

Privy Council Appeal No. 167 of 1919.
Allahabad Appeal No. 6 of 1917.

Musammat Sukhi - - - - - *Appellant*

v.

Munshi Ghulam Safdar Khan and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH APRIL, 1921.

Present at the Hearing :

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by LORD DUNEDIN.*]

This is a suit by a mortgagee, Musammat Sukhi, to sell a property called Rasulpur. The facts out of which the suit arises are as follows.

Nand Ram and others, the owners of the property in question and of other properties, executed on the 3rd January, 1874, and the 10th June, 1875, two simple mortgages in favour of Kirpa Ram, now deceased, the husband of the plaintiff. Subsequently, on the 15th January, 1883, they executed another mortgage of the property in question alone by way of conditional sale in favour of the first respondent, Ghulam Safdar Khan and another person whom the second and third respondents now represent. These mortgages were all duly registered. In 1886, Kirpa Ram, the mortgagee, raised an action for payment and sale, but he omitted to implead the holders of the mortgage of 1883. In that suit he obtained a decree for sale. The property was sold and Kirpa Ram himself purchased at the judicial sale. Kirpa Ram died leaving a will dated in 1895 in favour of his widow, the plaintiff. She obtained probate in 1898. She thereafter made a gift of the

properties to which she had succeeded including the property in question to Jag Ram and Net Ram, her nephews. They at the same time covenanted to pay her Rs. 1,200 a year for maintenance and in security of this obligation they hypothecated the properties including the property in question by way of mortgage. The mortgage was dated the 14th October, 1902, and was duly registered.

In 1910 the respondents, the mortgagees in the mortgage of 1883, brought a suit on their mortgage against Jag Ram and Net Ram, but omitted to implead the plaintiff. Jag Ram and Net Ram put forward the mortgages of 1874 and 1875 as a shield and accordingly the respondents had to pay into the Court the sum of Rs. 2,954. Having so done and Jag Ram and Net Ram not choosing to redeem the respondents were adjudged owners of the property. This was finally settled in 1913.

In 1914, the plaintiff raised the present suit in respect of her mortgage, the sums due under the agreement to pay maintenance amounting to over Rs. 10,000. It was not defended by Jag Ram and Net Ram, but appearance was made for the respondents who held the property in virtue of the decree they had obtained in 1913, upon their mortgage of 1883. The Subordinate Judge decreed the suit, but on condition that the plaintiff repaid to the respondents the sum of Rs. 2,954 which they had paid to the first mortgagees. On appeal the High Court altered this by adding the condition that the plaintiff should also pay the sum of Rs. 8,649.13.7, being the sum found due to the respondents in the suit of the mortgage of 1883, in respect of which they were given the foreclosure decree of the property. Appeal has now been taken to His Majesty in Council.

The appellant's counsel relied entirely on the case of *Het Ram v. Shadi Lal and others*, 45 I. A., 130. In that case a property had been twice mortgaged by way of simple mortgage, one in 1880, and another in 1881. Het Ram purchased the property from the mortgagee in 1883. In 1885 the mortgagee of 1880 obtained against the mortgagor and Het Ram a decree absolute for sale under sec. 89 of the Transfer of Property Act, 1882. He did not implead the mortgagee under the mortgage of 1881. He took no further steps under the decree and the property was not brought to sale. He died, and was succeeded to by Het Ram as his heir. In 1910, the mortgagee under the mortgage of 1881 instituted the suit. It was held that Het Ram could not set up the mortgage of 1880 as a shield, because the decree of 1885 was (1) barred by limitation, (2) inoperative as against the plaintiff who had not been made a party to the suit and because the mortgage itself was gone because of the terms of sec. 89 of the Transfer of Property Act, 1882. The appellant urged that the same result followed in this case. The mortgagor of 1883, having omitted to implead the appellant, she was not bound by the decree. The mortgage of 1883 was no longer available because it was merged in the decree.

The respondents on the other hand relied on the case of

Matru Mal v. Durga Kunwar, 47 I. A., 71. In that case a property had also been the subject of two mortgages of 1872 and 1879 respectively. The mortgagee of 1872 obtained in 1884 a decree for sale under the same section 89 of the Transfer of Property Act, 1882, but omitted to implead the second mortgagee. A lady who was an assignee of the second mortgage raised suit in 1909. The owner resisted the decree unless he was paid the whole amount due under the first mortgage with interest calculated at the rate stipulated therein. The plaintiff offered to pay the amount under the decree of 1884, but refused to pay the amount of the mortgage so calculated. The Subordinate Judge gave effect to the condition of the owner. The High Court altered and gave effect to the offer of the plaintiff. The owner then appealed. The Board adhered to the judgment of the High Court.

