PRIVY COUNCIL.

SUKHI (PLAINTIFF) *v.* GHULAM SAFDAR KHAN AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Allahabad.]

*P. C.
1921
April, 19.

Mortgage—Foreclosure decree—Failure to join puisne mortgagee—Rights of puisne mortgagee—Prior mortgage as a shield—Civil Procedure Code, (1908), order XXXIV, rules 3 and 5.

Whereas section 89 of the Transfer of Property Act (IV of 1882) provided that after a decree under that section for the sale of mortgaged property the security was extinguished, order XXXIV, rules 3 and 5, under which sale and foreclosure decrees are now made do not so provide. A mortgagee who has obtained a sale or foreclosure decree under order XXXIV without joining a puisne mortgagee, and afterwards is sued on the puisne mortgage can use his mortgage as a shield in all cases in which he could have done so before the Act of 1882.

Het Ram v. *Shadi Ram* (1) distinguished.

A village was mortgaged in 1874 and 1875 to K. R., and in 1883 to G.S. In 1836 K.R. having obtained a sale decree without joining G S., purchased the property. K. R. died in 1895 having bequeathed the property to his widow, the appellant. In 1902 she gave it to J. R., and N. R., who covenanted to pay her an annuity, and hypothecated the property to her as security. In a suit brought in 1910 G. S. obtained a foreclosure decree under order XXXIV, rule 2, against J. R. and N.R. paying under the decree Rs. 2,954 in discharge of the mortgages of 1874 and 1875; the appellant was not made a party to that suit. In 1914 the appellant sued J. R. and N. R. (neither of whom defended) and G. S., claiming a sale under the hypothecation deed of 1902; G. S. set up his mortgage of 1883 as a shield, and relied on his payment in discharge of the mortgages of 1874 and 1875

Held that the appellant was entitled to be placed in the position which she would have occupied if she had been made a defendant to the suit of 1910; that, accordingly, she was entitled (as mortgagee of the rights of mortgagor and mortgagee under the 1874 and 1875 mortgages) to recover from G. S. the Rs. 2,954 which he had paid to J. R. and N. R. and they had improperly received, and that upon that sum being paid or realized by sale she could have a sale decree, but only if she paid to G. S. the amount due upon his mortgage of 1883, he being entitled to rely upon it as a shield; that G. S. was entitled to recover the Rs. 2,954 from J. R. and N. R.

APPEAL (No. 167 of 1919) from a judgment and decree of the High Court (January 16th, 1917) varying a decree of the Subordinate Judge of Agra (February 23rd, 1915).

The suit was instituted in 1914 by the appellant, Musammat Sukhi, against the respondents, of whom Jag Ram and Net Ram,

* *Present* :—Lord BUCKMASTER, Lord DUNEDIN, Lord SHAW, Sir JOHN EDGE, and Mr. AMEER ALI.

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joined *pro formâ* as respondents 4 and 5, did not defend. She sued as holder of a deed executed on the 14th of October, 1902, by Jag Ram and Net Ram, hypothecating to her mauza Rasulpur to secure payment to her of Rs. 1,250 per annum which they covenanted to pay. By her plaint she prayed for (*a*) a declaration that a foreclosure decree under order XXXIV obtained in 1910 by Ghulam Safdar Khan and others (respondents 1, 2, and 3) against Jag Ram and Net Ram, upon a mortgage of the property made in 1883, was not binding upon her, since she had not been joined as a defendant in the suit, (*b*) payment of Rs. 10,500 alleged to be due to her under the hypothecation deed, or in default, a sale of the property, and (*c*) a personal decree for any deficiency.

The respondents 1, 2, and 3 by their written statement relied, *inter alia*, upon their decree of 1910, and on the priority of the mortgages of 1874 and 1875, which they had discharged, and their own mortgage of 1883.

The circumstances in which the suit was brought are stated at the beginning of the judgment of the Judicial Committee.

The Subordinate Judge made a preliminary decree under order XXXIV, rule 4, by which he decreed the plaintiff's claim with costs, and interest, future and pendente lite, at 6 per cent. per annum, provided she paid into court within two months Rs. 2,954 with interest; that in case of such payment the defendants should have the right to pay off the entire decretal amount within four months; that in case of default the plaintiff should have the right to recover by sale the debt decreed to her together with the amount which she might have to pay as directed above.

