

## APPELLATE CIVIL.

Before Patterson and McNair JJ.

## OFFICIAL ASSIGNEE OF CALCUTTA

v.

## JAGABANDHU MALLIK.\*

1933  
 Nov. 17, 20;  
 1934  
 Feb. 13.

*Mortgage—Prior mortgagee—Subsequent mortgagee's suit—Pro forma defendant—Lis pendens—Constructive res judicata.*

Where a prior mortgagee, who had, in execution of his mortgage decree, purchased the mortgaged property, was made a defendant by a puisne mortgagee in a subsequent mortgage suit, in the plaint, whereof nothing was clearly alleged in derogation of his priority,

held that the prior mortgagee's paramount title was outside the scope of the controversy in the later suit and the rule of constructive *res judicata* did not apply.

*Radha Kishun v. Khurshed Hossein* (1) followed.

## SECOND APPEAL by the defendant.

The facts of the case and the arguments advanced at the hearing of the appeal appear sufficiently in the judgment.

*Bijankumar Mukherji* and *Apurbadhan Mukherji* for the appellant.

*Atulchandra Gupta* and *Panchanan Chaudhuri* for the respondent.

*Cur. adv. vult.*

PATTERSON J. This is an appeal by the Official Assignee, representing one of the defendants, and arises out of a suit for declaration of title in, and

\*Appeal from Appellate Decree, No. 1348 of 1931, against the decree of Kunjabihari Ballabh, Subordinate Judge of Burdwan, dated Jan. 27, 1931, reversing the decree of Neeradeshwar Banerji, Second Munsif of Katwa, dated March 12, 1928.

(1) (1919) I. L. R. 47 Calc. 662; L. R. 47 I. A. 11.

recovery of possession of, a one-third share of a certain tank.

The facts leading up to the institution of this suit are no longer in dispute, and may be briefly stated as follows :—The property in suit belonged originally to one Gopeshpada Datta, who mortgaged it to the plaintiff, Jagabandhu Mallik, along with other properties, on the 29th June 1909. On the 20th April 1920, the plaintiff instituted a mortgage suit against Gopesh, and obtained a decree some time in 1922,—and, on the 7th November of that year, purchased the property in suit in execution of his decree. Meanwhile, on the 28th October 1920,—(that is to say, *after* the plaintiff had instituted his mortgage suit, but *before* he had obtained his decree),—Gopesh mortgaged the property to the defendant Apurbakrishna Ray (now represented by the Official Assignee), and, on the 17th July 1924, Apurba instituted a mortgage suit against Gopesh, making the present plaintiff, Jagabandhu, a party. That suit was decreed on the 13th September 1924, and, on the 13th January 1926, Apurba purchased the property in suit in execution of his decree, and obtained possession in due course, thus dispossessing the plaintiff, who, on the 27th February 1927, instituted the present suit, with a view to the establishment of his title and recovery of possession.

From the above statement of facts, it is clear that the plaintiff acquired a clear title in the property in suit by his purchase of the 7th November 1922, and that the defendant acquired nothing by his purchase of the 13th January 1926, Gopesh's title having already been extinguished by the plaintiff's prior purchase.

The main contention of the defendant throughout these proceedings has been that the suit is barred by the rule of constructive *res judicata*, inasmuch as the plaintiff was made a party to the defendant's suit of 1924 and was duly served with notice, but nevertheless did not appear and contest. Both the courts below

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have found that the rule of constructive *res judicata* applies in the present case, and they have also referred in their respective judgments to the question of the applicability of the rule of *lis pendens*. The trial court refused to allow the question of *lis pendens* to be raised, on the ground that no such case had been set up in the plaint, and accordingly dismissed the suit; but the lower appellate court allowed this question to be raised, as all necessary facts had been stated in the plaint, and holding that the rule of *lis pendens* should prevail over the rule of constructive *res judicata*, allowed the appeal and decreed the plaintiff's suit.

Before us it has been conceded on behalf of the plaintiff, respondent, that the view of the lower appellate court, that the doctrine of *lis pendens* should prevail over the rule of *res judicata*, cannot be supported, but it is contended that the rule of constructive *res judicata* has been wrongly applied to the present case, inasmuch as nothing was alleged by Apurba, in the suit brought by him in 1924, in derogation of the plaintiff's title. This aspect of the matter appears to have been entirely overlooked by all concerned in both the courts below, and it has been canvassed for the first time in this Court. The question is, however, a pure question of law, and the facts, out of which the question arises being no longer in dispute, there is, in my opinion, no bar to the question being considered by this Court. Both the courts below appear to have assumed that the plaintiff's title and the priority of his mortgage had been called in question by Apurba in the suit instituted by the latter in 1924, but on looking into the plaint in that suit, it appears that this is not the case. All that Apurba alleged in that suit, with regard to Jagabandhu's title, was that—

After the mortgage to the plaintiff, the *pro forma* defendants Nos. 2, 3 and 4 came into possession on the basis of purchase and mortgage,

that it had, therefore, been thought necessary that the trial should take place in their presence, and

that they had, accordingly, been made parties as *pro forma* defendants. This paragraph of the plaint does certainly *suggest* that the present plaintiff, Jagabandhu, was a subsequent mortgagee, but the plaint does not say so in so many words, and this being so, it seems to me that the contention of the learned advocate for the respondent is correct, namely, that nothing was alleged in the plaint in Apurba's suit, in derogation of the present plaintiff, Jagabandhu's title.

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The position is, therefore, that the present plaintiff was a prior mortgagee and purchaser, and nothing was alleged in the plaint in Apurba's suit in derogation of his priority:—his paramount title was outside the scope of the controversy in that suit, and in these circumstances, it must, in my opinion, be held, as was held by their Lordships of the Judicial Committee of the Privy Council in *Radha Kishun v. Khurshed Hossein* (1), that the rule of constructive *res judicata* does not apply. I would, accordingly, dismiss the appeal, and decree the suit with costs in all the courts.

McNAIR J. I agree.

*Appeal dismissed.*

G. S.

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