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on to the record. We therefore allow the application, set aside the order of abatement and direct that the appeal be put up in the ordinary course. We make no order as to costs.

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February, 27.

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

PARAS RAM SINGH (DEFENDANT) *v.* PANDOHI AND OTHERS (PLAINTIFFS.)*

Mortgage—Prior and puisne mortgagees—Prior mortgage foreclosed without puisne mortgagees being made parties—Rights of the two mortgagees inter se.

The owners of certain zamindari property, having mortgaged the same by way of conditional sale to the defendant, subsequently made a usufructuary mortgage of certain specific plots of land included in the first mortgage to the plaintiff. The defendant sued for foreclosure, but without making the plaintiffs parties to his suit, and having obtained a decree got possession of the mortgaged property. The plaintiffs then sought to redeem the prior mortgage; the prior mortgagees on the other hand pleaded that they ought to be permitted to redeem the plaintiffs.

Held that in the circumstances of the case and more particularly to prevent further litigation in future the equities of the case demanded rather that the defendant should be allowed to redeem the plaintiffs.

Hassanbhai valad Budhanbhai v. *Umaji bin Hiraji* (1), *Kedar Nath* v. *Saiyad Hafiz Ali* (2), *Charni* v. *Raj Bahadur* (3), *Musammat Ram Piari* v. *Raghunath Singh* (4) and *Kedar Prosanna Lahiri* v. *Girindra Prosad Sukul* (5) referred to.

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

Dr. *S. M. Sulaiman* and Dr. *Kailas Nath Katju*, for the appellant.

Munshi *Kamalakanta Varma*, for the respondents.

RYVES, J.—The essential facts, so far as they are necessary for the purposes of this appeal, can be stated very shortly. The mortgagor, who is no longer interested, by a mortgage by conditional sale, dated the 20th of September, 1900, mortgaged his zamindari share in four villages to the defendants. Subsequently, on the 15th of July, 1903, he executed a usufructuary mortgage in favour of the plaintiffs of three small plots of *sir*

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* Second Appeal No. 385 of 1920, from a decree of G. C. Badhwar, District Judge of Ghazipur, dated the 10th of February, 1920, confirming a decree of Piare Lal Rastogi, Additional Subordinate Judge of Ghazipur, dated the 6th of March, 1919.

(1) (1903) I. L. R., 28 Bom., 153. (3) (1909) 2 Indian Cases, 495.

(2) (1907) 10 Oudh Cases, 356. (4) (1915) 29 Indian Cases, 794.

(5) (1908) 8 C.L.J., 173.

land for Rs. 99-15-6, and, on the 8th of July, 1904, he executed two other usufructuary mortgages in favour of the plaintiffs of some other small plots of *sir* and *khudkasht* land for Rs. 71 and Rs. 75 respectively. The aggregate area of these plots was a little over 3 bighas, that is, something more than an acre. All these plots of land were situated within the boundary of the village of Ukraon, one of the four villages mortgaged to the defendants. These three usufructuary mortgages were all unregistered. The terms of all of them were similar. The mortgagees undertook to pay the Government revenue, and the profits were set off against the interest. It was agreed that the mortgages could be redeemed at the end of the month of Jeth in any year on payment of the principal money.

In 1907 the defendants brought a suit for foreclosure of the mortgage of 1900 against the mortgagor and obtained a decree, which was made absolute in 1908, and thus they obtained eventually possession of the mortgaged property. The plaintiffs, the puisne mortgagees, were not made parties to that suit. Thereafter the defendants sought to eject the plaintiffs in the revenue court, describing them as their tenants. They pleaded that they were usufructuary mortgagees, and, on being referred to the civil court, obtained a decree from the civil court declaring them to be usufructuary mortgagees. This was on the 21st of May, 1917. On the 6th of August, 1918, the plaintiffs served a notice on the defendants of their intention to sue for redemption of the prior mortgage of 1900. On the 30th of August, 1918, the defendants deposited in court under the provisions of section 83 of the Transfer of Property Act the entire amount due to the plaintiffs on the three subsequent usufructuary mortgages, offering to redeem them. The plaintiffs refused to accept the money, and on the 10th of September, 1918, filed this suit praying to be allowed to redeem the prior mortgage of 1900 on payment of "the amount which the court considers genuine and valid" and that "they may be put in possession of the property comprised in the prior mortgage together with the *sir* land appertaining thereto". The defendant No. 1 contested the suit on three grounds. The first two need not be considered. The third ground taken was: "To avoid future dispute and to put a stop to the litigation, he (the defendant) had deposited the whole

