

1917

KRISHNA SAH  
v.  
THE  
COLLECTOR  
OF BAREILLY.

learned District Judge and remand the case to him with directions to re-admit the case on its original number on the file and proceed to hear and determine the same on the merits having regard to what we have said above. The respondent must pay the costs of this appeal.

*Appeal allowed and cause remanded.*

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*April, 18.*

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

LAKHPAT RAI (PLAINTIFF) v. FAKHR-UD-DIN (DEPENDANT)\*  
*Act No. IV of 1882 (Transfer of Property Act), section 91—Mortgage—  
Right to redeem—Attaching creditor.*

Certain property was mortgaged on the 4th of April, 1889. One *N. K.* obtained a simple money decree against the mortgagor on the 25th of May, 1889. Before judgement *N. K.* had attached the property, and it was subsequently sold by auction and purchased by *L. R.* on the 28th of September, 1902. In 1897, the mortgagees sued on their mortgage without impleading either *N. K.* or *L. R.* In execution of their decree the property was sold and purchased by defendant's father, who obtained possession on the 25th of April, 1900. *L. R.* brought a suit for recovery of possession or, in the alternative, for redemption.

*Held* that under section 91 (f) of the Transfer of Property Act, *N. K.* was entitled to redeem, and the plaintiff, as a person claiming under him, was also entitled to redeem.

THE facts of this case were as follows:—

One Nand Kishore obtained a simple money decree against Ram Mohan Lal on the 25th of May, 1889. Before judgement he had caused the property to be attached. The property was subsequently put up to sale and purchased by Lakhpat Rai on the 28th of September, 1902. The sale was confirmed on the 26th of November, 1902. The defendant, on the other hand, set up the following title:—The property in dispute had been mortgaged by Ram Mohan Lal on the 4th of April, 1889, in favour of Ram Ratan and Ram Gopal. On the 15th of June, 1897, a suit was instituted by the mortgagees for sale upon the mortgage. They obtained a decree on the 25th of September, 1897, and caused the property to be sold on the 20th of June, 1899, when the defendant's father purchased the same. He was put in possession on the 25th of April, 1900.

\* First Appeal No. 167 of 1915, from a decree of Rama Das, Subordinate Judge of Pilibhit, dated the 31st of March, 1915.

Neither Nand Kishore nor Lakhpat Rai was made a party to the mortgagees' suit. The present suit was by Lakhpat Rai for possession of the mortgaged property, either simply in virtue of his purchase, or by redemption of the mortgage of 1889. The court of first instance dismissed the suit as barred by limitation. The plaintiff appealed to the High Court.

The Hon'ble Sir *Sundar Lal* and the Hon'ble Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Babu *Preo Nath Banerji*, for the respondent.

RICHARDS, C. J., and BANERJI, J.:—This appeal arises out of a suit in which the plaintiff claimed possession of certain property and that, if he was not entitled to possession, pure and simple, he might get possession after redeeming a certain mortgage. The plaintiff's title is as follows:—Nand Kishore obtained a simple money-decree against Ram Mohan Lal on the 25th of May, 1889. Before judgement he had caused the property to be attached. The property was subsequently put up to sale and purchased by Lakhpat Rai on the 28th of September, 1902. The sale was confirmed on the 26th of November, 1902. The defendant, on the other hand, sets up the following title:—The property in dispute had been mortgaged by Ram Mohan Lal on the 4th of April, 1889, in favour of Ram Ratan and Ram Gopal. On the 15th of June, 1897, a suit was instituted by the mortgagees for sale upon the mortgage. They obtained a decree on the 25th of September, 1897, and caused the property to be sold on the 20th of June, 1899, when the defendant's father purchased the same. He was put in possession on the 25th of April, 1900. It is an admitted fact that Nand Kishore was not made a party to the mortgagees' suit, and it is further admitted that he had obtained his decree before the suit was instituted. The defendant accordingly contends that the suit is barred by limitation so far as it claims possession and that any right which Nand Kishore, or others claiming under him, had to redeem the property is long since extinguished. The court below has held that the suit is barred by time, and on this preliminary point has dismissed the plaintiff's claim, without going further into the merits. In the course of the argument in this Court it was strongly contended

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that Nand Kishore had no interest in the property itself or even in the equity of redemption such as would entitle the plaintiff to claim redemption now. Numerous authorities have been cited on both sides as to the effect of an attachment by an execution-creditor. The remarks of their Lordships of the Privy Council in the case of *Suraj Bansi Koer v. Sheo Persad Singh* (1) are quoted. Their Lordships' remarks in the case of *Moti Lal v. Karrabuldin* (2) have also been referred to. We think that it is unnecessary in the present case for us to express any opinion as to whether or not an attachment by a judgement-creditor has the effect of conferring an estate. Section 91 of the Transfer of Property Act specifies the persons, other than the mortgagor, who have the right to redeem mortgaged property. Clause (f) is as follows:—"The judgement-creditor of the mortgagor when he has obtained execution by attachment of the mortgagor's interest in the property." The right to redeem which is conferred on the persons mentioned in this section seems to be the same right to redeem in all cases. It is the very same right which the mortgagor himself has. A mortgagor in this country can redeem within 60 years unless his right to redeem has been concluded by proper legal proceedings. It seems to us therefore that Nand Kishore and the plaintiff as claiming under him are entitled to redeem, it being an admitted fact that neither Nand Kishore nor Lakhpat Rai were made parties to the mortgagees' suit. We need hardly say that in our opinion the court below was quite right in holding that the suit, so far as it is a suit for possession other than by redemption, is clearly barred by time. We also think that the plaintiff's only right is to redeem and he cannot question the genuineness of the mortgage. We allow the appeal, set aside the decree of the court below, and remand the case with directions to re-admit the case under its original number and proceed to hear and determine the same on the merits. Costs here and heretofore, will be costs in the cause.

*Appeal allowed and cause remanded.*

(1) (1879) I. L. R., 5 Calc., 148.

(2) (1897) I. L. R., 25 Calc., 179.