PRIVY COUNCIL.

P. C.°
1919
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Oct. 31,
Nov. 3,
Dec. 2.

RADHA KISHUN
v.
KHURSHED HOSSEIN.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mortgage—Suit for sale by second mortgagees making prior mortgagee a party, but not attacking his title—Decree for sale—Subsequent suit by assignee of prior mortgagee to enforce his mortgage against second mortgagees—Civil Procedure Code (Act V of 1908), s. 11, Explanation IV—Transfer of Property Act (IV of 1882), s. 96—Res judicata.

The respondents were second mortgagees of certain villages under a mortgage of April, 1894, and the appellant was the assignee of the original mortgagee of the same property under a mortgage of May, 1892. The respondents brought a suit (100 of 1906) to enforce their mortgage to which they made the assignor of the appellant a party but did not attack or impugn the validity or priority of his mortgage, and he did not appear to defend it. In a suit by the appellant in 1907 to enforce his mortgage against the second mortgagees, they contended that the mortgage deed of 1892 might and ought to have been made a ground of defence in the former suit, and by the omission to do so the present suit was barred as *res judicata*. In this suit the appellant's mortgage was admittedly valid :—

Held, that under these circumstances the case came within the terms of section 96 of the Transfer of Property Act, and that the property could only be sold as therein provided with the consent of the prior mortgagee who had a paramount claim outside the controversy of the suit unless his mortgage was impugned ; and, therefore, to sustain the plea of *res judicata* it was incumbent on the respondents to show that they sought in the former suit to displace the title of the prior mortgagee, and postpone it to their own, and that had not been done. The respondents, therefore, had failed to establish the conditions essential to their plea.

APPEAL 9 of 1919 from a decree (24th May, 1915) of the High Court at Calcutta, which affirmed a decree (12th October, 1909) of the Court of the Subordinate Judge of Mozufferpur.

° *Present :* LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

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The plaintiff was the appellant to His Majesty in Council.

The appellant claimed in the suit from which the present appeal arose to realise monies due to him under a deed of mortgage dated 13th May, 1892, of which he was assignee by virtue of a deed of 7th September, 1906: the object of the suit was to enforce his mortgage by the sale of certain villages mortgaged to him.

None of the respondents in this appeal disputed the validity of the appellant's mortgage or his title as assignee, but respondents 9 and 10, Parbati Koer and Dongar Mull, contended that appellant's claim to two of the villages, Barnihar and Lachnowta, was barred by the decree in a suit 11 of 1901 in the Court of the Subordinate Judge at Motihari; and the respondents 3 to 8, Chattadhari Sahu, Rajpati Sahu, Bhola Sahu, Mangal Sahu, Thakur Sahu and Bhajju Sahu, contended that the appellant's claim to two other villages, Pandharia and Gamharia, was barred by the decree in a suit 100 of 1906 in the Court of the Subordinate Judge at Mozufferpur.

The only question for determination in this appeal is whether as to the four abovenamed villages the claim is *res judicata* against the appellant.

For the purposes of this report the facts will be found to be sufficiently stated in the judgment of the Judicial Committee.

The Subordinate Judge dismissed the suit as to all four villages as being *res judicata*, holding as to the villages of Barnihar and Lachnowta that the appellant's right to redeem was barred by the decree *nisi* in the suit 11 of 1901 and by the sale in execution thereof; and as to the villages of Pandharia and Gamharia that the appellant's right to bring them to sale was barred by the decree *nisi* in the suit 100 of

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1906, the assignor of the appellant having (as he said) omitted to set up his right of being redeemed or of the sale being held subject to his mortgage.

From that decree the appellant preferred an appeal to the High Court (FLETCHER and RICHARDSON JJ.) and that Court, affirming the decree of the Subordinate Judge, that as to Barnihar and Lachnowta the appellant's equity of redemption had been effectually foreclosed by the decree in the suit of 1901, and the sale in execution thereof; and as to Pandharia and Gamharia that the appellant having failed to appear and set up his prior mortgage, could not set it up in the present suit.

