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TULSHI
RAM
v.
BISHNATH
PRASAD.

We accordingly allow this appeal and setting aside the decree of the court below decree the plaintiff's suit with costs in both courts.

Appeal allowed.

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

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March, 15.

JAGAT SINGH AND OTHERS (PLAINTIFFS) v. JAI NARAIN
AND OTHERS (DEFENDANTS).*

*Civil Procedure Code, order XXXIV, rule 14—Mortgage—
Same property subject to a usufructuary mortgage and a
later simple mortgage to same mortgagee—Effect of sale
under a decree on the later mortgage.*

Two villages were mortgaged usufructuarly on the 20th of April, 1877, for Rs. 22,000, and half of a third village was hypothecated as collateral security. Four days later, the mortgagee leased the first two villages to the mortgagor, and the mortgagor hypothecated all three villages to the mortgagee as security for the lease-money. The lease-money was not paid and in consequence the lessee was ejected. The mortgagee then, having taken possession, brought a suit on the deed of the 24th of April, 1877, (the second, and simple, mortgage) for the sale of the three villages, subject to his earlier mortgage of the 20th of April, and, having obtained a decree, brought the property to sale and purchased it himself.

Held, on suit by the heirs of the mortgagor to redeem the earlier (usufructuary) mortgage, that what was really sold and purchased by the defendants, mortgagees, decree-holders was the plaintiffs' equity of redemption, and, therefore, the suit could not be maintained. *Khairajmal v. Daim* (1), *Lal Bahadur Singh v. Abharan Singh* (2), *Sardar Singh v. Ratan Lal* (3), *Mata Din Kasodhan v. Kazim Husain* (4), and *Parmanand v. Daulat Ram* (5), referred to.

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

* First Appeal No. 161 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 3rd of January, 1924.

(1) (1904) L.R., 32 I.A., 28; I.L.R., (2) (1915) I.L.R., 37 All., 165.
32 Calc., 296.

(3) (1914) I.L.R., 36 All., 516. (4) (1891) I.L.R., 13 All., 432.

(5) (1902) I.L.R., 24 All., 549.

Sir *Tej Bahadur Sapru* and Mr. *P. N. Sapru*, for the appellants. 1927

Dr. *Surendra Nath Sen*, Pandit *Uma Shankar Bajpai* and *Munshi Binod Bihari Lal*, for the respondents. JAGAT SINGH
JAI NARAIN.

MEARS, C. J., and DALAL, J. :—This is an appeal by the plaintiffs from the dismissal of their suit for redemption of a mortgage. They are the sons and grandsons of Bahadur Singh and Tundi Singh who executed the mortgage in suit on the 20th of April, 1877, in favour of Damodar Das for a sum of Rs. 22,000. Under the mortgage two villages, Ramnagar Jagatpur and Pasgawan, were mortgaged with possession, and half share in village Deothan was hypothecated by way of security for payment of the mortgage money at the time of redemption, should the value of the two villages mortgaged with possession prove insufficient to pay the debt. The rate of interest, and the collection charges were fixed by agreement between the parties. The result of the transfer was that Damodar Das took possession as mortgagee of the two villages, and obtained a lien by way of a simple mortgage over the third village. Four days later, on the 24th of April, 1877, the mortgagee leased the two villages Ramnagar Jagatpur and Pasgawan to the mortgagors, and on the same day the mortgagors hypothecated the two villages and half share in village Deothan as security for payment of the lease-money agreed to be paid. A charge was created, in clause (6), in the following words :—

“ In security of the lease-money we hypothecate the 20-biswa share in each of the villages Ramnagar Jagatpur and Pasgawan named above, and the 10-biswa share in mauza Deothan, in addition to the charge of the mortgage money due under the mortgage-deed, dated the 20th of April, 1877.”

