

APPELLATE CIVIL.

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

ARURA (PLAINTIFF) Appellant

versus

BUR SINGH AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 1611 of 1921.

1924

April 14.

Civil Procedure Code, Act V of 1908, sections 11, 47 and Order XXXIV, rule 7—Mortgage—Decree for redemption not drawn up in accordance with the provisions of Order XXXIV, rule 7—Second suit to redeem the same mortgage—Res judicata.

The plaintiff-mortgagor obtained a decree on the 18th of January 1919 against B. S. and others, for redemption on payment of Rs. 986 within two months. The decree went on to say that A. should also make up the deficiency in Court-fees. On his failure to pay the money and the Court-fees it was provided that the decree could not be executed. The decree was not drawn up in the manner prescribed by Order XXXIV, rule 7 of the Code of Civil Procedure and did not contain any clause that if payment was not made on or before the date fixed by the Court, the plaintiff should be debarred from all right to redeem or that the mortgaged property should be sold. The plaintiff did not pay the money within the required time, but brought a second suit for redemption.

Held, that the second suit for redemption was not barred by section 11 of the Code of Civil Procedure.

Ram Das v. Mehr Dad (1), distinguished.

Sita Ram v. Madho Lal (2), *Dhanpat Mal v. Jhaggar Singh* (3), and *Ramji v. Pandharinath* (4), referred to.

Second appeal from the decree of Lt.-Col. F. C. Nicolas, District Judge, Amritsar, dated the 20th May

(1) 12 P. R. 1914.

(3) 93 P. R. 1908 (F. B.).

(2) (1901) I. L. R. 24 All. 44.

(4) (1918) I. L. R. 43 Bom. 334 (F. B.).

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1921, reversing that of Mirza Zahur-ud-Din, Munsif, 1st Class, Amritsar, dated the 25th October 1920, and dismissing the suit.

MUHAMMAD RAFI, for Appellant.

M. L. PURI, for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—Arura appellant sued for redemption of 80 *kanals* 4 *marlas* of occupancy land and was given a decree by the trial Court on payment of Rs. 986 payable within two months. The lower Appellate Court dismissed the suit holding that it was barred by the rule of *res judicata*, plaintiff having obtained a previous decree for redemption of the same land on the 18th January 1919 which decree he failed to execute within the time prescribed by the Court.

Plaintiff has filed a second appeal to this Court, the facts are briefly as follows :—

In the previous suit for redemption the decree of 18th January 1919 provided for redemption on payment of Rs. 986 within two months from the date of the decree. The decree went on to say that plaintiff was to make up the Court-fees. It was provided that on his failure to pay the money and the Court-fees within the prescribed period the decree could not be executed. The decree was not drawn up in the manner prescribed by Order XXXIV, rule 7 of the Civil Procedure Code, and did not contain any clause that, if payment was not made on or before the date fixed by the Court, the plaintiff should be debarred from all right to redeem or that the mortgaged property should be sold.

No doubt the decree of the 18th January 1919 should have been drawn up as prescribed in Order XXXIV, rule 7, and if it had been properly drawn

up and the decree-holder had failed to make the payment as directed the trial Court should then, upon an application made by the defendant, have passed a final decree in the terms of rule 8 to the effect that the plaintiff and all persons claiming through or under him were debarred from all right to redeem the mortgaged property. No such final decree was ever passed, and we do not see how plaintiff can be debarred from redeeming under rule 7 (*d*), when there was no clause entailing those consequences entered in the decree. The case of *Sita Ram and others v. Madho Lal and others* (1) has been referred to. There the plaintiffs brought a suit and obtained a decree for redemption conditional on their paying a certain sum within a time specified in the decree. The decree, however, instead of going on to direct that in default of payment by the due date the property should be sold, directed that if payment was not made within the time fixed the judgment should be deemed to be non-existent. The plaintiffs did not pay the decretal amount within the time fixed, but some years afterwards brought a second suit for redemption. It was held that the second suit was not under the circumstances barred, either by reason of anything contained in the Transfer of Property Act, or by section 13 or section 244 of the Civil Procedure Code of 1882. In *Dhanpat Mal v. Jhaggar Singh and others* (2), it was held that it is open to a mortgagor, who has brought a suit for redemption and obtained a decree, to bring a second suit for redemption, and that such second suit was not barred by reason of the decree in the first suit. At that time there was a decision of the Bombay High Court in which it was held that the second suit was barred, but in *Ramji v. Pandharinath and others* (3)

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a Full Bench of that Court held by a majority that, under such circumstances, the mortgagor could bring a second suit for redemption and the same would not be barred by section 11 or section 47 of the Civil Procedure Code, 1908.

The lower Appellate Court in support of its decision that the present suit is barred relied upon *Ram Das and others v. Mehar Dad and others* (1), but the facts of that case are clearly distinguishable from the present one, and we have no difficulty in holding that the present suit is not barred by section 11 of the Civil Procedure Code.

In the grounds of appeal to the lower Appellate Court the defendants did not contest the amount fixed as payable by the trial Court, namely, Rs. 986, but in ground No. 4 it was contended that the name of Hira deceased was still shown in the revenue papers as a mortgagor and therefore the impleading of his representative in the present suit was necessary. The mortgage in favour of Hira has, however, been set aside at the instance of the landlords and therefore there was no necessity for his representatives to be made parties to the present suit.

We accept the appeal and setting aside the order of the lower Appellate Court grant the plaintiff a preliminary decree in terms of Order XXXIV, rule 7, Civil Procedure Code, for possession by redemption of the land in suit on payment of Rs. 986 to be paid within two months of this date. The appellant's costs shall be paid by the defendants-respondents in all the Courts.

A. R.

Appeal accepted.