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necessarily arise as to what happened when on the 24th of August, 1921, Mr. Ali Ausat was content that the co-respondent should be dismissed from the suit and that the decree *nisi* should be passed upon the basis that the child born on the 3rd of July, 1920, was the child of some unknown man. In the circumstances Mr. Howard is at liberty, if he is so minded, to file a fresh petition; but he must insert in that petition a statement of the institution of this suit and its result,—that is in accordance with the divorce practice as it prevails in England,—and if he proposes to proceed on the basis of his wife's adultery with a man unknown, he must obtain leave from the Court to dispense with the making of a co-respondent. At the same time we think it right to point out that this case, both as regards the materials in the petition and as regards the statements of the parties, leaves us in some doubt as to the good faith of the parties, and it is very necessary, if there is another attempt of Mr. Howard to obtain a decree *nisi*, that he should put the whole of his case in the greatest fullness of detail before the Court. The decree *nisi* is therefore set aside. We direct that a copy of this judgment be sent to Mr. Sherring personally by registered post.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Stuart.

HARI RAM AND OTHERS (PLAINTIFFS) *v.* INDRAJ AND OTHERS (DEFENDANTS).*

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Mortgage—Redemption—Second suit for redemption after dismissal of first suit for failure to pay the amount decreed—Res judicata.

Where the decree in a suit for redemption of a mortgage merely provided that in default of payment of the mortgage money due the suit should be dismissed, and the money was not paid and nothing further was done, it was *held* that it was open to the mortgagor to sue again for redemption of the same mortgage. *Sita Ram* v. *Madho Lal* (1) followed.

THE facts of this case are fully set forth in the judgment of RYVES, J.

Dr. *Surendra Nath Sen*, for the appellants.

Mr. *E. A. Howard*, for the respondents.

* Second Appeal No. 437 of 1921, from a decree of E. R. Neave, District Judge of Meerut, dated the 17th of January, 1921 confirming a decree of P. K. Ray, Subordinate Judge of Meerut, dated the 15th of June, 1920.

(1) (1901) I. L. R., 24 All., 44.

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RYVES, J. :—In this appeal two important and difficult points of law arise, and our attention has been drawn to a number of decisions of the various High Courts in India, more or less relevant. I think, however, that we are bound by two Full Bench decisions of this Court, and, therefore, need not consider nor discuss any other cases.

The facts are as follows, so far as they are relevant :—The father of the present plaintiffs brought a suit in 1905 in the court of the Munsif of Ghaziabad to redeem the simple mortgage now in suit, and obtained a decree for redemption on payment of Rs. 2,647-11-2 within six months of the date of the decree. The decree went on to say, " otherwise the suit will be considered dismissed."

The money was not paid and the defendants recovered their costs. Nothing further was done until the present plaintiffs brought this suit in the court of the Subordinate Judge of Meerut to redeem the same mortgage on payment of Rs. 2,647-11-2 (as found due in the previous suit). The defendants to this suit were defendants in the previous suit or their transferees.

Two main defences were raised :—(1) that this suit was barred by the rule of *res judicata*; (2) that, no previous tender having been made, it was premature.

Both these contentions were upheld by the two lower courts, which dismissed the suit. Hence this appeal. Both findings of law are challenged in appeal.

The second point can be disposed of at once. The recent Full Bench case, *Raghunandan Rai* v. *Raghunandan Pande* (1) (which was decided subsequently to the decision of the lower courts), lays down that a tender under section 83 of the Transfer of Property Act is not a necessary condition precedent to a suit for redemption.

There remains the first point. Did the decree in the previous suit extinguish the mortgage, or can the plaintiffs, even if it did not, maintain this suit in the face of the previous decree ? This puts the defendants' case at its broadest. It seems to me that, so far as we are concerned, we are bound by the Full Bench ruling in *Sita Ram* v. *Madho Lal* (2) and must be guided by that decision if it is applicable.

