Privy Council Appeal No. 33 of 1916.
Allahabad Appeal No. 49 of 1913.

Het Ram - - - - - - - - *Appellant,*

v.

Shadi Ram, since deceased, and others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1918.

Present at the Hearing:

VISCOUNT HALDANE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR WALTER PHILLIMORE, Bart.

[*Delivered by* VISCOUNT HALDANE.]

The material point in this appeal, which comes from the High Court of Judicature for the North-Western Provinces, Allahabad, lies in short compass. The question in the suit was whether property in mortgage to the respondent Shadi Ram, as to which he had sought to obtain a decree for sale under section 88 of the Transfer of Property Act, 1882, should, when sold, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage. This mortgage was dated the 25th February, 1880: Shadi Ram's mortgage was dated the 15th October, 1881.

The appellant had become the successor in title to the mortgagors, and it is assumed, for the purposes of this appeal, that he had also acquired such title as remained to the mortgagee under the earlier mortgage. In 1892 the prior mortgagee, whose name was Lachman Das, brought a suit on his mortgage and obtained a decree for a sale under the Act referred to. But the suit was brought only against the remaining mortgagor, and the second mortgagee was not made a party. This decree neither Lachman Das nor his successor in title took any steps to execute, and under article 179 of the second schedule to the Limitation Act, 1877, it ceased to be operative when three years had elapsed from the date of the

decree becoming absolute. It had thus become wholly ineffective long before the present suit was commenced. The only other observation which it is necessary to make before considering the question of law that arises under the Transfer of Property Act, 1882, is that on the admissions of the parties it is to be taken that the second mortgage was duly registered, and that the first mortgagee must be taken to have had notice of it when he brought his suit, and obtained a decree for sale in 1892.

The mortgage made to Lachman Das in 1880 was a simple mortgage within the meaning of section 58 of the Transfer of Property Act, and under section 67 the mortgagee had a right to obtain, as he actually did, an order for sale. The provisions of the Act, inasmuch as section 69 does not apply to a simple mortgage, precluded him from any right to sell without such an order. Under section 85 the first mortgagee was bound to make the second mortgagee a party to his suit for sale, and as he did not do so, the second mortgagee was not bound by the order for sale, which could only have been operative subject to his title. Section 89 is important. Under this section, where an order for sale under section 88 has been made, such as was made here in 1892, in favour of the first mortgagee, the mortgagor, or the second mortgagee, if he had been made a defendant, would have had the right to redeem if he had paid on the date fixed by the decree the amount due. If such payment is not made, as happened here, an application may be made for an order absolute, and for payment of the amount realised into Court. The section then provides that "the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the suit of 1892, and in addition the decree itself became inoperative under the Limitation Act as the result of nothing having been done under it. It follows that the title of the second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

They concur in the opinion of the learned Judges of the High Court that the decision of the Assistant-Sessions Judge of Moradabad, who tried the case, was wrong.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

HET RAM

v.

SHADI RAM, SINCE DECEASED, AND OTHERS.

DELIVERED BY

VISCOUNT HALDANE.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1918.