SIVASAMI ODAYAR v. SUBRAMANIA AIYAR.

WALLER J.

the plea of *bona fides* could not be sustained in regard to them. As to that, the law at that time was not settled and there was some doubt whether the sons' shares also did not vest in the Receiver. Apart from that, it is clear that the auction-purchaser himself was not entitled to anything but symbolical possession. If he has a legal grievance at all, it is against the Official Receiver, who has received payment from his lessee.

We allow the second appeal and dismiss the suit with costs throughout.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1931, July 24.

VISWANATHA AYYAR (APPELLANT), APPELLANT,

v.

CHIMMUKUTTI AMMA AND FOUR OTHERS (RESPONDENTS 1 to 4 AND 6), RESPONDENTS.*

Mortgage—Sub-mortgage—Redemption suit by original mortgagor against original mortgagee—Sub-mortgagee not impleaded in—Right of, where redemption suit ends in redemption—Original mortgagor not having notice of sub-mortgage—Notice of sub-mortgage to mortgagor—Registration of sub-mortgage not of itself—Redemption suit—Preliminary decree in—Payment out of Court made after, and reported to Court by both mortgagor and mortgagee—Validity of—Third party's right to question.

A sub-mortgagee (of whose sub-mortgage the original mortgagor had no notice) left out of a redemption suit against his mortgagor, which ends in redemption, cannot claim afterwards to bring either the property originally mortgaged to his mortgagor or what was mortgaged to himself to sale. His

* Letters Patent Appeal No. 135 of 1926.

right in such a case is only to a personal decree against his mortgagor.

A sub-mortgagee has a right to sue for sale of the property mortgaged to him, and, if he is not made a party to the redemption suit against his mortgagor, his right to bring his own suit is unaffected and can be pursued by him. But the legal effect of the redemption of the original mortgage in accordance with the decree of the Court in the redemption suit is to wipe out the original mortgage. As the sub-mortgagee has only a mortgage right over that mortgage, if that is gone, the whole foundation of a suit by him for sale is gone too.

Muhammad Haji v. *Mohidin Kutti*, (1920) 30 M.L.T. 21, followed.

Sukhi v. *Ghulam Safdar Khan*, (1921) I.L.R. 43 All. 469 (P.C.), distinguished on the ground of its not being a sub-mortgagee's case.

The registration of a sub-mortgage is not of itself notice thereof to the mortgagor.

The rule that a payment made out of Court after the preliminary decree in a redemption suit will not be recognised by the Court if disputed cannot affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. When they do so the validity of the payment cannot be questioned by a third party not impleaded in the suit.

Singa Raja v. *Pethu Raja*, (1919) I.L.R. 42 Mad. 61, explained.

APPEAL under clause 15 of the Letters Patent against the decision of SPENCER J. in Second Appeal No. 892 of 1923 preferred to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 141 of 1922—Appeal Suit No. 343 of 1922, on the file of the District Court of South Malabar—(Original Suit No. 234 of 1921 on the file of the Court of the Additional District Munsif of Calicut).

K. P. Ramakrishna Ayyar for appellant.

K. P. Krishna Menon for respondents.

VISWANATHA AYYAR v. CHIMMUKUTTI AMMA.

REILLY J.

JUDGMENT.

REILLY J.—The predecessor of the fifth defendant in this case, the janmi of the land concerned, granted a kanam to the first and second defendants. They granted a sub-mortgage of that kanam to the third and fourth defendants, who assigned their right to the plaintiff. After that, on the expiry of the term of the kanam, the fifth defendant sued for redemption without making the plaintiff or his assignors, the third and fourth defendants, parties to the suit, obtained a preliminary decree for redemption and settled with the kanamdars, the first and second defendants, by payment out of Court. The plaintiff has brought this suit to enforce his sub-mortgage by sale of the kanam right, which had been mortgaged to his assignors. The District Munsif gave him a personal decree against his mortgagors and a decree for the sale of their possessory right in the land concerned, whatever that might be. The plaintiff appealed to the Subordinate Judge claiming a decree for sale of the kanam; but his appeal was dismissed. He then appealed to this Court, and the second appeal was dismissed by SPENCER J. The present appeal is against SPENCER J.'s decision.

