

*Privy Council Appeal No. 96 of 1930.*

*Allahabad Appeal No. 19 of 1929.*

Bhaiya Raghunath Singh and others - - - - *Appellants*

*v.*

Musammat Hansraj Kunwar and others - - - - *Respondents*

*from*

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1934.

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*Present at the Hearing :*

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

SIR SHADI LAL.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

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This appeal from the High Court at Allahabad arises in a suit for redemption of a mortgage and further charge, the appellants being the heirs of some of the original mortgagees.

The relevant facts leading up to the present litigation must first be stated.

The mortgage and further charge are both dated the 22nd June, 1864. By the mortgage certain shares in 5 villages were mortgaged by way of conditional sale, the mortgagees being placed in possession, with no liability to account for mesne profits. The principal money was repayable at the end of three years. A further principal sum was secured by the further charge.

In the year 1892 the mortgagor instituted a redemption suit alleging that nothing was due under the securities, and claiming to be put into possession of the shares in the 5 villages, or, if the Court should find that any sum was due, that it might order redemption subject to the payment of such sum. The result of that suit was that as to the shares in 2 of the villages it was decided that (for reasons which need not here be stated) there

was no right of redemption any longer existing, and that as to the shares in the other 3 villages the plaintiff could redeem them on payment of the proper proportion of the mortgage money, viz., Rs. 4,208-6-0. A decree dated the 25th September, 1896, was accordingly made in the following terms :—

It is ordered and decreed that the plaintiff is entitled to a decree for possession by redemption of mortgage in the following terms, viz., that he should pay Rs. 4,208-6-0 by the 15th of November, 1896, that if he will pay the said sum he will get all the costs, except the pleader's fee, incurred by him in this court, and that in case of default his case will stand dismissed and the costs incurred by the defendants will be charged against him.

An appeal therefrom was dismissed with costs. No payment of the mortgage money was ever made, and the mortgagees remained in possession.

The suit in which the present appeal arises was commenced on the 5th March, 1924. The plaintiff is the representative and heir of the original mortgagor, the defendants being persons claiming through or under the original mortgagees and being in possession of the shares in the said 3 villages. By his plaint the plaintiff alleged that the whole of the Rs. 4,208-6-0 had been satisfied out of the increased profits of the mortgaged properties, and he claimed (a) possession of the shares of the 3 villages by redemption on the footing that the mortgage money had been satisfied, or (b) if any amount of the mortgage money be proved due, a decree for redemption on condition of payment of that amount.

The two principal points for decision were (1) whether any and what amount of mortgage money was then due, and (2) whether this (the second) redemption suit was maintainable.

At the trial the Subordinate Judge decided (1) that the amount of mortgage money then due was Rs. 5,243-13-0, and (2) that notwithstanding the dismissal of the previous suit the present redemption suit was maintainable, and he made a decree (dated the 14th November, 1924) for redemption on payment into Court of the amount declared due on or before the 25th April, 1925.

The Subordinate Judge considered that on the second point the case was covered by the decision in *Hari Ram v. Indraj* (I.L.R. 44 All. 730).

An appeal to the District Judge by the present appellants was dismissed by him. He also considered that the case was covered by the above-mentioned decision.

A second appeal to the High Court at Allahabad by the present appellants was equally unsuccessful, the Court holding that upon authority "one cannot question the right of the plaintiffs to sue for redemption notwithstanding their failure to redeem under the decree of the previous suit." Upon a cross-objection the High Court modified the redemption decree in regard to the amount payable on redemption thereunder.

The appellants now appeal to His Majesty in Council from the decision of the High Court and claim that the suit should have been dismissed. No complaint was made in argument before their Lordships in regard to the amount fixed as payable on redemption. The argument was confined to the broad proposition that no decree for redemption should have been made at all, and that the suit should have been dismissed.

Counsel for the appellants based this contention upon three grounds, viz. (1) that the suit, though in form a redemption suit, was in reality an application to enforce the old decree of the 25th September, 1896, that such a suit could not be maintained, and that execution of the old decree was barred by limitation: (2) that the decision in the former suit operated as *res judicata*, and that therefore section 11 of the Code of Civil Procedure prohibited the Courts from trying the present suit: and (3) that no payment having been made under the old decree, the former suit stood dismissed on the 15th November, 1896, with the result that the mortgagor's right to redeem became extinguished under section 60 of the Transfer of Property Act, 1882.

The respondents did not appear before their Lordships' Board.

In regard to the first point, it can only arise for consideration if the appellants fail to establish their third point, and their Lordships feel a difficulty in appreciating how it could then prevail; because if a second suit for redemption is, in the circumstances of the present case, properly maintainable, then the simple answer to the first point is that the present suit is a redemption suit, and is *not* an application to enforce the old decree.