It will be noticed that the plaintiff there offered to pay the sum in the decree of 1884. *Het Ram's* case had not at the date of the High Court judgment been decided, and it does not appear to have suggested itself to the plaintiff that she could argue that the effect of sec. 89 was to destroy the mortgage of 1872 and prevent its ever being set up again. The head-note of that case, however, bears that it was held that the condition upon which the second mortgagee was entitled to a sale decree was the payment to the decree holder of the amount due under the decree in respect of the first mortgage. If this were really so, it would be necessary to consider how far such a pronouncement could stand beside the decision in *Het Ram's* case. In their Lordships' view it is not necessary to consider that question. The decision in *Het Ram's* case is based on two propositions. The first is that the puisne mortgagee is not barred by the decree and the sale following thereon. That in *Het Ram's* case is based on two points which are, it must be admitted, alternative and not cumulative: (1) that the decree was useless in respect of limitation and (2) that the second mortgagee had not been impleaded. Although the first point has no application to this case, the second has. But the second proposition which was absolutely necessary for the judgment was that the mortgage was gone for ever so soon as the decree of sale was obtained; and that was based on the express words of sec. 89 of the Transfer of Property Act, 1882, which ends after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." Now the group of secs. 85-90 inclusive of the Transfer of Property Act, 1882, were repealed by the Code of Civil Procedure of 1908, and were replaced by the rules under Order 34. In these rules the words above quoted are omitted in the rule which corresponds to sec. 89. They do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of Order 34, which are limited to providing for the extinction of the debt.

The difficulty which had arisen as to these words in several cases, e.g., *Vannikalanga Mudali v. Chidambara Chetty*, 29 Madras, 37—which case it may be mentioned does not seem to have been

brought to the notice of the Board in Het Ram's case—therefore no longer arises. The decree in this case was in 1910, and was, therefore, under the Code of Civil Procedure Rules and not under the section of the Transfer of Property Act, 1882.

Now the words being gone their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, *viz.*, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield. From this it follows that the omission by the respondent Ghulam Safdar Khan to make the plaintiff a party to the suit instituted by him to execute his mortgage of 1883 does not prevent him from setting up that mortgage in cases where he would have been so entitled before the Act of 1882; and the present dispute is within the benefit of this ruling.

But then there is the question of the position due to the original mortgages of Rs. 2,924, and unfortunately this seems not to have been very carefully considered in the judgment below. The Subordinate Judge held that the defendants were entitled to set up this as a shield because the defendants had paid this sum to the original first mortgagees as a condition of getting the property: and that as the plaintiff's title flowed from the first mortgagees, she could have no higher right than the first mortgagees, and must be bound by anything done by them. The High Court seemed to think that the same arguments that applied to the mortgage of 1883 also applied to the earlier mortgages.

The situation, however, must be looked at more closely than this. The general principle is stated rightly by the High Court. It is this:—"The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit." Now the original mortgagee having bought the estate at the sale in the suit was the owner of both the mortgage and the equity of redemption merged in one by the decree of the Court. He was succeeded by his widow and she made the gift to Jag Ram and Net Ram. When they in turn mortgaged to the widow, the present plaintiff, they mortgaged both the original mortgage and the equity of redemption merged as aforesaid. When in the suit of the present defendants on the mortgage of 1883, Jag Ram and Net Ram, so to speak revived the original mortgage as a shield, they revived something which in a question with the widow they had mortgaged. Whether the decision of the Court that the sum in the prior mortgages should be made a condition of the decree in the suit was right or wrong—for if Het Ram's case had been decided it would have been wrong, the sale having taken place in 1886—is immaterial, for the present defendants acquiesced in and paid under the judgment. If the widow had been made a party to the suit, as she ought to have been, she

would have been entitled in right of her mortgage to have been put in possession of the amount which was being put forward as a shield by Jag Ram and Net Ram against the then plaintiffs and the present defendants. She was not made a party and the result was that owing to the laches of the present defendants Jag Ram and Net Ram were allowed to carry off in money the part of the estate represented by the value of the first mortgage which they had really impledged by their mortgage to the widow. It follows that to carry out the general principle expressed above, the widow must not be deprived of the rights which had she been called she could have made good.

The result must be that unless the defendants pay the plaintiff Rs. 2,925 with interest thereon at 6 per cent. from 3rd December, 1914, the plaintiff must get her decree for sale of so much of the estate as will realise that sum. If, however, the defendants pay that sum or the said sum is realised by sale of part of the estate then the plaintiff can only have decree and sale of the rest of the estate on condition that she pay to the defendants Rs. 8,649.13.7, being the sum in the decree of 1883 as brought out by the High Court. The defendants will have a right to recover from Net Ram and Jag Ram the sum wrongly carried off by them in fraud of their own mortgage to the present plaintiff, but the right cannot be given effect to in this suit.

Neither party should have any costs in the Courts below and any costs paid on order of the Courts below should be returned; the appellants will have the costs of the appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MUSAMMAT SUKHI

v.

MUNSHI GHULAM SAFDAR KHAN AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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