It is true that the mortgage there was usufructuary, whereas here it is simple. I do not think this, in any way,

(1) (1921) I. L. R., 43 All., 638.
(2) (1901) I. L. R., 24 All., 44.

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affects the *ratio decidendi* of the ruling. In *David Hay* v. *Raziuddin* (1) the mortgage was also usufructuary, but the learned Judges who decided that case were at pains to point out that this circumstance was not considered by them as material to the question of law which they decided. It was this ruling which necessitated the Full Bench, in order to consider whether it was correct, and the Full Bench definitely overruled it. Incidentally I may note that one of the grounds on which the decision in *Hay's case* was based, and which was repeated here, was that the Legislature contemplated that there should be one suit, and only one, for redemption. This view, which prevailed in this Court for some time, was held to be untenable by the Full Bench.

The question referred to the Full Bench was quite general. KNOX, A. C. J., in the opening of his judgment, says :—

"What we have now to consider and determine is whether a mortgagor who has obtained a decree for redemption, which does not contain a provision that if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and has not paid in the decretal amount within the time, can subsequently bring a second suit for redemption of the mortgage in respect of which such decree was obtained." pp. 47-48.

The decree in the Full Bench case was unusually worded. It provided that on default of payment "the judgment should, after the expiry of the time fixed in the decree, be considered "*ma adum*"—translated by KNOX, A. C. J., as "annihilated," and by BANERJI and AIKMAN, JJ., as "non-existent."

The learned Judges concurred in holding that a mortgagor has an unfettered right to sue for redemption unless that right has been extinguished by act of the parties or by an order of a court. They go on to say that, having regard to the provisions of sections 92 and 93 of the Transfer of Property Act (which sections were in force when the decree in 1905, in this case, was passed), the proper decree in a redemption suit should have ordered, under the last clause of section 92, that in default of the payment directed under the previous provisions of that section the mortgaged property be sold.

Then, under section 93 it was open to the mortgagee to apply for the sale of the mortgaged property, in which event the court "shall order that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale

(1) (1897) I. L. R., 19 All., 202.

(after defraying throughout the expenses of the sale) be paid into court and applied in payment of what is due to the defendant (mortgagee), and that the balance be paid to the plaintiff." The section goes on to say that, "On the passing of any order under this section, the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished."

The Full Bench held that unless the defendant obtained an order of sale as provided in section 93, the mortgage was not extinguished, and that, therefore, the equity of redemption remained intact and the mortgagor's right to redeem still subsisted.

At the same time, however, it was pointed out that even if the decree in the redemption suit was not drawn in accordance with the law, nevertheless it might be so worded that, if allowed to become final, it would bar a second suit for redemption by the rule of *res judicata*, and, as a case in point, reference was made to *Ramasami* v. *Sami* (1), where the decree provided that in default of payment within the period fixed by the court, "the mortgagor shall be debarred from redeeming" the property afterwards.

What I think, therefore, we have to do here is to construe the decree in the previous case of 1905, and see whether, though not framed in accordance with law, it has declared that the result of non-payment was then decided by the decree to involve the extinguishment of the mortgage, and so debar the plaintiffs from ever again suing to redeem.

Mr. Howard for the respondents strenuously argues that this is so. He says:—The suit was a suit for redemption, it was decreed and the amount, very different from that alleged by the plaintiffs, was determined and the plaintiffs were given a fixed time within which to pay that amount, in which case their suit would be decreed with the necessary consequences; if they failed to pay in the money as directed, their suit "would be considered dismissed." This, he argued, meant that the court held that failure to pay in time involved not only that the suit was dismissed, but that any subsequent suit must be dismissed, because the decision amounted to a declaration that the right to redeem had been extinguished.

(1) (1893) I. L. R., 17 Mad., 96.

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The decree certainly does not say so, nor does it say anything about the extinguishment of the relations of mortgagor and mortgagee, or that the right to redeem will henceforth be barred (as in the Madras case cited *supra*).

