

## PRIVY COUNCIL.

HET RAM (DEFENDANT) v. SHADI RAM (PLAINTIFF) AND OTHERS (DEFENDANTS).

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

P. C.\*  
1918,  
February, 21  
22. March. 15.

*Mortgage—Prior mortgagee who had obtained a decree absolute for sale but had not executed it—Decree barred under schedule II, article 179, of Limitation Act, 1877—Subsequent mortgagee not made a party to suit under section 65 of Transfer of Property Act, 1882—Registered later mortgage as notice to prior mortgagee—Suit to enforce later mortgage—Prior mortgagee's right merged in decree and extinguished—Transfer of Property Act, section 89, construction of.*

The question in this appeal was whether property mortgaged to the respondent on the 15th of October, 1881, should, when sold under a decree absolute for sale, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage of the same property, dated the 25th of February, 1880.

The appellant, in 1883, acquired the title of the mortgagor, and also such title as remained to the mortgagee, under the earlier mortgage. In 1892, the prior mortgagee brought a suit on his mortgage, and in 1895 obtained a decree absolute for sale under the Transfer of Property Act. The suit was, however, only against the mortgagor, and the second mortgagee was not made a party to it. Neither the prior mortgagee nor his successor took any steps to execute that decree, and it became barred and inoperative after the lapse of three years from the date on which it became absolute. It was admitted that the later mortgage was duly registered, and that the earlier mortgagee must be taken to have had notice of it when he brought his suit and obtained a decree in 1892.

*Held* in a suit brought on the 26th of July, 1910, by the first respondent on his mortgage of the 15th of October, 1881, against, among others, the appellant, respondent was entitled to a decree absolute under order XXXIV, rule 2, of the Code of Civil Procedure, 1908, for sale, but that the sale was not subject to the prior mortgage of the appellant.

The true construction of section 89 of the Transfer of Property Act is that on the making of the order absolute for sale under that section, the security as well as the defendant's right to redeem were both extinguished, and that for the right of the mortgagee under his security there was substituted the right to a sale conferred by the decree.

APPEAL 88 of 1916, from a judgement and decree (19th May, 1913) of the High Court at Allahabad, which varied a judgement and decree (19th December, 1911) of the Assistant Sessions Judge of Moradabad, exercising the powers of a Subordinate Judge.

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\* Present :—Viscount HALDANE, Sir JOHN EDGE, Mr. AMER ALI, and Sir WALTER PHILIMORE, BART.

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The only question for determination in this appeal was whether certain property mortgaged to the plaintiff respondent should be decreed to be sold subject to a prior charge claimed by the defendant appellant.

The facts are sufficiently stated in the judgment of the Judicial Committee.

The case in the High Court was decided by Sir H. G. RICHARDS, C. J., and H. W. LYLE, J.

*A. M. Dunne, K.C.*, and *T. B. W. Ramsay*, for the appellant, contended that he had a valid prior charge on the property mortgaged to the first respondent, which could only be sold subject to such prior charge. There was no merger of the mortgage rights when the appellant by his purchase succeeded to the rights of the original mortgagee, and became, it was submitted, entitled to the benefit of the mortgage of 1880. Reference was made to *Gokal Das, Gopal Das v. Puranmal Preamsukhdas* (1); *Dinobundhu Shah Chowdhry v. Jogmaya Dasi* (2); and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (3). Moreover, the first respondent was not a party to the decree made in 1891 in the prior mortgagee's suit, and the appellant's prior mortgage rights as against the first respondent were not extinguished. As to no steps having been taken to enforce the decree, the appellant was the owner of the property mortgaged, and could not enforce the decree against his own property.

*B. Dube*, for the first respondent, contended that the security of the prior mortgage became merged in the decree absolute and was extinguished by it. Owing to the omission to make the first respondent, as being the mortgagee of the second mortgage, a party to his suit (to which he was a necessary defendant under section 85 of the Transfer of Property Act), and the fact that the period of limitation for enforcing the decree began to run from the date of the decree being made absolute, and that after three years the decree became barred under article 179 of schedule II of the Limitation Act, 1877 [See *Mahabir Prasad v. Sital Singh* (4)], the rights which the appellant might otherwise have had against

(1) (1884) I. L. R., 10 Cal., 1085; L. R., 11 I. A., 126. (3) (1912) I. L. R., 39 Cal., 527 (555); L. R., 39 I. A., 68 (81, 82).

(2) (1901) I. L. R., 29 Cal., 151; L. R., 29 I. A., 9. (4) (1837) I. L. R., 19 All., 520.

