

## FULL BENCH.

Before Mr. Justice Tudball, Mr. Justice Ryves and Mr. Justice Gobul Prasad.

HUKUM SINGH (DEFENDANT) v. LALLANJI, (PLAINTIFF) AND MATA  
DIN AND OTHERS (DEFENDANTS)\*.

Act No. IV of 1882 (*Transfer of Property Act*), sections 85, 89—*Civil Procedure Code* (1908), order XXXIV, rule 5—*Mortgage—Suit on prior mortgage without impleading puisne mortgagee—Effect of failure to implead—Suit for sale by puisne mortgagee, impleading prior mortgagee—Duty of puisne mortgagee to redeem the prior mortgage.*

A prior mortgagee, without impleading the puisne mortgagee, sued for and obtained a decree for sale on his mortgage under the provisions of section 88 of the *Transfer of Property Act*, 1882. After the *Code of Civil Procedure of 1908* had come into force, the decree-holder obtained a decree absolute for sale. Before, however, the sale actually took place, the puisne mortgagee instituted a suit for sale on the basis of his mortgage, and in such suit he contended that the prior mortgagee, by omitting to implead him, had forfeited his right to execute his decree.

Held that this was not so. The position of the puisne mortgagee was rendered neither better nor worse by his not having been impleaded in the prior mortgagee's suit. If the prior mortgage was valid, the puisne mortgagee was not entitled to a decree for sale without giving the prior mortgage an opportunity of redeeming him. *Janki Prasad v. Kishen Dat* (1) dissented from. *Ram Prasad v. Bhikari Das* (2), *Deokali Kunwar v. Alim-un-nissa Bibi* (3) and the judgment of BANERJI, J., in *Bhawani Prasad v. Kallu* (4) referred to. *Het Ram v. Shadi Ram* (5) distinguished.

THE facts of this case were as follows :—

Two simple mortgages of the same property were executed, the first in 1896 and the second in 1907, in favour of different mortgagees. In 1908 the first mortgagee sued for sale on his mortgage, without impleading the second, and obtained a decree for sale under section 88 of the *Transfer of Property Act*. Later on, he applied for and obtained a decree absolute for sale under order XXXIV, rule 5, of the *Code of Civil Procedure*, 1908. When he proceeded to sell the property the second mortgagee brought a suit for sale upon his own mortgage, impleading the mortgagors and the first mortgagee, and praying further for a

\* Second Appeal No. 1212 of 1917, from a decree of D. R. Lyle, District Judge of Agra, dated the 28th of April, 1917, confirming a decree of Govind Sarup Mathur, Munsif of Fatehabad, dated the 29th of September, 1916.

(1) (1894) I. L. R., 16 All., 478.

(3) Weekly Notes, 1901, p. 22.

(2) (1903) I. L. R., 26 All., 464.

(4) (1895) I. L. R., 17 All., 537.

(5) (1913) L. R., 45 I. A., 130; I.L.R., 40 All., 407.

declaration that the property was not liable to sale in execution of the decree obtained by the first mortgagee and for an injunction restraining the latter from executing his decree. Both the courts below held that the plaintiff was not affected by the decree which the first mortgagee had obtained without impleading him, and that as a fresh suit by the first mortgagee would now be time-barred the plaintiff was entitled to the decree claimed by him. The first mortgagee appealed to the High Court.

Mr. J. M. Banerji, for the appellant :—

The courts below have relied on the case of *Janaki Prasad v. Kishen Dat* (1), but in that case the only question decided by the Full Bench was whether registration of a subsequent incumbrance was sufficient notice to the prior mortgagee. The decision which bears upon the present case is that of the Division Bench at page 482 of the report, and the question is whether that is a correct decision. In this suit the puisne mortgagee has not offered to redeem the prior mortgage. The rights under that mortgage have not become extinguished by the fact that a suit was brought on it and a decree for sale passed. Under the present Code of Civil Procedure the passing of a decree absolute for sale does not extinguish the security or the right of redemption. The case of *Matru Lal v. Durga Kunwar* (2) was decided under the old law, namely, section 89 of the Transfer of Property Act. Even there it was held that the puisne mortgagee could redeem the prior mortgagee, although an order absolute for sale had been passed on the prior mortgage. The mere fact that the puisne mortgagee was not made a party to the suit by the prior mortgagee would not kill the latter's rights. The rights exist, although the remedy may be barred. I refer to the cases of *Ram Charan Lal v. Muhammad Rashid-ud-din* (3), *Raghunath Kunwar v. Shankar Singh* (4), *Deokali Kunwar v. Alim-un-nissa Bibi* (5), *Kudratullah v. Kubra Begam* (6) and *Delhi and London Bank v. Bhikuri Das*, (7).