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amount due to the puisne mortgagees on their mortgages and asked them to give up possession and that although they had refused this offer, he was still willing to pay them everything due under their mortgages." On these pleadings the trial court framed, among other issues, issue No. 6 :—"Have defendants got a right to redeem the mortgages in favour of the plaintiffs? Have defendants been ready to pay the mortgage money due to plaintiffs? If so, how does it affect the claim?" On this issue, the only one with which we are concerned, it held: "Defendants appear to have deposited the mortgage money due to the plaintiffs in court under section 83 of Act IV of 1882, and they claim that they have got a preferential right of redemption. This view, though countenanced by the Bombay High Court, is opposed to the views of the other High Courts (*vide* Gour's Transfer of Property Act, page 1130, fourth edition, and the rulings cited on that page). The learned author observes: 'If the Bombay view be correct, the prior mortgagee would steal a march over the subsequent mortgagee by keeping him ignorant of the suit in which he acquires the mortgagor's interest.'" I went on to find that inasmuch as the plaintiffs had not been made parties in the foreclosure suit, the plaintiffs had a preferential right to redeem; and it gave them a decree for redemption on payment, not of the amount claimed by the plaintiffs, namely Rs. 3,282-12-0, but of Rs. 4,929-6-0, which included a sum of Rs. 1,400 which the defendants had to pay in their suit to redeem a still earlier mortgage. The defendant No. 1 appealed, and in paragraph 4 of his memorandum of appeal put his case in the following words :—"Legally the appellant as representative of the mortgagor and also as prior mortgagee has a right to redeem the mortgages in favour of the plaintiffs. The appellant with a view to do away with future disputes, has already deposited, under section 83 of Act IV of 1882, the mortgage consideration due to the plaintiffs in a competent court, but they, as a precautionary measure, instituted this suit. Having regard to the entire circumstances, the defendant's prayer as to the redemption of the plaintiffs' mortgages was fit to be allowed, and, in this case, a decree for redemption in favour of the defendant should have been prepared. Such a decree is not prejudicial to the plaintiffs, and the one for redemption passed by the court is

materially injurious to the defendant's right." The learned Judge of the court below sets out as one of the two points for his decision, as follows, "that the defendants appellants (*sic*) who were once prior mortgagees were now the owners of the equity of redemption and were, therefore, entitled to redeem the plaintiffs' mortgages." Unfortunately, as it seems to me, when he comes to discuss this proposition in his judgment, he changes the phraseology of the issue as he had originally expressed it and asked himself, "the second point for decision is whether the subsequent mortgagees have a preferential right of redemption over a prior mortgagee who has obtained a decree for foreclosure", and he then goes on to hold that the plaintiffs, not having been made parties in the former foreclosure suit, cannot in any way be affected by what happened in that suit, and, finally, after discussing some rulings to which I shall refer later, accepted the dictum of Dr. Gour already quoted and dismissed the appeal. The defendant No. 1 comes here in second appeal, and his first ground is that the learned District Judge has overlooked the fact that although the subsequent mortgagees are entitled to redeem the prior mortgage, the prior mortgagees, who have already acquired the mortgagor's right by foreclosure, can after such redemption claim redemption of the subsequent mortgage.

It seems to me most unfortunate that the courts below should have asked themselves which of the parties had "the preferential" right to redeem. It seems to me clear beyond any controversy that both had a right of redemption. I prefer to regard this litigation as being substantially two cross-suits which might well have been consolidated, as indeed they were for all practical purposes, having regard to the pleadings and issue No. 6 framed by the trial court and reiterated in the appellate court and tried out in both courts. I think paragraph 21 of the written statement already quoted may be regarded as substantially a plaint in such a cross-suit. I think this litigation really involves two suits: (1) by a puisne mortgagee to redeem a prior mortgagee who had not made him a party in his suit on his own mortgage, and (2) by a person who had become the owner of the mortgaged property, and who had acquired the equity of redemption and, therefore, stands in the shoes of the mortgagor, to