I have mentioned that the fifth defendant paid the first and second defendants the amount fixed in his redemption decree. It has been suggested before us in the course of the arguments by Mr. Ramakrishna Ayyar for the plaintiff that the evidence of that payment is unsatisfactory. But the payment was found by the District Munsif to have been made; the Subordinate Judge's judgment obviously proceeds on the ground that that finding is correct; SPENCER J. accepted it as correct; and I do not see how we can allow that finding of fact to be questioned at this stage. The District Munsif found that neither the fifth defendant

nor his predecessor ever had actual notice of the plaintiff's sub-mortgage, and that finding is not now contested. It cannot be disputed that on the authorities, if a mortgagor without notice of any sub-mortgage pays off his mortgagee out of Court, the sub-mortgagee cannot after that redemption bring the right mortgaged to him to sale. For that we have *Narayana Mudali* v. *Raghavammal*(1), *Chinnaswamy* v. *Venkataramakrishnayya*(2), *Sahadev Ravji* v. *Shekh Papa Miya*(3) and *Maung Shan Hpyu* v. *U Po Thaw*(4). Those were all cases in which the redemption proceeded out of Court. In this case, as I have mentioned, the fifth defendant brought his suit for redemption, and it was in the course of that suit that he made his payment. Mr. Ramakrishna Ayyar has contended that that makes a vital difference in the matter. Under rule 1 of Order XXXIV of the Code of Civil Procedure, the plaintiff, a sub-mortgagee, as a person interested in the mortgage-security should have been made a party to the fifth defendant's suit. Mr. Ramakrishna Ayyar contends that, as he was not made a party, the payment in his absence did not discharge the mortgage to the first and second defendants, which is still available to the plaintiff. He has relied upon certain expressions in the judgment of their Lordships of the Privy Council in *Sukhi* v. *Ghulam Safdar Khan*(5). Their Lordships there quote with approval as a correct statement the following sentences from the judgment of the High Court in that case:

"The plaintiff is a puisne mortgagee seeking to enforce her mortgage, the prior mortgagee in his suit having failed to make her a party. It is the duty of the Court to give the

(1) (1907) 18 M.L.J. 462. (2) (1917) M.W.N. 111.
(3) (1904) I.L.R. 29 Bom. 199. (4) (1927) I.L.R. 5 Rang. 749.
(5) (1921) I.L.R. 43 All. 469 (P.C.).

VISWANATHA AYYAR v. CHIMMUKUTTI AMMA.

REILLY J.

plaintiff the opportunity of occupying the position which she would have occupied if she had been made a party to the former suit."

Mr. Ramakrishna Ayyar would have us interpret that as meaning that we must put the plaintiff in this case into the position in which he would have been if he had been made a party to the fifth defendant's redemption suit and that he must now get what he would have got in that suit. But I do not think that their Lordships, in quoting those expressions, meant to lay down that, when one of the proper parties to a mortgage suit was not impleaded, the suit should be treated as if it had never been or as if the decision between the parties to the suit as it stood could be wiped out or that the hands of the clock should be put back or that necessarily the omitted party must get all that he would have got in that suit. It has been decided that, if a proper party in a mortgage suit is omitted, then his rights are not affected by that suit in the sense that he can still pursue his own remedy. That is so on general principles and is made clear in *Mulla Vittil Seethi* v. *Achuthan Nair*(1) and *Chinnu Pillai* v. *Venkatasamy Chettiar*(2). In this case the plaintiff, as the sub-mortgagee, had a right to sue for sale of the property mortgaged to him. If he was not made a party to the fifth defendant's suit, his right to bring his own suit was unaffected and could be pursued by him. But, if he brought such a suit, what would he get? All he could get would be a decree for sale of the mortgage right which was mortgaged to him and, if necessary and available, in due course a personal decree against his mortgagors. It happens that in consequence of the redemption of the land mortgaged it is of no use to the plaintiff to bring that mortgage to sale. It is

(1) (1911) 21 M.L.J. 213. (2) (1915) I.L.R. 40 Mad. 77.

gone; and therefore all that remains to him is a personal decree against his mortgagors, to which the District Munsif has added a decree for sale of their possessory right, if any.

But Mr. Ramakrishna Ayyar has also contended that *Sukhi* v. *Ghulam Safdar Khan*(1) is a direct decision that a simple sub-mortgagee left out of a mortgage suit to which his mortgagor is a party can in all cases afterwards enforce his mortgage by sale. I think it is clearly a mistake to suppose that *Sukhi* v. *Ghulam Safdar Khan*(1) was a case dealing with a sub-mortgagee. In that case the first mortgagee brought a suit for sale of his mortgage without impleading the second mortgagee, got a decree, brought the property to sale and bought it himself. He died, bequeathing what he got by that purchase to his widow, and she gave it to her nephews, taking from them a mortgage over it to secure certain annual payments to her for maintenance. After that the second mortgagee brought a suit for foreclosure against the nephews omitting to make the widow a party. He got a decree for foreclosure and paid the nephews about Rs. 3,000 claimed by them under the first mortgage, which they put forward as a shield against the second mortgagee. The second mortgagee then got possession of the property. In the suit which came before the Privy Council the widow sued for sale, and she eventually got a decree for sale for the realization of the amount of Rs. 3,000, which had been paid by the second mortgagee on the first mortgage, on the ground that the nephews had derogated from the right mortgaged to her to that extent. But it was also provided that, if she wanted a decree to recover by sale any further amount on her mortgage, she must pay off

(1) (1921) I.L.R. 43 All. 469 (P.C.).

