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RAM CHANDRA SAGOREMULL v. AMARCHAND MURALIDHAR, *In re.*

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applications under section 38 of the Act. The addition to Rule 92 is not *ultra vires*; but so far as applications under section 38 of the Act are concerned, the preliminary hearing must be before a Bench formed on the lines laid down in Rule 95 with the result that no notice would issue thereafter except on good grounds in order that opportunities for protracting cases might be diminished.

In this view of the matter, the orders of the 1st December 1919 in the two suits referred to above must be set aside and the application for new trials in the two suits mentioned above must be considered again by a Bench of the Small Cause Court formed on the lines laid down in Rule 95. No order as to costs of this application.

A. P. B.

Attorney for the petitioner: *P. N. Bannerjee.*

Attorney for the opposite party: *M. N. Mitter.*

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

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Feb. 17.

KRISHNA KISHORE DE

v.

AMARNATH KSHETTRY.*

Mortgage—Property in the mofussil—Sub-mortgage including property in Calcutta—Suit by sub-mortgagee—Frame of suit—Forum—Jurisdiction of High Court—Waiver—Res judicata.

The mortgagee of a certain property situate in the mofussil transferred his interest therein to a sub-mortgagee and included in that document a certain other property in Calcutta as further security:

Held, that the sub-mortgagee could enforce in the mofussil Court the security under the original mortgage against the original mortgagor just as the mortgagee might have done.

* Appeal from Original Civil No. 30 of 1919 in suit No. 986 of 1918.

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Held, also, that the sub-mortgagee might also sue his mortgagor on the Original Side of this Court and bar his equity of redemption.

Held, also, that the sub mortgagee could not be allowed by the inclusion of two claims in one suit against his mortgagor and against the original mortgagor in respect of properties situated as regards one of them in the moffusil alone to make the composite suit against both the defendants maintainable on the Original Side of this Court.

Matigara Coal Co., Ld. v. *Shragers, Ld.* (1), *Sarat Chandra Roy Chowdhry* v. *M. M. Nahapiet* (2) and *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (3) referred to.

Where the decision of the Court is void for want of jurisdiction over the subject-matter of a suit, it cannot operate as *res judicata*; in order that a judgment may be conclusive between the parties the essential prerequisite is that it should be the judgment of a Court of competent jurisdiction under section 11 of the Civil Procedure Code.

Where a Court judicially considers and adjudicates the question of its jurisdiction and decides that facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication the decree remains a decree without jurisdiction and cannot operate as *res judicata*.

APPEAL by Krishna Kishore De, the plaintiff, from the judgment of Greaves J.

On the 30th August 1907, Khagendra Nath Mookerjee, Kumudindu Mookerjee, Mohon Lal Mookerjee and Rajani Kanto Bhattacharjya, referred to hereafter as the original mortgagors, borrowed the sum of Rs. 25,000 on a mortgage executed in favour of one Haridas Banerjee in respect of a certain share of theirs in two properties situated in Howrah. On the 13th December, 1907, Haridas Banerjee executed a sub-mortgage of his interest in the Howrah properties and included in that document as further security his one-third share in two houses in Calcutta in favour of Sunder Das Khettry and Bhola Nath Khettry, referred to hereafter as the sub-mortgagees, to secure the

(1) (1911) I. L. R. 38 Calc. 824. (2) (1910) I. L. R. 37 Calc. 907.
(3) (1914) I. L. R. 41 Calc. 972; L. R. 41 I A. 110.

