

APPELLATE CIVIL.

Before Suhrawardy and Graham J.J.

SONABANNESSA

v.

ABDUL HAMID.*

1931

Jan. 19, 20.

Res judicata—*Suit on mortgage—Omission by defendant to raise question of title independent of equity of redemption, whether bars future claim to such title—Code of Civil Procedure (Act V of 1908), s. 11.*

If a defendant in a mortgage suit has a title independent of and paramount or adverse to it, he is not bound to set it up in the mortgage suit and the court trying the mortgage suit is not justified in raising an issue of title as between him and the mortgagee. The decision will therefore not operate as *res judicata* against the defendant and he will not be estopped from raising such title in a future suit.

Srimanta Seal v. Bindubasini Dasi (1) dissented from.

Asmatulla Pramanik v. Gamir Pramanik (2) and *Girija Kanta Chakrabarty v. Mohim Chandra Acharjya* (3) followed.

Hare Krishna Bhowmik v. Robert Watson & Co. (4) and *Jaygeswar Dutt v. Bhuban Mohan Mitra* (5) referred to.

SECOND APPEAL by the plaintiffs.

The facts of the case have been sufficiently stated in the judgment.

Amarendranath Basu and *Bhagirathchandra Das* for the appellant.

Birendrachandra Das and *Nagendrachandra Chaudhuri* for the respondent.

SUHRAWARDY J. This appeal is by the plaintiffs, who have obtained a partial decree in a suit for possession. The fact, according to the findings of the courts below, is that one Azimuddin left three sons, Amiruddin, Rahimuddin and Jamiruddin, a widow, Anna Bibi, defendant No. 7, and five daughters. The plaintiffs' case is that Azimuddin had only two sons, Amiruddin and Rahimuddin, who were owners of the

*Appeal from Appellate Decree, No. 2469 of 1929, against the decree of N. L. Hindley, District Judge of Tippera, dated April 22, 1929, modifying the decree of Taraknath Basu, Subordinate Judge of Tippera, dated May 31, 1928.

(1) (1922) 38 C. L. J. 183.

(3) (1915) 20 C. W. N. 675.

(2) (1929) 33 C. W. N. 659.

(4) (1901) 8 C. W. N. 365.

(5) (1906) I. L. R. 33 Calc. 425.

properties which were mortgaged in 1304 B. S. to Sahabuddin, whose heirs the plaintiffs are. The defendants Nos. 1 to 3 are sons of Amiruddin, defendant No. 6 is the son of Rahimuddin and defendant No. 7, the mother of Amiruddin and Rahimuddin, was made a party to the suit as an heir of the mortgagors as found by the court of appeal below.

1931
 Sonabannessa
 v.
 Abdul Hamid.
 Suhrawardy J.

It appears that, before the mortgage in 1304 B. S. to Sahabuddin, Amiruddin and Rahimuddin had mortgaged the property in suit in 1302 B. S. to one Ramkumar. Ramkumar brought a suit against the mortgagors only upon the mortgage after the mortgage to Sahabuddin, obtained a decree against the mortgagors and, having purchased the mortgaged properties in execution of his mortgage decree, sold portions of them in 1904 to defendants Nos. 9 to 13. The plaintiffs' predecessor brought a suit against the mortgagors only on his mortgage in 1911 and purchased the property in execution of his mortgage decree in 1915. The plaintiffs, according to their case, obtained delivery of symbolical possession in November, 1916, but failed to get actual possession and hence brought this suit for declaration of title and for possession. There were some other defendants in the suit, defendants Nos. 15 and 16 and defendants Nos. 17 to 19, but the suit against them was dropped; and they are no longer before us.

Both the courts below have allowed the plaintiffs a partial decree, the learned District Judge having slightly modified the decree of the Subordinate Judge. The findings of the courts below are that the property belonged not to Amiruddin and Rahimuddin, but to their father Azimuddin, and was inherited by his three sons, Amiruddin, Rahimuddin and Jamiruddin, his widow (defendant No. 7), and five daughters. The plaintiffs' mortgagors' share was, accordingly, nine annas and odd for which they were awarded a decree.

Mr. Basu on behalf of the appellants raised four points. The first point relates to the application of

1931

Sonabannessa
 v.
Abdul Hamid.
 ———
Suhrawardy J.

the principle of *res judicata* and estoppel to the facts of the present case. The learned District Judge had found that Anna Bibi (defendant No. 7) was made a party in Sahabuddin's mortgage suit as one of the heirs of the mortgagors and he, therefore, held that she was not bound to set up a title as an heiress of Azimuddin, and that her share was outside the property purchased by the plaintiffs in execution of their mortgage decree. Mr. Basu argues, on the authority of the view expressed in *Srimanta Seal v. Bindubasini Dasi* (1), that Anna should have asserted her right as an heiress of Azimuddin to the two annas share of the property inherited by her, in the mortgage suit and, not having done so, she and, consequently, her vendees are not entitled to plead that her share was unaffected by the sale in execution of the plaintiff's mortgage decree. The view expressed in *Srimanta's* case (1) is couched in very wide language and I am not convinced of its correctness. There the defendant in a mortgage suit held twofold character, as a purchaser of the equity of redemption in the mortgaged holding as also a settlement holder from the superior landlord. In the mortgage suit he had not set up his right as a settlement holder. In the subsequent suit for possession, it was held that, as he allowed the mortgaged holding to be sold in execution of the mortgage decree without resisting the sale, he would be bound by the result of the sale in execution of the decree. I find that my doubts regarding the correctness of this decision have been confirmed by the view taken by my learned brother Pearson J. in *Asmatulla Pramanik v. Gamir Pramanik* (2). That case and the case of *Girija Kanta Chakrabarty v. Mohim Chandra Acharjya* (3) are clear authorities for the proposition, which is as old as the law of mortgage in British India, that if a defendant in a mortgage suit has a title independent of the mortgage and paramount or adverse to it, he is not bound to set it up in the mortgage suit. I may go further and

(1) (1922) 38 C. L. J. 183.

