

of the deposit the Subordinate Judge would probably not have disposed of the case till notice had been served.

In my opinion the petitioners were guilty of negligence and we should not exercise our powers under section 107 of the Government of India Act in their favour.

The application will, therefore, be dismissed with costs.

BUCKNILL, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Kulwant Sahay, J.

BASDEO PRASAD

v.

DWARIKA PANDEY.*

1923.

June, 15.

Mortgage suit—suit by persons claiming in succession to original mortgagors, against mortgagees and other defendants—plaintiff's title challenged by all the defendants—no appearance by mortgagees except to file written statement—suit dismissed—appeal by plaintiff—decree against mortgagees.

Where, in a suit for redemption of a mortgage, the plaintiffs are not the original mortgagors but persons claiming to be entitled to a share under a partition of the properties of the original mortgagors, the defendants are entitled to challenge the plaintiffs' title.

In a suit for redemption the plaintiffs claimed that they had succeeded to a portion of the properties of the original mortgagors. The mortgagor defendants filed a written statement contesting the plaintiffs' right but did not otherwise

* Second Appeal No. 919 of 1921, from a decision of Ananta Nath Mitra, Esq., Additional District Judge of Saran, dated the 20th January, 1921, reversing a decision of Babu Kamini Kumar Bawerji, Munsif of Chapra, dated the 31st March, 1920.

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appear in the suit. The other defendants, who claimed to have succeeded to the original mortgagors' properties, also contested the plaintiffs' right. The trial court found that the plaintiffs had no interest in the mortgaged property. The appellate court held that as the mortgagee defendants had not appeared at the trial, the plaintiffs were entitled to a decree against them, and, further, that it was unnecessary to decide whether the plaintiffs had or had not an interest in the mortgaged property. *Held*, that the defendants were entitled to challenge the plaintiffs' title and that the appellate court should have arrived at a finding as to that title.

Appeal by defendants 1 to 6, 33, 36, 38 and 36.

The facts of the case material to this report were as follows :—

The plaintiffs sued for redemption, the mortgage having been granted as far back as the year 1861, not by the plaintiffs but by an ancestor of theirs as well as of some of the other defendants who were joined in the suit. Not only the mortgagees who are the defendants 1 to 6 in the present suit, but also a number of other persons who were alleged by the plaintiffs to have an interest in the mortgaged property as proprietors were impleaded as defendants. The defendants 7 to 31 were alleged to be the proprietors of an 8-annas share. The other defendants 32 to 39 were alleged to be the proprietors of a 4-annas share and the plaintiffs themselves claimed the remaining 4-annas share and they claimed to redeem the mortgage and to get back into their possession a 4-annas share of the mortgaged property. The mortgagee defendants, that is the defendants 1 to 6, by their written statement, directly challenged the plaintiffs' title to any share in the mortgaged property. In paragraph 3 they said :

“ The plaintiffs are in no way entitled to the share alleged by them ”

and in paragraph 8 they said, after referring to a partition under which the plaintiffs in fact claimed a 4-annas share :

" Under the aforesaid partition the plaintiffs have no concern with the *zarpeshgi* property and therefore they have no right to bring a suit for redemption of the mortgage. Hence the plaintiffs' suit is fit to be dismissed."

The other defendants in the suit alleged by the plaintiffs to be proprietors of the remaining 12-annas share also disputed the plaintiffs' right to redeem, contending that by the partition which admittedly was made amongst the members of the family of the plaintiffs and the defendants 7 to 39 the plaintiffs acquired no interest at all in the mortgaged property but got compensating interest elsewhere. Their case was that they between them held the whole of the shares in this property a portion of which had been purchased from one or other of them by the mortgagees themselves. At the trial the mortgagee defendants did not appear or call any witnesses. The other defendants, however, did appear and they called evidence in opposition to that of the plaintiffs to show that at the partition, which admittedly took place some time ago, the whole of the mortgaged property was divided amongst the defendants 7 to 39 and no portion of it at all went to the plaintiffs. Upon that evidence the learned Judge came to the conclusion that the plaintiffs never had any interest in the property and therefore that they were not entitled to redeem.

Parmeshwar Dayal, for the appellants.

S. Sahai and *Sheonandan Rai*, for the respondents.

DAWSON MILLER, C. J.—In this case I think there must be a remand to the Additional District Judge to come to a finding as to whether the plaintiff in the suit had in fact any interest in the mortgaged property. [After stating the facts of the case as set out above, his Lordship proceeded as follows:] I may point out that this is not a case of the mortgagee-defendants in a mortgage suit disputing the title of their mortgagor. The plaintiffs in this case were not mortgagors. The mortgagor was their ancestor in the year 1861. Their case was that they have succeeded to his property. The defendants' case was that they have done nothing of

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the sort, and that by the partition which took place between the members of that family they got nothing in this particular property. That was, in my opinion, a very proper issue to be determined in a mortgage suit of this sort and it is very different from the case of a mortgagee setting up a paramount title as against his admitted mortgagor.

When the case came before the learned District Judge on appeal he took the view that it was not competent to the Court in a suit for redemption to go into the question whether the plaintiffs had or had not an interest in the mortgaged property and as the mortgagee defendants did not appear at the trial, although they had put in a written statement contesting the plaintiffs' right, he came to the conclusion that the plaintiffs must have judgment against the mortgagee defendants, that is the defendants 1 to 6, notwithstanding that the Judge of the trial Court had found on the facts before him that the plaintiffs had no interest in the property. He further came to the conclusion that it was not necessary in this suit to decide whether the plaintiffs had or had not an interest in the mortgaged property. In my opinion in taking that view he was wrong for the reason I have already given. I think therefore that the decision of the learned District Judge cannot stand, that his decree must be set aside and that the case must go back to him again to come to a conclusion on the question of fact about which there is evidence on the record and which was found in favour of the defendants by the trial Court, namely, whether the plaintiffs have any title to the property in suit. That is a question of fact. It has been set out in issue No. 3 and it is in my opinion a vital issue in this case. The costs of this appeal will abide the final results of the suit.

KULWANT SAHAY, J.—I agree.

Case remanded.