

1891 We think the question must be answered in the affirmative.  
 MACKENZIE By section 184 of the Rent Act, all suits for arrears of rent must  
 v. be instituted within the time prescribed in Schedule III of that  
 HAJI SYED Act, and that in a suit for rent is declared to be three years. We  
 MAHOMED think that this suit is governed by that Act, and the limitation is  
 ALI KHAN. three years.

A. A. C.

## APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice  
 Beverley.*

1891  
 July 20.

GUNGA PERSHAD (DEFENDANT) v. JAWAHIR SINGH AND  
 OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).\*

*Mortgage, suit on—Leave to bid given to mortgagee, effect of—Civil Proce-  
 dure Code—Act XIV of 1882, s. 294—Satisfaction not calculated on  
 what mortgaged premises are worth, but on what they fetch—Credit for  
 amount bid.*

A decree-holder (a mortgagee) who has, after obtaining leave to bid at a sale, purchased the mortgaged premises is in the same position as an independent purchaser, and is only bound to give credit to the mortgagor for the actual amount of his bid.

*Mahabir Pershad Singh v. Macnaghten* (1) followed.

THESE were two analogous suits, heard together by consent of parties, brought to recover moneys lent under two mortgage bonds, bearing the same date—the 25th September 1885—against defendants 1 to 6, who were the mortgagors and the members of a joint Hindu Metacshara family, and defendants 7 to 9, who were prior encumbrancers on the mortgaged properties.

Defendant No. 7, Gunga Pershad, one of such prior encumbrancers, had already obtained a decree against a portion of the properties held by him on mortgage, and had, with leave of the Court, himself become the purchaser for a sum of Rs. 40,000. The petition of defendant No. 7, asking for permission to bid, ran as

\* Appeals from original decrees Nos. 122 and 123 of 1890, against the decrees of Baboo Sham Chand Dhur, Subordinate Judge of Gaya, dated the 31st of January 1890.

follows:—"Your petitioner wishes to purchase the judgment-debtors' property in satisfaction of his decree, should no one offer a higher bid....., and prays that he may be accorded permission to purchase the judgment-debtors' property in satisfaction of his decree ....." The order on such petition was—"Let the decree-holder bid and be allowed to set off the decretal amount against the purchase-money."

1891  
 GUNGA  
 PERSHAD  
 v.  
 JAWAHIR  
 SINGH.

The plaintiff alleged that the real value of the property bought in by defendant No. 7 was more than a lakh of rupees, and that, therefore, as the amount due under the decree obtained by defendant No. 7 was less than that sum, his decree had been satisfied in full, and that he, the petitioner, was entitled to enforce his own lien irrespective of the mortgage of defendant No. 7.

The Subordinate Judge found that the real value of the property at the time of its purchase by defendant No. 7 was one lakh and thirty-three thousand odd rupees, whilst his decree was one for under a lakh of rupees, and therefore held on the authority of the cases of *Hart v. Tara Prasanna Mukherji* (1), *Gulab Singh v. Bemian* (2), and *Sheonath Doss v. Janaki Prasad Singh* (3) that the plaintiffs, the second mortgagees, were entitled to treat the debt of defendant No. 7 as paid off, and were therefore entitled to enforce their own claim without reference to the mortgage of defendant No. 7. He, therefore, without deciding the other issues (which were unnecessary under the above finding) decreed the suit with costs.

• The defendant No. 7 appealed to the High Court.

Dr. *Rash Behari Ghose* (with him *Babu Jogesh Chunder Roy*) for the appellant—The mortgagee having obtained leave to bid is in the same position as an independent purchaser—*Hart v. Tara Prasanna Mukherji* (1), *Mahabir Pershad Singh v. Macnaghten* (4). There, therefore, can be no reason why he should be debited with any amount in excess of the price for which property was sold. If these points are decided in my favour, the cases should be remanded for decision on other points arising.

Mr. *C. Gregory* and *Baboo Uma Kali Mukerjee* for the respondent, referred to *Gulab Singh v. Bemian* (2), and contended

(1) I. L. R., 11 Calc., 718.

(3) I. L. R., 16 Calc., 132.

(2) I. L. R., 5 All., 342.

(4) I. L. R., 16 Calc., 682.

1891  
 GUNGA  
 PERSHAD  
 v.  
 JAWAHIR  
 SINGH.

that on the authority of *Hart v. Tara Prasanna Mukherji* (1), the decree-holder, when purchasing with leave the property was bound to prove that the property purchased by him had realized a fair price before he could take out further execution.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by—

PETHERAM, C.J.—These were two suits brought by the mortgagees of certain properties to recover the mortgage money, and they have obtained decrees.

The appellant is the defendant No. 7 who held a mortgage of some of the properties included in these mortgages, his mortgage being prior in date to that of the plaintiffs in both these suits.