The defendants, other than Jag Ram and Net Ram, appealed to the High Court, on the ground, among others, that the plaintiff was bound to pay off the amount due under their mortgage of 1883 before she could sell the property. The plaintiff filed an objection under order XLI, rule 22, contesting her liability to pay the sum of Rs. 2,954.

The learned Judges (TUDBALL and RAFIQ, JJ.) said:

"The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is

the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit. In our opinion the defendants appellants are entitled to what they claim, that is, the plaintiff, before she can put to sale the property in Mauza Rasulpur, shall pay off to the defendants appellants not only the amount allowed by the Court below, but also the amount which would be due to them on the mortgage of the 15th of June, 1883. On behalf of the respondents cross-objections have been filed contesting the plaintiff's right to a payment of Rs. 2,954 due on the old mortgages of 1874 and 1875. What we have said above is sufficient to decide this cross-objection."

They added that it was not open to the plaintiff to contend that Rs. 8,649, the amount decreed to the defendants in the former litigation, was not the amount due under the mortgage of 1883, as at the trial she had not disputed the amount but only her liability.

In the result the appeal was allowed and the decree was varied by adding thereto that the plaintiff should pay, in addition to the sum of Rs. 2,954, "the sum of Rs. 8,649 due on the mortgage of 1883"; the period for payment was increased to six months from the date of the decree.

On this appeal :—

Narasimham, for the appellant:—

The appellant not having been made a party defendant in the litigation of 1910 was entitled in this suit to an unconditional decree for sale. The earlier mortgages, both those of 1874 and 1875, and that of 1883, were extinguished or merged upon the decree of 1910 being obtained. The respondents 1, 2 and 3 were not entitled to payment of their prior mortgage debt: *Het Ram* v. *Shadi Ram* (1), *Munna Lal* v. *Munun Lal* (2). The mortgage of 1883 being by conditional sale and the decree for foreclosure, it cannot be implied that the respondents intended the security to subsist; under section 101 of the Transfer of Property Act, 1882, it was extinguished. The debt of Rs. 2,954 formed part of the property hypothecated to the appellant, so far from being called upon to pay it, she is entitled to receive it from the respondents.

Kenworthy Brown for the respondents 1, 2 and 3 :—

These respondents had to pay the sum of Rs. 2,954 under the decree; and the appellant was bound to reimburse

(1) (1918) I. L. R., 40 All., 407 ; L. R., 45 I. A., 130. (2) (1914) I. L. R., 36 All., 327.

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them as a condition to getting a decree: *Matru Mal* v. *Durga Kunwar* (1). The decree in the suit of 1910 was made under the Code of Civil Procedure, order XXXIV. The rules under the Code do not provide, as section 89 of the Transfer of Property Act did, as to a sale-decree that after the decree the security was extinguished. In *Het Ram* v. *Shadi Ram* (2) the decree in question was under section 89 and the judgment is based upon that provision of the section. The decision is, therefore, distinguishable. That section not applying, it must be assumed that the intention was to keep alive the mortgage of 1883; *Gokuldoss Gopaldoss* v. *Rambux Sheochand* (3). These respondents were entitled to use the mortgage as a shield on the principle of *Adams* v. *Angell* (4). Reference was also made to *Mirza Yadalli Beg* v. *Tukaram* (5).

Narasimham replied.

1921, April, 19.—The judgment of their Lordships was delivered by Lord DUNEDIN:—

This is a suit by a mortgagee, Musammat Sukhi, to sell a property called Rasulpur. The facts out of which the suit arises are as follows.

Nand Ram and others, the owners of the property in question and of other properties, executed on the 3rd of January, 1874, and the 10th of June, 1875, two simple mortgages in favour of Kirpa Ram, now deceased, the husband of the plaintiff. Subsequently, on the 15th of January, 1883, they executed another mortgage of the property in question alone by way of conditional sale in favour of the first respondent, Ghulam Safdar Khan and another person whom the second and third respondents now represent. These mortgages were all duly registered. In 1886, Kirpa Ram, the mortgagee, raised an action for payment and sale, but he omitted to implead the holders of the mortgage of 1883. In that suit he obtained a decree for sale. The property was sold and Kirpa Ram himself purchased at the judicial sale. Kirpa Ram died leaving a will, dated in 1895, in favour of his widow, the plaintiff. She obtained probate in 1898. She thereafter

(1) (1919) L. R., 47 I. A., 71.

