APPELLATE CIVIL

Before Mr. Justice Eisneshwar Nath Srivastava, Chief Judge, and Mr. Justice H. G. Smith

1936 *October 7*

SHEO SAHAI (DEFENDANT-APPELLANT) *v.* RAJA BAHADUR SURAJ BAKHSH SINGH (PLAINTIFF-RESPONDENT)*

Civil Procedure Code (Act V of 1908), order XXXIV, rule 1—Prior mortgagee obtaining decree for sale without making puisne mortgagee a party—Prior mortgagee in execution of his decree purchasing mortgaged property and obtaining possession—Puisne mortgagee subsequently obtaining sale decree without making prior mortgagee party and purchasing property in auction sale—Rights of prior and puisne mortgagees—Prior mortgagor, if can recover back possession —Redemption by prior and puisne mortgagee.

Where the same property is mortgaged under two mortgage-deeds in favour of different persons and the prior mortgagee obtains a decree for sale to which the puisne mortgagee is not made a party and in execution thereof the property is purchased by him himself and he obtains actual possession on the basis of his purchase, there is no principle at all on the basis of which he can be summarily dispossessed by a puisne mortgagee who has subsequently brought the property to sale without making the prior mortgagee a party and purchased it. If the puisne mortgagee forcibly dispossesses the prior mortgagee the latter is entitled to recover possession of the property and then he can redeem the puisne mortgagee or the latter can redeem the prior mortgagee. *Sukhi* v. *Ghulam Safdar Khan* (1), and *Jawahar Singh* v. *Rajendra Bahadur Singh* (2), relied on. *Babu Lal* v. *Jalakia* (3), *Ram Sanehi Lal* v. *Janki Prasad* (4), and *Jnanendra Nath Singh Roy* v. *Shorashi Charan Mitra* (5), referred to.

Mr. *Ganga Prasad Bajpai*, for the appellant.

Mr. *B. N. Shargha*, for the respondent.

SRIVASTAVA, C.J. and SMITH, J.:—This is a second appeal from a decision of the learned Additional

* Second Civil Appeal No. 262 of 1934, against the decree of Pandit Piarey Lal Bhargava, Additional Civil Judge of Sitapur, dated the 10th of May, 1934, modifying the decree of Babu Grish Chandra, Munsif of Sitapur, dated the 7th of December, 1933.

(1) (1921) L.R., 48 I.A., 465. (2) (1909) 12 O.C., 133.
(3) (1917) A.I.R., All., 359. (4) (1931) A.I.R., All., 466.
(5) (1922) I.L.R., 49 Cal., 626.

Subordinate Judge of Sitapur, by which he allowed an appeal from a decision of the learned Munsif of Sitapur.

The suit was brought by Raja Suraj Bakhsh Singh against one Sheo Sahai for possession of 12 bighas 16 biswas of land in a certain *patti* in a village called Baksuhia. The facts, briefly stated, are that on the 19th of August, 1903, one Manna Singh and his sons mortgaged their share in the *patti* in question to Thakur Jawahir Singh, the father of the present plaintiff. On the 5th of August, 1904, they executed a deed of further charge in his favour. On the 1st of January, 1908, Munna Singh mortgaged the same property to Sheo Sahai, tht present defendant, and on the 17th of February, 1909, he executed two deeds of further charge in respect of that same property. Thakur Jawahir Singh obtained a preliminary decree on the 29th of March, 1912, and a decree absolute on the 30th of November, 1912, on the basis of the deeds above referred to in his favour, and purchased the property himself on the 29th of March, 1915. Mutation of names was effected in his favour in November, 1916. Afterwards, on the 23rd of April, 1923, Sheo Sahai obtained a preliminary decree for sale on the basis of his deeds, and on the 26th of March, 1925, he obtained a decree absolute, and on the 22nd of April, 1930, he in his turn purchased the mortgaged property. He was given formal possession on the 29th of June, 1930, and in August, 1932, he obtained mutation of names in his favour, the plaintiff's name being removed. According to the allegations made in the plaint (*vide* paragraphs 7 and 8), after the entry of his name in the papers the defendant denied the plaintiff's rights and disputed his possession, and the present suit accordingly became necessary. The learned Munsif found that the plaintiff could get possesssion of the property in question only after redeeming it from the defendant, for which purpose the learned Munsif allowed three months' time, it being ordered that if the property was not redeemed within the appointed time,

1936

SHEO SAHAI v. RAJA BAHADUR SURAJ BAKHSH SINGH

the suit would stand dismissed. The plaintiff appealed, and the learned Additional Subordinate Judge allowed the appeal and decreed the plaintiff's claim for possession of the property. This second appeal has been instituted by the defendant.

Srivastava, C.J. and Smith, J.

