ORIGINAL CIVIL.

1931

June 25.

Before Buckland J.

TINKARHI DASEE

v.

NARENDRANATH MUKHERJI.*

Mortgage—Mortgage suit—Parties—Question of paramount title, if should be tried—Code of Civil Procedure (Act V of 1908), O. I, r. 3, O. XXXIV, r. 1.

The question of paramount title should not, in general, be tried in a mortgage suit.

Bhuban Mohan Ghose v. *Co-operative Hindusthan Bank Ld.* (1) discussed and explained.

Nilkant Banerji v. *Suresh Chandra Mullick* (2) referred to.

Relevant facts of the case and arguments of counsel appear sufficiently from the judgment.

B. C. Ghose and *J. C. Hazra* for the plaintiff.

K. C. Mukherji and *P. C. Basu* for the defendant Manindranath Mukherji.

S. Ghose for the Goswami defendants.

N. C. Chatterji for the defendant Haridas Mukherji.

S. C. Bose, *P. N. Sen* and *S. N. Bose* for the defendant Ashalata Basu.

J. C. Sett for the defendant Siddheswar Bhattacharya.

BUCKLAND J. This is a suit to enforce a mortgage, dated 25th September, 1912, executed by the defendants Narendranath Mukherji and Manindranath Mukherji and the deceased son of Surabala Debi, in favour of the predecessors of the plaintiff, of their undivided 1/3 share in the

*Original Civil Suit No. 2062 of 1927.

(1) (1925) 29 C. W. N. 784.

(2) (1885) I. L. R. 12 Calc. 414; L. R. 12 I. A. 171.

property mortgaged. The property consists of No. 10, Chandramohan Sur's Lane and 4-1, Iswar Mill's Lane, now known as 4/1/A and 4/1/B.

As regards the defendants Radhagobinda Goswami, Mohangobinda Goswami, and Siddheswar Bhattacharya, the case has been already disposed of and the terms of the decree to be made so far as regards these parties have been consented to and recorded. The defendants Ashalata Basu and Haridas Mukherji claim, it appears, a title to the second property mentioned, paramount to the mortgagor, and a position arises therefrom which is not free from difficulty. In her plaint, the plaintiff states quite briefly, in paragraph 13, that the defendant Ashalata Basu claims to be the owner of premises 4/1/B, Iswar Mill's Lane and the defendant Haridas Mukherji claims to be the owner of the premises 4/1/A, Iswar Mill's Lane, and it appears that, though they have not been read to me, these two defendants have filed written statements setting out their respective titles to the property. Through their counsel, they submit that they were not necessary parties to the suit and that no question of their title should be tried in these proceedings.

On behalf of the plaintiff, learned counsel has expressed himself in effect as indifferent whether this question of title should or should not be tried in this suit, provided that he does not have to pay these defendants' costs, but if there is any question of having to pay their costs in this suit, he submits that the Court is competent to and should try the issues that arise between the plaintiffs and the last two defendants. In support of this proposition, he has referred me to a judgment of the present Chief Justice and his learned predecessor in *Bhuban Mohan Ghose* v. *Co-operative Hindusthan Bank Ld.* (1), where the question which now arises was considered, and the view which Rankin J. appears to have taken is that Order XXXIV, rule 1, which provides that all persons having an interest either in

(1) (1925) 29 C. W. N. 784, 792, 793.

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the mortgage security or in the right of redemption shall be joined as parties to any suits relating to the mortgage, is in no way directed to the question whether any causes of action may be joined with a claim upon a mortgage, or if so, in what circumstances. The learned Judge later passed on to a consideration of Order I, rule 3 and observed: "However plainful it may be to old-fashioned "equity lawyers to find causes of action lying "together in one suit, if such a case comes under "Order I, rule 3, it cannot be held to be incompetent." The effect of this is that Order I, rule 3 is in no way limited by Order XXXIV, rule 1, and the learned Chief Justice observed that the question was not one of jurisdiction, and at most the misjoinder was an irregularity or inconvenience. Rankin J., however, further observed: "I do not think that the objection "as to misjoinder requires us to allow the present "appeal. I must not, however, be understood to "throw doubt upon the need for a high decree of "caution before permitting questions of paramount "title to be investigated in a mortgage suit. Both "as to competence and convenience there will "generally be much to consider."