(2) (1929) 33 C. W. N. 659.

(3) (1915) 20 C. W. N. 675.

say that he should not even be permitted to set it up and the court trying the mortgage suit is not justified in raising an issue of title as between him and the mortgagee. Under Order XXXIV, rule 1, all persons interested in the right of redemption are necessary parties in a mortgage suit. It does not say that no one else can be made a party, but it indicates the scope of a mortgage suit. It may be conceivable that, in very special circumstances, a person not interested in the equity of redemption may be made a party. It is worthy of note that one of the cases which have taken this view, namely, *Girija Kanta's* case (1) was decided by Mookerjee J., who took a somewhat inconsistent view in *Srimanta's* case (2). In a case, especially where a defendant is sued as heir or representative of the mortgagor, he is estopped, as much as the mortgagor would have been if he were a party, from asserting that the mortgagor had no right to the mortgaged property. To my mind, Anna Bibi, when she was made a party to the mortgage suit as one of the heirs of Amiruddin and Rahimuddin, the mortgagors, could not set up a case inconsistent with the mortgage, namely that the property belonged to her husband and she had inherited a share from him. If she had done so, the court would not have been justified in making such a defence subject of an issue for trial in a mortgage suit which is limited to an enquiry into the validity of the mortgage and the amount due thereon. I should also note that the decision in *Srimanta's* case (2) was based on the view taken in *Hare Krishna Bhowmik v. Robert Watson & Co.* (3). The facts of that case were very peculiar and the decision was not fully acceptable to Mookerjee J. in *Jaggewar Dutt v. Bhuban Mohan Mitra* (4). The result is, as has been found by the courts below, that the share of Anna Bibi was not affected by the plaintiff's mortgage decree and did not pass to the plaintiffs by the sale held under their decree.

1931

Sonabannessa
 v.
Abdul Hamid.
Sukrawardy J.

(1) (1915) 20 C. W. N. 675.

(3) (1901) 8 C. W. N. 365.

(2) (1922) 38 C. L. J. 183.

(4) (1906) I. L. R. 33 Cal. 425.

1931

Sonabannessa
v.
Abdul Hamid.
Suhrawardy J.

Mr. Basu next argues that the defendants Nos. 1 to 3 and 6, as heirs of his client's mortgagors, are estopped from pleading that Anna Bibi or Jamiruddin had any share in the mortgage property. This contention should have prevailed, but for the fact that the defendants Nos. 1 to 3 and 6 are not only heirs of the plaintiff's mortgagors but are purchasers of the interest of Anna Bibi and the daughters of Azimuddin. They are, therefore, entitled to set up the rights of their vendors. As to Jamiruddin, the contesting defendants may not be able to plead that the property belonged to Jamiruddin, but it seems to me that they are entitled to say, in a suit for possession by eviction, that other persons, who have a right to remain in possession of some portion of the property, are in possession and the plaintiff's suit for recovery of possession of the entire property is bad for non-joinder of proper parties. The learned District Judge is right in saying that the plaintiffs did not claim in this suit appropriate reliefs and it appears to me that, if a decree is given to the plaintiffs for eviction of the contesting defendants only, it would not be possible to fully execute the decree so long as other persons are in possession of portions of the property. In this suit for possession on the basis of title, they can succeed only so far as they can prove their mortgagor's title and this they have by the decree under appeal.

The third ground urged by Mr. Basu is that the plaintiffs should have been given the right to redeem the defendants Nos. 9 to 13. When the suit was brought by the first mortgagee, Ramkumar, the plaintiff's predecessor, Sahabuddin, had already acquired an interest in the equity of redemption, but he was not made a party in the mortgage suit. His right of redemption, therefore, subsists and may be exercised by the plaintiffs. But the courts below are of opinion that there are several difficulties in allowing the plaintiffs the right to redeem in this suit. In the first place, the plaintiffs have not claimed it in the suit and it is not possible, after the close of the

case, to convert it from a possessory suit into a suit for redemption. It has also been found that some of the properties, affected by the first mortgage, were outside the plaintiffs' mortgage; but the real difficulty is about allowing the plaintiffs a decree for redemption as they claim. They claim to redeem the defendants Nos. 9 to 13 to the extent of the property in their hands. It is not possible to do that in the present suit. They cannot be allowed also to redeem the entire property mortgaged under the first mortgage, inasmuch as all the persons interested in the various properties are not parties to the suit. In this suit, the plaintiffs never asked the right to redeem the defendants, but, on the other hand, claimed that the defendants should redeem them as they (the plaintiffs) were not parties to the first mortgagee's suit. On the facts of the case, it would appear that both the plaintiffs and the defendants Nos. 9 to 13 have mutual right to redeem each other; but the plaintiffs should have sought to redeem those that are in possession under the first mortgage.

The last point relates to plot No. 1 of the property in suit. In the decree on the first mortgage and the sale certificate, this plot is said to be $1\frac{1}{2}$ *kânis* in area. In the plaintiffs' mortgage suit it is said to be 7 *kânis* and in other proceedings as noted by the learned District Judge the area is differently described. The courts below have found that the discrepancy between the sale certificate under the first mortgage and the plaintiffs' sale certificate may be due to some mistake; but it is apparent, from the boundaries given, which ought to prevail, that the entire property was mortgaged to Ramkumar. This question is, therefore, finally settled by the concurrent findings of the courts below.

All the points taken by the appellants fail and this appeal is dismissed with costs.

GRAHAM J. I agree.

Appeal dismissed.