R., 29 I. A., 9.

the first respondent ceased to exist. The registration of the mortgage of 1881 gave the appellant notice of it; *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (1). Limitation ran uninterruptedly, as the interests of mortgagor and mortgagee became joined in one and the same person. The appellant, moreover, could have proceeded to enforce the decree under section 232 of the Code of Civil Procedure, 1882.

*A. M. Dunne, K. C.*, in reply, contended that the appellant not being the plaintiff the limitation provisions referred to were not applicable and the equitable right the appellant claims was not affected by section 28 of the Limitation Act. As he could not enforce the decree against his own property he should not be deprived of his mortgage rights by not doing so.

1918, *March, 15th* :—The judgment of their Lordships was delivered by Viscount HALDANE.

The material point in this appeal, which comes from the High Court of Judicature for the North-Western Provinces, Allahabad, lies in a short compass. The question in the suit was whether property in mortgage to the respondent Shadi Ram, as to which he had sought to obtain a decree for sale under order XXXIV, rule 2, of the Civil Procedure Code, 1908, should, when sold, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage. This earlier mortgage was dated the 25th of February, 1880. Shadi Ram's mortgage was dated the 15th of October, 1881.

The appellant had become the successor in title to the mortgagors, and it is assumed, for the purposes of this appeal, that he had also acquired such title as remained to the mortgagee under the earlier mortgage. In 1891 the prior mortgagee, whose name was Lachman Das, brought a suit on his mortgagee and in 1895 obtained a decree absolute for a sale under the Transfer of Property Act. But the suit was brought only against the remaining mortgagor, and the second mortgagee was not made a party. This decree neither Lachman Das nor his successor in title took any steps to execute, and under article 179 of the second schedule to the Limitation Act, 1877, it ceased to be operative when three years had elapsed from the date of the decree becoming absolute.

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It had thus become wholly ineffective long before the present suit was commenced. The only other observation which it is necessary to make before considering the question of law that arises under the Transfer of Property Act, 1882, is that on the admissions of the parties it is to be taken that the second mortgage was duly registered, and that the first mortgagee must be taken to have had notice of it when he brought his suit, and obtained a decree for sale in 1892.

The mortgage made to Lachman Das in 1880 was a simple mortgage within the meaning of section 58 of the Transfer of Property Act, and under section 67 the mortgagee had a right to obtain, as he actually did, an order for sale. The provisions of the Act, inasmuch as section 69 does not apply to a simple mortgage, precluded him from any right to sell without such an order. Under section 85, the first mortgagee was bound to make the second mortgagee a party to his suit for sale, and as he did not do so, the second mortgagee was not bound by the order for sale, which could only have been operative subject to his title. Section 89 is important. Under this section, where an order for sale under section 88 has been made, such as was made here in 1892, in favour of the first mortgagee, the mortgagor, or the second mortgagee, if he had been made a defendant, would have had the right to redeem if he had paid on the date fixed by the decree the amount due. If such payment is not made, a decree absolute may be passed, such as was made in 1895, for sale and for payment of the amount realized into Court. The section then provides that "the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the suit of 1892, and in addition the decree itself became inoperative under the Limitation Act as the result of nothing having been done under it. It follows that the title of the

second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

They concur in the opinion of the learned Judges of the High Court that the decision of the Assistant Sessions Judge of Moradabad, who tried the case, was wrong.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellant:—*T. L. Wilson & Co.*

Solicitor for the plaintiff respondent:—*Pyke, Franklin & Gould.*

J.V.W.

## APPELLATE CIVIL.

*Before Mr. Justice Piggott and Mr. Justice Walsh.*

GIRDHAR DAS AND OTHERS (DEFENDANTS) *v.* SIDHESHWARI PRASAD NARAIN SINGH AND OTHERS (PLAINTIFFS)\*.

1918  
*February, 26.*

*Civil Procedure Code (1892), section 315—Execution of decrees—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money.*

Where property of a judgment-debtor had been sold twice over in execution of decrees against him and purchased twice by different purchasers it was held that the second purchaser took no title by his purchase, inasmuch as at the time of sale the judgment-debtor's title was extinct, and that he was entitled to recover the purchase money which he had paid, and to follow it into the hands of other creditors of the judgment-debtor amongst whom it had been rateably distributed.

THE facts of this case were, briefly, as follows:—

Certain house property in the city of Benares, belonging to a man of the name of Rajendradhari Singh, was sold by auction in execution of a decree against the owner on the 15th of February, 1906, and was purchased by Ram Prasad Singh. The same property was, however, sold a second time as the property of Rajendradhari Singh on the 18th of March, 1907, and on this occasion was purchased by Sidheshwari Prasad Narain Singh and others. This led to litigation, to begin with, between the first purchaser and the second, resulting in a decision in favour of Ram

\* First Appeal No. 86 of 1916, from a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 12th of August, 1915.