

the plaintiff). The eldest daughter Fatima Bibee and her husband Nurul Haq went and lived in the house after Dader's death, and the Subordinate Judge has decided that the plaintiff cannot get possession of it. The house is included in the *hibanama* and the plaintiff got possession of it from the date of that deed. When Fatima Bibee took up her residence in it, she dispossessed him, and that was before the institution of this suit. If the plaintiff had stated these facts, he might have obtained a decree for the house along with the other properties of which he said he had been dispossessed. But he did not set out these facts in his plaint and he placed the house among the properties which he said were in his possession and in which he wished his possession confirmed. We do not see, then, how we can, upon these facts, give him a decree for recovery of possession of the house in this suit.

For these reasons, we affirm the decree of the Lower Court and dismiss this appeal with costs. We also dismiss the cross appeal.

Appeal and Cross appeal dismissed.

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31 C. 332 (=31 I. A. 57=8 C. W. N. 609=8 Sar. 599.)

[332] PRIVY COUNCIL.

KEDAR LAL MARWARI v. BISHEN PROSAD.*

[10th November and 2nd December, 1903.]

[*On appeal from the High Court at Fort William in Bengal.*]

Mortgage—Accounts—Accounts between two mortgagees one of whom redeems the other—Decree on previous mortgage—Interest, rate of—Privy Council, practice of—Objection to suit not taken in Courts below.

The appellant sued as mortgagees of a certain property under a mortgage dated 5th September, 1886. The respondent had, in a suit on an earlier mortgage of 1884, purchased in 1890 the rights of the mortgagor in the same property, and was also holder of a decree of 29th June 1891 in a suit on another mortgage of the same property dated 4th October 1882, which provided for compound interest in default of payment. To that suit the persons from whom the appellant derived title were parties. The decree of 29th June 1891 gave interest not in terms of the bond, but at a reduced rate. It being settled that the appellant should redeem:—

Held (reversing the decision of the High Court) that in the accounts between them the respondent was only entitled in respect of the mortgage of 4th October 1882, to interest at the reduced rate allowed by the decree of 29th June 1891, and not to compound interest in terms of the mortgage bond.

An objection that the claim on the 5th September 1886 might and should have been enforced in the suit in which the decree of 29th June 1891 was given, and could not be made the subject of a fresh suit, was not allowed to be taken on appeal to the Judicial Committee, not having been raised in either of the Courts below.

The record of the case having been received in December 1900, but the case not set down for hearing until September 1903, the Judicial Committee directed the Registrar to disallow to the appellant any costs occasioned by his delay in prosecuting the appeal.

[*Ref.* 36 Cal. 193=5 C. L. J. 611; 6 C. L. J. 612=12 C. W. N. 107; 19 C. L. J. 193=18 C. W. N. 814=20 I. C. 499; 11 C. L. J. 226=14 C. W. N. 617=5 I. C. 165.]

*PRESENT: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser.

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APPEAL from a judgment and decree (23rd May 1898) of the High Court at Calcutta, which reversed a judgment and decree (29th November 1895 and 20th April 1896) of the Subordinate Judge of Bhagalpore.

The representative of the plaintiff appealed to His Majesty in Council.

[333] The suit out of which the appeal arose was brought to recover Rs. 10,720 alleged to be due on a mortgage dated 5th September 1886, of which the plaintiff was assignee by sale to him of 13th December 1894. The defendants were the mortgagor, Birj Prosad Singh, and his sons, who formed a joint family governed by Mitakshara law, and the subsequent purchasers of some of the mortgaged properties. The mortgagor defendants did not defend the suit. It was defended only by two of the purchasers of the interests of other mortgagees. One of such purchasers was the present respondent, Dewan Bishen Prosad; the other was one Ram Chandra Chowdhry, who was the purchaser of Baisaipore, one of the mortgaged properties. He, however, was not a party to this appeal. The defendant, Bishen Prosad, set up, amongst other pleas, a claim to Rs. 2,505 which he had paid on 6th December 1890 for Burhanpore, another of the mortgaged properties, which on that date was sold in execution of a decree of 7th January 1889 obtained on two mortgages executed by the mortgagor, Birj Prosad Singh, on 27th January 1884; and he also claimed two other sums, *viz.*, Rs. 10,642-1-6 and Rs. 8,000, paid by him in satisfaction of a mortgage dated 4th October 1882, executed by the same mortgagor on the same property (Burhanpore), and on which a suit (No. 47 of 1890) was brought and decreed on 29th June, 1891.

