

## APPELLATE CIVIL.

*Before Jwala Prasad and Kulwant Sahay, J.J.*

MUSSAMMAT DHANWANTI CHAUDHURAIN

v.

HARGOBIND PRASHAD.\*

1924.

*January, 18.*

*Mortgage—suit by prior mortgagee without impleading puisne mortgagee—property purchased by prior mortgagee in execution—suit by puisne mortgagee—right of prior mortgagee to redeem.*

Where a prior mortgagee purchases the mortgaged property in execution of a decree obtained by him in a suit to which the puisne mortgagee was not a party, he is entitled to redeem the puisne mortgagee.

A prior mortgagee purchased the mortgaged property in execution of a decree obtained by him in a suit to which the puisne mortgagee was not a party. Thereafter the puisne mortgagee sued on his mortgage and prayed (a) to redeem the prior mortgagee and, (b) after such redemption, for sale of the mortgaged property (i) for the sum found due to him upon his mortgage and, (ii) for the sum deposited by him in court for redemption of the prior mortgage. *Held*, that the prior mortgagee was entitled to redeem the puisne mortgagee on payment to the latter of the sums mentioned above.

*Davendra Nath Rai v. Ram Taran Bannerji*(1), applied.

*Durga Charan Mukhopadhyaya v. Chandra Nath Gupta Chowdhury*(2), referred to.

This was an appeal on behalf of the plaintiff decree-holder against an order of the District Judge of Darbhanga, dated the 21st April, 1923, whereby he set aside the order of the Munsif dated the 24th February, 1923, and directed him to allow the present respondent, who was the defendant third party in the suit, to redeem the plaintiff.

\*Appeal from Appellate Order No. 146 of 1923, and Civil Revision No. 322 of 1923, from an order of Ashutosh Chatterji, Esq., District Judge of Darbhanga, dated the 21st April, 1923, reversing an order of Babu Permeshwari Dayal, Munsif of Darbhanga, dated the 24th February, 1923.

(1) (1903) I. L. R. 30 Cal. 599, F. B. (2) (1899-1900) 4 Cal. W. N. 541.

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The undisputed facts of the case were shortly these :

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The predecessor in interest of the defendant No. 1 executed two mortgages, dated the 7th August, 1907, and 9th December, 1908, in favour of the defendant third party. On the 25th January, 1912, he executed another mortgage of the same properties in favour of the plaintiff's husband. The defendant third party brought a suit upon his mortgages, obtained a decree, sold the mortgaged property and purchased it himself, and obtained delivery of possession of the same on the 9th of January, 1918. In this suit, the present plaintiff or her husband who was a second mortgagee was not impleaded as a party. The plaintiff brought a suit to enforce her mortgage and in this suit the defendant No. 1 represented the original mortgagor, the defendant second party held a mortgage of a date subsequent to the plaintiff's mortgage; and the defendant third party was the prior mortgagee under the bonds of 1907 and 1908 and was in possession of the mortgaged property by virtue of the delivery of possession of the 9th of January, 1918. The defendants fourth party were subsequent lessees of the mortgaged property. The plaintiff in her suit prayed : first, that she might be entitled to redeem the defendant third party and, after such redemption, she prayed for sale of the mortgaged property for the sums found due to her upon her mortgage as well as the sum paid by her to the first mortgagee to redeem his first mortgage.

Various points were raised by the learned Munsif before whom the suit came on for trial; but for the purpose of the present appeal, it is only necessary to mention that one of the questions raised between the plaintiff and the defendant third party was as to whether the plaintiff was entitled to redeem the defendant third party, and, as to whether the plaintiff could bring the property to sale, and, if so, on what terms. The Munsif dealt with these points in issues

Nos. 4 and 5 in his judgment. He held that the plaintiff not being made a party in the first mortgagee's suit, the right of redemption in so far as she was concerned had not been extinguished and that she had still the right to redeem. Thereafter, the Munsif held that the plaintiff was entitled to add the sum paid by her in order to redeem the first mortgagee to the sum found due upon her own mortgage and the original mortgagor, namely, the defendant No. 1 or his representatives in interest would be entitled to redeem the plaintiff on payment to her of the sums found due upon her mortgage as well as the sum paid by the plaintiff to redeem the first mortgagee, and in the event of the mortgagor or his representative or the subsequent mortgagee, namely, the defendant second party, failing to redeem the plaintiff, the latter would be entitled to bring the property to sale.

It appeared that in compliance with this decree the plaintiff deposited in Court, on the 28th of November, 1922, the sum found due to the first mortgagee, namely, the defendant third party, under the decree of the Munsif. Thereupon, on the 3rd of February, 1923, the defendant third party applied to the Munsif for leave to deposit in Court the money due to the plaintiff on account of her own mortgage as well as the money deposited by the plaintiff to redeem the defendant third party. The Munsif, by his order dated the 24th February, 1923, held that the defendant third party was not entitled to deposit the money, and he accordingly rejected his application for leave to deposit the money. Against this order the defendant third party went in appeal before the District Judge. Various points were raised by the respondent before the District Judge but they were all decided against her and in favour of the appellant before him. He held that the appellant before him, namely, the defendant third party, was entitled to deposit the money, and he accordingly set aside the order of the Munsif and directed him to allow the appellant before him to redeem the plaintiff. Against this order the

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plaintiff appealed to the High Court. She also filed an application for revision under section 115 of the Civil Procedure Code in the alternative in case it was held that the order of the District Judge was not appealable.

