

1931  
 RAM UDIT  
 v.  
 RAM SAMUJH.

possession over the right of equity of redemption. Be as it may, Ram Samujh cannot deny his mortgagor's title in the present suit and he must allow his mortgagor's representative to redeem the property in suit.

Raza, J.

I would therefore allow this appeal, set aside the decree of the lower court and restore the decree of the first court with costs in all courts in favour of the plaintiff.

1931  
 April, 1.

BY THE COURT (HASAN, C. J. and RAZA and SRIVASTAVA, JJ.):—As the point of law involved in this appeal on which there was a difference of opinion between two of us has now been decided in favour of the appellant by the opinion of the majority of us the appeal is accordingly allowed, the decree of the court below is set aside and the decree of the court of first instance is restored with costs in all courts in favour of the appellant.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Mr. Justice E. M. Nanavally.*

DAL BAHADUR SINGH (PLAINTIFF-APPLICANT) v. SARABJIT TEWARI AND OTHERS (DEPENDANTS-RESPONDENTS).\*

1931  
 April, 13.

*Redemption—Suit for declaration of right and possession, if can be converted into a suit for redemption—Prima facie proof of claim for redemption, necessity of—Mortgage sought to be redeemed, particulars and proof of, whether to be given—Absence of evidence of particulars and proof of alleged mortgage sought to be redeemed, effect of.*

*Held*, that a suit for a declaration of right and for possession cannot be converted into a suit for redemption.

*Prima facie* proof in support of a claim for redemption must be forthcoming and where the particulars and proof of an alleged mortgage are altogether conspicuous by their

\* Second Civil Appeal No. 276 of 1930, against the decree of Sh. Ali Hammad, Additional Subordinate Judge of Fyzabad, dated the 30th of May, 1930, confirming the decree of B. Pratap Shankar, Munsif, Fyzabad, dated the 6th of February, 1930.

absence the suit for redemption must inevitably fail. When in such a suit the plaintiff admits that he is not vested with the rights of a mortgagee or purchaser in respect with the land in suit, then he cannot be allowed to turn round and assume the role of mortgagee and purchaser and in virtue of that assumed right or title claim redemption from an alleged prior mortgagee. *Bala v. Shiva*, (1) and *Raja Kishen Dutt Ram Pandey v. Nirindra Bahadur Singh* (2) distinguished. *Sevraji Vijaya Raghunadha Valoji Kristnan Gopalar v. Chinna Narayana Chetti* (3) referred to. *Salik Ram v. Rumanand* (4), *Kayasth Scholarship Trust, Allahabad v. Shankar Din* (5), *Khan Bahadur Saiyad Didar Husain v. Gayu Prasad and others* (6), *Niamat Khan v. Deputy Commissioner of Kheri in charge of Mahewa estate* (7), *Durga and others v. Ram Padarath and others* (8), *Nageshar Singh v. Baldeo Singh* (9), and *Jaggiwan Singh v. Gajraj Singh* (10), referred to and relied on.

Mr. *Hyder Husain*, for the appellant.

Mr. *Har Dhian Chandra*, for the respondents.

NANAVUTTY, J. :—These are two connected second civil appeals filed by the plaintiff Dal Bahadur Singh against the appellate judgments and decrees of the Additional Subordinate Judge of Fyzabad upholding the judgments and decrees of the Munsif of Fyzabad. The plaintiff Dal Bahadur Singh brought two suits for a declaration of title and in the alternative for redemption; both reliefs were refused by the courts below.

The facts as found by the lower appellate court are that Fursat Singh and others were owners of the property in suit, that they mortgaged it with possession to the predecessor of the defendants Sarabjit Singh and others many years ago, that Bikram Singh and others who are the successors-in-interest of Fursat Singh and others executed a mortgage on the 17th of January, 1928, in favour of the plaintiff-appellant Dal Bahadur Singh, that on the basis of this mortgage Dal

1931

DAL BAHADUR SINGH  
v.  
SARABJIT TEWARI.

(1) (1902) I.L.R., 27 Bom., 271.

(2) (1875) L.R., 3 I.A., 65.

(3) (1864) 10 M.I.A., 151.

(4) (1899) 3 O.C., 178.

(5) (1908) 11 O.C., 285.

(6) (1917) 4 O.L.J., 494.

(7) (1914) 1 O.L.J., 442.

(8) (1921) 8 O.L.J., 495.

(9) (1925) 12 O.L.J., 160.

(10) (1924) 1 O.W.N., 130.

1931

DAL BAHADUR SINGH  
v.SARABJEET  
TIWARI.Nanavatty,  
J.

Bahadur Singh sought to get mutation effected in the revenue court, but his application was dismissed on the 26th of September, 1928, on the objection of the defendants who alleged themselves to be owners and mortgagees of the land in suit. On the 16th of September, 1929, plaintiff filed the two suits out of which these appeals have arisen. The relief with which this Court is concerned in these two second appeals is confined to the relief for redemption. The learned counsel for the plaintiff gives up the relief for declaration and confines these appeals solely to the relief for redemption.