On this appeal,

A. M. Dunne, K.C., and *E. B. Raikes*, for the appellant, contended that his rights under the mortgage of 13th May, 1892, were not, and could not have been, attacked in suit 100 of 1906, and that suit had not been finally decided when the present suit was decreed. The decree therefore could not have barred him from enforcing the mortgage of 1894 against the villages of Pandharia and Gamharia. The assignee of the appellant was joined in that suit as being a prior mortgagee, as admitting that his mortgage was a valid one, and its validity was not disputed in the proceedings in that suit. There was no obligation on him to put in an appearance as by the Transfer of Property Act, section 96, the property could not without his consent be sold free of his mortgage. Prior mortgagees were not necessary parties to a suit for sale, but it was necessary by section 85 of that Act to make puisne mortgagees parties to such a suit. The cases of *Gopal Lal* v. *Benarasi Pershad Chowdhry* (1) and *Gopal* v. *Pirthi Singh* (2) were distinguished from the present

(1) (1904) I. L. R. 31 Calc. 428.

(2) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.

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case. *Ajudhia Pande* v. *Inayatullah* (1) was relied upon as being rightly decided and applicable to the facts of the present case. The decision in *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (2) that a puisne mortgagee failing to set up an equitable right to priority, cannot set up the right in a subsequent suit is not applicable to the facts of the present suit. Ghosh on Mortgages was also referred to.

Sir William Garth, K.C., and *B. Dube*, for the respondents, contended that the appellant's claim was barred as *res judicata* under the provisions of section 11 of the Civil Procedure Code, 1908, and the Transfer of Property Act, 1882. The prior mortgagee, the assignor of the appellant, was a party to suit 100 of 1906 and the decree was binding on the appellant under explanations IV and VI of that section of the Act of 1908. The prior mortgagee could and should have raised a ground of defence on his mortgage by proving it. There was nothing in section 96 of the Transfer of Property Act inconsistent with that. Section 85 of the Transfer of Property Act made him a necessary party and gave him, as was its object, an opportunity of raising that defence of which he did not avail himself and it was submitted, the appellant his assignee could not now set up the prior mortgage. Reference was made to *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (2) and *Gajadhar Teli* v. *Bhagwanta* (3) as being conclusive in the respondent's favour, so far as regarded the villages of Pandharia and Gamharia were concerned.

Dunne, K.C., in reply, referred to *Mohiruddin Mondal* v. *Indra Kumari* (4) and *Krishna Dayal*

(1) (1912) I. L. R. 35 All. 111.
(2) (1912) I. L. R. 39 Calc. 527; L. R. 39 I. A. 68.
(3) (1912) I. L. R. 34 All. 599.
(4) (1914) 18 C. W. N. 1013.

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Gir v. *Amirul Hassan* (1), the first suit in each being under the Transfer of Property Act, 1882.

The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS. The suit out of which this appeal arises is one brought by the appellant, Radha Kishun, for the realisation of his mortgage security by sale, and the only question now remaining for decision is whether the appellant's claim to four villages which form a part of his security is barred by the plea of *res judicata*.

The Additional Subordinate Judge of Mozufferpur and, on appeal, the High Court of Calcutta have decided adversely to him. He has accordingly preferred this appeal.

There are two groups of contesting respondents who may be conveniently described as the Sheikhs and the Sahus. The Sheikhs claim the two villages called Barnihar and Lachnowta, the Sahus those named Pandharia and Gamharia.

The validity of the Sheikhs' claim to the two villages of Barnihar and Lachnowta is beyond dispute, and the High Court's conclusion with regard to them must be upheld.

To the contest as to the other two villages, however, different considerations apply.

By an instrument dated the 13th May, 1892, these villages were mortgaged to Kishun Lal to secure Rs. 40,000.

On the 7th September, 1906, the mortgage and the security were transferred to the appellant by Bakhtaur Mull Abhor on whom they had devolved on Kishun Lal's death. This is the appellant's title, and it is not now disputed except so far as the plea of *res judicata* may be a bar to its successful assertion.

(1) (1914) 19 C. W. N. 942.

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But on the 25th February, 1891, the villages had been transferred by way of usufructuary mortgage to the Sahus, and on the 28th April, 1894, a simple mortgage of them was executed to the same mortgagees.

On the 15th March, 1907, the present suit was instituted by the appellant against the Sahus and others for enforcement of his mortgage.

It was tried in 1909, and as against the Sahus it was dismissed as barred by the plea of *res judicata* on the 12th October, 1909, and this was affirmed on appeal by the High Court on the 24th May, 1915.