As usually happens in these cases, the mortgagors behaved as if nothing had happened, went on pocketing the profits of the villages and paid nothing to the mortgagee lessor. The result was that under clause (2) of

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the lease Bahadur Singh and Tundi Singh were ejected from the two villages on the 15th of May, 1879. After taking possession of the two villages, Damodar Das instituted a suit to enforce the simple mortgage of the 24th of April, 1877, against the three villages on the 10th of June, 1880, for recovery of the amount of arrears of lease-money. The prayer in that suit was that a money decree may be passed, and in case of default of payment the property subsequently hypothecated, that is, the three villages, may, subject to the prior hypothecation lien created under the mortgage-deed of the 20th of April, 1877, be sold by auction. The claim was admitted, and Damodar Das obtained a judgement and decree in terms of his prayer in the plaint. The property was put up to auction and purchased by Damodar Das himself in satisfaction of the decree. The terms of the sale certificate are :—

“ The entire 20 biswas in the village Ramnagar Jagatpur and the entire 20 biswas in the village Pasgawan as well as 10 biswas in the village Deothan were purchased by Damodar Das for Rs. 10,400 with proclamation that Rs. 22,000, the prior mortgage money, was due to the decree-holder in this suit and that a suit was brought by Carew and Company to the effect that the judgement-debtors had sold the jungle . . . in village Deothan . . . and that a claim was brought by Musammat Rupni, daughter of Jagat Singh, a minor, to the effect that the property advertised for sale was ancestral, and the judgement-debtors had spent the money for unlawful purposes, and that Rs. 1,000 were in arrears in village Deothan.”

This is a clear narration of the disabilities alleged to attach to the property and what would or might affect the property in the hands of the auction-purchaser.

In the lower court the argument was that the property did not pass to Damodar Das because the sons of the mortgagors were not parties to the decree. It is obvious that to render a sale ineffectual on that ground it was necessary for the plaintiffs to prove that the debts

were contracted for immoral purposes. They admittedly failed to lead evidence in the matter.

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In this Court, however, all other grounds of appeal were abandoned and the plaintiffs appellants' learned counsel, Dr. *Sapru*, confined himself to only one argument—that the sale certificate did not transfer the equity of redemption to Damodar Das because the usufructuary mortgage was saved and, therefore, the plaintiffs still had an existing right for the redemption of the usufructuary mortgage in suit. The one question, therefore, presented to us for decision is whether by the sale of the 22nd of November, 1881, duly confirmed by the court executing the decree, the mortgagors' right in the equity of redemption was extinguished or not. The learned counsel's argument was that the equity of redemption was preserved to the mortgagors. If so, the conclusion must be that nothing was sold. If the purchaser had been some person other than Damodar Das, he would have paid Rs. 10,400 without obtaining any rights in the property, because, on the one hand, he was liable to redemption, according to the learned counsel, by the mortgagors, and, on the other, a usufructuary mortgagee was in physical possession of the property. It will be helpful to consider for a moment the situation as it existed on the 15th of May, 1879, when Bahadur Singh and Tundi Singh were ejected from possession of the property. The rights of Damodar Das on that day were a charge on two villages under the usufructuary mortgage, dated the 20th of April, 1877, and a subsequent charge on them under the simple mortgage of the 24th of April, 1877. On village Deothan he had two liens, one under the usufructuary mortgage of the 20th of April, 1877, and the other under the simple mortgage of the 24th of April, 1877. Thus, after preserving his rights under the mortgage of the 20th of April, he was entitled to bring to sale the equity of redemption

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in all the three villages under the simple mortgage of the 24th of April. It is well recognized now that the equity of redemption is as much property under the Transfer of Property Act as actual physical immovable property. There can be no doubt that what Damodar Das did was to sue in 1880 for the sale of this equity of redemption, and, when a decree was passed, what was put up to auction was this equity of redemption. It was the equity of redemption owned by Bahadur Singh and Tundi which was sold at auction, and after the sale it no longer remained their property.

It was argued that the sale was void by reason of the principles enacted, subsequent to the sale, in section 99 of the Transfer of Property Act (No. IV of 1882), which ran as follows :—

“ When a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67.”

What happened in the present case, however, was that the property (equity of redemption) was brought to sale by instituting a suit similar to one under section 67 of the Transfer of Property Act and not otherwise.

