

ORIGINAL CIVIL.

Before *McNair J.*

MATILAL DAGA

v.

SUSHEELKUMAR MUKHERJI.*

1935

Aug. 19, 27.

Mortgage—Subsequent mortgage—Independent property included in subsequent mortgage—Sale of independent property in prior mortgagee's suit.

A subsequent mortgage comprised independent property in addition to properties subject to a prior mortgage. In a suit on the prior mortgage, the puisne mortgagee, though made a party, cannot obtain a decree for sale of the independent property.

Sarat Chandra Roy Chowdhry v. Nahapiet (1) followed.

Kissory Mohun Roy v. Kali Churn Ghose (2) dissented from.

Kalipada Mukherji v. Basantakumar Datta (3) referred to.

REFERENCE by the Master.

The facts of the case and arguments of counsel appear from the judgment.

H. K. Bose for the puisne mortgagee.

Cur. adv. vult.

McNAIR J. A question has been referred to me by the learned Master which arose on the settling of the final decrees in two similar mortgage suits.

The circumstances were as follows: Property comprised in a mortgage was subsequently mortgaged together with other properties to a second mortgagee. The prior mortgagee sued on his mortgage and made the subsequent mortgagee a party to his suit.

A preliminary decree was made and the property, the subject matter of the original mortgage, was sold and was insufficient to satisfy the prior mortgagee's claim. The question arises on the

*Reference in Original Suit No. 420 of 1932.

(1) (1910) I. L. R. 37 Cal. 907. (2) (1897) I. L. R. 24 Cal. 190.

(3) (1931) I. L. R. 59 Cal. 117.

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drawing up of the final decree whether in this decree the second mortgagee is entitled to an order for sale of the remaining property in satisfaction of his mortgage.

I have had the benefit of hearing arguments from counsel. For the second mortgagee reliance is placed on the case of *Kissory Mohun Roy v. Kally Churn Ghose* (1), where Sale J. held that it had been the practice on the Original Side of this Court, for a long series of years and certainly since the decision of Pontifex J. in 1879 in the case of *Auhindro Bhoosun Chatterji v. Chunnoolol Johurry* (2), where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgages to make a decree directing an account on the footing of each of the mortgages and fixing one period of redemption for all the defendants.

That practice the learned Judge said, in 1894, is now too well settled to be disturbed. In *Kissory Mohun Roy v. Kali Churn Ghose* (3), the same learned Judge, three years later, made a similar order in favour of a third mortgagee and held that the remaining properties which were outside the jurisdiction might be sold at the instance of the defendant.

In 1910, Mr. Justice Pugh, in *Sarat Chandra Roy Chowdhry v. Nahapret* (4), held that this practice on the Original Side was based on and in conformity with the English practice, but that it did not conform to the provisions of the Transfer of Property Act which had been incorporated into Order XXXIV of the Code of Civil Procedure. He held that, since 1908, the Original Side practice was bound to conform to the practice in the *mofussil* and on the appellate side, where the view had always been held that the subsequent mortgagees were only made parties to the suit in order that they might have an opportunity

(1) (1894) I. L. R. 22 Cal. 100.

(3) (1897) I. L. R. 24 Cal. 190.

(2) (1879) I. L. R. 5 Cal. 101.

(4) (1910) I. L. R. 37 Cal. 907.

to redeem and to receive their mortgage money out of the surplus sale proceeds after satisfaction of the first mortgage. That judgment, if I may say so with respect, is clear and well reasoned and the learned Judge on page 911 of the report calls attention to the difficulty that might arise if there were a prior or a subsequent mortgagee or assignee of the property excluded from the plaintiff's but included in the second mortgagee's mortgage. Such a person would not be a proper party to the plaintiff's suit, yet the property could not be sold except in his presence and after decree had been made with respect to his interests.

It is noteworthy that, in that case, the first mortgagee's security was Calcutta property, whereas the second mortgagee had a mortgage over the Calcutta property and also over properties in the *mofussil*, and the learned Judge held that the second mortgagee was only entitled to be paid out of the balance of any sale proceeds of the Calcutta property and could not in any event proceed in that suit against the *mofussil* property. This decision was obviously opposed to the decision of Sale J. in *Kissory Mohun Roy v. Kali Churn Ghose* (1), but Pugh J. based his decision not on this ground but on the wider ground that the provisions of section 85 of the Transfer of Property Act had been incorporated in the Code and that the procedure on the Original Side of this Court which had hitherto prevailed had now become obsolete.

The practice referred to and approved by Sale J. had the obvious advantage of entitling all matters between the mortgagor and the various mortgagees to be adjusted in a single suit, but it also had the obvious disadvantage which was noted by Pugh J. and to which I have already referred, *viz.*, that there is no provision to safeguard the rights of other encumbrancers of the property mortgaged to the second mortgagee.

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This question was again dealt with in a recent decision of this Court, *Kalipada Mukherji v. Basanta Kumar Datta* (1), where the learned Judges, Mukerji and Guha JJ., referred to some of the decisions I have mentioned and reiterated that whatever might be the English practice and the practice on the Original Side of this Court, the procedure in the *mofussil* was different, and the second mortgagee was merely made a party to the suit in order that he might have his mortgage money or part of it out of the surplus sale proceeds after satisfaction of the first mortgage, but that, in order to obtain the sale of some other property included in his own mortgage, he must have recourse to a separate suit.

In my view, the judgment of Pugh J. is correct and the former practice of the Original Side approved by Sale J. became obsolete so soon as the relevant provisions of the Transfer of Property Act were incorporated in the Civil Procedure Code. A subsequent mortgagee of independent property, who is made a party to the prior mortgagee's suit, cannot, in that suit, obtain a decree for sale of the independent property.

These are my views in regard to the practice. In the particular cases before me preliminary decrees were made on the 6th December, 1932, and the 15th December, 1925, respectively. In each of these decrees an order was made for the sale not only of the property subject to the plaintiff's mortgage but also of the property mortgaged to the defendant puisne mortgagee. It is not now open to question whether those decrees were or were not in proper form. They have been made and the puisne mortgagees are entitled to have the remaining mortgaged properties sold. The final decrees for sale will be settled and passed as drawn by the learned Master.

G. K. D.