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redeem an encumbrance. It seems to me that both are, *prima facie*, entitled to what they claim, and the question for the court under such circumstances, when all the parties were before it and all the necessary evidence was on the record, was to decide once and for all, having regard to the equities of the parties and to prevent further litigation, what the justice of the case demanded. In this view, what I think we have to look at in this appeal, is not whether the decisions of the courts below were legally correct, but whether we should now do what I think the courts below should have done. Look at the consequences. If we uphold this decree, the plaintiffs pay the decretal amount to the defendants and the next day the defendants will inevitably file their suit to redeem the plaintiffs and so recover the property. All that the plaintiffs are entitled to is to get back their mortgage money. After all, they are merely mortgagees and, as such, are liable to be redeemed by the owner of the property, that is, the mortgagor or whoever represents him. In this case the prior mortgagees, the defendants, having acquired the equity of redemption, stand in the shoes of the mortgagor and are the owners of the property. I should be content to stop here and base my decision on what seems to me to be required by the equities of the case. But as it has been very ably argued on behalf of the respondents that the decisions of the various courts, except the Bombay decision, are opposed to my view, I think I should consider those authorities. The Bombay case, namely, *Hassanbhai valad Budhanbhai* v. *Umaji bin Hiraji* (1), it is conceded, is an authority in favour of the appellant, but it is argued that the facts there were different, that the decision itself is unreasonable and that it has not been followed by other courts. In the Bombay case the mortgagor brought a suit to redeem the prior mortgage and got a decree but failed to pay the decretal amount within the time ordered, and, consequently, the mortgage was foreclosed. Then the subsequent mortgagee brought a suit for sale on his mortgage, thereby, it is said, offering the prior mortgagee the option of redeeming him. Although the facts are different, I do not think the principle of law involved is substantially different. Next, it is said that the decision of the Bombay Court

(1) (1903) I. L. R., 28 Bom., 153.

is unreasonable, because if the puisne mortgagees had been made parties in the former suit, as they should have been made, they would have had an undoubted right to redeem the prior mortgage, and it is said the prior mortgagee must not be allowed to take advantage of his own fault by depriving the subsequent mortgagees of their right to redeem the prior mortgage. This, I think, puts Dr. Gour's dictum, already quoted, in other words. Although it has been held that a subsequent mortgagee who should have been made a party to the suit on a prior mortgage but had not been made a party, cannot in any way be affected by the decree in that suit, and cannot be put in a worse position than he would have been in if he had been made a party, on the other hand, it seems to me, he cannot be put in a better position than he would have been in if represented then. If he had been made a party to the former suit, no doubt he could have redeemed the prior mortgage, but he would not thereby have obtained possession of the property. What he now claims is, that, not having been made a party to the former suit, that decree *must* be considered a nullity, and that he is now entitled on redeeming the prior mortgage to become the owner of the whole property originally mortgaged. This, manifestly, he cannot do. The result of the former suit undoubtedly was to vest the ownership of the property in the defendants and, as such, they must have a right to redeem the plaintiffs. The last argument is that the other High Courts have not followed the Bombay decision. It seems to me that this argument is based on the head-note to the Bombay case which is very misleading. According to that it was "*Held*, reversing the decree, that H, the prior mortgagee, had a right to redeem superior to that of U, the subsequent mortgagee." Put baldly like that, it is most misleading. The High Court never held anything of the kind. What they did hold was, as reported on page 160: "Looking to the substance and not to the form of the suit, the plaintiff was clearly seeking relief on the basis of the right of a mortgagee. When the pleadings were complete it appeared that his mortgage was subsequent in date to that which Hassan had taken of the same lands and had foreclosed. The contest thus became one between, on the one hand, a prior mortgagee in possession who had obtained a decree absolute for foreclosure and, on the

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other hand, a subsequent mortgagee who had not been made a party to the redemption suit in which that final decree for foreclosure was made." Later on it is said: "The next and main point for decision is whether, looking to the equities on both sides, Hassan, the prior mortgagee, who had already obtained a final decree for foreclosure against the mortgagors and was in possession, ought to have been given an opportunity to redeem Umaji, the subsequent mortgagee", and they held that under the circumstances of the case he should be allowed to redeem the subsequent mortgagee. It seems to me, therefore, that the note in Dr. Gour's commentary on page 1130 is not quite accurate where he says, "the right of the prior mortgagee to redeem the subsequent mortgagee on his acquiring the mortgagor's equity of redemption whether by foreclosure or sale *in* a suit to which the subsequent mortgagee was not a party, has been categorically affirmed in Bombay while it has been as categorically denied by the Calcutta and other courts."