Secondly, the terms of this section are much wider than the equitable principle applying to such a case, and, therefore, the prohibition of the enactment cannot be applied in the very terms of the section to a sale which took place prior to 1882. The equitable principle is now laid down in the present Code of Civil Procedure, order XXXIV, rule 14, which repealed the provisions of section 99. The rule lays down :—

“ Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage.”

This is the equitable principle laid down by their Lordships of the Privy Council in *Khairajmal v. Daim* ¹⁹²⁷ JAGAT SINGH v. JAI NARAIN. (1). Possibly the attention of their Lordships was then not called to the wider terms of section 99 of the Transfer of Property Act. What they said was :—

“ But the Judge has made a decree for redemption of the whole estate, on the ground that the mortgagees could not acquire the equity of redemption directly or indirectly by purchase at a court sale except by a suit brought on the mortgage, on account taken and time specially allowed for redemption. Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by *obtaining a money decree for the mortgage debt* and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage.”

We are of opinion that in 1881, when the sale took place, the principle of equity enunciated by their Lordships was applicable and not a prohibition as laid down in section 99 of the Transfer of Property Act. In addition to this, we have already given reasons for holding that even if the principle of the provisions of section 99 of the Transfer of Property Act applied in terms to the sale of 1881, the equity of redemption in the auctioned property would not be saved to the mortgagors after the sale was confirmed.

We have avoided, in discussing the learned counsel Dr. *Sapru's* arguments, a reference to a Full Bench ruling of this Court, *Lal Bahadur Singh v. Abharan Singh* (2), which would be a complete answer to his arguments. That ruling is in sharp conflict with an earlier ruling of a Divisional Bench of this Court, *Sardar Singh v. Ratan Lal* (3). It was not necessary for us to inquire whether the sale of 1881 was void or only voidable, because the sale was not held in execution of a money

(1) (1904) L.R., 32 I.A., 23; (2) (1915) I.L.R., 37 All., 165.
I.L.R., 32 Calc., 296.

(3) (1914) I.L.R., 36 All., 516.

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decree, nor in execution of a decree arising out of the mortgage which is the subject of the present suit. That decree itself was a decree for sale on foot of a mortgage and obtained, as observed by their Lordships in *Khairaj-mal v. Daim* (1), "on accounts taken, and with the other safeguards usual in a suit on the mortgage." It was a suit for sale of the equity of redemption by a subsequent mortgagee, a suit well recognized in these provinces except during the period during which the rule laid down in the case of *Mata Din Kasodhan v. Kazim Husain* (2), prevailed in this Court. The facts of the present case are, in our opinion, similar to those of *Parmanand v. Daulat Ram* (3), with this difference that sale of an equity of redemption is now held to have been contemplated by the Transfer of Property Act. The learned Chief Justice, Sir JOHN STANLEY, and Mr. Justice BANERJI held in that case that the sale (like the one of 1881 in this case), having been the outcome of a suit under section 67 of the Transfer of Property Act (No. IV of 1882), did not offend against section 99 of the Act.

The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Boys and Mr. Justice Kendall.

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 March, 29.

NAND KISHORE (DEFENDANT) *v.* RAM SARUP (PLAINTIFF).*

Act No. IV of 1882 (Transfer of Property Act), section 36—Purchase at auction of zamindari property—Possession delayed—Collection of rents by judgement-debtor—Method of apportioning collections between judgement-debtor and auction-purchaser.

Plaintiff, on the 20th of February, 1919, became the purchaser at an auction-sale held in execution of a decree of some

* Second Appeal No. 1294 of 1924, from a decree of Ganga Nath, Additional Subordinate Judge of Moradabad, dated the 16th of May, 1924, modifying a decree of Banwari Lal, City Munsif of Moradabad, dated the 11th of January, 1923.

(1) (1904) L.R., 32, I.A., 23; I.L. (2) (1891) I.L.R., 13 All., 432.
 R., 32 Calc., 296.

(3) (1902) I.L.R., 24 All., 549.