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repayment of a loan of Rs. 20,000. On the 23rd September, 1911, the original mortgagors redeemed their share in one of the two mortgaged properties. On the 25th November, 1912, the sub-mortgagees, having obtained leave under clause 12 of the Charter, instituted a suit, numbered 1083 of 1912, in the High Court, to enforce the mortgage of the 13th December, 1907, against Haridas Banerjee and the original mortgagors. On the 2nd September, 1914, a preliminary decree was made *ex parte* in that mortgage suit On the 20th June, 1916, at an execution sale one Krishna Kishore De purchased the equity of redemption of the original mortgagors in respect of their share in their property under mortgage. On the 24th May, 1917, the sub-mortgagees made Krishna Kishore De and one Srimatee Nagendrabala Chowdhurani, a puisne mortgagee by virtue of a mortgage of the 13th February, 1915, parties to their said suit No. 1083 of 1912, and their said *ex parte* decree was made absolute on the 24th August, 1917. On the 29th July, 1918, Krishna Kishore De instituted a suit against the original mortgagors, Haridas Banerjee, the sub-mortgagees, and Srimutty Nagendrabala Chowdhurani, to set aside both the preliminary decree and the decree absolute passed in the said suit No. 1083 of 1912, on the ground that the Court had no jurisdiction to grant leave under clause 12 of the Charter and to entertain such a suit, as a portion of the property affected by the decree consisted of immovable property lying outside the local limits of the Ordinary Original Civil Jurisdiction of the High Court. The suit was dismissed by Mr. Justice Greaves. The plaintiff, thereupon, appealed.

Sir B. C. Mitter (with him *Mr. H. D. Bose*, *Mr. L. P. E Pugh* and *Mr. M. N. Bose*), for the appellant. The mortgage to the sub-mortgagees consisted of a

mortgage of properties in Calcutta and the mortgage of a debt secured on immovable properties outside Calcutta. The sub-mortgagees were entitled to bring a suit on the Original Side of this Court for foreclosure or sale against their mortgagors in respect of the properties in Calcutta. It was, however, not obligatory on them to frame their suit in such a way as to enforce the original mortgage against the mortgagors of their mortgagor: see *Zaki Hasan* v. *Deo Nath Sahai* (1), *Bansi Lal Bhagat* v. *Durga Prasad* (2) and *Ram Shankar Lal* v. *Ganesh Prasad* (3). If they brought their suit for foreclosure or sale against their mortgagor and the mortgagors of their mortgagor it could not be instituted in the High Court, but would have to be filed in the moffusil Court. The sub-mortgage was a mere debt and could not be regarded as though it were immovable property. The High Court, consequently, had no jurisdiction to try the suit in question: *Gous Mahomed* v. *Khawas Ali Khan* (4), *Baij Nath Lohea* v *Binoyendra Nath Palit* (5), *Malcolm* v. *Charlesworth* (6), *Arden* v. *Arden* (7), and *Gresham Life Assurance Society* v. *Crowther* (8).

Mr. S. R. Das (with him *Mr. B. K. Ghose*), for the respondents. The point raised here as to jurisdiction could have been taken in the previous suit but it was not done. The principle of *res judicata*, therefore, applied. The sub-mortgagees had interest in specific immovable property within the jurisdiction of this Court and a transfer of interest in immovable property outside the jurisdiction. They clearly had a right against both their mortgagor and the mortgagors of their mortgagor in respect of the sub-mortgage.

(1) (1909) 10 C. L. J. 470.
(2) (1908) 9 C. L. J. 429.
(3) (1907) I. L. R. 29 All. 385, 397.
(4) (1896) I. L. R. 23 Calc. 450.
(5) (1901) 6 C. W. N. 5.
(6) (1836) 1 Keen 63.
(7) (1885) 29 Ch. D. 703.
(8) [1915] 1 Ch. 214.

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They could not split up their rights against the two sets of defendants and bring an action in Calcutta and a separate action in Howrah. The suit they instituted was a suit for immovable property in respect of both the mortgage and the sub-mortgage and was properly instituted in the High Court. In *Matigara Coal Co., Ld.* v. *Shragers Ld.*(1) a similar question was attempted to be raised.

Mr. Pugh, in reply, referred to *The British South Africa Co.* v. *The Companhia de Mocambique* (2), on the question of jurisdiction.

Cur. adv. vult.

