

plaintiff has or has not a right to carry on a certain business in or about a particular locality, and whether the defendant has or has not given him a cause of action by unlawful interference with his conduct of that business. We think that these questions must be answered in the affirmative. This appeal, therefore, fails and we dismiss it with costs.

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BENI MADHO
I RAGWAL
v.
HIRA LAL.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

NAND KUNWAR AND OTHERS (DEFENDANTS) v. SUJAN SINGH (PLAINTIFF). *
Civil Procedure Code (1908), order XXXIV, rule 8—Prior and subsequent mortgages—Suit and sale of mortgaged property by prior mortgagee—Subsequent suit for sale by puisne mortgagee not impleaded in former suit—Court not competent to extend time limited for payment of purchase money to auction purchaser.

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May, 31.

Held that a suit by a puisne mortgagee, who had not been made a party to the prior mortgagee's suit in the course of which the mortgaged property had been sold by auction, to pay off the auction purchaser and bring the mortgaged property to sale, is not, *quoad* the auction purchaser, a suit for redemption, and the Court has no power under order XXXIV, rule 8, to extend the time limited for payment of whatever may have been found due to the auction purchaser *Kalian v. Sadho Lal* (1) distinguished. *Idumba Parayan v. Pethi Reddi* (2) dissented from.

THE facts of this case are fully stated in the judgment of the Court

Mr. J. M. Banerji, for the appellants.

Babu Piari Lal Banerji, and Munshi Panna Lal, for the respondent.

TUDBALL and SULAIMAN, JJ. :—This is a defendant's appeal which has arisen out of a mortgage suit on an application by the decree-holder for a final decree. The facts are as follows :—

Two persons, Hari Singh and Sahib Singh, on the 22nd of June, 1871, created a simple mortgage over the property in suit in favour of one Sujan Singh (not the present respondent). On the 17th of March, 1876, they created another simple mortgage on the property in favour of one Lachcho. On the 27th of July, 1878, Sujan Singh sued upon his mortgage without impleading Lachcho, the puisne mortgagee. The property was finally put

* First Appeal No. 398 of 1917, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 20th of April, 1917.

(1) (1912) I. L. R., 35 All., 116. (2) (1920) I. L. R., 43 Mad., 357.

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to sale in execution of the decree and was purchased by Rudra Singh, the husband of the appellant, Musammat Nand Kunwar, in May, 1892. Since then she has been in possession thereof. On the 3rd of June, 1911, Musammat Bhawani, daughter of the original puisne mortgagee, and her son brought a suit on the mortgage of 1876. The plaintiffs impleaded the auction purchaser under the sale of 1892 and also the representative of the prior mortgagees. The decree that was passed is to be found at page 2 of the appellants' book. It decreed the plaintiff's claim for Rs. 6,000, with costs and future interest and gave the mortgagors a period of six months within which to redeem the mortgage. The decree then went on to say that if they failed to do this then the plaintiff was to pay within nine months from the date of the decree a sum of Rs. 1,000 to defendant No. 1, i.e., the widow of Rudra Singh, and Rs. 2,005-9-9 to defendants Nos. 2 to 6, representatives of the prior mortgagees, and that if they paid those sums then the said sums were to be added to the mortgage money due to him and he would be entitled to realize the entire amount by sale of the mortgaged property, but that if the plaintiff failed to pay the said sums he should not be entitled to have the property sold by auction.

An appeal was preferred to the High Court by the present appellant, Musammat Nand Kunwar. She raised two contentions. The first was that the plaintiff had failed to establish his mortgage and was not entitled to any decree. The second was that in any event the whole sum of Rs. 3,005-9-9 should have been decreed as payable to her alone and not to the defendants Nos. 2 to 6, representatives of the original prior mortgagees. The court held on the one point against her and on the other point in her favour. It held that the total sum of Rs. 3,005-9-9 was payable to her alone and that none of it was payable to the representatives of the prior mortgagees. It will thus be seen that this Court did not on appeal in any way increase the amount which the decree-holder was directed to pay into court to the defendants in order to enable them to put the properties to sale. There was, therefore, no question of the period of nine months being extended by this Court and no order was passed by this Court in respect to the extension of time. The plaintiff, Musammat

Bhawani failed to put into court the sum of Rs. 3,005-9-9. The High Court's decree was passed on the 12th of December, 1912. On the 22nd of February, 1914, Musammat Bhawani transferred her decree in favour of the present respondent, Sujan Singh. Sujan made an application to have his name brought on the record but withdrew it. He finally made the application out of which this appeal has arisen on the 11th of December, 1915. He asked to have his name brought upon the record as decree-holder, and to have a final decree for sale prepared in his favour. He stated in his application that he was willing to pay the sum which the Court had ordered the decree-holder to pay in favour of Musammat Nand Kunwar. The lower court gave him a fortnight within which to pay the money into court. He paid it, and on the 11th of April, 1917, the court below directed a final decree for sale to be prepared. It is from this final decree for sale that the present appeal has been preferred. It is urged that the court below had no power whatsoever to extend the time, that order XXXIV, rule 8, does not apply to the circumstances of the present case, in that it is not a redemption decree. It is further pleaded that the application for the preparation of the final decree is barred by limitation.