(1) (1894) I. L. R., 16 All., 478.

(4) (1913) I. L. R., 36 All., 123.

(2) (1919) I. L. R., 42 All., 364.

(5) Weekly Notes, 1901, p. 23.

(3) (1912) 10 A. L. J., 134.

(6) (1900) I. L. R., 23 All., 25.

(7) Weekly Notes, 1902, p. 17.

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My position is that either the puisne mortgagee should redeem me or, in the alternative, I may be allowed to redeem him in my character of representative of the original mortgagor; *Pandurang Jasvant v. Sakharchand Malji* (1), *Bhajahari Maiti v. Gajendra Narain Maiti* (2)

The Hon'ble Munshi *Narayan Prasad Ashthana*, (with him the Hon'ble *Dr. Tej Bahadur Sapru*), for the respondent:—

The decree obtained on the first mortgage was passed behind the back of the present plaintiff and did not affect his rights. It was binding only on the parties to it. A sale under it would in no way bind the plaintiff. The real position of the plaintiff was that inasmuch as the first mortgage was barred by limitation, in the sense that a fresh suit on it impleading the present plaintiff would be beyond time, he was entitled to a declaration that the property was not saleable on the first mortgage. The suit is based on the principle laid down at page 482 of the report in the case of *Janki Prasad v. Kishen Dat* (8). It is not necessary for me, however, to go as far as that case, which holds that a prior mortgagee who obtains a decree without impleading a puisne mortgagee gets a nullity and is not entitled to sell the property at all. I say that the sale would not be binding on me and would not affect my rights in any way. On this point reference may also be made to the case of *Bhagwan Das v. Mansumrat Das* (4). It was the duty of the first mortgagee to implead me in his suit. Having omitted to do so, he had the right to bring a fresh suit against me if he liked. But such a suit had now become time-barred and his right was lost. His right under the mortgage had merged in his decree, a decree which was ineffectual as against me. *Het Ram v. Shadi Ram*, (5) *Matru Lal v. Durga Kunwar* (6).

Mr. *J. M. Banerji*, was not heard in reply.

TUDBALL, RYVES and GOKUL PRASAD, JJ.:—This appeal arises out of the following circumstances:—It appears that Mata Prasad and Devi Prasad, defendants 1 and 2, executed a simple mortgage of certain property in favour of one Sanwalia, defendant No. 4,

(1) (1906) I. L. R., 31 Bom., 112. (4) Weekly Notes, 1901, p. 23.

(2) (1909) I. L. R., 37 Calc., 282. (5) (1918) 45 I.A., 130; I.L.R., 40 All., 607.

(3) (1894) I. L. R., 16 All., 478. (6) (1915) I. L. R., 42 All., 364.