*P. K. Sen* (with him *Abani Bhushan Mukerjee*), for the appellant: It was the duty of the prior mortgagee who has purchased in execution of his mortgage-decree the rights of the mortgagor to make me a party in the suit. I am not, therefore, bound by the decree or the result of it. *Davendra Nath Rai v. Ram Taran Bannerji* (1) is an authority on the point. The mortgagor is bound by the decree but my rights are not affected. The mortgagee no doubt stands in the shoes of the mortgagor, but by what means? I am not bound by the decree or the sale held in execution thereof, and if the mortgagee purports to have occupied a position by virtue of these events, my rights cannot be affected thereby. In *Durga Charan Mukhopadhyaya v. Chandra Nath Gupta Chowdhury* (2) the Court observes: "..... not having been made a party to the suit, his right to redeem is not affected. There is no right of redemption left in the mortgagor. His right to redeem went at the time of the first sale.....". The mortgagor's right to redeem is therefore extinguished.

[KULWANT SAHAY, J. : But the decree gives the mortgagor and his representative the right to redeem. In execution proceedings we cannot go behind the decree.]

Your Lordships have to administer equity. The auction-purchaser is not the true representative in the eye of law. He has stepped into the shoes of the mortgagor by such means as the law deprecates. He can only come in as representative by virtue of the procedure he has adopted which is contrary to law.

(1) (1903) I L. R. 30 Cal. 599, F.B. (2) (1899 1900) 4 Cal. W. N. 541 (542).

[JWALA PRASAD, J. : The right to redeem is transferable. By the sale the mortgagee stepped into the shoes of the mortgagor in respect of all his rights.]

But he should not be allowed to affect me by such means. He captures the position of the mortgagor by means of a suit which is not in accordance with the provisions of law.

*Shiveshwar Dayal*, for the respondent: The whole question is whether a prior mortgagee who has purchased the mortgagor's rights at a sale in execution of a mortgage decree can stand in the position of the mortgagor. It is a settled principle of law that the dominant feature of a mortgage is but a loan and the security is only a collateral aspect of the loan. "Once a mortgage always a mortgage." The outstanding equity of redemption can be availed of by the mortgagor or anybody interested in the mortgage. The puisne mortgagee has only a right to a repayment of his loan; and so long as there is somebody to pay up the amount he is not entitled to redeem the prior mortgagee. The only point that arises is whether a mortgagee who enters into the shoes of a mortgagor by virtue of a purchase is only a mortgagee or occupies the double position of a mortgagor and a mortgagee. On the authorities I submit that all the rights and equities of the mortgagor are open to the purchaser. I need only refer to Dr. R. B. Ghose's *Lectures on Law of Mortgage*, Vol. I. 4th ed., page 621. I also rely on *Ganpat Lal v. Bindhasini Prashad Narayan Sinah* (1), wherein it was decided that a mortgagee who purchases the rights of a mortgagor occupies a distinct position from that of a mortgagee and he can raise all the defences open to a purchaser.

*P. K. Sen*, in reply: It appears that the decree contains the words "mortgagor and *warisan*." The

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(1) (1920) I. L. R. 47 Cal. 924; L. R. 47 I. A. 91.

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purchaser by no stretch of language can be said to be a 'waris' or heir. He may be a representative but not an heir.

*Shiveshwar Dayal* (with the Court's permission) :  
If the decree is ambiguously worded, it ought to be read with the judgment, which clearly says "mortgagor or his representatives."

S. A. K.

KULWANT SAHAY, J. (after stating the facts, as set out above, proceeded as follows) :—

The only point argued by the learned Counsel for the appellant is that the defendant third party, who is the first mortgagee, has no right to redeem the plaintiff who is the second mortgagee. His contention is that having regard to the fact that the second mortgagee, namely, the plaintiff, was not made a party to the suit brought by the first mortgagee, the second mortgagee has the right to redeem, and once the second mortgagee exercises this right and redeems the first mortgagee, the latter is out of the field and he has no right in his turn to redeem the second mortgagee.