On behalf of the respondent it is urged that the case is governed by the ruling of this Court in *Kalian v. Sadho Lal* (1), that virtually the direction for the payment of Rs. 3,005-9-9 was a redemption decree and that order XXXIV, rule 8, therefore, applied and the lower court had jurisdiction to extend the time. Our attention has also been called to the decision of the Madras High Court in *Idumba Parayan v. Pethi Reddi* (2). So far as the case of *Kalian v. Sadho Lal* (1), is concerned, it is not on all fours with the present case. That was a suit in which there were subsisting prior mortgages and the prior mortgagees were made parties to the suit and the puisne mortgagee offered to redeem. He also sought to recover his own money and asked for the sale of the property to recover the total amounts due on all the mortgages. His prayer was allowed. He was given time within which to redeem the prior

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mortgages, and this Court held that order XXXIV, rule 8, certainly applied to that portion of the decree. The decision in our opinion was correct, for it was partly a decree for redemption to which the order quoted clearly applied. With the decision of the Madras case we, with all respect, find ourselves unable to agree. That was a case where a co-sharer sued for partition and sued also to recover his share in a bit of the family estate which had been alienated by other members of the family, which alienation the court found to be binding to the extent of Rs. 800. The court allowed him to obtain possession of the property conditional on his paying his share, Rs. 400, of the money. The learned Judges who decided the case treated that decree as a redemption decree and applied order XXXIV, rule 8. Order XXXIV, rule 8, with the proviso attached to it, applies only to redemption decrees. There is a similar provision to be found in order XXXIV, rule 3, which relates to suits for foreclosure. No such provision is to be found in relation to simple decrees for sale. In the present case the present appellant Musammât Nand Kunwar was not a prior mortgagee, and no order could have been passed that in case of default of payment by the plaintiff of the sum of Rs. 3,005 odd the present appellant should have power to put the property to sale to recover that amount. The decree was merely an equitable decree passed in the circumstances of the case. The prior mortgage no longer existed. It had merged into the decree and that decree had been executed and satisfied. The decree passed by the first court ordering payment of part of the money to the representatives of the prior mortgagee was set aside by this Court and the whole amount was made payable to the representatives of the auction purchaser. No redemption decree could have been passed in this case, nor was any redemption decree passed, and the only result, according to the decree, of the plaintiff's failure to put the money into court was that she was not able to put the property to sale. This was tantamount to a dismissal of her suit in default of payment, for without payment it was impossible for her to recover any money by sale of the property. There was no personal decree. In our opinion order XXXIV, rule 8, can apply only, as the law says it shall

apply, to redemption suits. The present was no redemption suit, and in our opinion the court below had no jurisdiction to extend the time. The order of the court in the decree directing payment of the money within a specified time has not been obeyed and the result followed as laid down in the decree. The respondent, therefore, was not entitled to a final decree for sale. Incidentally we call the attention of the court below to the following words in the proviso to order XXXIV, rule 8. "upon good cause shown." As far as we are able to discover, no cause whatever, good, bad or indifferent, was shown. The court appears to have acted in a purely arbitrary manner without assigning any reasons. The result, therefore, is that we allow the appeal and set aside the decree of the court below. The application for a final decree will stand dismissed with costs in both courts.

Appeal decreed.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

OHHABRAJI KUNWAR (DEFENDANT) v. GANGA SINGH (PLAINTIFF)*
Act (Local), No. II of 1901. (Agra Tenancy Act), section 134—Lambardar and co-sharer—Suit for profits—Decree to be either on gross rental or actual collections, but not on both—Finding as to negligence of lambardar a mixed finding of law and fact.

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 June, 2.

In a suit for profits by a co-sharer against a lambardar the decree must be based either on the gross rental or on the actual collections. It cannot be based partly on one and partly on the other. *Nand Kishore v. Ram Ratan* (1) referred to.

Held also that a finding of negligence or misconduct on the part of a lambardar is a mixed finding of fact and law, and is not exempt from reconsideration by the High Court in second appeal.

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

Dr. *Kailas Nath Katju*, for the appellant.

Babu *Satya Chandra Mukerji*, and Babu *Piuri Lal Banerji*, for the respondent.

* Second Appeal No. 967 of 1917, from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 2nd of July, 1917, confirming a decree of Bashir Ahmad, Assistant Collector, First class, of Cawnpore, dated the 19th of April, 1916.

(1) Weekly Notes, 1887, p. 250.