

The decision of the lower appellate court is, in my opinion, erroneous. I would allow these appeals, set aside the orders passed by the courts below and dismiss the application of Mussammat Kokila. The respondents must pay the costs of these proceedings in all the courts.

Ross, J.—I agree.

Appeal allowed.

1926.

MALIK
FAZLUL
RAHMAN
v.
MUSSAMMAT
KOKILA.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, J.J.

MUSSAMMAT RAMJHARI KOER

v.

LALA KASHI NATH SAHAI.*

1925-1926.

Oct., 26, 27.
March, 11.

Limitation Act, 1908 (Act IX of 1908), Schedule I, Articles 132 and 148—Prior mortgagee, suit by—non-joinder of second mortgagee, effect of—decree and sale, whether affects the second mortgagee's right to redeem—second mortgagee, suit for redemption by—Article 148, applicability of.

A second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgagee and is not bound either by the decree in the prior mortgagee's suit or by the sale held in execution thereof.

The second mortgagee not having been made a party to a suit by the prior mortgagee, who obtained a decree and in execution thereof got the mortgaged property sold, subsequently brought a suit to redeem the prior mortgage.

The defendant pleaded that the suit was barred by Article 132 of the Limitation Act, 1908, which provides a period of 12 years for a suit "to enforce payment of money

*Appeal from Appellate Decree no. 398 of 1923, from a decision of Babu Akhauri Nityanand Singh, Subordinate Judge of Saran, dated the 18th January, 1923, reversing a decision of Rai Krishna Bilhari Sharan, Munsif of Chapra, dated the 21st December, 1921.

1925-1926. charged upon immoveable property". Plaintiff contended that the suit was governed by Article 148 which provides a period of 60 years for a suit "against a mortgagee to redeem or to recover possession of immoveable property mortgaged".

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Held, that whatever right the second mortgagee had before the sale remained intact, and the suit brought by him to redeem the prior mortgage was governed by Article 148.

Basant v. Inder Singh(1), *Priya Lal v. Bhora Champa Ram*(2) and *Harprasad Lal v. Dal Mardan Singh*(3), followed.

Bidhi Ram Bandhopadhya v. Sarveshwar Biswas(4), *Bitraguntu Appayya v. Addanki Venkataramanayya*(5) and *Lakshmanan Chettiar v. Sella Muthu Naicker*(6), dissented from.

Appeal by the plaintiff.

This appeal arose out of a suit for redemption of a mortgage which had been dismissed by the learned Subordinate Judge on the ground of limitation.

In Mouza Sarai Srikant, Tauzi no. 10752, a 5-annas 4-pies share belonged to Lala Fatah Bahadur and Lala Lal Bahadur. On the 11th of December, 1886, they executed a zarpeshgi in respect of a 4-annas share to the plaintiff's mother and the defendants 11 to 13. On the 28th of March, 1892, they mortgaged a 6-pies share to the defendant no. 5 and it appeared to have been the case of both parties that this 6-pies was out of the 4-annas given in the zarpeshgi. On the 16th of February, 1893, they executed a second mortgage to the plaintiff's mother and the defendants 11 to 13 in respect of the 4-annas share which had already been given in zarpeshgi in the year 1886, and which included the 6-pies already mortgaged to defendant no. 5. It appeared that the remaining 1-anna 4-pies out of 5-annas 4-pies had passed to defendants nos. 8 to 10. Defendant no. 5 instituted a suit to enforce his mortgage, which was Suit no. 50

(1) (1920) 2 Lah. L. J. 419.

(2) (1923) I. L. R. 45 All. 268.

(3) (1905) I. L. R. 32 Cal. 891.

(4) (1909-10) 14 Cal. W. N. 439.

(5) (1924) 82 Ind. Cas. 864.

(6) (1924) 84 Ind. Cas. 301.

of 1894. In this suit the subsequent mortgagees were not made parties. A decree was obtained and the mortgaged property, viz. 6-pies share, was sold on the 26th October, 1895, and purchased by the defendants 1 to 3 in the farzi name of the defendant no. 4. Subsequently the second mortgagees, namely, the plaintiff's mother and the defendants 11 to 13, instituted a suit to enforce their mortgage of the 16th of February, 1893. In this suit neither the first mortgagee nor the purchasers in execution of his decree were made parties. A decree was obtained on the 26th February, 1896, and in execution of the decree the 4-annas share was sold on the 8th January, 1897, and purchased by the decree-holders themselves. The plaintiff's mother being dead, the plaintiff now claimed the 4-annas share as her heiress on the allegation that by a private partition she had been allotted the entire 4-annas share and the defendants 11 to 13 had no interest therein.

