

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Wilberforce.

GORDHAN DAS (PLAINTIFF)—*Appellant*,

versus

Mussammat RUKMAN, &C. (DEFENDANTS)—
Respondents.

Civil Appeal No. 2464 of 1914.

Mortgage—conditional sale—foreclosure proceedings—service of notice of demand on minor mortgagor through his brother, the other mortgagor, as guardian, with whom he was living—demand made some time prior to application for foreclosure.

The plaintiff mortgagor sued for possession by foreclosure of the mortgaged property. The application for notice of foreclosure was dated 15th May 1911. Demand had been made by registered notice dated 30th August 1909, which was served upon H. L. for himself and as guardian of K. C. the other mortgagor, a minor. An application for guardianship had been dismissed on the ground that K. C. and H. L. formed members of a joint Hindu family and it was found that the minor lived with his relation.

Held, that the service of the notice on K. C. through H. L. was under the circumstances sufficient.

Ras Muni Dibiah v. Pran Kishen Das (1), and *Lal Singh v. Gopal Das* (2), referred to.

Held also, that there is no authority for the contention that the demand must immediately precede the application for foreclosure, and that the foreclosure proceedings were consequently not defective because the demand was made sometime previous to the application for foreclosure.

Bhagirath v. Nath Mal (3), *Dalip Singh v. Jaimal Singh* (4) and *Barkat Ali v. Ali* (5), referred to.

Hazara Singh v. Muhammad Khan (6), distinguished and in part dissented from.

First appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Delhi, dated the 6th August 1914, dismissing the claim.

(1) (1848) 4 Moo. I. A. 392 (402).

(2) 94 P. R. 1892.

(3) 105 P. R. 1907.

(4) 184 P. L. R. 1910.

(5) 91 P. R. 1918.

(6) 184 P. L. R. 1901.

MOTI SAGAR and BALWANT RAI, for Appellant.

LAKSHMI NARAIN and RALLI, for Respondents.

The judgment of the Court was delivered by —

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WILBERFORCE, J.—In this case the plaintiff sued for possession by foreclosure of mortgaged property. His suit was dismissed on the ground that the foreclosure proceedings were not regular and sufficient, no demand having been made for payment immediately before the application for notice of foreclosure. The learned Judge cited *Hazara Singh v. Muhammad Khan* (1) as an authority that a demand immediately preceding the application for notice of foreclosure was necessary. On appeal before us counsel urges that the view taken in this judgment does not correctly represent the law and that the *ratio decidendi* of this judgment is also faulty.

As counsel for the respondents has contended before us that there is no proof on the record of the service of any notice of demand, it is first necessary for us to discuss the evidence on this subject. The plaintiff states that many demands were made previous to the application for notice of foreclosure which was dated the 15th of May 1911. The application contains a statement to this effect, though the relevant words have been omitted from the translation on page 20 of the paper book. He relies, however, especially on a registered notice, dated the 30th of August 1909, which was served upon Hira Lal for himself and as guardian of Kapur Chand, the other mortgagor. There appears to us to be no doubt that this registered notice was received by Hira Lal. He is now dead, but there is reliable evidence as to his signature given by Sardari Mal. It was also contended by Mr. Ralli for the respondents that the notice of demand was defective inasmuch as Hira Lal was not the guardian of the minor Kapur Chand. The learned District Judge citing *Ras Muni Dibiah v. Pran Kishen Das* (2) and *Lal Singh v. Gopal Das* (3) considered the service sufficient as the minor was living with his relation. In addition to this, we notice that a guardianship application printed on page

(1) 134 P. L. R. 1901.

(2) (1848) 4 Moo. I. A. 392 (402).

(3) 94 P. R. 1892.

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30 of the paper book shows that Hira Lal and Kapur Chand were living together, and we may also note that this guardianship application was dismissed on the ground that Kapur Chand and Hira Lal formed members of a joint Hindu family. We consider, therefore, that there is no doubt that a registered notice of demand was served upon Hira Lal in August 1909, while, as we have stated, the application for foreclosure was dated the 15th of May 1911. We have next to consider whether the delay in the making of the application is in any way fatal to the present case.

In *Hazara Singh v. Muhammad Khan* (1) the main objection taken appears to have been that no demand previous to the application for foreclosure had been made. This objection was upheld, and any further decision on the question of a demand immediately preceding the issue of the application for foreclosure was unnecessary. The remarks on this question, therefore, were *obiter*. They were also not based upon any authority nor upon the Regulation of 1806. They were merely based upon the ground that the mortgage money would ordinarily vary in amount with the lapse of time and that the demand ought to be for the amount for which the notice was issued. We do not think that this *ratio decidendi* is sound, as in every case there must be some delay between the demand and the issue of the application for foreclosure, and there must, therefore, always be some variation between the amount demanded and the amount for which the notice is issued. Moreover, a mortgagor is in no way prejudiced by any delay between the demand and the application for foreclosure. Indeed, the delay is to his advantage as it gives him further opportunity to arrange for payment. Counsel for the appellant has cited many other authorities in support of his contentions which we may notice briefly. In *Bhagirath v. Nath Mal* (2) it was not considered necessary to state in the notice the precise sum demanded. In *Dalip Singh v. Jaimal Singh* (3) a notice issued under the Regulation was not considered defective merely because the amount due was wrongly stated. The same was the decision in *Barkat Ali v. Ali* (4). These authorities are somewhat in favour of the appellant, but he

(1) 134 P. L. R. 1901.

(2) 105 P. R. 1907.

(3) 134 P. L. R. 1910.

(4) 91 P. R. 1913.

does not really require their assistance, as there is no authority for the contention that a demand should immediately precede the application for foreclosure.

Mr. Ralli for the respondents also endeavoured to uphold the decision of the District Judge on the ground that a notice of the application for foreclosure was not served on a subsequent mortgagee. This point was not taken before the District Judge and there was no objection by the subsequent mortgagee himself. Moreover, as pointed out by Mr. Moti Sagar for the appellant, notice to a subsequent mortgagee is only necessary if there has been a complete assignment in his favour *Mulraj v. Sobha Ram* (1).

For the foregoing reasons we disagree with the decision of the Lower Court and accepting the appeal, decree the plaintiff's suit with costs in both Courts.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

RALIA RAM (DEFENDANT)—*Appellant,*

versus

MULK RAJ AND GIAN CHAND (PLAINTIFFS), AND OTHERS (DEFENDANTS) — *Respondents.*

Civil Appeal No. 863 of 1919.

Civil Procedure Code, Act V of 1908, section 99 and order 1, rule 3—suit by reversioners for the usual declaration in respect of a sale and previous mortgages of land—Misjoinder of parties—remand by lower Appellate Court for a fresh decision.

The plaintiffs, minor sons of G., through their maternal uncle, brought the present suit for the usual declaration in respect of a sale and previous mortgages of land effected by their father and his two brothers, defendants 1-3, in favour of the vendee, defendant 4, and the previous mortgagees, defendants 5-10. The first Court held that the suit was bad for misjoinder of parties and returned the plaint to the plaintiffs for amendment. The plaint was accordingly amended by striking out the mortgagees and the suit was thereafter

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