

PRIVY COUNCIL.

*P. C.
1919
November, 11.
December, 2.

MATRU LAL AND OTHERS (DEFENDANTS) v. DURGA KUNWAR (PLAINTIFF).
[On appeal from the High Court of Judicature at Allahabad].

Mortgage—Suit and decree for sale—Mortgage extinguished by sale—Purchase by first mortgagee—Subsequent suit by second mortgagee who was not made a party to first mortgagee's suit—Act No. IV of 1882 (Transfer of Property Act), section 69.

An order made under section 69 of the Transfer of Property Act, 1882, for the sale of mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished.

Where, therefore, a first mortgagee brought a suit for sale under the Transfer of Property Act on his mortgage without making a second mortgagee of the same property a party to his suit, and obtained a decree for sale and purchased the property under that decree; and the second mortgagee afterwards sued on her mortgage.

Held the amount to be paid by the second mortgagee was to be calculated on the basis of the decree, and not with regard to the amount due on the prior mortgage. *Het Ram v. Shadi Ram* (1) followed.

Unes Chunder Sircar v. Zahur Falima (2) (a case decided before the Transfer of Property Act, 1882, was passed) distinguished on that ground.

APPEAL 8 of 1918 from a decree (27th January, 1916,) of the High Court at Allahabad, which modified a decree (8th July, 1914,) of the Additional Subordinate Judge of Aligarh.

The suit which gave rise to this appeal was instituted by the respondent as transferee of a second mortgage of certain immovable property within the jurisdiction of the Subordinate Judge of Aligarh for the sale of the property making the predecessor in title of the first party appellants and the other appellants defendants as the persons entitled to the benefit of a first mortgage on the same property; and in her plaint expressed her readiness to pay to them any amount which might be found due to them in respect of the first mortgage, or to have such amount deducted from the sale-proceeds of the property.

The question for determination is as to what sum, under the circumstances stated, is payable by the respondent to the appellant in respect of the first mortgage.

* Present:—Viscount FINLAY, Lord PARMOOR, and Sir JOHN EDGE.

(1) (1918) I. L. R., 40 All, 407; L. R., 45 I. A., 180.

(2) (1890) I. L. R., 18 Calc., 104; I. R., 17 I. A., 201.

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

The first court made a decree in favour of the respondent (the second mortgagee) on condition of the payment by her to the appellants (the first mortgagees) of Rs. 49,124-9-0 within four months from the date of the decree.

From that decision the respondent appealed to the High Court and the appeal came before Sir H. G. RICHARDS, C. J., and M. RAFIQ, J., who modified the decree of the first court by reducing the amount of the decree to Rs. 23,311.

From that decree the first mortgagees (appellants) appealed to His Majesty in Council.

E. B. Raikes, for the appellants, contended that they were as first mortgagees, entitled to the terms of their mortgage, as against the second mortgagee (the respondent) until the date when they obtained actual possession of the property as purchasers. As against the second mortgagee, the mortgage debt did not merge in, and was not affected by, the decree of 1884. The case was, it was submitted, governed by the decision of the Board in *Umee Chunder Sircar v. Zahur Fatima* (1), the facts of which were similar, and the later case of *Het Ram v. Shadi Ram* (2) did not affect the present case, the mortgages in which were made before the Transfer of Property Act, 1882, came into operation, and in which, moreover, there was no evidence that a final order had been made under section 89 of that Act. *Sri Gopal v. Pirthi Singh* (3) was also referred to. The decision of the Subordinate Judge was, therefore, correct, and the appeal should be allowed.

J. M. Parikh, for the respondent, contended that on the Court making the order in 1884 for the sale of the mortgaged property, the security under the mortgage of 1872 became extinguished, and the appellants were, therefore, not entitled to set up that mortgage; but were only entitled to relief on the basis of the order of 1884. The present case was governed by *Het Ram v. Shadi Ram* (2). That a final order was made by the court may be presumed.

(1) (1890) I. L. R., 18 Calc., 164; L. R., 17 I. A., 201.

(2) (1918) I. L. R., 40 All., 407; L. R., 45 I. A., 130.

(3) (1902) I. L. R., 24 All., 429; L. R., 29 I. A., 118.

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Raikes replied.

1919, *December*, 2 :—The judgment of their Lordships was delivered by Sir JOHN EDGE :—

This is an appeal from a decree, dated the 27th of January, 1916, of the High Court at Allahabad, which modified a decree, dated the 8th of July, 1914, of the Additional Subordinate Judge of Aligarh.

In the suit in which this appeal has arisen, the appellants here or those whom they represent were defendants, and the plaintiff was Musammat Durga Kunwar, who was the respondent to this appeal but is now dead; her personal representative is now the respondent. The suit was brought on the 8th of July, 1909, by Musammat Durga Kunwar to obtain a decree for the sale of certain immovable property within the jurisdiction of the Court of the Subordinate Judge, and was based upon a mortgage of the property, dated the 12th of June, 1879, of which she became the assignee on the 21st of May, 1909, by an assignment from the representatives of one Murli Dhar, to whom the mortgage of the 12th of June, 1879, had been granted; his mortgage was the second mortgage on the property. The property had been mortgaged on the 19th of February, 1872, to the predecessors in title of the present appellants for Rs. 3,750, with compound interest at 15 per centum per annum with yearly rests.