The questions for determination in this appeal therefore were only between Biseswar Lal Marwari and Bishen Prosad, as to their respective rights under their mortgages, and as to the terms on which redemption should take place, or the mortgaged property be made liable. For these questions the further facts are sufficiently stated in their Lordships' judgment.

During the course of the trial before the Subordinate Judge the defendant, Bishen Prosad, was offered his election whether he would redeem the plaintiff's mortgage or allow the plaintiff to redeem him. He, however, declined to make such election.

The plaintiff prayed for mortgage accounts with compound interest and for sale of an eight-anna share of Burhanpore.

The defendant, Bishen Prosad, denied that the plaintiff had any right to redeem the property, of which he claimed by virtue of his purchases and payments, to be absolute owner. He pleaded [334] that at any rate the plaintiff could only redeem by payment of the entire amount of the mortgages of 4th October 1882, and of 27th January 1884, with interest according to the terms of the mortgage bonds.

The Subordinate Judge held that the plaintiff before he could bring the mortgaged property (Burhanpore) to sale must pay to the defendant, Bishen Prosad the sum of Rs. 2,505 with interest at 12 per cent. per annum from 21st December 1891, and Rs. 10,642-1-6 with interest at the same rate from 20th November 1891, and Rs. 8,000 with interest at the same rate, less any amount collected by Bishen Prosad from Burhanpore, which was in his possession under his purchase of 6th December 1890.

From this decree Bishen Prosad appealed to the High Court, and a Division Bench of that Court (O'KINEALY and GUPTA, JJ.) varied in Bishen Prosad's favour the decree of the Subordinate Judge. The judgment of the High Court was as follows:—

"The suit was on a mortgage. Originally the mortgage covered three properties; but one of them having been sold and the security being destroyed the mortgage suit was carried on in respect to the other two properties. In regard to one of these two properties, the defendant Bishen Prosad was the owner, and the relation between him and the mortgagee, the plaintiff, who was enforcing the security, was of such a nature that he might either elect to redeem the mortgagee the plaintiff, or he might ask the plaintiff to redeem him. The plaintiff has elected to redeem him, and so an account must be taken in the relation of mortgagee and mortgagor, as the defendant Bishen Prosad disclaims any intention to redeem the plaintiff.

"It appears also, that the defendant Bishen Prosad was a party to a suit brought on a prior mortgage, and he paid the amount due under the decree in that suit. Therefore, according to the law laid down in our Courts, he can hold out that mortgage as security to protect his interests. He is, accordingly, entitled to recover the amount of principal and interest according to the terms of that document, up to date. He will also receive the sum under Ex. R, namely, Rs. 2,505, to which no objection is taken in this Court. This, then, is all that can be given in his favour. On the other hand, he has to account for rents and profits in the ordinary way, up to date. Some few sums in regard to kamat land have been objected to, notably a sum of Rs. 600 and odd. A decree had been obtained for Rs. 1,100 mesne profits, and only Rs. 500 were realized. The Subordinate Judge has allowed that sum of Rs. 600 against him, on the ground that evidently he had given up that amount, which he could easily have obtained. The other sum in regard to kamat land is not contested, nor are the sums given in the Jamabandi, and which appear in the account taken by the commissioner. Therefore the account to be taken will be in regard to the sum to which the appellant is entitled under the prior encumbrance, and the account will be made up to date. If the money is not paid within [335] six months from the date of the decree of this Court, the power to redeem will be lost.

"There are some items of expenditure for the years 1299 to 1300, which were evidently intended by the Subordinate Judge to be allowed in the account; but by some mistake they have not been entered in the account. We direct that these sums be added to the amount."

"We make no order as to costs in this Court."

The decree of the High Court by allowing interest on the mortgage of 4th October 1882 "according to the terms of that document" made a sum of Rs. 1,21,546-13-1 payable by the plaintiff to the defendant, Bishen Prosad, before the former could redeem the eight-anna share of Burhanpore.

On this appeal.

Rattigan, K. C. and *C. W. Arathoon*, for the appellant, contended that the High Court had wrongly held that the respondent Bishen Prosad was entitled to recover interest on the amount due on the bond of 4th October 1882 according to the terms of the bond. All he was entitled to, it was submitted, on that bond was interest at the reduced rate allowed on that bond by the decree of 29th June, 1891 in suit No. 47 of 1890: and this had been rightly allowed him by the decree of the Subordinate Judge which should be upheld. Reference was made to *Fisher on Mortgage*, 4th Edition, p. 1009; *Transfer of Property Act (IV of 1882)*, ss. 74, 75, 88, 89; *Auhindro Bhoosun Chatterjee v. Chunnoololl Johurry* (1), *Ganga Prosad Sahu v. Land Mortgage Bank* (2), *Ex-parte Fewings*, *In re Sneyd* (3), *In re European Central Railway Com-*

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(1) (1879) I. L. R., 5 Cal. 101.
(2) (1893) I. L. R., 21 Cal. 366;

L. R. 21 1, A. I.
(3) (1889) L.R. 25 Oh. D. 838.

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pany (1), and *People v. Sylvester* (2) a case referred to by Fry, J. in the case of *Ex-parte Fewings* (3).