and his brother on the 29th of June, 1896. In the year 1907 the mortgagors made a simple mortgage in favour of Lallanji, the plaintiff respondent. Sanwalia, defendant No. 4, brought a suit for sale on his mortgage on the 1st of December, 1908, and obtained a decree for sale under the provisions of section 88 of the Transfer of Property Act, No. IV of 1882, on the 23rd of December, 1908. Later on he applied for and obtained an absolute decree for sale. The date of this decree does not appear from the record, but the decree must have been passed under the provisions of the present Code of Civil Procedure which had come into force on the 1st of January, 1909. To this suit and the subsequent proceedings Sanwalia, defendant No. 4, had omitted to implead Lallanji, the second mortgagee. When he proceeded to sell the property, the present suit was instituted by the second mortgagee for sale of the property on his mortgage, and a declaration was also sought to the effect that the property was not liable to sale in execution of the decree obtained by the prior mortgagee, defendant, and also prayed for a permanent injunction restraining him from executing the decree. In the alternative the plaintiff asked for such relief as the court might think he was entitled to. The suit was defended by the prior mortgagee alone, who pleaded, *inter alia*, that unless the amount due to him was paid the claim could not be maintained. The Munsif came to the conclusion that, the prior mortgagee having failed to implead the plaintiff in his suit for sale, that decree was not binding on the plaintiff and a fresh suit on the prior mortgage being now barred by time, the plaintiff was entitled to the decree claimed. This judgment has been affirmed on appeal by the learned Judge of the lower appellate court on the strength of the case of *Janki Prasad v. Kishen Dat* (1). The defendant first mortgagee comes here in second appeal, and his contention is that the plaintiff is not entitled to sell the property without redeeming his prior mortgage. This appeal came up before a learned Judge of this Court who, having regard to the importance of the question raised in this appeal and the doubt expressed in some cases about the correctness of the view expressed in the case of *Janki Prasad* aforesaid, referred the matter to a larger

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Bench. The question raised in the case, put shortly, comes to this, what is the effect of the failure of a prior mortgagee to implead a subsequent incumbrancer in his suit for sale? Does it result in the total destruction of his rights as a mortgagee so far as the puisne incumbrancer is concerned or does this omission simply amount to this that the right of the puisne incumbrancer to challenge the validity and binding effect of the prior charge remains unaffected because he has had no opportunity to contest it and therefore the only right which the second mortgagee has is to have the question tried out? In our opinion there is no warrant for holding that the mere omission would result in the total extinction of the rights of the prior mortgagee. That this is so would appear from cases in which it has been held that a person who has purchased mortgaged property at a sale in execution of a decree on a prior mortgage to which the second mortgagee was no party is entitled to set up the prior mortgage as a shield in a suit for a sale brought by the second mortgagee, and the second mortgagee has in those cases been held to have a right to sell the property in satisfaction of his mortgage only on the condition that he pays up the prior mortgage. See *Ghulam Sajdar Khan v. Sulchi* (1), and compare *Gokaldas Gopaldas v. Puranmal Premsulchdas* (2) and *Rahim-un-nissa v. Badri Das* (3). We have now to see whether the mere fact that the prior mortgagee has not yet sold the mortgaged property makes any difference in his rights. We are not aware of any principle on which a distinction can be made between the rights of a decree-holder prior mortgagee and a prior mortgagee who has purchased the property in execution of his own decree on the mortgage.

The learned Judges who decided the case in 16 Allahabad seem to have overlooked totally this aspect of the question. Jones, in his well-known work on the Law of Mortgages, says 'When a party in interest other than the owner of the equity of redemption is not made a party to the bill the foreclosure is not generally for this wholly void. It is effectual as against those persons interested in the equity who are made parties.

(1) (1917) 15 A. L. J., 190.

(2) (1884) I. L. R., 10 Cal., 1035.

(3) (1911) I. L. R., 83 All., 368.

The sale vests the estate in the purchaser, subject to redemption by the person interested in it who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening by petition in the foreclosure suit. *His only right is the right of redemption*". Jones, Paragraph 1395). To put it in other words, "omission to join keeps intact the rights of persons not joined."

There can be no doubt whatever that the claim put forward by the plaintiff respondent is not one which upon merely equitable grounds is entitled to consideration. We consider that there is nothing to prevent the defendant from compelling the plaintiff respondent to redeem him before the property can be sold to satisfy the plaintiff's mortgage.

In this case all the parties interested in the mortgaged property are before the court and we think that the equities between them should be worked out and the plaintiff given an opportunity to redeem the mortgage of the defendant No. 4 before he can sell the property to satisfy his own mortgage, as was done in the case of *Bibu Lal v. Jalakia* (1). The reasoning applied by this Court in the case of *Ram Prasad v. Bhikari Das* (2) might well be applied to the present case. In that case the mortgaged property had been sold in execution of a simple money decree and the purchasers were put in possession. Subsequently to this the mortgagees brought a suit for sale on their mortgage without impleading the auction purchaser. They obtained a decree for sale, the property was sold and purchased by a third person. That third person brought a suit for possession of the property against the purchasers in execution of the simple money decree and prayed that the latter might be allowed to redeem him, and if he fail to do so, his right of redemption be foreclosed and possession handed over to the plaintiff. He failed in the lower court and came up in appeal to this Court. The learned Judges observed in the course of their judgment :—

" In the present case the suit is one, as we have said, for foreclosure of the mortgaged property, and it is the duty of the

(1) (1916) 14 A. L. J., 1146.

