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In my opinion, therefore, the appeal should be allowed, the judgments of the courts below set aside and the case sent back to the District Judge to be disposed of according to law in the light of the observations made above. Costs will abide the result.

COURTNEY TERRELL, C.J.—I agree.

FAZL ALI, J.

MACPHERSON, J.—I agree.

Appeal allowed.

Case remanded.

APPELLATE CIVIL.

1936.

March, 20, 23.

Before Agarwala and Rowland, JJ.

JOTI LAL SAH

v.

SHEODHAYAN PRASAD SAH.*

Mortgage—redemption suit—previous suit for redemption, when bars a second suit—Transfer of Property Act (Act IV of 1882), section 60—Code of Civil Procedure, 1908 (Act V of 1908), sections 11, 47 and Order XXXIV, rules 7 and 8—res judicata.

The plaintiff brought suits for declaration of his right of redemption and the defendants pleaded (*i*) that inasmuch as the predecessor in interest of the plaintiffs had brought suits for similar relief and did not make payment under the decrees their right to redeem had been extinguished, (*ii*) that the suits were barred by res judicata, (*iii*) that section 47 of the Code of Civil Procedure was a bar to the maintainability of the suits. It was also urged that the equity of redemption had during the pendency of the suits vested in another person and hence the plaintiff could not continue the suit.

* Appeals from Appellate Decrees nos. 232, 233 and 234 of 1933, from a decision of Babu Ananta Nath Banerjee, Subordinate Judge of Chapra, dated the 9th August, 1932, affirming a decision of Babu Damodar Prasad, Munsif of Chapra, dated the 14th August, 1931.

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Section 60 of the Transfer of Property Act declares the right of a mortgagor to tender the mortgage money and redeem the mortgage

"provided that the right conferred by the section has not been extinguished by act of the parties or by decree of a court."

Order XXXIV, rule 8 of the Code of Civil Procedure preserves the right of a mortgagor in a suit for redemption until the mortgagee has applied for and obtained a final decree debarring the mortgagor from his right to redeem.

Held, that section 47 of the Code of Civil Procedure, 1908, was no bar to the maintainability of the suit as there was no direction for foreclosure in default of redemption and no final decree had been passed.

Where a court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that and were heard and determined, became res judicata; but unless there has been a determination that the mortgagor has no right to redeem there would still remain one other issue in a subsequent suit which would not be res judicata. *Vedapuratti* v. *Vallabha Valiya Raja*(1), distinguished.

Sita Ram v. *Madho Lal*(2), *Roy Dinkur Doyal* v. *Shee Golam Singh*(3) and *Ramji* v. *Pandharinath*(4), followed.

Maina Bibi v. *Chaudhri Vakil Ahmad*(5), referred to.

A plaintiff who has instituted a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue in his name for the benefit of his successor.

Rai Charan Mandal v. *Biswa Nath Mandal*(6), followed.

Appeals by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Rowland, J.

The case was first heard by Varma, J. who referred it to a Division Bench.

S. N. Dutt, for the appellants.

(1) (1902) I. L. R. 25 Mad. 300, F.B.
(2) (1901) I. L. R. 24 All. 44, F.B.
(3) (1874) 22 W. R. 172.
(4) (1918) I. L. R. 43 Bom. 334, F.B.
(5) (1924) I. L. R. 47 All. 250, P. C.
(6) (1914) 20 Cal. L. J. 107.

A. B. Mukharji and *Hareshwar Prasad Sinha*, for the respondents.

ROWLAND, J.—These three second appeals arise out of three analogous suits in which the plaintiff claimed a declaration of his right of redemption of properties covered by usufructuary mortgages in favour of the predecessors of the principal defendants. The plaintiff alleged that the mortgage money had been satisfied by the usufruct of the properties and claimed in the alternative that an account be taken and the plaintiff given a fixed time for depositing the amount. The suits were dismissed by the Munsif as being barred by the principle of res judicata and the appeals were dismissed by the Subordinate Judge on the ground that they were not maintainable at the instance of the plaintiffs. During the pendency of the litigation the whole equity of redemption in the mortgage properties had become vested by virtue of a partition in Parmeshar Prashad Sah who had been impleaded as a defendant in the suits. His application to be transferred as an appellant and to be allowed to maintain the appeals was rejected. In second appeal it is contended that the suits should have been tried on merits.