A. Phillips and W. C. Bonnerjee, for the respondent Bishen Prosad, contended that by his purchase and subsequent payments he became absolutely entitled to all the rights possessed by the other parties in suit No. 47 of 1890, to which all the persons then entitled to redeem Burhanpore were parties, and that, therefore, the alleged subsequent assignments of the mortgage of 5th September 1886, conveyed no right to redeem to the appellant. As [336] to the amount to be paid by the appellant, if he were allowed to redeem, it was submitted that the respondent was entitled to the benefit of the mortgage of 4th October 1882, and to the full amount due as principal on that mortgage with compound interest in terms of the bond. The cases of *Nilakant Banerji v. Suresh Chandra Mullick* (4), *Kasumunnissa Bibee v. Nilratna Bose* (5) were referred to. It was also contended that the claim in the present suit ought to have been enforced in suit No. 47 of 1890 to which the plaintiff (now represented by the appellant) was a party, and that it could not now be made the subject of a fresh suit.

Counsel for the appellant were not called on to reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This suit was brought by the late appellant, Biseswar Lal Marwari, to enforce a mortgage bond dated the 5th of September 1886, hypothecating, together with other property, 8 annas of a mouzah known as Burhanpore or Badhanpore.

It seems that this share of Burhanpore was included in an earlier mortgage bond dated the 27th of January, 1884. The owner of that encumbrance brought a suit to enforce his security and obtained a decree. The property was put up for sale on the 6th of December, 1890. It was then bought for Rs. 2,505 by the late respondent, Dewan Bishen Prosad, in the name of his relative Sambhu Sahai. The encumbrancer from whom the appellants derive title was not a party to this suit or bound by the decree for sale.

Another suit (No. 47 of 1899) brought in respect of the same property on a bond dated the 4th of October, 1882 resulted in a decree dated the 29th of June, 1891. The principal question in that suit was as to the rate of interest on the money secured by the bond. The bond purported to reserve interest at the rate of 2 per cent. per month, with annual rents and compound interest. But the learned Judge held that rate exorbitant and improper under the circumstances, and allowed only simple interest at the [337] rate of 1 per cent. per month, or 12 per cent. per annum. Sambhu Sahai, who represented the Dewan, was added as a party, and the decree was pronounced in his presence and also in the presence of the person from whom the appellants derive title, who being already a party to the suit was ordered to be "made a defendant as a subsequent mortgagee." Under this order, which was dated the 8th of September 1890, amendments seem to have been made though they are not to be found in the record. The order for sale of the property appears to have been made absolute. But on the day of the auction, the Dewan deposited the amount found due to the plaintiff, the decree-holder. It was accepted by him. The sale did not take place and the order for sale

(1) (1876) L. R. 4 Ch. D. 33.

(2) (1882) L. R. 22 Ch. D. 98.

(3) (1888) L. R. 25 Ch. 338.

(4) (1885) I. L. R. 12 Cal. 414; L. R.

12 I. A. 171.

(5) (1881) I. L. R. 8 Cal. 79, 88.

dropped. There was at the time an appeal pending on behalf of the plaintiff, who was dissatisfied with the rate of interest allowed, and also a cross-appeal on behalf of the Dewan on some question of costs. Ultimately a compromise was made. The Dewan paid the plaintiff Rs. 8,000 in addition to the amount found due to him. By an order of the High Court dated the 21st of June 1892 the plaintiff's appeal was by consent dismissed without costs, and so the order reducing the rate of interest on the bond of the 4th of October 1882 as against the mortgaged property and the subsequent mortgagees became absolute.

In the present suit Bisseswar Lal obtained a decree to enforce his mortgage security of the 5th of September 1886. The Dewan who, as purchaser at the sale of the 6th of December 1890, had succeeded to the rights of the mortgagor and who also stood in the shoes of the decree-holder under the decree of the 29th of June 1891, declined to redeem, and accounts were directed to be taken in view of Bisseswar Lal either redeeming the Dewan or in default of payment standing foreclosed.