(2) (1903) I. L. R., 26 All., 464 (467).

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Court to work out the equities between the parties and to give the respondents the opportunity which ought to have been afforded them, when the decree for sale was passed in Nath Mal's suit, of redeeming his mortgage. The respondents are entitled to redeem, but they are not entitled to anything further by reason of the fact that the plaintiff in that suit omitted to implead them as defendants. The omission to implead them can neither improve their position nor the reverse. The plaintiff appellant, who purchased the property at a Court sale in a suit in which the mortgagee Nath Mal was the plaintiff and the mortgagor was the defendant, purchased the property, that is, whatever rights the mortgagor and mortgagee then possessed, subject to the infirmity that the present respondents had not been impleaded, and consequently he must suffer by reason of the neglect of the plaintiff to implead the respondents. He did not get a clear title to the property, but he got all the title which Nath Mal and the mortgagor could give, and that was a title subject to the equity which the respondents had of redeeming Nath Mal's mortgage and preserving the property for themselves. That right will still be secured to them."

In our opinion the only extent to which the appellant's right to sell the property is qualified is by a right of redemption in the respondent plaintiff which has not been affected in any way, because he was not made a party to this suit.

On behalf of the plaintiff respondent reliance has been placed on the case of *Het Ram v. Shadi Ram* (1) as tending to show that the mortgage in favour of the defendant appellant has merged in the decree for sale and the only right left to the defendant is to execute his decree, and as the decree is not binding upon the plaintiff the defendant appellant is not entitled to set up his prior mortgage as a defence to the plaintiff's suit. In the case abovementioned their Lordships of the Privy Council were considering the effect of section 89 of the Transfer of Property Act, and having regard to the wording of that section, came to the conclusion that on the passing of an order absolute for sale the defendant's right to redeem as well as the security were both extinguished and that for the right of the mortgagee under a

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

security there was substituted the right to a sale conferred by the decree. As we have stated above, the final decree for sale in the present case was passed after the Code of Civil Procedure, Act V of 1908, came into force. Order XXXIV, rule 5, of the present Code, which has replaced section 89 of the Transfer of Property Act, IV of 1882, contains no such provision about the extinction of the right of redemption and security as soon as the final decree is passed. Another point which distinguishes the Privy Council case from the present one is that in the former the execution of the decree on the basis of prior mortgage had become barred by time, whereas in the present case *the decree is alive* but its execution has been stayed at the instance of the plaintiff in the present suit. Another Privy Council case on which reliance has been placed by plaintiff respondent in support of his claim is to be found reported in the Allahabad Law Journal Reports for the current year, at page 396\*. That case also depended upon the interpretation of the wording of section 89 of the Transfer of property Act and their Lordships followed the case of *Het Ram* just mentioned. These two cases, therefore, do not in any way improve the plaintiff's position. The correctness of the decision in the case of *Janki Prasad* in 16 Allahabad, page 478, was doubted by Sir ARTHUR STRACHEY, late Chief Justice, and Mr. Justice BANERJI in the case of *Deokali Kunwar v. Alim-un-nissa Bibi* (1). In the course of his judgment, commenting upon the case of *Janki Prasad*, the Chief Justice says: "In that case no doubt the learned Judges held that where a prior mortgagee who has notice of a subsequent mortgage obtains a decree for sale without making the subsequent mortgagee a party to the suit as required by section 85 of the Transfer of Property Act, 1882, he is not entitled to bring the mortgaged property to sale, and it is not the proper course to allow the sale to take place subject to the subsequent mortgagee being given an opportunity of redeeming the decree-holder's mortgage. I must say that I feel considerable doubt as to the soundness of that decision. I should have thought that the guiding principle was that where a subsequent mortgagee has not been made a party to a suit upon a prior mortgage, his interest should be protected by putting

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 \* *Matru Lal v. Durga Kunwar*, I. L. R., 42 All., 364.