A large number of rulings were referred to before us by the learned counsel for the appellant. We do not think it necessary to refer to all these decisions, since some of them appear to have no particular bearing on the facts of the present case, and some of them were passed before section 89 of the old Transfer of Property Act had been repealed by the Code of Civil Procedure (Act V of 1908). Some of the rulings to which we have been referred on behalf of the defendant-appellant seem to us to favour the other side. For instance, in a judgment of their Lordships of the Privy Council reported in *Sukhi* v. *Ghulam Safdar Khan* and others (1), it was laid down that where a puisne mortgagee has not been made a party to the suit in which a prior mortgagee has obtained a decree, the puisne mortgagee is entitled in a subsequent suit to occupy the position which he would have done had he been a party. Where the prior mortgagee, having obtained a decree under order XXIV, is sued by a puisne mortgagee whom he has not joined in the former suit, he is entitled, in all cases in which he would have been entitled before the coming into force of the Act of 1882, to use his prior mortgage as a shield, and to have the discharge of his decree made a condition to a sale decree in favour of the puisne mortgagee. In the present case, it should be mentioned, Thakur Jawahir Singh, the prior mortgagee, did not implead Sheo Sahai, the puisne mortgagee, in his suit, nor did Sheo Sahai implead Thakur Jawahir Singh in his suit. As to the fact of possession, the finding of the learned court below is that the present plaintiff and his predecessor were in possession from 1915 till

(1) (1921) L.R., 48 I.A., 465.

the time when the cause of action for the present suit accrued, which time is stated in the plaint as the month of September, 1932.

No doubt some difficulties arise when a puisne mortgagee puts mortgaged property to sale and it is purchased by him himself or a third party, and a prior mortgagee also puts the property to sale, and either purchases it himself or gets it purchased by a third party after the sale has taken place in satisfaction of the puisne mortgagee's claim. Such was the case in a ruling reported in *Babu Lal* v. *Jalakia* (1). In that case it was held, *inter alia*, that the purchaser in connection with the subsequent mortgage was entitled to nothing more than an opportunity of paying off the prior mortgage, and on his declining to do so he should surrender possession. In a Full Bench decision of the Allahabad High Court reported in *Ram Sanehi Lal* and another v *Janki Prasad and others* (2), the general principles were stated by MUKERJI, J. at page 488 as follows:

Srivastava C.J. and Smith, J.

> "It is firmly established that the purchaser in execution of a mortgage decree obtains the rights of the mortgagor and the mortgagee alone; if therefore the subsequent mortgagee has not been made a party to the prior mortgagee's suit, the auction purchaser acquires no right as against the subsequent mortgagee, and it would follow, as against those who claim under the subsequent mortgagee. It is equally a firmly established proposition that a property can be sold only once and the mortgagor can lose his property once only. Thus the purchaser at the first auction sale, whether it be held under the prior mortgage, or whether it be held under the subsequent mortgage, acquires the interest of the mortgagor. After the mortgagor's interest has once passed away to a purchaser, that interest cannot be sold again effectively."

At any rate where a prior mortgagee has put the mortgaged property to sale and has purchased it and has obtained actual possession on the basis of his purchase, we can discern no principle at all on the basis of which he can be summarily dispossessed by a puisne mortgagee

(1) (1917) A.I.R., All., 359. (2) (1931) A.I.R., All., 466.

1936

SHEO SAHAI v. RAJA BAHADUR SURAJ BAKHSH SINGH

who has subsequently brought the property to sale and purchased it. The facts of the present case are to all intents and purposes exactly parallel to those of a case of the old Court of the Judicial Commissioner reported in *Jawahir Singh (Thakur)* v. *Rajendra Bahadur Singh (Thakur)* and others (1). The head-note to that case runs as follows:

Srivastava C.J. and Smith, J.

> "The same property was mortgaged under two mortgages in favour of different persons. The prior mortgagee obtained a decree for sale to which the puisne mortgagee was not made a party and in execution thereof the property was purchased by the plaintiff. Subsequently the puisne mortgagee also obtained a decree for sale without making the prior mortgagee a party and in execution thereof purchased it himself. The defendants who were the successors-in-title of the puisne mortgagee forcibly dispossessed the plaintiff.
>
> *Held,* that the plaintiff was entitled to a decree for possession subject to the defendant's right to redeem."

It will be seen from the contents of this head-note that the facts of that case and those of the present case are identical, and we think that the plaintiff in the present case was clearly entitled to recover possession of the property in suit. The question remains, however, how the matter will stand as between the parties after the plaintiff has recovered possession. In this connection it is argued by the learned counsel for the plaintiff-respondent that the defendant-appellant has not in this suit proved the deeds on which he relies. This point does not appear to have been taken in the trial court, though it was taken before the lower appellate court. It appears from the judgment of the learned court below that the defendant produced a certified copy of the mortgage-deed of the 1st of January, 1908, and he also produced a copy of his preliminary decree, dated the 23rd of April, 1923. The learned Additional Subordinate Judge held that the defendant ought to have proved his mortgages

(1) (1909) 12 O.C., 133

in the present case, and that having regard to the provisions of section 43 of the Evidence Act the copy of the decree is only relevant to prove the existence of the decree. The result was that he took the view that the defendant had failed to prove that he was a subsequent mortgagee of the property in suit. In view of the fact that this point was not raised in the trial court, so as to give the defendant an opportunity to prove his deeds, we should not think it necessary or desirable for the purposes of the present appeal, to defeat the defendant on the ground that he did not fully prove his deeds. The real question is what the position is as between the parties on the assumption that they have in their favour the deeds and decrees that we have set out earlier in this judgment. It was conceded by the learned counsel on both sides that the plaintiff as purchaser of the mortgagor's interest can redeem the defendant, or the defendant as puisne mortgagee can redeem the plaintiff. The learned counsel for the plaintiff was given time by us to consult his client as to whether the latter wishes to redeem the defendant. He has since informed us that the plaintiff does not wish to redeem the defendant, but prefers that the defendant should redeem him. That being the situation, the question is what has the defendant to pay to the plaintiff in order to redeem?