On the 6th of February, 1884, the first mortgagees brought a suit for sale under the Transfer of Property Act, 1882, on their mortgage, but did not make Murli Dhar, the second mortgagee, a party to their suit. On the 28th of February, 1884, the first mortgagees obtained a decree in their suit for Rs. 9,342, annas 12, for principal and interest due on this mortgage at the date of their suit, for Rs. 29, annas 13, pies 7, in respect of interest from the date of their suit to the date of their decree, and for further interest at the rate of 6 per centum per annum on the decretal amount until payment, and for costs. By the decree the mortgaged property should, in default of payment, be sold to realize the amount decreed. An order for sale was made and the property was sold on the 20th of March, 1890, by public auction and was purchased by the first mortgagees for Rs. 13,702, annas

6, pies 3, the amount due under the said decree of the 28th of February, 1884. Formal possession was given to the purchasers on the 15th of August, 1890, but they did not obtain actual possession until the end of 1895.

In the present suit the defendants claimed that the plaintiff had no right to a decree unless she paid the entire amount of the first mortgage, with compound interest at 15 per centum per annum to the date when the purchasers at the sale of the 20th of March, 1890, got actual possession, together with some revenue and irrigation charges, amounting in all to Rs. 55,155, annas 13, pies 2. The Subordinate Judge, no doubt acting on the decision of the Board in *Umes Chunder Sircar v. Zahur Fatima* (1), gave Musammat Durga Kunwar a decree for sale conditional on her paying to the defendants Rs. 49,124, annas 9. From that decree Musammat Durga Kunwar appealed to the High Court.

The High Court in the appeal rightly held that the first mortgagee purchasers "had no greater rights than any stranger would have had who had purchased the property under the mortgage decree and paid cash for it." The learned Judges said: "In our judgment all that the answering defendants (the mortgagee purchasers) are entitled to is to set up the amount of the decree of the 28th of February, 1884." But as Musammat Durga Kunwar had by her petition of appeal only asked that the sum of Rs. 49,124, annas 9, should be reduced to Rs. 23,311, which she professed herself willing to pay, the High Court modified the decree to that extent. From that decree of the High Court this appeal has been brought.

At the time when the High Court delivered judgment, the case of *Het Ram v. Shadi Ram* (2) had not been before the Board. That case decided that an order made under section 89 of the Transfer of Property Act, 1882 (Act IV of 1882), for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished. When the decree or order for sale in the case of *Umes Chunder Sircar v. Zahur Fatima* (1) was made the Transfer of

(1) (1890) L. L. R., 18 Cal., 164; L. R., 17 L. A., 201.

(2) (1918) L. L. R., 40 All., 407; L. R., 45 L. A., 130.

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Property Act, 1882, had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist; that case was decided on the law as it then stood.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court under the circumstances be confirmed.

Appeal dismissed.

J. V. W.

Solicitors for the appellants : *Ranken Ford and Chester.*

Solicitor for the respondent : *Edward Dalgado.*

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NAGESHAR BAKHSH SINGH (DEFENDANT) v. GANESHA (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Joint ancestral property—Partition, evidence of—Revenue and village records—Decree made at Regular Settlement—Decree for widows of “superior proprietary rights”—Rights subject to those of the other share-holders.

In this case the plaintiffs (respondents) sued for possession of a village by cancellation of a sale deed of it executed on the 30th of December, 1871, in favour of the predecessor in title of the defendant appellant, by three Hindu pardanashin ladies whose husbands had been lineal descendants of the proprietor. The main question raised by the defendant was whether the property (joint ancestral and undivided property) was or was not joint and undivided at the date of the sale. The appellant alleged that a partition of it had been made; there was no evidence of any deed for the purpose, but he founded his contention chiefly on the terms of the khewat and wajib-ul-arz and of a settlement decree of the 6th of December, 1869, which was for superior rights in favour of the widows, “subject to the rights of the other share-holders.”

Held that “a definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has come before us could we have regarded such a definition of shares standing alone, as sufficient evidence on which to find contrary to the presumption of Hindu law that the family to which such definition referred had separated.”

Their Lordships adopted with approval the above citation from the decision of EDGE, O. J., in *Gajendar Singh v. Sardar Singh* (1) as being a correct decision of the law.

Held as to the decree when on the one hand it declared for superior proprietary rights in favour of the widows, and on the other that these are to be given subject to the rights of the other share-holders, it completely conserved such reversioners' and other ownership rights as are inherent in the succession

*Present :—Lord SHAW, Lord PHILLIMORE, Mr. AMBER ALI, and Sir LAWRENCE JENKINS.