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The present suit for redemption was instituted on the 17th of January, 1919. The contesting defendants, namely defendants 1 to 3, pleaded inter alia that the suit was barred by limitation, they having been in possession for more than 20 years and the claim of the plaintiff to enforce her second mortgage having been barred by lapse of time.

The learned Munsif held that the suit was governed by Article 148 of the Schedule to the Indian Limitation Act; and that the plaintiff had therefore 60 years to bring the suit from the date when the right to redeem accrued to her. He further held that as the plaintiff's predecessors in interest were not made parties in the suit of the first mortgagee, the plaintiff had still the right to redeem. He accordingly made a decree for redemption in favour of the plaintiff.

On appeal the learned Subordinate Judge set aside the decree of the Munsif on the ground that, although the plaintiff had got the right of redemption

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as her predecessors in interest were not made parties to the suit of the prior mortgagee, her right was barred by limitation, as in his opinion the Article applicable to the present suit was not Article 148, but Article 132 of the Indian Limitation Act, and he relied upon the decision of the Calcutta High Court in the case of *Nidhi Ram Bandhopadhyaya v Sarveshwar Biswas*⁽¹⁾. He accordingly dismissed the suit on the ground of limitation.

Against this decision of the Subordinate Judge the plaintiff appealed to the High Court; and the only question for consideration in this Second Appeal was as to the period of limitation for the suit.

K. P. Jayaswal, B. N. Mitter and Sunder Lal,
for the appellant.

P. Dayal, for Jadubans Sahay, for the
respondents.

Cur. adv. vult :

March, 11.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): It is clear that a second mortgagee who has not been made a party to the suit of a prior mortgagee is entitled to redeem the prior mortgage and is not bound either by the decree in the suit of the prior mortgagee or by the sale held in execution thereof. It has been contended on behalf of the respondents that after the sale in execution of the decree of the prior mortgagee, the mortgage was extinguished and the purchasers remained in possession not as representatives of the prior mortgagee but as representatives of the mortgagor; and that, therefore, Article 148 has no application inasmuch as it provides for a suit against a mortgagee to redeem or to recover possession of the mortgaged property.

In my opinion this contention is not sound. So far as the second mortgagee is concerned, he is not bound by the decree or the sale in enforcement of the

(1) (1909-10) 14 Cal. W. N. 439.

prior mortgage. His position as a second mortgagee remains unaffected by the decree and the sale. He was a necessary party in the suit brought by the prior mortgagee and a decree obtained in his absence on the basis of the prior mortgage did not affect his right to redeem the prior mortgage. The fact that the purchaser in execution of the decree of the prior mortgage has been in possession for more than 20 years does not, in my opinion, affect the right of the second mortgagee to redeem the first mortgage.

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The question, however, remains as to whether Article 132 or Article 148 of the Indian Limitation Act applies to the present case. In my opinion Article 132 has no application to the present suit. In the case of *Nidhi Ram Bandhopadhyaya*⁽¹⁾ mentioned above, the reasoning adopted was that the second mortgagee by his purchase at the sale in satisfaction of his mortgage debt cannot acquire any right of redemption which he had not as mortgagee. With very great respect to the learned Judges, I am unable to follow this reasoning. The right to redeem the prior mortgage was vested in the second mortgagee by virtue of his being a second mortgagee. This right was not acquired by him by his purchase at the sale in satisfaction of his mortgage debt. The learned Judges observed that "the omission of the prior mortgagee to include the second mortgagee in his suit has been held by this court not to deprive the second mortgagee of his right to redeem the prior mortgage; but it cannot be held that this interpretation of the law which is intended merely to save his right as second mortgagee gives him any additional right or extends the period during which under the law he can sue to enforce his rights. The right to redeem was held not to be lost. It was not held and in our opinion it was not intended to hold that a fresh period to enforce his right to redeem under his mortgage was given to him from the date of the purchase. We hold

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that Articles 134 and 148 of Schedule II of the Indian Limitation Act have no application in this case. The Article that applies is Article 132 of that Schedule under which limitation begins to run from the date when the mortgage debt became due". I regret I am unable to agree with this reasoning. Once it is conceded that the second mortgagee had still the right to redeem and was not affected by the sale in execution of the prior mortgage, it must necessarily follow that whatever right the second mortgagee had before the sale in execution of the decree on the prior mortgage remained intact. Under Article 148 the second mortgagee had 60 years to redeem the first mortgage and this right was consequently not affected by the sale in execution of the decree upon the prior mortgage. Article 132 provides for enforcement of payment of money charged upon immoveable property. The second mortgagee's right of redemption cannot, in my opinion, be considered to be a right to enforce payment of money charged upon immoveable property. The second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage. This Article has, therefore, no application to a suit for redemption brought by the second mortgagee.