Now, the rights of the parties have been determined by the decree of the Munsif passed in the suit of the second mortgagee, namely, the present appellant. The learned Munsif in dealing with issues Nos. 4 and 5 in the suit observed as follows: "Now the first mortgagee in this case happens to be a purchaser of the equity of redemption. Therefore, if the plaintiff pays the amount due on the first mortgage, then the plaintiff in her own turn may be redeemed by the first mortgagee." The decree prepared by the Munsif in accordance with this judgment also directs that in the event of the plaintiff redeeming the first mortgagee, the mortgagor or his representatives would be entitled to redeem the plaintiff on payment to her of the sum found due to her under her own mortgage as well as under the mortgage of the first mortgagee. The learned Counsel for the appellant relies upon the case

of *Durga Charan Mukhopadhyaya v. Chandra Nath Gupta Chowdhury* (1) where the learned Judges of the Calcutta High Court observed that after a sale of the mortgaged property in execution of a decree obtained by the first mortgagee there is no right of redemption left in the mortgagor, his right to redeem went at the time of the first sale; and, he contends that in the Full Bench case of *Davendra Nath Rai v. Ram Taran Bannerji* (2) although the decision of the Division Bench in the case of *Durga Charan Mukhopadhyaya v. Chandra Nath Gupta Chowdhury* (1) was overruled on the question that the subsequent mortgagee had the right not only to redeem the first mortgagee but also to sell the mortgaged property subject to the encumbrance of the first mortgage, the decision of the Division Bench as regards the right of the mortgagor to redeem having been lost was not disturbed. To my mind, the case of *Durga Charan Mukhopadhyaya v. Chandra Nath Gupta Chowdhury* (1) does not lay it down as a proposition of law that in no case the mortgagor can be allowed to redeem after sale of the mortgaged property. The question as to whether the mortgagor would be entitled to redeem the second mortgagee, who in his turn had redeemed the first mortgagee, even after the sale in execution of a decree obtained by the first mortgagee was not considered, and the learned Chief Justice of the Calcutta High Court in the Full Bench case of *Davendra Nath Rai v. Ram Taran Bannerji* (2) observes that a purchaser at a sale in execution of a decree obtained by a first mortgagee in a suit to which the puisne encumbrancer was not a party, does not displace the latter but stands only in the position of the first mortgagee and that under such sale the interests of the first mortgagee and of the mortgagor pass to the purchaser subject to the rights of the puisne encumbrancer. The Full Bench there held that the right of the purchaser in execution of a decree obtained by the first mortgagee was the same as that of the mortgagor; in other words, the

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purchaser was a representative of the mortgagor and stood in his shoes and was therefore, entitled to redeem the second mortgagee. The same view is expressed in Sir Rash Behari Ghose's *Law of Mortgage*, where the learned author, in dealing with the case of *Gopee Bandhu v. Kali Pado* (1), observes that though the purchaser under the first decree was entitled to the outstanding interest in the mortgagor, as the puisne mortgagee was not a party to it the latter had a right to pay off the amount due under the first mortgage and that upon such payment he would be the "holder of the first charge" on the property with power to realize in the usual way, *if the first mortgagee in his character of owner of equity of redemption did not choose to redeem* [vide Ghose's *Law of Mortgage*, page 658, 5th ed.]. It is manifest that in the present case the defendant third party occupies the double capacity of a first mortgagee as well as the owner of the equity of redemption by virtue of his purchase and, in my opinion, he is entitled to redeem the plaintiff on payment to her of the sum found due upon her mortgage as well as the sum deposited by the plaintiff to redeem the defendant third party.

Apart from the legal position of the parties their rights in the present case have been determined by the decree which is binding on both parties. That decree clearly entitled the defendant third party to redeem the plaintiff. Mr. *P. K. Sen* has referred to the wording of the decree of the Munsif drawn up in the vernacular wherein it is stated that the mortgagor and his *warisan* would be entitled to redeem the plaintiff, and he argues that the word '*warisan*' means not representatives but heirs and therefore the defendant third party who is not the heir of the mortgagor has no right to redeem. Mr. *Shiveshwar Dayal* on behalf of the respondent contends that the word '*warisan*' includes representatives as well as heirs. If there is any doubt as regards the interpretation to be put upon

(1) (1875) 23 W. R. 338.



the decree we have to refer to the judgment, and, as I have already pointed out, the judgment clearly directs that the mortgagor and his representatives would be entitled to redeem. In fact, in the passage quoted by me above from the judgment of the learned Munsif, it is quite clear that the defendant third party was given the right to redeem the plaintiff.

Under these circumstances the decision of the learned District Judge is correct and this appeal must be dismissed with costs

No question has been raised in this Court as regards the maintainability of the appeal and the Revision case is also dismissed but without costs.

JWALA PRASAD, J.—I agree.

*Appeal dismissed.*

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### APPELLATE CIVIL.

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*Before Das and Ross, J.J.*

KOKIL SINGH

*v.*

RAMASRAY PRASAD CHOUDHARY.\*

1924.

*January, 24.*

*Arbitration—Agreement to withdraw suit and refer dispute to arbitration—suit accordingly dismissed—application to file award—Civil Procedure Code, 1908 (Act V of 1908), Schedule II, paragraph 20—Award, extension of time for making, effect of—Mistake of law.*

If the parties to a pending suit apply to the court for an order referring the matters in dispute to arbitration the court must keep control over the proceedings up to the end. But it is not necessary for the parties to take this course and there is nothing to prevent them getting the suit dismissed by consent.

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\* Appeal from Original Order No. 217 of 1923, from an order of B. Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 12th July, 1923.