The learned vakil for the respondents has not been able to refer us to a single case in which the Bombay case had been dissented from. That decision was published as long ago as 1904, and the cases that have been referred to really have held nothing more than what is quite clear, namely, that a subsequent mortgagee who has not been made a party to a foreclosure decree is not affected by it. The Bombay case, however, has been unreservedly approved of and followed in the case of *Kedar Nath* v. *Saiyad Hafiz Ali* (1), decided by a Bench consisting of Messrs. CHAMIER and GRIFFIN, both of whom were subsequently Judges of this Court. It was followed in the case of *Charni* v. *Raj Bahadur* (2), by Mr. Justice KARAMAT HUSAIN, and it was referred to by Mr. Justice PIGGOTT in the case of *Musammat Ram Piari* v. *Raghunath Singh* (3). That was a similar case to this one, and Mr. Justice PIGGOTT, far from dissenting from the Bombay case, decided not to follow it, not apparently because he did not approve of it, but because there were no materials on the record on which he could give the prior mortgagee a decree, and he, therefore, left the parties to obtain such remedies as they might have in a further suit. I do not think it

(1) (1907) 10 Oudh Cases, 356. (2) (1909) 2 Indian Cases, 495.
(3) (1915) 29 Indian Cases, 794.

necessary to refer more specifically to any other of the many decisions which have been brought to our notice, except perhaps the case of *Kedar Prosanna Lahiri* v. *Girindra Prosad Sukul* (1). There the contest was between the first mortgagee and the second mortgagee who had both brought suits on their mortgages without making the other a party, and on getting a decree had purchased the mortgaged property, and it was there held that each party was entitled to redeem the other, but the preferable right to redeem was with the plaintiff who, in that case, was the subsequent mortgagee. The point now before us was not argued or decided and no cases were referred to. As I have already said, the decision of the courts below in this case was legally right, but I do not think it was the proper decision to give having regard to all the circumstances of the case and the pleadings of the parties. I would, therefore, allow the appeal and allow the defendants to redeem the plaintiffs' mortgages, on payment to them of the sum due on their mortgages in the next month of Jeth. If they fail to do so, I would dismiss the appeal.

GOKUL PRASAD, J.—I agree in the order proposed and in the judgment of my learned brother. I have only to state that the result of our dismissing this appeal would be to prolong this litigation. If the plaintiffs are allowed to redeem the prior mortgage in favour of the defendant who has now acquired the equity of redemption, the result would be that the defendant prior mortgagee purchaser will bring a suit to redeem the puisne mortgage in favour of the plaintiffs and would get back the property on payment of the amount due under the plaintiffs' mortgages as also the amount which he has received from the plaintiffs in satisfaction of his prior mortgage, or in other words, the defendant would be placed back in the same position in which he would have been if he had been allowed to redeem the plaintiffs. Besides this, the plaintiffs would be in no better position by redeeming the mortgage in favour of the defendant. They would have after redemption their three bighas odd free from the mortgage and would only have a charge on the balance of the mortgaged property for the proportionate amount which they would have had to pay over and above the proportionate share

(1) (1908) 8 C. L. J., 173.

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due from their three bighas. From this aspect, too, the result of conceding to the plaintiffs' argument would be a suit for contribution by the plaintiffs against the owners of the remaining portion of the mortgaged property. So that, in any case, the plaintiffs would not benefit from the suit. The decree proposed by my learned brother fully meets the justice of the case and gives effect to the equities between the parties and at the same time prevents uselessmultiplicity of proceedings.

BY THE COURT.—The order of the Court is that this appeal is allowed, the defendant being given time to the 9th of June, 1922, to redeem the plaintiffs' mortgages on payment of the sum due on their mortgages on that date. In case of their failure to do so, this appeal will stand dismissed. Under the circumstances of this particular case, we direct that the parties do bear their own costs of this litigation.

Appeal allowed.

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March, 3

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAO NARSINGH RAO (PLAINTIFF) *v.* BETI MAHA LAKSHMI BAI AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (*Indian Evidence Act*), *section* 112—*Presumption—Burden of proof.*

Plaintiff sued for the recovery of a large amount of property, the basis of his claim being that he was the son of a certain lady, but he failed to prove the parentage alleged, or even that his alleged mother had given birth to any child on or about the date specified as that of his birth. The defendants on the other hand failed to prove the case that they set up, which was that the plaintiff was of an entirely different parentage.

Held that the failure of the defendants to prove their case affirmatively did not entitle the plaintiff to the benefit of the presumption laid down in section 112 of the Indian Evidence Act, 1872.

Narendra Nath Pahari v. *Ram Gobind Pahari* (1) and *Tirlok Nath Shukul* v. *Lachmin Kunwari* (2) distinguished.

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

Mr. *Nihal Chand* and Munshi *Sheo Prasad Sinha*, for the appellant.

Pandit *Ladli Prasad Zutshi*, and Dr. *Kailas Nath Katju*, for the respondents.

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* Privy Council Appeal, No. 48 of 1922

(1) (1901) I. L. R., 29 Calc., 111. (2) (1903) I. L. R., 25 All., 403.