MOOKERJEE J. This is an appeal by the plaintiff in a suit to declare the invalidity of the decree in a mortgage suit in so far as such decree affects land situated beyond the local limits of the Ordinary Original Civil Jurisdiction of this Court, on the ground that leave under clause 12 could not have been granted and the decree was consequently to that extent made without jurisdiction. The question raised is of first impression, and the facts material for its determination are not in controversy.

On the 30th August, 1907, certain persons who may be called the Mookerjees and their trustee, one Bhattacharjya (represented by defendants Nos. 4-9 in the present litigation), executed a simple mortgage in favour of Banerjee (defendant No. 3), to secure the repayment of a loan of Rs. 25,000, which was charged upon a share of lots Santoshpur and Mandalika, Patni Mahals in sub-district Howrah within the district of Hooghly. On the 13th December 1907, Banerjee executed a mortgage in favour of the Khettrys (represented by defendants Nos. 1 and 2) to secure a loan of Rs. 20,000. The properties conveyed and assured by

(1) (1911) I. L. R. 38 Calc. 834. (2) [1893] A. C. 602.

this mortgage included a share of two parcels of land in the town of Calcutta as also the interest of Banerjee as mortgagee under the document of the 30th August, 1907. On the 23rd September, 1911, the patni taluk Mandalika was released and absolutely discharged from the mortgage of the 30th August, 1907, upon payment of Rs. 10,000 by the original mortgagors and with the concurrence of all the parties interested. On the 25th November, 1912, the Khettrys instituted a suit (No. 1083 of 1912) on the Original Side of this Court to enforce their security of the 13th December, 1907, against Banerjee, the Mookerjees and Bhattacharjya. It is necessary to observe that the suit was brought by the Khettrys not only against their mortgagor Banerjee but also against the mortgagors of Banerjee under the transaction of the 30th August, 1907. The reason for this was that the Khettrys sought, not merely to enforce their security against their mortgagor Banerjee and to cut off his equity of redemption under the mortgage of the 13th December, 1907, but also to enforce the mortgage held by Banerjee against the Mookerjees and Bhattacharjya under the deed of the 30th August, 1907; this relief they claimed under their derivative title from Banerjee who had granted a mortgage of his interest as mortgagee. The suit was thus in essence a composite suit wherein two distinct reliefs were claimed by the Khettrys, namely, first, to enforce a right of sale of Calcutta properties under the mortgage of the 13th December, 1907, and, secondly, to enforce a right of sale of moffusil properties under the mortgage of the 30th August, 1907. The Khettrys, accordingly, prayed for and obtained leave under clause 12 of the Letters Patent on the assumption that the clause was applicable. The suit was decreed *ex parte* on the 2nd September, 1914, and the preliminary decree then passed was made absolute

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on the 24th August, 1917. Meanwhile, the plaintiff De had purchased the right, title and interest of the Mookerjees and Bhattacharjya at an execution sale on the 20th June, 1916, and on the 29th July, 1918, he instituted the present suit to impeach the validity of the decree in the suit of the Khettrys in so far as it affected land beyond the local limits of the Ordinary Original Civil Jurisdiction of this Court. Mr. Justice Greaves has held that the Court was competent to grant leave under clause 12 and that the decree was consequently made with jurisdiction.

It is now well settled by decisions in all the Indian High Courts that a sub-mortgagee is entitled to bring a suit against his mortgagor and to realise the dues on his mortgage by sale or foreclosure: *Ram Shankar Lal* v. *Ganesh Prasad* (1), *Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai* v. *Venkatachallam Chetti* (2), *Narayan Vithal Maval* v. *Ganoji* (3) and *Bansi Lal Bhagat* v. *Durga Prasad* (4). It is also open to a sub-mortgagee, but by no means obligatory on him, to frame his suit in such a way as not only to enforce his rights under his own mortgage, but to enforce the original mortgage against the mortgagor of his mortgagor: *Zaki Hasan* v. *Deo Nath Sahai* (5). A sub-mortgagee may thus be content to cut off the equity of redemption of his mortgagor, or he may, at his choice, by a suit properly framed, cut off the equity of redemption not merely of his mortgagor but also of the mortgagor of his mortgagor. This he is able to accomplish by reason of his derivative title. Where a mortgagee transfers his interest by way of a mortgage, his mortgagee, that is, the sub-