The main contention of the learned counsel for the plaintiff is that as plaintiff is proved to be mortgagee of the land in suit in one case and a purchaser of the land in suit in the other case from the original lawful owners of the land from whom the defendants also got their mortgage many years ago, and as the defendants themselves admit that their mortgage is not irredeemable, that therefore the plaintiff is in law entitled either as puisne mortgagee in one case or as purchaser in the other case to redeem the prior mortgage from the defendants. In support of his contention the learned counsel for the plaintiff-appellant relied upon *Bala v. Shiva* (1) and *Raja Kishen Dutt Ram Pandey v. Nirindra Bahadur Singh* (2). In the case before the Bombay High Court (27 Bom., 271) the plaintiff Bala sued for redemption and to recover possession of certain lands alleging that they had been mortgaged to the ancestors of the defendants about 45 years before the suit was filed. The defendants who were in possession of the land denied the mortgage, but the Subordinate Judge found the mortgage proved and passed a decree for redemption in favour of the plaintiff. In appeal another Subordinate Judge with appellate powers reversed the decree of the trial court and held that the plaintiff was bound to prove

(1) (1902) I.L.R., 27 Bom., 271.

(2) (1875) L.R., 8 I.A., 85.

the specific mortgage made 45 years ago as alleged in the plaint and that he had failed to do so and his suit must be dismissed. In second appeal it was held by Mr. Justice CHANDAVARKAR that the plaintiff was entitled to succeed if he proved that the land was held by the defendants as mortgagees. In the course of his judgment in this case the learned Judge of the Bombay High Court made the following observation :—

“It is true that when a plaintiff sues to redeem and the defendant denies the mortgage, the plaintiff must in the first instance ‘prove’ his title. ‘A plaintiff who alleges that his ancestor 44 years ago made a mortgage to the ancestor of the present possessor of a property and by virtue thereof seeks to dispossess the present possessor must prove his case clearly and indefeasibly.’” *Sevraji Vijaya Raghunadha Valoji Kristnan Gopalar v. Chinna Nayana Chetti* (1).

In the suits filed by the plaintiff-appellant the plaints of Dal Bahadur Singh do not contain the particulars of the mortgage sought to be redeemed. The names of mortgagors and mortgagees, the date of the mortgage, the sum secured, the rate of interest if any, the property which is the subject of the mortgage sought to be redeemed, and such other particulars as are set forth in the model plaint in a suit for redemption—Form No. 46, Appendix A of the Code of Civil Procedure—are all conspicuous by their absence in the plaints of these two suits. No decree for redemption could, therefore, possibly have been passed by the lower court in plaintiff’s favour upon two such defective plaints. Apart from these defects in the plaints, the plaintiff has adduced no evidence of any kind in either of these two cases to prove the date or year of the mortgage which is sought to be redeemed and the sum secured on that mortgage and the extent of property subject to that mortgage. These particulars had to be

1931

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 DAL BAHADUR SINGH  
 v.  
 SARABJIT  
 TEWARI.

*Nanavatty,*  
 J.

1931

LAL BAHADUR SINGH

v.  
SARABJIT  
TEWARI.Nanaratty,  
J.

proved by the plaintiff before any decree for redemption could be passed by the lower court in his favour. Moreover, Order XXXIV, rule 1 of the Code of Civil Procedure, lays down in imperative language that all persons having an interest in the mortgage security or in the right of redemption must be joined as parties to any suit relating to the mortgage. Again under Order XXXIV, rule 7 of the Code of Civil Procedure, in a suit for redemption if the plaintiff succeeds the Court shall pass a preliminary decree ordering that an account be taken of what was due to the defendants at the date of such decree for principal and interest and for cost of suit, and declaring the amount due at that date and directing that if the plaintiff pays into court the amount so found on or before such date as the court may fix within six months from the date on which the court confirms the account, the defendant shall deliver up to the plaintiff all documents in his possession or power relating to the mortgaged property and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage, etc. Form No. 5 of Appendix D of the Code of Civil Procedure gives the model for preliminary decree for redemption (Order XXXIV, rule 7). The plaintiff produced no evidence whatsoever to enable the court to determine the amount due to the defendants on account of principal and interest. In fact the plaintiff never really intended to bring a suit for redemption. It was only an afterthought—*apis aller* for want of anything better in case his suit for a declaration failed. A suit for a declaration of right and for possession cannot be converted into a suit for redemption. As was pointed out by Dr. Gour in his learned treatise on the law of Transfer in British India (Vol. II, p. 1138, 5th edition), "If a suit for possession be regarded as one for ejectment it is certain that it could not be converted into one for redemption which would not only alter its character, but may require the addition of parties and admit additional

pleas, possibly involving a new trial . . . It may then be conceded that if the plaintiff frames his suit offering to redeem on payment of whatever may be found due, the Court would be justified in allowing redemption, if on the taking of account, a balance is found still due to the mortgagee. But of course such a suit must then proceed as a redemption suit in which all persons interested in the mortgage have to be joined."

