

Privy Council Appeal No. 8 of 1918.
Allahabad Appeal No. 12 of 1916.

**Lala Matru Mal, since deceased (now represented by Ghanshiam Das
and another), and others** - - - - - *Appellants*

c.

Musammat Durga Kunwar, since deceased - - - - - *Respondent*

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 2ND DECEMBER, 1919.

Present at the Hearing :

VISCOUNT FINLAY.

LORD PARMOOR.

SIR JOHN EDGE.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from a decree, dated the 27th January, 1916, of the High Court at Allahabad, which modified a decree, dated the 8th July, 1914, of the Additional Subordinate Judge of Aligarh.

In the suit in which this appeal has arisen, the appellants here or those whom they represent were defendants, and the plaintiff was Musammat Durga Kunwar, who was the respondent to this appeal but is now dead : her personal representative is now the respondent. The suit was brought on the 8th July, 1909, by Musammat Durga Kunwar to obtain a decree for the sale of certain immovable property within the jurisdiction of the Court of the Subordinate Judge, and was based upon a mortgage of the property dated the 12th June, 1879, of which she became the assignee on the 21st May, 1909, by an assignment from the representatives of one Murli Dhar, to whom the mortgage of

the 12th June, 1879, had been granted; his mortgage was the second mortgage on the property. The property had been mortgaged on the 19th February, 1872, to the predecessors in title of the present appellants for Rs. 3,750, with compound interest at 15 per centum per annum with yearly rests.

On the 6th February, 1884, the first mortgagees brought a suit for sale under the Transfer of Property Act, 1882, on their mortgage, but did not make Murli Dhar, the second mortgagee, a party to their suit. On the 28th February, 1884, the first mortgagees obtained a decree in their suit for Rs. 9,342, annas 12, for principal and interest due on this mortgage at the date of their suit, for Rs. 29, annas 13, pies 7, in respect of interest from the date of their suit to the date of their decree, and for further interest at the rate of 6 per centum per annum on the decretal amount until payment, and for costs. By the decree the mortgaged property should in default of payment be sold to realise the amount decreed. An order for sale was made and the property was sold on the 20th March, 1890, by public auction and was purchased by the first mortgagees for Rs. 13,702, annas 6, pies 3, the amount due under the said decree of the 28th February, 1884. Formal possession was given to the purchasers on the 15th August, 1890, but they did not obtain actual possession until the end of 1895.

In the present suit the defendants claimed that the plaintiff had no right to a decree unless she paid the entire amount of the first mortgage, with compound interest at 15 per centum per annum to the date when the purchasers at the sale of the 20th March, 1890, got actual possession, together with some revenue and irrigation charges, amounting in all to Rs. 55,155, annas 13, pies 2. The Subordinate Judge no doubt acting on the decision of the Board in *Umes Chunder Sircar v. Musummat Zahoor Fatima and others*, 17 I.A. 201, gave Musammat Durga Kunwar a decree for sale conditional on her paying to the defendants Rs. 49,124, annas 9. From that decree Musammat Durga Kunwar appealed to the High Court.

The High Court in the appeal rightly held that the first mortgagee purchasers "had no greater rights than any stranger would have had who had purchased the property under the mortgage decree and paid cash for it." The learned Judges said: "In our judgment all that the answering defendants (the mortgagee purchasers) are entitled to is to set up the amount of the decree of the 28th February, 1884." But as Musammat Durga Kunwar had by her petition of appeal only asked that the sum of Rs. 49,124, annas 9, should be reduced to Rs. 23,311, which she professed herself willing to pay, the High Court modified the decree to that extent. From that decree of the High Court this appeal has been brought.

At the time when the High Court delivered judgment, the case of *Het Ram v. Shadi Lal and others*, 45 I.A. 130, had not been before the Board. That case decided that an order made under s. 89 of the Transfer of Property Act, 1882 (Act

IV of 1882), for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. When the decree or order for sale in the case of *Umes Chunder Sircar v. Musummat Zahoor Fatima and others* (*supra*) was made the Transfer of Property Act, 1882, had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist ; that case was decided on the law as it then stood.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court under the circumstances be confirmed.

In the Privy Council.

LALA MATRU MAL, SINCE DECEASED (NOW
REPRESENTED BY GHANSHIAM DAS AND
ANOTHER), AND OTHERS

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MUSAMMAT DURGA KUNWAR, SINCE
DECEASED.

DELIVERED BY SIR JOHN EDGLE.