The former suit on which this plea is based is Suit No. 100 of 1906. It was brought by the Sahus, and the defendants to it included the mortgagor and Bakhtaur Mull, the present appellant's predecessor in title.

The claim was for recovery of the mortgage-money due on the mortgage-deed of the 28th April, 1894. Reference was made to the zerpeshgi deed of the 25th February, 1891, with a view to safeguarding it.

A decree was passed on the 6th August, 1906, in the absence of the defendants, and it was ordered that "this suit is decreed, and that if the principal with interest as mortgage-bond with costs in Court is paid within six months the mortgaged property be released from mortgage, and in the event of the decretal money not being paid the mortgaged property will be sold subject to former zerpeshgi mortgage-deed." The decree then proceeds to make a personal order for payment against the defendants.

The contention for the Sahus is that as the present appellant did not make his mortgage-deed of the 13th May, 1892, a ground of defence in the former suit, he is now barred from suing on it.

The rule of *res judicata* is contained in section 11 of the Code of Civil Procedure, 1908, which provides

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that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a Court competent to try such subsequent suit, and has been heard and finally decided. Had this been an exhaustive statement of the rule it obviously would not have supported the plea in the facts of this case, and so reliance has been placed on Explanation IV which provides that any matter which might and ought to have been made a ground of defence in such former suit shall be deemed to have been directly and substantially in issue in such suit.

The mortgage-deed of the 13th May, 1892, it is urged, might and ought to have been made a ground of defence in the former Suit No. 100 of 1906, and by the omission the present suit is barred.

The rule is clear; the controversy is narrowed down to the question whether the facts invite its application.

It becomes necessary, therefore, to see what was the position of Bakhtaur Mull in the former Suit No. 100 of 1906. It was a suit brought by the Sahus to enforce against the mortgagor their mortgage-deed of the 24th April, 1894. Bakhtaur Mull was joined as a defendant, but whether any or what relief was sought against him does not appear.

Bakhtaur Mull's mortgage was prior to that on which the Sahus sued, and its validity is now admitted.

The case, therefore, came within the terms of section 96 of the Transfer of Property Act which expressly provides that where property, the sale of which is directed, is subject to a prior mortgage the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in

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the proceeds of the sale as he had in the property sold. The implication of the section is that without such consent the property could not be so sold.

Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of *res judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority.

But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a Court of law is the same.

The Sahus, therefore, have failed to establish the conditions essential to their plea, and they alone are responsible for this defect. The plaint in Suit No. 100, 1906, has not been produced, and this omission is not supplied by the summary of the plaint set out in the extracts from the decree (Exhibit J. 37 c). That summary still leaves the contents of the plaint a matter of mere conjecture and certainly does not show that Bakhtaur Mull's mortgage was attacked. The decree, too, is open to the same comment. In arriving at this conclusion their Lordships have not overlooked the authorities cited at the Bar, but so far as they are binding on this Board they are clearly distinguishable.

Their Lordships at one time hesitated as to whether it would not be the better course to afford the Sahus an opportunity of producing the record of the former

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suit but, on reflection, they felt that they were not entitled to this indulgence. The Sahus have been singularly remiss: the absence of this evidence was not sprung upon them in the argument before this Board; it was made a ground of complaint in the application for leave to appeal, and yet no attempt has been made to meet it.

Nor is this the only defect in their proofs, for they have not even shown by any evidence on the record that being decree-holders they obtained an order absolute for sale, or the necessary permission of the Court to purchase the property. Moreover, it is not without importance that it is the decree-holders who claim to have brought in execution and that they are endeavouring to defeat by their plea a mortgage of which they had notice, and which on their own admission now made was valid and so of necessity paramount to their claim.

Their Lordships, therefore, hold that the plaintiff's claim to the villages of Pandharia and Gamharia cannot be defeated by the plea of *res judicata*, and that it was erroneous to dismiss the suit as against the defendants 37 to 42. They will, therefore, humbly advise His Majesty that the decrees of the High Court and the Additional Subordinate Judge ought to be varied accordingly, and the case remitted to the High Court with directions to modify its decree in accordance with this decision in regard to the two villages of Pandharia and Gamharia, the adjustment of costs consequent thereon, and otherwise as the circumstances of the case may require. There will be no order as to the costs of this appeal.

J. V. W.

Solicitors for the appellant: *W. W. Box & Co.*

Solicitors for the respondents: *Barrow, Rogers & Nevill.*