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ABU MOHAMMAD MIAN v. BABU DEODUTT.

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of law in the sense contended for here by Mr. De. But the questions actually referred for the decision of the Full Bench were specifically framed with reference to the facts of that case, namely, "first, where a prior mortgage is redeemed partly by the mortgagor and partly by vendees of the mortgaged property out of the sale consideration and in terms of covenants in the sale deeds in their favour, are the vendees as against the puisne mortgagees entitled to the rights of subrogation under section 92 of the Transfer of Property Act and, secondly, does clause 3 of section 92 of the Transfer of Property Act apply to persons mentioned in section 91 of the Act". The questions for decision by us were somewhat different, and we have not thought ourselves bound to follow all the observations in the judgment of this case with some of which we find ourselves not entirely in agreement.

S. A. K.

Appeal allowed.

Cross-objection dismissed.

APPELLATE CIVIL.

1937.

October, 1.

Before Wort and Rowland, JJ.

SYED ABDUL HAKIM.

v.

MANGAL CHAND.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 103, *scope of—court, whether required to determine mere possession at the date of the adverse order.*

The view that in a suit framed under Order XXI, rule 103, Code of Civil Procedure, 1908, the court has merely to

*Appeal from Appellate Decree no. 212 of 1935, from a decision of S. P. Chatterjee, Esq., Additional District Judge of Patna, dated the 6th of December, 1934, confirming a decision of Babu Nanda Kishor Chaudhury, Subordinate Judge of Patna, dated the 17th of June 1933.

ascertain whether the plaintiff was in possession at the date of the adverse order against him is based on a misconception. In such a suit the plaintiff has to establish the right or title by which the plaintiff claims the present possession of the property.

Unni Moidin v. *Pocker*(1), followed.

Appeal by the plaintiff.

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

Syed Ali Khan, for the appellant.

Janak Kishore, for the respondent.

WORT, J.—In this case the point that falls to be determined is the meaning of Order XXI, rule 103, of the Code of Civil Procedure which provides:

"Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive."

An order was made against the plaintiff who is the appellant in this case in the following circumstances. The plaintiff was the assignee of a decree obtained by the Allahabad Bank against defendant no. 2. He proceeded to execute the decree by selling the property which was the subject-matter of this action and in the result purchased the property and obtained possession. Defendant no. 1 who is the respondent in this appeal was a usufructuary mortgagee of the property under a mortgage, dated the 20th of October, 1920. On the next day he gave back possession to the mortgagor and allowed him to remain in possession by granting him a lease. In course of time that lease came to an end and the defendant brought an action against defendant no. 2 who was the mortgagor. In the meantime, as I have already indicated, the plaintiff-appellant obtained possession and he was resisted in his possession by the defendant-respondent.

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The defendant-respondent moved the Court under Order XXI of the Code of Civil Procedure and an order was made in his favour and possession was given to him. In those circumstances the plaintiff brought this action.

WORT, J.

The learned Advocate who appears on behalf of the appellant, in his argument against the judgment of the learned Judge in the Court below, has contended that all he is bound to show is his right to possession by reason of the execution of the decree and the delivery of possession given to him by Court. The learned Judge, as I have perhaps indicated by the observations which I have already made, has held that the plaintiff is not entitled to possession. There was one contention in the Court below that the plaintiff was the mere benamidar of the judgment-debtor (defendant no. 2), but that point has been decided in favour of the plaintiff-appellant. Now, the position is a simple one. The plaintiff when he purchased in execution of the decree which had been assigned to him, purchased the mere equity of redemption: therefore he purchased such rights as his judgment-debtor had and no more and he purchased those rights subject to the rights of the usufructuary mortgagee. It matters not at all whether we consider the defendant no. 1 as the lessor who has obtained a decree for possession against his tenant, or whether we consider him as having obtained that decree by reason of his position as a usufructuary mortgagee. The fact remains that he obtained possession because the lease came to an end by the effluxion of time. There is no doubt that the usufructuary mortgagee was entitled to possession, the mortgagor was not entitled to possession, and by his purchase the plaintiff could not get more than the mortgagor himself was entitled to. That in my judgment disposes of the matter.

As to the scope of Order XXI, rule 103, of the Code of Civil Procedure there is authority in *Unni Moidin* v. *Pocker*(1). There the learned Chief

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Justice in course of the judgment said: "The Subordinate Judge allowed the appeal and decreed the suit, holding that the plaintiff having, as he found, been in possession at the date of the order under rule 98, could not be ousted in execution of a decree to which he was not a party, and that under the rule the Court was concerned with possession only. The view that in a suit of this kind the Court has merely to ascertain whether the plaintiff was in possession at the date of the order against him under rule 98 is based on a misconception of the scope of this rule. If he was, then the Court ought not to have passed the summary order against him under rule 98 but ought to have dismissed the decree-holder's application against him under rule 99."

The rule reads

"the rights which he claims to the present possession of the property."

The contention of the learned Advocate for the appellant that his client was ousted from the property he purchased is in my view quite irrelevant. He may have been ousted by force, but not as a result of a decree of the Court. The question is what right had he when he got the property back, had he any title to it. The answer which the learned Advocate for the respondent gives is a correct one, namely, that he had no title.

For those reasons it seems to me that the appeal fails and must be dismissed with costs.

ROWLAND, J.—I agree. In answering the question propounded it may perhaps assist if we contemplate the consequences of a contrary decision for at first sight it may appear an attractive supposition that seeing the duty of the executing court under rule 98 or rule 99, that duty is to refuse to give the decree-holder possession in these execution proceedings if possession is resisted by a person claiming possession in good faith on his own account. Now, the plaintiff it has been held was such a person and if the Munsif in the execution proceedings had

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so held the Munsif ought to have dismissed the application of the decree-holder to be given possession of the property. So Mr. Syed Ali Khan argues what the Court dealing with the title suit ought to do is the same as what the executing court ought to have done. But the consequences of this would be that the present title suit would be decided in favour of the plaintiff and the first defendant who has been held to be a usufructuary mortgagee would be defeated in a title suit for the right to possession over the land and this decision would be res judicata in any subsequent suit by him to declare and give effect to his title. It seems inconceivable that the legislature should have contemplated or intended such a result and therefore I agree for this reason as well as those given by my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

1938.

October, 5.

Before Wort and Rowland, JJ.

RAMKARAN THAKUR

v.

BALDEO THAKUR.*

Hindu Law—legal necessity—antecedent debt, what constitutes—benefit to family—acquiring fresh property by mortgaging ancestral property, whether beneficial to family—amendment of plaint, whether should be allowed after claim is barred by limitation.

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

*Appeal from Appellate Decree no. 288 of 1935, from a decision of Bashiruddin, Esq., District Judge of Darbhanga, dated the 26th of March, 1935, confirming a decision of Babu Umakant Prasad Sinha, Munsif of Samastipur, dated the 30th of July, 1934.