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

(3) (1884) L. R., 11 I. A., 126.

(4) (1877) 5 Ch. D., 634.

(5) (1920) L. R., 47 I. A. 207.

made a gift of the properties to which she had succeeded including the property in question to Jag Ram and Net Ram, her nephews. They at the same time covenanted to pay her Rs. 1,200 a year for maintenance and in security of this obligation they hypothecated the properties including the property in question by way of mortgage. The mortgage was dated the 14th of October, 1902, and was duly registered.

In 1910 the respondents, the mortgagees in the mortgage of 1883, brought a suit on their mortgage against Jag Ram and Net Ram, but omitted to implead the plaintiff. Jag Ram and Net Ram put forward the mortgages of 1874 and 1875 as a shield and accordingly the respondents had to pay into the Court the sum of Rs. 2,954. Having so done and Jag Ram and Net Ram not choosing to redeem, the respondents were adjudged owners of the property. This was finally settled in 1913.

In 1914, the plaintiff raised the present suit in respect of her mortgage, the sums due under the agreement to pay maintenance amounting to over Rs. 10,000. It was not defended by Jag Ram and Net Ram, but appearance was made for the respondents who held the property in virtue of the decree they had obtained in 1913, upon their mortgage of 1883. The Subordinate Judge decreed the suit, but on condition that the plaintiff repaid to the respondents the sum of Rs. 2,954 which they had paid to the first mortgagees. On appeal the High Court altered this by adding the condition that the plaintiff should also pay the sum of Rs. 8,649-13-7, being the sum found due to the respondents in the suit of the mortgage of 1883, in respect of which they were given the foreclosure decree of the property. Appeal has now been taken to His Majesty in Council.

The appellant's counsel relied entirely on the case of *Het Ram* v. *Shadi Ram* (1). In that case a property had been twice mortgaged by way of simple mortgage, one in 1880, and another in 1881. Het Ram purchased the property from the mortgagee in 1883. In 1885 the mortgagee of 1880 obtained against the mortgagor and Het Ram a decree absolute for sale under section 89 of the Transfer of Property Act, 1882. He did not implead the mortgagee under the mortgage of 1881. He took no further steps under the

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decree and the property was not brought to sale. He died, and was succeeded to by Het Ram as his heir. In 1910, the mortgagee under the mortgage of 1881 instituted the suit. It was held that Het Ram could not set up the mortgage of 1880 as a shield, because the decree of 1885 was (1) barred by limitation, (2) inoperative as against the plaintiff who had not been made a party to the suit and because the mortgage itself was gone because of the terms of section 89 of the Transfer of Property Act, 1882. The appellant urged that the same result followed in this case. The mortgagor of 1883, having omitted to implead the appellant, she was not bound by the decree. The mortgage of 1883 was no longer available because it was merged in the decree.

The respondents, on the other hand, relied on the case of *Matru Mal* v. *Durga Kunwar* (1). In that case a property had also been the subject of two mortgages, of 1872 and 1879 respectively. The mortgagee of 1872 obtained in 1884 a decree for sale under the same section 89 of the Transfer of Property Act, 1882, but omitted to implead the second mortgagee. A lady who was an assignee of the second mortgage raised suit in 1909. The owner resisted the decree unless he was paid the whole amount due under the first mortgage with interest calculated at the rate stipulated therein. The plaintiff offered to pay the amount under the decree of 1884, but refused to pay the amount of the mortgage so calculated. The Subordinate Judge gave effect to the condition of the owner. The High Court altered the decree and gave effect to the offer of the plaintiff. The owner then appealed. The Board adhered to the judgment of the High Court.