(1) (1907) I. L. R. 29 All. 385.
(2) (1896) I. L. R. 20 Mad. 35.
(3) (1891) I. L. R. 15 Bom. 692.
(4) (1908) 9 C. L. J. 429.
(5) (1909) 10 C. L. J. 470.

mortgagee, takes it subject to the original mortgagor's right to redeem; consequently, the sub-mortgagee who holds a fragment of the interest of the mortgagee may achieve what the mortgagee might have obtained, namely, to cut off the equity of redemption of the original mortgagor. The form of the decree to be made in such a suit, where two-fold relief is claimed by the sub-mortgagee against his mortgagor and the mortgagor of that mortgagor is set out in Seton on Judgments (1912) page 2009 (Derivative Mortgagee *v.* Mortgagee and Mortgagor) and the Code of Civil Procedure, Appendix D, form 9. No difficulty arises in a suit of this description when the properties included in the original mortgage as also the additional properties, if any, comprised in the mortgage by the mortgagee are situated within the same jurisdiction. Where, however, as here the properties comprised in the original mortgage are situated in the moffusil and the additional property included in the security granted by the mortgagee is situated in the town of Calcutta, an important question or some nicety arises. The original contract of mortgage plainly contemplates a suit in the moffusil Court for its enforcement. Is the mortgagee, by the grant of a sub-mortgage along with a mortgage of property in the town of Calcutta, entitled to have the *forum* altered in relation to the enforcement of the original mortgage? We are clearly of opinion that the answer should be in the negative. As between the mortgagee and the sub-mortgagee a suit to enforce the security may fittingly be instituted on the Original Side of this Court; this is in conformity with the intention of the parties as indicated by the inclusion of the Calcutta property in the mortgage. If, however, the sub-mortgagee is not content with relief against his mortgagor alone and claims to have a remedy against the mortgagor of his

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mortgagor, the situation becomes entirely changed. As he can claim this relief only by virtue of title derived from his own mortgagor in respect of the moffusil property, he can do neither more or less than what his mortgagor could have done towards the original mortgagor. The original mortgagor, as we have seen, could have been sued by his mortgagee in respect of liabilities arising out of the mortgage transaction, only in the moffusil Court. The mortgagee, by granting a mortgage to a third person, of his interest as mortgagee and by including in that document a property in Calcutta cannot be permitted to prejudice the position of his mortgagor and to render him liable to be sued in a Court never contemplated by the parties at the time of the mortgage contract. We are of opinion that this view is consistent with a plain reading of clause 12 of the Letters Patent which, so far as it is material for our present purpose, provides as follows:

"The said High Court of Judicature at Fort "William in Bengal, in the exercise of its Ordinary "Original Civil Jurisdiction, shall be empowered to "receive, try and determine suits of every description, "if in the case of suits for land or other immovable "property, such land or property shall be situated, "or, in all other cases, if cause of action shall have "arisen either wholly, or, in case the leave of the "Court shall have been first obtained, in part, within "the local limits of the Ordinary Original Jurisdiction "of the said High Court."

