

rate of 1 per cent. per mensem from the date of the institution of the suit till the date of payment as against Sheo Narain Singh only. The plaintiff-appellant will be entitled to his costs as against the same defendant in both the courts. The suit of the plaintiff-appellant is dismissed as against the other three defendants. These three defendants will be entitled to their costs from the plaintiff-appellant in both the courts.

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Appeal allowed.

*Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran
Nath Misra.*

MOHAMMAD JAIMUR KHAN (PLAINTIFF-APPELLANT) v.
RAGHUNATH SINGH (DEFENDANT-RESPONDENT).*

*Civil Procedure Code, section 11—Registration—Mortgagor's
and mortgagees' estates, definition of—Decree against
mortgagor without joining mortgagee whether binding on
mortgagee.*

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The superior proprietor obtained decrees for arrears of rent against the original owner of an under-proprietary tenure at a rental which was computed with reference to the annual gross income of the tenure but had not made his mortgagee a party to those suits. The mortgagor then brought a suit on the basis of his mortgage, obtained a decree for sale and in execution of the decree himself purchased the under-proprietary tenure. The superior proprietor then brought the present suit for rent at the same rate against the mortgagor who had purchased the property in the auction sale.

Held, that both the mortgagor and the mortgagee held separate defined interests in their own rights. None could be said to represent the other and when the sale took place in pursuance of that mortgage all that the auction purchaser got was the estate which had remained with the mortgagor.

* Second Rent Appeal No. 25 of 1925, against the decrees of Raghubar Dayal Shukla, Additional District Judge, dated the 25th of January, 1925, affirming the decree of Amba Dutt, Punt, Assistant Collector, First Class, Gonda; dated the 30th of July, 1923.

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To that extent he is the representative of the mortgagor but as regards the interests which he himself held, which we prefer to describe as the legal estate, that vested in him all along from the date of the mortgage right up to the date of purchase, that estate was never represented in the previous suit for arrears of rent and therefore the rate of interest determined in those suits to which the mortgagee was not a party could not be *res judicata*.

Held further, that according to English law on a mortgage having been created in respect of an estate in fee simple the legal estate at once vests in the mortgagee and the mortgagor is left with nothing more than an equitable interest which is popularly described as the equity of redemption.

Mr. M. Wasim and Mr. Mahmud Beg, for the appellants.

Mr. Niamatullah, for the respondent.

HASAN and MISRA, JJ.:—This is the plaintiff's appeal in a suit for arrears of rent against the defendants from the decree of the Additional District Judge of Gonda, dated the 21st of January, 1925. The Additional District Judge confirmed the decree of the trial court except on a certain minor matter with which we are not concerned in this appeal.

The original owner of the under-proprietary tenure in respect of which the rent is claimed by the plaintiff-appellant was one Muhammad Khan. He made a simple mortgage of the entire tenure in favour of the father of Raghunath Singh and Birnar Singh, respondents Nos. 1 and 2 of the present appeal, on the 31st of March, 1914. The superior proprietary interests through a process, with which we are not concerned, came to be vested in one Musammat Kulsum Bandi. Musammat Kulsum Bandi brought several suits for recovery of rent against the original under-proprietor and other persons who had acquired interest in the under-proprietary tenure but to none of those

suits the mortgagee or his representatives were ever made a party. The superior proprietor obtained decrees for rent in those suits at a rental which was computed with reference to the annual gross income of the tenure. The mortgagee then brought his suit for sale of the property over which he held the mortgage, that is the entire under-proprietary tenure, with which we are now concerned in this appeal. He obtained a preliminary decree on the 13th of November, 1918, against the original mortgagor and other persons who had acquired interest in the under-proprietary tenure. This decree was made absolute on the 3rd of September, 1919. In due course the under-proprietary tenure was sold in obedience to the mortgage decree, and purchased by the mortgagee's sons, Raghunath Singh and Birnar Singh, on the 23rd of October, 1920.

The only point argued in support of the appeal before us is that the decrees which Musammam Kulsum Bandi had obtained operated as *res judicata* in favour of the plaintiff-appellant in the matter of the amount of rent. We think that the argument cannot be accepted. It was broadly argued that an auction purchaser buys the interest of the judgement-debtor. It was also argued that an auction purchaser in a sale under a mortgage decree buys the interests of his mortgagor as they stood at the date of the purchase. According to our judgement both these lines of arguments miss the crucial point which is involved in the proposition necessary for the learned Advocate for the appellant to establish in support of the plea of *res judicata*. We have to consider the nature and the extent of the estate which a purchaser at an auction sale in execution of a mortgage decree acquires under that sale. If we were to decide this case according to English law, nothing

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could be easier than to make ourselves perfectly intelligible. On a mortgage having been created in respect of an estate in fee simple the legal estate at once vests in the mortgagee and the mortgagor is left with nothing more than an equitable interest which is popularly described as equity of redemption. But though we are not administering the rules of English law we think we are perfectly justified for the purposes of deciding the plea of *res judicata* in resorting to the distinction just now mentioned. When this particular mortgage was made by Muhammad Khan in favour of Sital Bakhsh, the father of the respondents Nos. 1 and 2 both the mortgagee and the mortgagor held separate defined interests in their own rights. None could be said to represent the other and when the sale took place in pursuance of that mortgage all that the auction purchaser got was the estate which had remained with the mortgagor. To that extent he is the representative of the mortgagor but as regards the interest which he himself held, which we prefer to describe as the legal estate that vested in him all along from the date of the mortgage right upto the date of the purchase, it is admitted that that state was never represented in the suit for arrears of rent. The view which we are taking is expressed in a different form in a recent decision of the High Court of Bombay in the case of *Ram Chandra Dhondo v. Malkapa* (1). We desire to say most respectfully that we are in entire agreement with that decision. We must, therefore, hold that the plaintiff-appellant is not entitled to avail himself of the plea of *res judicata* in the matter of the rate of rent as against the respondents.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) I.L.R., 40 Bom., 679.