I take first the question of res judicata. The predecessors in interest of the plaintiffs brought suits 335 and 354 of 1914 for redemption of these very mortgages on similar allegations. The suits ended in decrees fixing the amount which was to be paid by the plaintiffs to redeem the mortgages and giving a period of grace for payment. It is contended for the respondents that payment not having been made within the stated time the right of redemption is extinguished. Section 60 of the Transfer of Property Act declares the right of mortgagor to tender the mortgage money and redeem the mortgage

" provided that the right conferred by the section has not been extinguished by act of the parties or by decree of a court ".

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The decision in the previous suits affirmed the mortgagor's right of redemption and did not couple with this declaration any order directing the right of redemption to be extinguished in default of payment. Order XXXIV of the Civil Procedure Code preserves the right of redemption even in a suit for sale until the actual confirmation of the sale (rule 5); and in a suit for redemption until the mortgagee has applied for and obtained a final decree debarring the mortgagor from his right to redeem (rule 8). Whether such a final decree can at all be passed in connection with a usufructuary mortgage I need not examine here. It is sufficient to say that no such final decree has been applied for or passed. Therefore the mortgage subsists and the equity of redemption is still alive.

It was then suggested for the respondent that the plaintiff should have come by way of application under section 47 of the Civil Procedure Code and not by a fresh suit. The contention receives some support from the decision of the Madras High Court in *Vedapuratti* v. *Vallabha Valiya Raja*(1) but that decision expressly distinguishes the cases in which there had been a direction for foreclosure or sale in default of redemption from cases in which there had been no such direction; so that this Madras decision has no application to the facts before us even if it be accepted to be good law. A different and in my opinion more correct view of the law was taken by the Full Bench of the Allahabad High Court in *Sita Ram* v. *Madho Lal*(2). Knox, A. C. J. observed:—

"It is true that where a Court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that, and were heard and determined, become res judicata and cannot be reopened; but unless there has been a determination that the mortgagor has no right to redeem, there would still remain one other issue in a subsequent suit which would not be res judicata, and which would

(1) (1902) I. L. R. 25 Mad. 300, F.B.
(2) (1901) I. L. R. 24 All. 44, F.B.

have to be heard and determined. In a second suit for redemption there would always be the question to be tried whether the plaintiff has or has not a right to redeem reserved to him by law until the mortgagee has applied for an order for sale. This issue would naturally not have been, and could not have been in issue in the former suit;"

and Aikman, J. in the course of his judgment cites the following passage from the Calcutta decision of *Roy Dinkur Doyal* v. *Sheo Golam Singh*(1) :—

"It seems to us plain that the principal cause of suit is the relation which subsists between the parties as mortgagor and mortgagee, and the consequent right on the part of the mortgagor at all reasonable times to ask for an account from the mortgagee.....The former suit effected an adjustment of accounts up to the date of 18th April, 1868. The substantial cause of action within the meaning of section 2 Act VIII of 1859, in the present suit, that which the plaintiff desires to have heard and determined, is the state of accounts which has arisen since the 18th April, 1868, obviously an entirely fresh cause of action. The matter which the Court is asked in this suit to hear and determine, is a matter which has arisen and come into being since the matter of the last suit was heard and determined."

To the same effect was the decision of the Full Bench of the Bombay High Court in *Ramji* v. *Pandharinath*(2). Scott, C. J. observed :—

"A second redemption suit must recognise the binding effect of the previous redemption decree *nisi* in so far as it settles the accounts up to the date of that decree, and the duty of the Court in the second suit would be limited to the ascertainment of the amount due at the date of the second suit or decree and to give such consequential relief as the law permits."

(1) (1874) 22 W. R. 172.
(2) (1918) I. L. R. 43 Bom. 334, F.B.