(1) Weekly Notes, 1901, p. 22.

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him on as nearly as possible the same footing as if he had been made a party under section 85 of the Act. The object of making him a party under section 85 is to give him an opportunity to redeem the prior mortgage, and if he was not given that opportunity in the prior mortgagee's suit, I should have thought the proper course would have been when he brought his suit, to treat him as if he had been made such a party, and to give him the same right and same opportunity to redeem as ought to have been given him in the former suit. The result of that view would be to allow the sale to take place in execution of the prior mortgagee's decree subject to the subsequent mortgagee's right of redemption. That would give full effect to the object of the Legislature in passing section 85 of the Transfer of Property Act, and would also prevent unnecessary multiplicity of suits. However, it was decided otherwise in the case to which I have referred. I think we ought to follow that decision, though, should the matter ever come before a Full Bench, I shall then be free to reconsider the matter in a way which is not open to me in this case." That time has now come, and we are in full accord with the reasons given by Sir ARTHUR STRACHEY for doubting the correctness of that case and the reasons given by BANERJI, J., in his dissentient judgment in the case of *Bhawani Prasad v. Kallu* (1) for arriving at the same conclusion. In our opinion the case of *Janki Prasad* has been wrongly decided and is against the principles of law regulating the relation between a prior and a subsequent mortgagee as administered by the Courts. Equity also is not on the side of the plaintiff. We are of opinion that the plaintiff's claim for an injunction restraining the defendant prior mortgagee from executing his decree for sale must be dismissed, and his claim for sale under his mortgage decreed, subject to his paying up the amount due under the plaintiff's decree on the prior mortgage within nine months from the date of the passing of the decree. The mortgagor judgment-debtor must pay up the amount due to the plaintiff within six months of this date and in case of his failure to do so, the plaintiff will pay the amount due under the decree on the prior mortgage in favour of the defendant appellant, and

(1) (1895) I, L. R., 17 All., 537.

in that event he will be entitled to realize the amount so paid and amount due on his mortgage by sale of the mortgaged property. In case of his failure to redeem the property as aforesaid his suit for sale will stand dismissed with costs in all courts. The defendant appellant is entitled to his costs in all courts.

*Appeal decreed.*

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## MISCELLANEOUS CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sulaiman.*

DEBA NAND (PETITIONER) v. ANANDMANI (OPPOSITE PARTY)\*

*Hindu Law—Guardian—Will—Father's power to appoint guardian by will.*

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 August, 7.

A Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death. He is unrestricted in the choice of a guardian, and may exclude even the mother from the guardianship. *Sobah Doorgah Lal Jha v. Raja Neelanand Singh* (1) and *Albrecht v. Bathoe Jellamma* (2) referred to.

THE facts of this case sufficiently appear from the order of the Court.

Munshi *Damodar Das*, for the petitioner.

Mr. *M. L. Agarwala*, for the opposite party.

MEARS, C. J., and SULAIMAN, J.:—This is a reference by the Local Government under Rule 17 of the Rules and Orders relating to the Kumaun Division. The facts are clearly set forth in the letter of reference.

The plaintiff Anandmani was the minor son of one Chandramani and formed a joint Hindu family with him. Chandramani by a written will appointed the defendant Deba Nand, his nephew, a guardian of the plaintiff's person and property. On Chandramani's death the testamentary guardian in 1910 took over the management of the estate. In 1918 Musamat Parbati, the widow of Chandramani, acting as the next friend of her minor son Anandmani, brought the suit, out of which this reference has arisen, for rendition of accounts, damages and for the removal of Deba Nand from the managership of the property. The case for the plaintiff was that no valid will had been made by the deceased, nor had he any authority to appoint a guardian of his minor son by will, and that the defendant had been guilty of

\* Civil Miscellaneous No. 286 of 1920.

(1) (1867) 7 W. R., C.R., 74.

(2) (1911) 22 M.L.J., 247.