The Subordinate Judge who tried the suits has disposed of the defendant's claim on the ground that he had himself put up a portion of the property mortgaged to him for sale, and had bought that property himself for a sum considerably less than its value, and that the true value of the property so put up and so purchased by him exceeded greatly the amount of his debt, and that under the authority of the case of *Hart v. Tara Prasanna Mukherji* (1), the second mortgagees were entitled to treat his claim as paid off and done with, and were entitled to enforce their lien without reference to his mortgage. In coming to this conclusion the learned Subordinate Judge, relying upon that case, has noticed the case of *Sheonath Doss v. Janki Prosad Singh*, reported in I. L. R., 16 Calc., 132, decided by this Court, and has endeavoured to reconcile the two; but he has not noticed the case of *Mahabir Pershad Singh v. Macnaghten*, reported in I. L. R., 16 Calc., 682, decided by the Privy Council. This case of course is binding upon this Court; and if it overrules the case of *Hart v. Tara Prasanna Mukherji*, the case in the Privy Council is to be acted upon.

With reference to the case of *Sheonath Doss v. Janki Prosad Singh* (2), we think that it was sufficient authority for the learned Subordinate Judge to have acted upon, as showing that the

(1) I. L. R., 11 Calc., 718.

(2) I. L. R., 16 Calc., 132.

mortgagee having obtained leave to bid was in the position of an independent purchaser.

However that may be, the case in the Privy Council makes the matter clear, because LORD WATSON, in delivering the judgment of the Privy Council, says:—"Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser."

If that is so—and on the authority of the Privy Council that must be taken to be so—this person, having obtained leave to bid, was an independent purchaser, and he was only obliged to give credit for the amount of his bid, and consequently we think that the learned Subordinate Judge was wrong in the conclusion he came to on this point; but having come to this conclusion on this point, he did not proceed to try the other issues. One of the other issues in the case which had been originally proposed to be raised, but which had not been accepted, and which is to be found at page 12 of the paper-book, is in these words—"Whether, or not, by reason of the mortgage right in mehal Khakhri having been purchased at auction sale by the defendant No. 7, the decree of the said defendant has been fully satisfied; and whether or not he is entitled to put other properties up to sale." Taking the view of the law laid down by the Privy Council, it is clear that that issue becomes most material, and consequently we set aside the judgment of the Subordinate Judge and remand the case to him with directions to try that issue, having regard to the remarks which we have made.

In addition to that, at page 97 of the paper-book, are the other issues in the case, and the fourth of those issues is this—"as between the parties to these suits, who has priority of lien over the mortgaged premises." That issue also was not tried at the trial because it was not necessary in consequence of the decision of this point of law, but now it is necessary that this issue should be tried, because, having regard to the remarks made before us by Baboo Uma Kali Mukerjee, it may happen that, upon an enquiry being made into this point, it will turn out that a portion of the amount which was advanced by this defendant No. 7 was not advanced in such a way and in such terms as to give him priority over the second mortgagee, and consequently this issue as well as the other will have to be tried.

1891

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 GUNGA  
 PERSHAD  
 v.  
 JAWAHIR  
 SINGH.

1891  
 GUNGA  
 PERSHAD  
 v.  
 JAWAHIR  
 SINGH.

In dealing with the previous issue, I ought to have mentioned the form of the petition for leave to bid. It will be found at pages 79 and 80 of the paper-book, and it asked leave "to buy the property for the amount of the petitioner's decree if no one else made a higher bid," and the leave seems to have been given in the terms of the petition. Having regard to that, it may be that, upon a thorough enquiry, it will be found that the bid which was in fact made of Rs. 40,000 was made upon the basis of this petition, and then, as between all the parties, although a bid of Rs. 40,000 was recorded, it must be taken to be a bid for the amount of the decree-holder's decree. If that should turn out to be so, then probably the Subordinate Judge will consider that this defendant No. 7 was in fact paid off by what had taken place. These are questions which will have to be decided by the learned Subordinate Judge upon the trial of these two issues, and with these remarks we remand these two cases for the trial of those issues, retaining the case upon the files of this Court. We reserve the question of cost till the final decision of these appeals.

T. A. P.

*Appeal allowed and case remanded.*

*Before Mr. Justice O'Kinealy and Mr. Justice Ghose.*

1891  
 March 11.

SURENDRO PROSAD BHUTTACHARJI (ONE OF THE DEFENDANTS)  
 v. KEDAR NATH BHUTTACHARJI (PLAINTIFF).\*

*Jurisdiction—Sayer compensation—Malikana—Civil Procedure Code (Act XIV of 1882), s. 16.*

A mortgaged at Calcutta to B his sayer compensation, payable at the General Treasury at Calcutta in respect of a certain hat within the Diamond Harbour subdivision. In a suit to enforce the mortgage bond in the Court of the Munsiff of Diamond Harbour, held, that sayer compensation did not partake of the nature of malikana, that it was not immoveable property or any interest in immoveable property within the meaning of section 16 of the Code of Civil Procedure, and that therefore the Munsiff had no jurisdiction to entertain the suit.

*Bungsho Dhur Biswas v. Mudhoo Mohuldar* (1) distinguished.

\* Appeal from Appellate Decree No. 1054 of 1890, against the decree of H. Beveridge, Esq., Judge of 24 Pergunnahs, dated the 5th of May 1890, affirming the decree of Baboo Rebat Churn Banerjee, Munsiff of Diamond Harbour, dated the 21st of November 1889.