

1922

MUBARAK
FATIMA
v.
MUHAMMAD
QULI KHAN.

plaintiff in respect of the years covered by this suit, and for this we can see no remedy other than by way of suit in a Civil Court. As the case stands, we must dismiss this appeal, and we do so accordingly with costs.

Appeal dismissed.

Before Mr. Justice Rives and Mr. Justice Gokul Prasad.

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February, 27.

BUDHI LAL AND ANOTHER (DEPENDANTS) v. THE ADMINISTRATOR GENERAL OF MADRAS (PLAINTIFF) AND INAM-ULLAH (DEPENDANT).
Mortgage—Prior and subsequent mortgages—Suit by second mortgagee for sale of the mortgaged property which had been already sold in a suit to which he was not made a party—Form of decree—Rights of auction purchaser.

The general rule is that where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage. *Cangayam Venkataramana Iyer v. Comperis*, (1) referred to.

This rule applies equally to auction purchasers and to private purchasers. *Mati-ullah Khan v. Banwari Lal* (2) and *Manohar Lal v. Ram Babu* (3) referred to.

In such a case the auction purchaser cannot claim to be repaid money which he has spent on improving the mortgaged property. *Cangayam Venkataramana Iyer v. Comperis* (1) referred to.

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

Munshi *Gulzari Lal*, for the appellants.

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

RYVES and GOKUL PRASAD, JJ.:—The circumstances giving rise to this appeal are as follows:—Inam-ullah, defendant No. 1, made a mortgage of a grove in favour of Manni Lal, defendant appellant, on the 1st of June, 1906. On the 6th of July, 1910, he made a second mortgage of the same grove in favour of Shamshad Ali who is now represented by the plaintiff respondent. In 1915 the first mortgagee brought a suit and obtained a decree for sale. To this suit the second mortgagee Shamshad Ali was not made a party and, therefore, his rights, whatever

* Second Appeal No. 1239 of 1920, from a decree of E. Bennet, District Judge of Farrukhabad, dated the 5th of August, 1920, modifying a decree of Ganga Prasad Varma, Munsif of Kanauj, dated the 23rd of April, 1920.

(1) (1908) I. L. R., 31 M. d., 425. (2) (1909) I. L. R., 32 All., 138.

(3) (1912) I. L. R., 34 All., 323.

they were, were not affected by this decree. On the 20th of January, 1916, the mortgaged property was sold in execution of the decree aforesaid and was purchased by Budhi Lal, defendant No. 3, and one of the appellants before us, and on the 1st of June, 1917, he obtained possession of the property. The plaintiff has now brought this suit for sale on the second mortgage and he has impleaded as defendants the original mortgagor, the holder of the decree on the first mortgage, and the auction-purchaser in execution of that decree. The defence raised by the auction purchaser and the prior mortgagee decree-holder was that the plaintiff could not bring the property to sale without redeeming the prior mortgage. They also claimed Rs. 247 for improvements made on the property by the auction-purchaser.

The trial court decreed the plaintiff's claim subject to his paying Rs. 798-8 and interest thereon at six per cent. per annum from the 23rd of January, 1916, to the date of payment, and Rs. 247 for improvements to the auction-purchaser before the plaintiff could sell the property, or, in other words, it gave a decree to the plaintiff conditional upon paying off the prior mortgage which had been, so to say, discharged by the auction-purchaser. The plaintiff went up in appeal and the learned Judge has, for reasons which commended themselves to him, decreed the plaintiff's claim unconditionally. The defendants, prior mortgagee and the auction-purchaser in execution of the decree under the prior mortgage, come here in second appeal, and their first contention is that the decree of the lower appellate court giving the plaintiff an unconditional decree for sale is bad and that the plaintiff should have been directed to redeem the first mortgage before he could bring the property to sale. They also claim the amount spent by the auction-purchaser on improvements as payable before the plaintiff could bring the property to sale.

As to the last contention, we have not been referred to any rule of law under which the auction-purchaser could make such a claim. It has been decided in the negative by the Madras High Court in the case of *Cangayam Venkataramana Iyer v. Gompertz* (1).

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As to the first contention, the general rule is that where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage: see *Cangoyam Venkalaramana Iyer v. Gompertz* (1). We see no reason why in this case we should depart from the general rule stated above. All the parties interested in the mortgaged property are before us and we can do justice between them and adjust the equities of the case. It has been contended before us by the learned advocate for the respondents that this rule does not apply to the case of auction-purchasers. We do not see any reason why an auction-purchaser should stand on a different footing from a private purchaser in this particular matter. No distinction seems to have been made between purchasers at auction and those by private treaty in the case of *Mati ullah Khan v. Banwari Lal* (2), and in the case of *Manohar Lal v. Ram Babu* (3). We think this appeal must be allowed and the decree of the court below set aside.

We, accordingly, allow the appeal with costs. As the decree passed by the Munsif is not quite clear, we discharge the decrees of both the courts below and in lieu thereof pass a decree for sale in favour of the plaintiff, giving the defendants six months' time from to-day to redeem the plaintiff's mortgage, and in case of their failure to do so, give the plaintiff three months' time from the expiry of the six months aforesaid to pay off the amount mentioned in the decree passed by the Munsif as due on the prior mortgage to defendant No. 3 (but not the sum of Rs. 247), and in case of such payment being made within the period aforementioned, the plaintiff will be entitled to realize the amount due on his mortgage as also the amount paid to satisfy the prior mortgage plus the costs of this litigation by sale of the mortgaged property. In case of failure by the plaintiff to make such payment, the suit shall stand dismissed with costs in all courts.

Appeal allowed.

(1) (1908) I. L. R., 31 Mad., 425. (2) (1909) I. L. R., 32 All., 188.

(3) (1912) I. L. R., 34 All., 323.