The only comment that falls to be made in this connection is that in the suits filed by the plaintiff-appellant he asked in the first instance that a declaratory decree be passed in his favour declaring him to be a mortgagee or purchaser of the land in suit. This relief for a declaratory decree was refused to the plaintiff by both the lower courts and his learned counsel has accepted before me the correctness of the decisions of the lower courts on this point. That being so, it is not open now to the plaintiff-appellant to style himself a mortgagee or a purchaser of the land in suit and to clothe himself with the rights of such mortgagee or purchaser the declaration of his title in respect of which has been denied to him by both the lower courts. When the plaintiff-appellant has before me through his counsel admitted that he is not vested with the rights of a mortgagee or purchaser in respect of the land in suit, then he cannot be allowed to turn round and assume the role of mortgagee and purchaser and in virtue of that assumed right of title claim redemption from an alleged prior mortgagee. The suit for declaration of title having failed, the plaintiff cannot upon the negation of his title as mortgagee and purchaser found a claim for redemption of the property said to have been mortgaged and sold to him. The principal relief having been denied the plaintiff, the fate of the subsidiary relief mentioned in clause (c) of the plaint which depends upon the plaintiff establishing his title as a subsisting mortgagee and purchaser, must follow suit.

1981

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 DAL BABA  
 DUE SINGH  
 v.  
 SARAJIT  
 TEWARI.

*Naincatty,*  
 J.

1931

DAL BAHADUR SINGH  
v.  
SARABJIT TEWARI.

Nonavatty,  
J.

I have shown above that the ruling of the Bombay High Court reported in *Bala v. Shiva* (1) is not applicable to the facts of the present suits. The other ruling relied upon by the learned counsel for the plaintiff is to be found reported in *Rajah Kishan Dutt Ram Pandey v. Narendra Bahadur Singh* (2) in which their Lordships of the Privy Council held that the burden of proof was *prima facie* on the mortgagor, regard being had, as respects the quantum of evidence required, to the opportunities which each party might naturally be supposed to have of giving evidence, is equally inapplicable to the facts of the present case. This ruling also does not support the contention of the plaintiff-appellant. The following observation of their Lordships completely exposes the weakness of the plaintiff's contention: "It appears to their Lordships that in such a case as the present, it lies upon the plaintiff to substantiate his case by some evidence, by some *prima facie* evidence at least." The learned counsel for the plaintiff-appellant when called upon by me to point to any evidence which would support his client's claim for redemption had to admit that there was not an iota of evidence on the record to enable this Court to pass a decree for redemption in plaintiff's favour, but he argued that in the circumstances of these two suits it was for the defendants to supply all necessary information and so help the plaintiff to secure a decree for redemption against them. Such a contention cannot be entertained for a moment. The burden of proof is primarily upon the plaintiff to establish his claim for redemption, and neither the Bombay High Court nor the Privy Council rulings cited above lay down any proposition to the contrary.

The learned counsel for the defendants-respondents relied upon *Salik Ram v. Ramanand* (3) in which it was held that where a plaintiff in a suit on a mortgage failed to prove the mortgage on which he relied and

(1) (1902) I.L.R., 27 Bom., 271.

(2) (1875) L.R., 3 I.A., 85.

(3) (1899) 3 O.C., 173.

which he alleged in his plaint he could not succeed upon the mere fact that the defendant admitted that he was a mortgagee of the land. He also cited *Kayasth Scholarship Trust, Allahabad v. Shankar Din* (1), *Khan Bahadur Saiyad Didar Husain v. Gaya Prasad and others* (2), *Niamat Khan v. Deputy Commissioner of Kheri in charge of Mahewa estate* (3), *Durga and others v. Ram Padarath and others* (4), *Nageshar Singh v. Baldeo Singh* (5) and *Jagjiwan Singh v. Gajraj Singh* (6). These rulings support the contention of the defendants' learned counsel that *prima facie* proof in support of the plaintiff's claim for redemption must be forthcoming; otherwise the plaintiff's suits must fail.

As far as Second Civil Appeal No. 336 of 1930 is concerned, it is hardly open to the learned counsel for the plaintiff-appellant to argue before me the question of redemption because the learned Subordinate Judge in his appellate judgment of the 25th of September, 1930, writes somewhere at the close of his judgment that "other points were not pressed"; and amongst these "other points" was the claim for redemption. There is moreover no affidavit filed by the plaintiff-appellant challenging the correctness of that statement made in the judgment of the learned Subordinate Judge. All other grounds taken in these two appeals Nos. 276 and 336 of 1930 have been orally given up by the learned counsel for the plaintiff-appellant.

As regards the claim for redemption it must inevitably fail for want of the necessary evidence in support of the plaintiff's claim for redemption in respect of an alleged mortgage the particulars of which and the proof of which are altogether conspicuous by their absence from the records of the suits and appeals.

The result is that these two connected appeals fail and are dismissed with costs.

*Appeal dismissed.*

1931

FAL BAHADUR SINGH  
v.  
SARABJIT  
TEWARI.

Nanabatty,  
J.

(1) (1908) 11 O.C., 285.

(3) (1914) 1 O.L.J., 442.

(5) (1925) 12 O.L.J., 160.

(2) (1917) 4 O.L.J., 494.

(4) (1921) 8 O.L.J., 495.

(6) (1924) 1 O.W.N., 136.