VISWANATHA AYYAR v. CHIMMUKUTTI AMMA.

REILLY J.

the second mortgagee. On these facts I think it is quite clear that the widow was not, as Mr. Ramakrishna Ayyar suggested, a sub-mortgagee. What was mortgaged to her was what her husband, the first mortgagee, had got in his sale, i.e. the whole interest in the property to the extent of the equity of redemption and his own mortgage but excluding the interest represented by the second mortgage. Their Lordships, while quoting from the judgment of the High Court a statement which they say is correct, quote her description as a puisne mortgagee; and it is quite clear that she must have been a puisne mortgagee, as otherwise she would not have been postponed to the second mortgagee. The case is therefore no authority for the proposition that a sub-mortgagee left out of a redemption suit against his mortgagor, which ends in redemption, can claim afterwards to bring either the property originally mortgaged to his mortgagor or what was mortgaged to himself to sale. It is a fact, as mentioned by SPENCER J. in his judgment, that MADHAVAN NAIR J. in Second Appeal No. 668 of 1921 relied upon this judgment of the Privy Council in deciding in favour of a sub-mortgagee in those circumstances. I think it is quite clear that MADHAVAN NAIR J. realised that the case, with which the Privy Council were dealing in *Sukhi* v. *Ghulam Safdar Khan*(1), was a puisne mortgagee's case, not a sub-mortgagee's case, as has been suggested. But he regarded it as applicable to a sub-mortgagee's case. With respect I may perhaps point out that on a reference to the papers it appears that the case before MADHAVAN NAIR J. himself was not merely a sub-mortgagee's case; it was a case of a puisne mortgagee also, and therefore there is no doubt that the Allahabad case was applicable to it. But that case in my opinion is no authority for giving a sub-mortgagee

(1) (1921) I.L.R. 43 All. 469 (P.C.).

the right which is claimed for him in this case. In *Muhammad Haji* v. *Mohidin Kutti*(1) a Bench of this Court decided that a sub-mortgagee left out of a redemption suit against his mortgagor after redemption had been effected could not enforce his sub-mortgage. And I think it is quite easy to see that on principle there is a distinction between the position of a pusine mortgagee and a sub-mortgagee in that respect. A pusine mortgagee obtains an interest in the property originally mortgaged; and every puisne mortgagee in his turn has a right to have his claim satisfied out of the property originally mortgaged until it is exhausted. A sub-mortgagee has no direct interest in the property originally mortgaged by his mortgagor's mortgagor. He has only an interest in the mortgage right obtained by his mortgagor—a right which he knows is terminable—and, when that right has been legally terminated, his security so far is gone. A mortgagor cannot be allowed by redeeming some of his mortgagees to defeat others; but, when a mortgagor wishes to exercise his legal right to redeem a mortgage created by him, he cannot be obstructed or delayed by the existence of a sub-mortgage of which he has never had knowledge or notice. We are certainly not at liberty to allow new obstacles to be invented in the way of redemption.

So far I have been dealing with the case as if the fifth defendant had no knowledge nor notice of the plaintiff's sub-mortgage. Mr. Ramakrishna Ayyar has raised a contention that, though the fifth defendant had no actual knowledge of the sub-mortgage, he had constructive notice of it. It is not suggested that the plaintiff was in possession of the property or that he had the kanam deed in his possession when the fifth

(1) (1920) 30 M.L.T. 21.

VISWANATHA AYYAR v. CHIMMOKUTTI AMMA.

REILLY J.

defendant came to pay off the mortgage. Constructive notice is not suggested in either of those ways. But it is contended that, when the fifth defendant brought his suit for redemption, it was his duty under rule 1 of Order XXXIV of the Code of Civil Procedure to bring before the Court all the parties interested in the mortgage-security, and in order to perform that duty he ought to have searched the records of the Registration Department, and, if he had done so, he would have discovered the plaintiff's sub-mortgage. It cannot be contended in a case like this that the registration of the sub-mortgage itself was notice. That is not the law as it was at the time of the fifth defendant's suit, nor is it even the law as altered by the recent amendment of the Transfer of Property Act. And the cases I have quoted, *Narayana Mudali* v. *Raghavammal*(1), *Chinnaswamy* v. *Venkatarama-krishnayya*(2), *Sahadev Ravji* v. *Shekh Papa Miya*(3) and *Maung Shan Hpyu* v. *U Po Thaw*(4), would all have been wrong if registration of the sub-mortgage was itself notice. But the contention is that the fifth defendant, if he was to perform his duty to the Court, would have been bound to search the records of the Registration Department in order to find out who were the parties interested in the mortgage-security so as to make the array of defendants in his suit complete. As Mr. Rama-krishna Ayyar has urged, in *Tilakdhari Lal* v. *Khedan Lal*(5) their Lordships of the Privy Council in discussing the duty of a plaintiff under section 85 of the Transfer of Property Act, before the present Code of Civil Procedure came into force, to bring before the Court in a mortgage suit all the parties interested in the property say :