It will be noticed that the plaintiff there offered to pay the sum in the decree of 1884. Het Ram's case had not at the date of the High Court judgment been decided, and it does not appear to have suggested itself to the plaintiff that she could argue that the effect of section 89 was to destroy the mortgage of 1872 and prevent its ever being set up again. The head-note of that case, however, bears that it was held that the condition upon which the second mortgagee was entitled to a sale decree was the

(1) (1919) L. R., 47 I. A., 71.

payment to the decree-holder of the amount due under the decree in respect of the first mortgage. If this were really so, it would be necessary to consider how far such a pronouncement could stand beside the decision in Het Ram's case. In their Lordships' view it is not necessary to consider that question. The decision in *Het Ram's* case is based on two points which are, it must be admitted, alternative and not cumulative: (1) that the decree was useless in respect of limitation and (2) that the second mortgagee had not been impleaded. Although the first point has no application to this case, the second has. But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so soon as the decree of sale was obtained; and that was based on the express words of section 89 of the Transfer of Property Act, 1882, which ends after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." Now the group of sections 85-90 inclusive of the Transfer of Property Act, 1882, were repealed by the Code of Civil Procedure of 1908, and were replaced by the rules under order XXXIV. In these rules the words above quoted are omitted in the rule which corresponds to section 89. They do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of order XXXIV which are limited to providing for the extinction of the debt.

The difficulty which had arisen as to these words in several cases, *e.g.*, *Vanmikalinga Mudali* v. *Chidambaru Chetty* (1) —which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's* case—therefore no longer arises. The decree in this case was in 1910, and was, therefore, under the Code of Civil Procedure Rules and not under the section of the Transfer of Property Act, 1882.

Now, the words being gone, their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, *viz.*, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first

(1) (1905) I. L. R., 29 Mad., 37.

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mortgage as a shield. From this it follows that the omission by the respondent Ghulam Safdar Khan to make the plaintiff a party to the suit instituted by him to execute his mortgage of 1883 does not prevent him from setting up that mortgage in cases where he would have been so entitled before the Act of 1882; and the present dispute is within the benefit of this ruling.

But then there is the question of the position due to the original mortgages of Rs. 2,924, and unfortunately this seems not to have been very carefully considered in the judgment below. The Subordinate Judge held that the defendants were entitled to set up this as a shield because the defendants had paid this sum to the original first mortgagees as a condition of getting the property; and that as the plaintiff's title flowed from the first mortgagees, she could have no higher right than the first mortgagees, and must be bound by anything done by them. The High Court seemed to think that the same arguments that applied to the mortgage of 1883 also applied to the earlier mortgages.

The situation, however, must be looked at more closely than this. The general principle is stated rightly by the High Court. It is this:—"The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit." Now the original mortgagee having bought the estate at the sale in the suit was the owner of both the mortgage and the equity of redemption merged in one by the decree of the Court. He was succeeded by his widow and she made the gift to Jag Ram and Net Ram. When they in turn mortgaged to the widow, the present plaintiff, they mortgaged both the original mortgage and the equity of redemption merged as aforesaid. When in the suit of the present defendants on the mortgage of 1883, Jag Ram and Net Ram, so to speak, revived the original mortgage as a shield, they revived something which in a question with the widow they had mortgaged. Whether the decision of the Court that the sum in the prior mortgages should be made a condition of the decree in the suit was right or wrong—for if Het Ram's case had been

decided it would have been wrong, the sale having taken place in 1886—is immaterial, for the present defendants acquiesced in and paid under the judgment. If the widow had been made a party to the suit, as she ought to have been, she would have been entitled in right of her mortgage to have been put in possession of the amount which was being put forward as a shield by Jag Ram and Net Ram against the then plaintiffs and the present respondents. She was not made a party and the result was that owing to the laches of the present defendants Jag Ram and Net Ram were allowed to carry off in money the part of the estate represented by the value of the first mortgage which they had really impledged by their mortgage to the widow. It follows that to carry out the general principle expressed above, the widow must not be deprived of the rights which had she been called she could have made good.

The result must be that unless the respondents pay the plaintiff Rs. 2,925 with interest thereon at 6 per cent. from the 3rd of December, 1914, the plaintiff must get her decree for sale of so much of the estate as will realize that sum. If, however, the respondents pay that sum or the said sum is realized by sale of part of the estate then the plaintiff can only have decree and sale of the rest of the estate on condition that she pay to the respondents Rs. 8,649-13-7, being the sum in the decree of 1883 as brought out by the High Court. The respondents will have a right to recover from Net Ram and Jag Ram the sum wrongly carried off by them in fraud of their own mortgage to the present plaintiff, but the right cannot be given effect to in this suit.

Neither party should have any costs in the courts below and any costs paid on order of the courts below should be returned; the appellants will have the costs of the appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty accordingly.

Decree modified.

Solicitor for appellant: *H. S. L. Polak,*

Solicitor for respondents 1,2,3: *Douglas Grant.*