I am, therefore, unable to accept the view taken in the case of *Nidhi Ram Bandhopadhya*⁽¹⁾. This case was followed in two cases in the Madras High Court in *Bitragunta Appayya v Addanki Venkataramanayya*⁽²⁾ and *Lakshmanan Chettiar v Sella Muthu Naicker*⁽³⁾, and the reasoning adopted in these cases is similar to the reasoning adopted by the learned Judges in *Nidhi Ram's* case⁽¹⁾. The Lahore High Court has, however, differed from the view taken in *Nidhi Ram's* case⁽¹⁾ in *Basant v Inder Singh*⁽⁴⁾. That Article 148 of the Schedule to the Limitation Act applies to the present case is

(1) (1909-10) 14 Cal. W. N. 439.

(3) (1924) 84 Ind. Cas. 301.

(2) (1924) 82 Ind. Cas. 864.

(4) (1920) 2 Lah. L. J. 419.

supported by the view taken by the Allahabad High Court in *Priya Lal v. Bhora Champa Ram*(¹) and by the Calcutta High Court in *Harprasad Lal v. Dal Mardan Singh*(²).

I would therefore hold that the present suit was not barred by limitation and that the plaintiff was entitled to a decree for redemption.

The question remains what should be the form of the decree. The learned Munsif has ordered that the plaintiff will be entitled to redeem on payment of Rs. 50 together with interest thereon at the rate of 12 per cent. per annum from the date of sale, that is, 26th October, 1895, to the defendants nos. 1-3. This sum of Rs. 50 represents the price of the property fetched at the sale in execution of the decree upon the first mortgage. This is not a correct principle upon which redemption should be allowed. The puisne mortgagee is held to be entitled to redeem the prior mortgage on the hypothesis that so far as he is concerned the mortgage has not been extinguished and is still in existence. He must, therefore, pay to the prior mortgagee the entire amount due upon the prior mortgage on an account being taken less the sum of Rs. 50, being the purchase money at the first sale already paid to him. Upon such payment being made the plaintiff will acquire the right of the prior mortgagee, because what he redeems is not the premises but the prior encumbrance and he is entitled not to a conveyance of the premises, but to an assignment of the security.

This would necessitate a remand for the taking of the account and also directions declaring the rights of the parties to redeem each other and relating to other matters which would create complications. The parties have, however, come to terms and desire that a decree be made in the following terms: that the plaintiff's right to redeem be declared, that it be

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1925-1926. declared that she will be entitled to redeem on payment
 MUSSAMMAT to the defendants 1-3 of a sum of Rs. 100 only within
 RAMJHARI three months from this date, that on her failure to
 KOER. do so, the suit will stand dismissed with costs. Each
 v. party is to bear its own costs throughout in the event
 LALA KASHI of payment being made by plaintiff within the three
 NATH SAHAL. months. It is represented that the plaintiff has
 KULWANT deposited in the trial court a sum of money in
 SAHAY, J. accordance with the decree of that court. If so, and
 if there be no other objection to her doing so, she
 will be entitled to take the sum back from the court.

The appeal be decreed by consent on the above terms. The decrees of the courts below will be set aside and the suit decreed as directed above.

MULLICK, J.—I agree.

Appeal decreed.

APPELLATE CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

FARMAN KHAN

v.

KING-EMPEROR.*

1926.

March, 15,
16, 17, 18,
23.

*Penal Code, 1860 (Act XLV of 1860), section 96, et seq—
 Right of private defence, when open.*

Where the parties to a dispute collect and arm men to vindicate their rights or supposed rights and a conflict ensues, no question of the right of self-defence of the person arises.

Queen v. Jeolal(¹), *Kalee Baparee*, In the matter of (²), *Kabiruddin v. Emperor*(³) and *Queen-Empress v. Prag Dul*(⁴), referred to.

* Criminal Appeal no. 25 of 1926, from a decision of Damodar Prasad, Esq., Sessions Judge of Purnea, dated the 1st of February, 1926.

(1) (1867) 7 W. R. 34.

(3) (1908) I. L. R. 35 Cal. 368.

(2) (1878) 1 Cal. L. R. 521.

(4) (1898) I. L. R. 20 All. 459.