(1) (1907) 18 M.L.J. 462. (2) (1917) M.W.N. 111.
(3) (1904) I.L.R. 29 Bom. 199. (4) (1927) I.L.R. 5 Rang. 740
(5) (1920) I.L.R. 48 Calc. 1 (P.C.).

"In order to discharge that duty the plaintiff was bound to search the register, and his omission to do so would be presumed to have been a wilful abstention from the search or gross negligence ; and in either case he would be deemed to have had notice of the fact that he would have discovered if the search had been made."

Those remarks appear to be equally applicable to the duty of a plaintiff in a mortgage suit under rule 1 of Order XXXIV of the Code ; and in that sense I do not see how we can escape the result that the fifth defendant, when he brought his suit, must have had constructive notice of the plaintiff's sub-mortgage. But what is the result of that ? The fifth defendant did not perform the duty to the Court which should have been performed. He might have been penalised in various ways for that. Anything that was done in the suit in the absence of the plaintiff would not prevent the plaintiff from pursuing his own remedy as he might be advised. But can that affect the legal result of the fifth defendant's redemption suit between the parties to it ? The suit was not altogether ineffective because the plaintiff was not made a party to it. We cannot wipe out that suit; we cannot pretend that it was never heard and decided ; we must respect its legal effect ; and as between the fifth defendant and his mortgagees, the first and second defendants, the legal effect of what happened in that suit is that their kanam was redeemed and, so far as they are concerned, is gone for ever. The plaintiff had only a mortgage right over that kanam, and, if the kanam is gone, then the whole foundation of his suit, so far as it is for sale, is gone too. In spite of the fact that in accordance with a very long course of decisions payment out of Court in redemption by a mortgagor to his mortgagee with the knowledge that there is a sub-mortgagee who is not satisfied cannot affect the sub-mortgagee's right, as in this case the mortgage has been redeemed

VISWANATHA AYYAR v. CHIMMUKUTTI AMMA.

KEILLY J.

in accordance with the decree of the Court, we cannot turn the clock back and pretend for the benefit of the plaintiff or any one else that that has not happened. That is in effect the way in which the question was dealt with in *Muhammad Haji* v. *Mohidin Kutti*(1), and with respect I think that that is the way to look at it.

There was one other contention raised by Mr. Ramakrishna Ayyar on the ground that the payment in this case was admittedly made by the fifth defendant to the first and second defendants after the preliminary decree in the redemption suit but not into Court. The payment was made out of Court and was reported to the Court. He contends that, after a preliminary mortgage decree is made directing payment of an amount into Court, such and such results follow, but no payment out of Court has any valid effect. For that he relies upon *Singa Raja* v. *Pethu Raja*(2). What was decided in that case was that, if after a preliminary decree the mortgagor alleges that he has paid the amount due from him out of Court and the mortgagee disputes it, the Court will not recognize a payment not made in accordance with the directions of the decree into Court. But that can in no way affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court. If they are in agreement and bring the payment to the notice of the Court, it is surely absurd for the Court to take up the position that the preliminary decree still stands and can be pursued, although the parties do not wish it to be done. Certainly that cannot be done at the instance of a third party not impleaded in the suit.

I may add in conclusion that this case has been argued before us as one of a mortgage and a submortgage. The mortgage is a kanam, and a kanam is

(1) (1920) 30 M.L.T. 21.

(2) (1918) I.L.R. 42 Mad. 61.

not a mortgage only: it is also a lease. But throughout these proceedings in all the Courts the case appears to have been treated as one of mortgage, and in that way I have dealt with it. If it were treated as a case, not of a sub-mortgage of a mortgage right, but of a mortgage of a leasehold right, still more if it were treated as a case of a mortgage of a kanam tenure under the new Malabar Tenancy Act, other considerations might arise. But I do not think that we ought to go into those aspects of the matter on the present occasion in view of the way in which the case has been treated in all the Courts.

In my opinion all the appellant's contentions fail, and this appeal should be dismissed with costs.

ANANTAKRISHNA AYYAR J.—I agree.

A.S.V.