On that point the learned counsel for the plaintiff relies on a decision reported in *Janendra Nath Singh Roy* v. *Shorashi Charan Mitra* (1), in which the following observations were quoted from the decision in *Sukhi* v. *Ghulam Safdar Khan* (2), to which we have already made reference:

> "The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the court to give the plaintiff an opportunity of occupying the position which she would have occupied if she had been a party to the former suit."

(1) (1922) I.L.R., 49 Cal., 626. (2) (1921) L.R., 48 I.A., 465.

1936

SHEO SAHAI v. RAJA BAHADUR SURAJ BAKESH SINGH

Srivastava, C.J. and Smith, J.

It was held in the Calcutta decision (we quote from the head-note), that "when a person insists upon the right to redeem on the ground that he was not made a party to and, therefore, not bound by the decree in the mortgage suit, he can be allowed to redeem only on the terms of the mortgage and on payment of interest at the rate payable under the mortgage up to the date of redemption to be fixed in the case."

The question arose what ought to be done about the profits that had been realised by the parties in possession. That matter was dealt with in the following passage in the judgment of the Calcutta High Court (*vide* page 644):

> "The amount of profits should not be taken as an equivalent of the interest due. We therefore direct that an account be taken of what is due to the defendant No. 1, who is the assignee of the other mortgagees, defendants Nos. 2 to 4, for the principal and interest on the mortgage and for his costs of the suit up to this date, allowing credit for all the sums paid to the mortgagees and the actual profits realised by them during the period they have been in possession of the mortgaged property, plaintiff being given three months from the date of declaration of the amount due on the amount hereby directed for redemption of the mortgage. The usual redemption decree is hereby made."

We ourselves were at first inclined to take the view that the profits realised by the plaintiff while he was in possession of the property may fairly be regarded as the equivalent of the interest that would have accrued on his deeds, and that the defendant should only be called upon to pay to him the amount for which the property was put to sale on the basis of the plaintiff's deeds. There is a difficulty, however, as regards the period during which the plaintiff has been out of possession, or, as it is put in the plaint, his possession has been "disputed" or "disturbed", both these expressions are employed in the plaint. In these circumstances we think it better not to consider in the present suit the amount on payment

of which the defendant will be entitled to redeem the plaintiff, since for the fixing of any such amount further evidence will be necessary. We accordingly leave it to the defendant to institute a separate suit if he wishes to redeem the plaintiff,—in that suit all questions relating to the amount that the defendant ought to pay to the plaintiff for redemption will have to be gone into. As regards this appeal, we content ourselves with dismissing it, with costs, and affirming the decree of the learned lower appellate court giving the plaintiff possession of the property in suit.

Srivastava C.J. and Smith J.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty

MRS. CAROLINE GRACE FOSTER (PETITIONER) *v.* MR. ALFRED BERTRAM FOSTER (RESPONDENT)*

1936 *April*, 6

Divorce Act (IV of 1869), sections 10 and 3(9)—"Desertion", meaning of—Desertion, how proved—Husband's connivance of his wife's adultery—Previous condoned adultery of wife, revival of—Damages against co-respondent—Husband responsible for wife's misconduct, if entitled to damages—Dissolution of marriage—Court's discretion to grant decree for dissolution of marriage, guiding principle of—Pleadings in India—Wife's petition for divorce—Petition containing an admission of adultery—Wife admitting adultery in Court, if entitled to exercise of Court's discretion in her favour.

Held, that desertion required to be proved under section 10 of the Indian Divorce Act must be desertion within the meaning of section 3(9) of that Act, viz., a wilful abstention by the husband against the wish of the wife. A wife is bound when seeking to prove desertion to give evidence of conduct on her part showing unmistakably that such desertion was against her will. *Hill* v. *Hill* (1), and *Fowle* v. *Fowle* (2), followed. *Fitzgerald* v. *Fitzgerald* (3), *Stevenson* v. *Stevenson* (4), and *Ste. Croix* v. *Ste. Croix* (5), distinguished.

*Divorce Case No. 1 of 1935.

(1) (1928) I.L.R., 47 Bom., 657. (2) (1879) I.L.R., 4 Cal., 260.
(3) L.R., 1 Pro., 694. (4) (1911) L. R., Pro. Dn., 191.
(5) (1919) I.L.R., 44 Cal., 1091.