of Property Act itself this would seem to be the effect of the statute construed according to its plain meaning. The only other question raised in this appeal is as to costs. On this point we think it sufficient to say that the orders of the courts below were within their discretion and that we are not satisfied that good cause is shown for interference. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1917
July, 23.

Before Mr. Justice Ryves.

EMPEROR v. GHASI.*

*Act No. XLV of 1860 (Indian Penal Code), section 441—Criminal trespass—
Building on another man's land.*

A man may be guilty of criminal trespass on the land of another without ever personally setting foot on the land, if, for example, he causes others to build on the land against the wishes and in spite of the protest of the owner of the land.

THE accused in this case was convicted by a bench of Honorary Magistrates of the offence of criminal trespass as defined in section 44 of the Indian Penal Code, in that he had caused certain buildings to be erected on another person's land in spite of the objections of the owner of the land. He appealed to the District Magistrate who dismissed the appeal. He then applied in revision to the Sessions Judge, who referred the case to the High Court, being of opinion that the offence of criminal trespass was not established, inasmuch as it did not appear that the accused had ever himself been upon the complainant's land.

The parties were not represented.

RYVES, J.—This is a reference by the learned Sessions Judge of Moradabad recommending that the conviction of one Ghasi under section 447 of the Indian Penal Code and the sentence of a fine imposed thereunder should be set aside. Ghasi was tried by a Bench of Honorary Magistrates and convicted and sentenced to pay a fine of Rs. 100. He appealed to the District Magistrate, who dismissed the appeal. The matter was then taken in revision

* Criminal Reference No. 581 of 1917.