The practical effect, therefore, of the decision is that, though it lays down that questions of title may be tried in a mortgage suit, it furnishes no rules by which courts may be guided as to the circumstances in which that should or should not be done. It does, however, appear, from the facts of that case, that, unless the mortgagor's title to the property was established, the mortgagee had no security whatever and it was, therefore, vital for the mortgagee to establish his mortgagor's right to charge the property in question. The problem, with which I am now concerned, was presented in that case in its simplest form and considerations of convenience were of little or no account.

I have been referred to a judgment of their Lordships of the Privy Council, which, though decided in 1885, I am told is the most recent,

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Nilakant Banerji v. *Suresh Chandra Mullick* (1). There, it appears that a representative of a purchaser of a mortgagor's interest in the mortgaged property claimed a paramount title, and the learned judge in the court of first instance, finding a defence raised which was quite foreign to a mortgage suit, considered that he had no option but to dismiss the defendant in question with costs, and Lord Hobhouse who delivered the judgment of the Board observed: "It may be mentioned that there "were several other purchasers of other portions of "the mortgaged property who were made parties, "and who also alleged paramount titles in "themselves, so that the suit would have been "multifarious and confused in the highest degree if "it had gone on in that shape. They were all "dismissed with costs."....."It was the paramount "claims that could not be conveniently tried in that "suit. If Khagendra had accepted the position of a "person who was entitled to redeem, then, so far from "his claims not being conveniently tried in that suit, "he was (apart from the doctrine of *lis pendens*) a "necessary party to that suit, and his claims could "not be conveniently or properly tried in any other "suit; but, not accepting that position, his claims "were tried in that suit so far as concerned the "question whether or no he was entitled to "redeem, and it was held on his own showing that "he was not entitled to redeem, and on that ground "he was dismissed."

It may be, but it has not been, argued that at that time the rules of pleading were not what they are now, and that that may now be done which could not have been done at that time. I have not examined the matter from this standpoint, nor does it appear to be necessary to do so, for the observations of the learned judge appear to go to the root of the matter and to be based upon considerations not dealt with, though recognised, by the decision in the case previously cited. No

(1) (1885) I. L. R. 12 Calc. 414 (419, 421); L. R. 12 I. A. 171 (177, 179.)

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general rule can be laid down. Questions of convenience must be considered in each case, but ordinarily, speaking for myself, I should be averse from allowing different causes of action, in only one of which different defendants may have any substantial interest, to be tried at the same time. So far as I can see, there are no reasons why questions of title should be determined at this stage as between these parties in this suit, nor has any one, except so far I have already stated, contended that they must now be determined. What eventually will be sold will be the right, title and interest of the mortgagor in the mortgaged premises, and persons who claim under a paramount title may file a suit for a declaratory decree or they can litigate hereafter with the auction purchaser, if they so desire.

The latter course appears to have been suggested from the bar in *Bhuban Mohan Ghose's* case (1), and in relation to that Rankin J. is reported to have said "Whatever is right or wrong, that undoubtedly "would have been calamitous. The only possible "way to ensure that the property should not be "wasted from the point of view of the mortgagors "and the mortgagees would have been to bring a "declaratory suit * * * * to a conclusion before "this mortgage interest was sold." I do not know whether the learned Judge based these observations upon the facts of that particular case or whether he intended them to be applicable to all circumstances similar or analogous to those which he then had occasion to consider. I read them, however, as meaning nothing more than that a declaratory suit at an early stage is to be preferred to litigation between the parties claiming a paramount title and the auction purchaser and not that, in order to avoid that which he described as calamitous, questions of title should be allowed to be agitated in a suit upon a mortgage, in regard to which he had already emphasised the need for caution.

(1) (1925) 29 C. W. N. 784, 792.

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For these reasons it appears to me that the defendants Ashalata Basu and Haridas Mukherji, who do not claim any right to redeem, should be dismissed from the suit and their costs should be paid by the plaintiffs. As against the Mukherji defendants, there will be the usual mortgage decree, and as regards the remaining three defendants the decree will incorporate the terms already recorded.

Attorney for plaintiff: *K. N. Ganguli.*

Attorneys for defendants: *N. C. Bural & Pyne, S. C. Mukherji & Co., A. Bose & Co., P. Basak, Rames Chandra Basu.*

S. M.