The accounts as passed by the Subordinate Judge, allowed the Dewan the sum found due to the plaintiff in the suit No. 47 of 1890, with interest on the sum secured by the bond of the 4th of October 1882 at the reduced rate allowed by the decree of the 29th of June 1891, and also the sum of Rs. 8,000 paid by the Dewan to the plaintiff in that suit on the occasion of the compromise, which resulted in the order of the High Court dismissing the plaintiff's appeal.

[338] From the final decree in this suit of the 20th of April 1896 the Dewan appealed to the High Court. The judgment of the High Court was pronounced on the 23rd of May 1893. The Court held that the Dewan was entitled to recover the sum of Rs. 2,505 paid for the property at the sale of the 6th of December 1890, which was allowed by the Subordinate Judge and to which no objection was taken in the High Court, and also the amount of principal and interest secured by the bond of the 4th of October 1882, "according to the terms of that document up to date," while on the other hand he had "to account for rents and profits in the ordinary way up to date." A slip in the accounts of rents and profits as passed by the Subordinate Judge was corrected. No order was made as to costs in the High Court.

The effect of that order, as worked out with interest at 2 per cent. per month and annual rents, resulted in Bisseswar Lal having to pay Rs. 1,21,546-13-1 in order to recover 8 annas of Burhanpore.

The appellants contend that the Dewan was not entitled to a higher rate of interest under the bond of the 4th of October 1882 than that allowed by the decree of the 29th of June, 1891. Their Lordships think this contention is plainly right. The High Court gives no reason for disregarding the decree of the 29th of June 1891, and none was given at the Bar. The predecessor in title of the appellants was a party to that decree as well as the Dewan, and the Dewan himself before the Subordinate Judge claimed to be allowed, and was allowed, as against Bisseswar Lal and the mortgaged property, the sum of Rs. 8,000, which he voluntarily paid as the consideration for having the decree reducing the rate of interest made absolute.

It was contended on behalf of the Dewan's representatives (who alone defended this appeal) that Bisseswar Lal ought to have enforced his right, if any, in the suit No. 47 of 1890, and that it was not competent for him to bring a fresh suit. Assuming that contention to be well founded, it seems to their Lordships much too late now to raise a point

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not insisted upon in either of the Courts below. It was also urged that the effect of the Dewan finding the money to pay off the plaintiff in the suit No. 47 of 1890 was to foreclose all subsequent mortgages and make the [339] Dewan absolute owner of the property. It is hardly necessary to say that their Lordships were unable to accept that view of the transaction.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged, and that the Dewan's representatives ought to pay the costs in that Court, and that the order of the Subordinate Judge ought to be restored, subject to correction of the slip in that order pointed out by the High Court, the accounts brought up to date, and six months from the date of His Majesty's Order in Council fixed for redemption of the property.

The Dewan's representatives will pay the costs of the appeal.

Their Lordships observe that the Record in this case was received in December 1900, but that the case was not set down for hearing till September 1903. They have accordingly directed the Registrar to disallow to the appellants any costs which, in his view, may have been occasioned by delay on the part of the appellants in prosecuting the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitor for the respondents: *G. C. Farr.*

31 C. 340 (=8 C. W. N. 246.)

[340] ORIGINAL CIVIL.

Before Mr. Justice Henderson.

AMRITA LAL KALAY v. NIBARAN CHANDRA NAYEK.*

[8th January, 1904.]

Jurisdiction—Small Cause Court, Presidency Towns—New Trial—Tiled huts—Title to immoveable property—Presidency Small Cause Courts Act (I of 1895) s. 38—Civil Procedure Code (Act XIV of 1882) s. 622.

Ordinarily where property attached as being the property of a judgment-debtor is claimed by a third person, that third person may file a claim; and, where the Court has jurisdiction to try the question, the title to the property is determined in the execution proceedings.

Tiled huts are immoveable property, and under the present law the Small Cause Court has no jurisdiction to try a question of title to such huts, as between an attaching creditor and a third person, who alleges, that the property belongs to him and not to the judgment-debtor.

Peary Mohan Ghosaul v. Harran Chander Gangooly (1) distinguished.
Jamnadas v. Bai Shivkor (2) followed.

[Ref 31 Cal. 1001.]

RULE granted to the defendant, Nibaran Chandra Nayek, under s. 622 of the Code of Civil Procedure.

The defendant on the 2nd March, 1903, obtained a decree against one Dinonath Kundu and another in the Presidency Small Cause Court, and on the 25th April, 1903, attached in execution of such decree certain

* Application in Original Civil Suit No. 4 of 1903.

(1) (1885) I. L. R. 11 Cal. 261.

(2) (1881) I. L. R. 5 Bom. 572.