I think the reasonable interpretation (in the absence of anything obviously to the contrary) is to hold that the decree means what it says, that is that the suit will be dismissed, leaving the parties in the position they occupied when the suit was brought. A similar interpretation was put by the Full Bench on the decree in the case before it.

To hold otherwise would mean that the court deliberately intended that the plaintiffs should be debarred, in the event of their failure to pay the decretal amount in time, from obtaining the possible advantage they might be entitled to, if a proper decree had been prepared and if the proper procedure indicated in section 93 had been adopted by the mortgagees. It might be that only a part of the mortgaged property would have had to be sold to satisfy the mortgage debt, in which case the surplus of the sale moneys, if any, and the balance of the property unsold, would go to the mortgagors plaintiffs, free of all liability, because the mortgage debt and the security for it, would both be extinguished.

In the face of very clear and unmistakable words in the decree, I would be loath to give it this unnecessarily broad interpretation.

In my opinion the appeal should be allowed, the decrees of both lower courts be set aside, and the case returned to the trial court through the district court to be restored to its original number and tried according to law. Costs throughout to be costs in the cause.

STUART, J. :—I concur. I have nothing to add to the decision that the suit is not premature, and very little to add on the remaining point.

In view of the Full Bench decision in *Sita Ram* v. *Madho Lal* (1) there seems to me to be only one question which requires an answer. Did the decree of 1905 expressly or impliedly debar the plaintiff from redeeming in a future suit and extinguish his right of redemption unless he paid the amount decreed within the time prescribed? I would, agreeing with my learned brother, answer that question in the negative. The appeal should, therefore, be allowed.

(1) (1901) I. L. R., 24 All., 44.

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COURT :—The appeal is allowed. The decrees of courts are set aside. The suit will be remanded court, through the District Judge, to be restored to al number and tried according to law.

Appeal decreed.

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

IAN AND SON (DEFENDANTS) *v.* A. CAMERON (PLAINTIFF).*

1922 *June*, 7.

Act IX of 1872 (Indian Contract Act), section 151—Hotel-keeper—Liability of hotel-keeper for safe custody of property of guests.

The liabilities of a hotel-keeper to his guests are regulated by the ian Contract Act, and in the absence of any specific agreement in a given se, the rules in Chapter IX of that Act will apply.

Where, therefore, the property of a guest at a hotel was stolen from room while he was at dinner in a different part of the hotel building, and was found that the room occupied by him was to the knowledge of the tel-keeper in an insecure condition, which the latter had taken no steps to ectify, it was *held* that the hotel-keeper was liable. *Rampal Singh* v. *Murray & Co.* (1) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

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

Babu *Sital Prasad Ghosh*, for the respondent.

RYVES and GOKUL PRASAD, JJ. :—The facts out of which this appeal arises are these :—The plaintiff (respondent), who is a commercial traveller, went to Cawnpore, in September, 1918, and put up as a guest at the Civil and Military Hotel, Cawnpore, which was owned by the defendant (appellant). While staying in the hotel, he alleged that a suit-case of his, containing valuables to something over Rs. 3,000 in value, was stolen from the room he occupied, while he was at dinner in another part of the building. He claimed to recover the value of the stolen goods from the defendant on the ground that the loss was due to the neglect of the defendant in keeping the premises in an unsafe condition. The defendant (appellant), among other pleas, pleaded that if the theft was committed, it was due to the fault or connivance of the plaintiff's own servant and that the defendant was not liable, and that the defendant had kept proper care and had taken proper steps to provide for the security of travellers staying in the hotel, and that there was no negligence on his part. The trial court

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* Second Appeal No. 1526 of 1920, from a decree of L. S. White, District Judge of Cawnpore, dated the 30th of July, 1920, confirming a decree of Ganga Prasad Varma, Subordinate Judge of Cawnpore, dated the 26th of August, 1919.

(1) (1899) I. L. R., 22 All., 164.