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This view and these observations are more consistent than the Madras view with what was said by Lord Atkinson in delivering the judgment of the Privy Council in *Maina Bibi* v. *Chaudhri Vakil Ahmad*(1) which (though the subject-matter of that litigation may not be entirely on all fours with the present suits) is nevertheless pertinent:—

"One asks oneself what was the *res* that was adjudicated upon, either on the 25th of November, 1903, or in the appellate Court on the 3rd of July, 1906? The things in dispute in the first case where (1) the right of the plaintiffs to recover immediate possession of the land in suit, (2) the amount of dower, and (3) the rate of interest. The two latter matters have been decided in that suit and cannot be re-opened. The suit out of which this appeal arises only asks for an adjudication as to the account since 1903. The right to get immediate possession of land at the date when a suit to recover it is, in fact, instituted, is a wholly different thing, a wholly different *res*, from the right to recover it at some future time, and possibly under wholly altered circumstances."

I have no doubt that the Munsif was in error in dismissing the entire suit as barred by res judicata. He should have held that the mortgagors had a subsisting right to redeem after having the state of account as between them and the mortgagees worked out by the court. In dealing with the account the court would of course be bound to respect the decision in the 1914 litigation on any questions in the present litigation which were identical with questions previously decided.

I now turn to the question of maintainability. The Munsif had given another reason for dismissing the entire suits, namely, that they had been dismissed against the minor defendants for want of prosecution. It was the plaintiff's case that these minor defendants

(1) (1924) I. L. R. 47 All. 250, P. C.

had no interest in the mortgage property and were not necessary parties. If that was so the suit need not fail because of their being struck off. But the defendants would be entitled if so advised to raise an issue whether these minor defendants in fact had an interest and were necessary parties in whose absence the suit could not be decreed. This alleged defect is not referred to in the judgment of the Subordinate Judge which proceeds on another ground. At the time of the institution of the present suits there was pending a partition suit in the court of the Subordinate Judge, 1st Court, Chapra, affecting properties of the family of the plaintiff. By a compromise in that suit the mortgage properties of the present litigation were assigned to Parmeshar Prashad Sah who was impleaded in these suits as defendant no. 8. The compromise agreement was effected on 25th July, 1931. The present suits were dismissed on 14th August, 1931. The decree passed on compromise in the partition suit was dated 15th September, 1931, and the appeals by the plaintiffs were presented on 19th September, 1931. The respondents' objection to the appeals was that they were not maintainable at the instance of the plaintiffs because the plaintiffs had parted with their interest in the property. This does not appear to be a correct view of the law. The true position is as explained in *Rai Charan Mandal* v. *Biswa Nath Mandal*[1] that the plaintiff who has instituted a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue in his name for the benefit of his successor. In the alternative the Civil Procedure Code, Order XXII, rule 10, provides that by leave of the Court the successor in interest may get himself substituted as plaintiff. This is a provision against the danger that the original plaintiff being no longer interested in the proceedings may not vigorously prosecute them or may even collude with the adversary. In such a case

(1) (1914) 20 Cal. L. J. 107.

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the successor in interest who has not got himself substituted is bound by the decision and has no remedy. No doubt Order XXII, rule 10, gives the Court a discretion in allowing or refusing such an application by the successor in interest but leave should not be unreasonably refused. It is not necessary for this Court to pass any order regarding Parmeshar's application under Order XXII, rule 10. The order that I propose is that the decisions of both the courts below be set aside and the suits remitted to the Munsif for disposal on the merits. It will be open to Parmeshar to make a fresh application under Order XXII, rule 10, to the Munsif. The costs of the appeal and second appeal will be borne by the defendants. The costs of the first court will abide the result.

AGARWALA, J.—I agree.

Appeals allowed.

Cases remanded.

REVISIONAL CIVIL.

1936.

March, 3, 24.

Before Agarwala and Rowland, JJ.

SURPAT SINGH

v.

SHITAL SINGH.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 170—*Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXI, rule* 58—*decree for arrears of rent against the tenants recorded in the landlord's serishta—claim under Order XXI, rule* 58, *of the Code of Civil Procedure, if barred under section* 170 *of the Bihar Tenancy Act.*

The petitioners having obtained a decree for arrears of rent against the tenants recorded in their serishta put the decree in execution. Prior purchasers from the tenants applied under Order XXI, rule 58, for release of the holding

* Civil Revision no. 508 of 1935, against an order of Mr. Shiva Pujan Rai, Munsif of Madhipura, dated the 12th August, 1935.