In the case before us, the Khettrys as derivative mortgagees from Banerjee, could enforce the security of the 30th August, 1907, against the Mookerjees and Bhattacharjya, just as Banerjee himself might have done, in the moffusil Court. The Khettrys might also, as the mortgagees of Banerjee, have sued him

alone on the Original Side of this Court and barred his equity of redemption. But the Khettrys plainly could not be allowed, by the inclusion of two claims in one suit against two sets of persons in respect of properties situated, as regards one set in the moffusil alone, to make the composite suit against both sets of defendants maintainable on the Original Side of this Court. The decisions in *Matigara Coal Co., Ld.*, v. *Shragers, Ld.* (1) and *Sarat Chandra Roy Chowdhry* v. *M. M. Nahapiet* (2) are of no avail to the Khettrys; they merely show that where some of the mortgaged properties included in the mortgage deed are within and some without the local limits of the Ordinary Original Civil Jurisdiction of the Court, the Court has jurisdiction to grant leave to sue and to entertain a suit on the mortgage in respect of all the properties including those situated beyond the local limits. This principle might be of assistance to the Khettrys in a suit by them against Banerjee alone on the mortgage of the 13th December, 1907, which included properties in the town of Calcutta as also mortgagee interest in property in the moffusil. But there is no foundation for the argument that the suit as framed could properly be treated as one to enforce a cause of action which had arisen partly within the local limits of the Ordinary Original Civil Jurisdiction; the contention is fallacious, as the causes of action under the mortgage of the 30th August, 1907, and 13th December, 1907, were distinct and affected different sets of individuals, of whom one set held properties situated entirely in the moffusil. We do not think it would be right to strain the language of clause 12 of the Letters Patent with a view to cover a case of this description. There is thus no escape from the conclusion that the Court was not competent to grant leave

(1) (1911) I. L. R. 38 Calc. 824. (2) (1910) I. L. R. 37 Calc. 907, 911.

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under that clause, and the decree, in so far as it affects properties in the moffusil, must be deemed made without jurisdiction [*cf.* the judgment of Lord Moulton in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (1)].

As a last resort, it was faintly argued on behalf of the respondent that the objection as to jurisdiction might and should have been raised in the original suit, and as it was not so raised, the rule of constructive *res judicata* should be applied, in other words, that the parties should be placed in the same position as if the point had been raised, contested and determined in favour of the Khettrys. There is obviously no foundation for this contention. It is an elementary principle that where a Court has no jurisdiction over the subject-matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties and no waiver or acquiescence on their part can make up for the lack or defect of jurisdiction. If any authority were needed to support this proposition, reference might be made to the recent decisions in *Rajlakshmi Dasee* v. *Katyayani Dasee* (2), *Gurdeo Singh* v. *Chandrikah Singh* (3) and *Ramjit Misser* v. *Kumador Singh* (4) where the earlier cases will be found reviewed. But if the decision of the Court is void for want of jurisdiction over the subject-matter, it cannot operate as *res judicata*; in order that a judgment may be conclusive between the parties, the essential pre-requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of section 11 of the Civil Procedure Code. In this case, as already stated, the question of

(1) (1914) I. L. R. 41 Calc. 972; L. R. 41 I. A. 110.
(2) (1910) I. L. R. 38 Calc. 639.
(3) (1907) I. L. R. 36 Calc. 193.
(4) (1912) 17 C. W. N. 116.

jurisdiction was neither raised nor decided; the position might have been different if the question had been raised and decided, for where a Court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remains a decree without jurisdiction and cannot operate as *res judicata*.

The result is that this appeal is allowed and the preliminary decree in suit No. 1083 of 1912 passed on the 2nd September, 1914, the decree absolute made on the 24th August, 1917, and all subsequent orders made on the basis thereof must be set aside. The consequence will be that suit No. 1083 of 1912 will stand revived at the stage when leave under clause 12 was granted. The Khettrys as plaintiffs in that suit will be at liberty to amend their plaint if they so desire and in such manner as they may be advised; if the suit is limited as a suit to enforce the mortgage of the 13th December, 1907, against Banerjee, it will be tried on the merits. The appellant is entitled to his costs both here and in the Court below including the costs of the order made on the 7th August, 1918.

FLETCHER J. I agree.

O. M. *Appeal allowed.*

Attorney for the appellant: *H. C. Ghose.*

Attorney for the respondents: *J. K. Dutt.*