In regard to the second point, their Lordships are of opinion that no relevant question of *res judicata* here arises. The issues decided in the former suit were (1) whether the mortgagors were then entitled to redeem; and (2) the amount then to be paid if redemption then took place. The issues in the present suit are (1) whether the right to redeem now exists, and (2) the amount now to be paid if redemption now takes place. If it could be said that the old decree involved a decision that the mortgagor's right to redeem was extinguished, that matter would indeed be *res judicata*, but this very question of the meaning and effect of the old decree arises for consideration under the third point. To that extent the second and third points overlap. It is sufficient to say in regard to the second point, that if the appellants fail to establish under their third point that the old decree extinguished the right to redeem, there is, in their Lordships' opinion, no ground for saying that the old decree operated by way of *res judicata* so as to prevent the Courts, under section 11 of the Code of Civil Procedure, from trying the present suit.

The important question for their Lordships' consideration is the third point, the answer to which depends, in their view, upon

a correct appreciation of the joint effect of the relevant sections of the Transfer of Property Act, 1882, and the form of the old decree. It is to be noted that at the relevant date (1896) the rights of the mortgagor were governed by the Act as originally enacted: the sections hereafter cited or referred to are those of the original enactment. Further it is to be observed that the rights of a mortgagor in that part of India from which this appeal comes are regulated by the provisions of the Act. It is impossible to say (as may be said under English law) that the dismissal of a redemption action operates as a foreclosure, unless the justification of that statement is to be found in the language of the Act.

The relevant sections of the Act are sections 60, 92 and 93. Section 60 in terms confers upon a mortgagor a right to redeem "at any time after the principal money has become payable." This right, however, is limited by a proviso which runs thus:—

"Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court."

There is here no question of extinguishment by act of the parties. The right must therefore still exist, unless it has been extinguished by order of a Court. Sections 92 and 93 indicate how such an order can be obtained. Section 92 provides for the decree to be passed by the Court in a suit for redemption if the plaintiff succeeds. The decree is to order an account of what will be due to the defendant on the date fixed for redemption, or is to declare the amount so due at the date of the decree. Further, it is to order that upon the plaintiff paying to the defendant or into Court the amount so due on a day to be fixed by the Court the defendant shall (*inter alia*) if necessary put the plaintiff into possession of the mortgaged property. Finally, the decree is to order:—

"That if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold."

Section 92 thus enacts what should be the form and contents of a redemption decree; but it enacts nothing more. If that section had been followed, the old decree would have in terms ordered that in default of payment on or before the 15th November, 1896, the plaintiff should be absolutely debarred of all right to redeem the property. The Act, however, by section 93, provides a further opportunity for the defendant to obtain this relief. It provides (*inter alia*) that if payment is not made the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem; and that if he so applies the Court shall pass an order that the

plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property. The section further enacts :—

“ On the passing of any order under this section the plaintiff's right to redeem and the security shall as regards the property affected by the order, both be extinguished.”

The old decree for some unexplained reason departed from the form required by the Act. It simply provided that in case of default by the plaintiff in payment “ his case will stand dismissed.”

It was contended by the appellant that these words read in the light of section 92 were to be construed as meaning that the plaintiff was to be debarred of all right to redeem, and that the old decree accordingly was an order of a Court extinguishing the right to redeem within the meaning of the proviso to section 60.

Their Lordships are of opinion that unless constrained by authority they ought not so to hold. The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. In the present case the only basis for the claim that the right to redeem has been extinguished is section 60 ; but in their Lordships' view the old decree cannot properly be construed as doing that which it does not purport to do, viz. as extinguishing the right to redeem.

No authority was cited to their Lordships in any way conflicting with the view which they have formed. *Sita Ram v. Madho Lal* (I.L.R. 24 All. 44) was a case of a usufructuary mortgage. The proper decree in a suit to redeem such a mortgage ought to have provided that in default of redemption the property should be sold. In fact it provided that in case of default the judgment should be deemed non-existent. It was held by the Full Bench that a second redemption suit was maintainable. In *Hari Ram v. Indraj* (I.L.R. 44 All. 730) a mortgagor brought a suit to redeem a simple mortgage and obtained a decree which provided that in case of default “ the suit will be considered dismissed.” A second redemption suit was held to be maintainable. The case of *Maina Bibi v. Chandri Vakil Ahmad* (52 Ind. App. 145) was also cited. That was a decision of their Lordships' Board in relation to a second suit brought by the heirs of a dead man to recover possession of an estate which had been in the possession of his widow entitled to dower. In an earlier suit the heirs had obtained a decree for possession on payment of a proportionate part of the dower debt within 6 months ; the decree provided that upon failure to pay, their suit should be dismissed. A second suit to recover possession was held to be maintainable. Had the widow's claim on the estate been (which it was not) similar to that of a mortgagee, the case would be an authority against the appellants. In any view, however, it does not assist their contention.

There being no authority constraining them to adopt a different view, their Lordships think that the right to redeem has never been extinguished in the present case, and that the present suit for redemption was maintainable.

This appeal accordingly fails and should be dismissed. Their Lordships will humbly advise His Majesty accordingly.

If the respondents have properly incurred any costs in relation to the appeal, these must be paid by the appellants.



In the Privy Council.

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BHAIYA RAGHUNATH SINGH AND OTHERS

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MUSAMMAT HANSRAJ KUNWAR  
AND OTHERS.

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DELIVERED BY LORD RUSSELL  
OF KILLOWEN.

Printed by  
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1934.