

1894
August 15.

Before Mr. Justice Blair and Mr. Justice Burkitt.

KALI CHARAN AND ANOTHER (PLAINTIFFS) v. AHMAD SHAH KHAN
(DEFENDANT.)*

Mortgage Suit by second mortgagors against purchaser of equity of redemption who had paid off a prior mortgage—Second mortgagors ignoring lien of purchaser of equity of redemption.

One A. S. purchased the equity of redemption of a property subject to two mortgages, and as part of the transaction paid off the prior mortgage. The mortgagors under the second mortgage sued to bring the mortgaged property to sale, making the original mortgagor and the purchaser of the equity of redemption defendants, but omitting any mention of the lien acquired by such purchaser. *Held* that such omission was not a valid reason for dismissing the plaintiff's suit altogether. *Salig Ram v. Harcharan Lal* (1) distinguished.

THE facts of this case were as follows :—

The plaintiffs brought their suit against two persons, Marjad Singh and Ahmad Shah Khan, alleging that the father of Marjad Singh had, on the 12th of April 1877, executed in their favor a bond for Rs. 300, hypothecating certain zamindari property, and subsequently on the 10th of January 1880, had executed a sale-deed by which he conveyed to the second defendant, Ahmad Shah Khan, the property mortgaged to them; and they prayed for realization of the mortgage debt, principal and interest, by sale of the mortgaged property.

Ahmad Shah Khan, the vendee-defendant, put in a written statement, in which he pleaded that he had bought the property in good faith and for an adequate consideration, without knowledge of the plaintiffs' mortgage, the sale having been made for the purpose of satisfying a mortgage on the property of a prior date to that of the plaintiffs. He alleged that the plaintiffs' suit was brought in bad faith with knowledge of the prior mortgage. He also pleaded adverse possession for more than 12 years, and that the plaintiffs' mortgage was a fictitious and collusive transaction.

* Second Appeal No. 1107 of 1893, from a decree of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farukhabad, dated the 14th June 1893, reversing a decree of Munshi Bakhtawar Lal, Munsif of Farukhabad, dated the 24th April 1893.

The Court of first instance (Munsif of Farukhabad) found the issues as to limitation and fraud against the defendant. It found that the sale to the defendant Ahmad Shah was a valid transaction, and that the plaintiffs, though entitled to a decree for sale on their mortgage, could not bring the property to sale without first discharging the defendant's prior incumbrance, and gave the plaintiffs a decree accordingly. The defendant Ahmad Shah Khan appealed.

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The lower appellate Court (Subordinate Judge of Farukhabad), finding that the defendant had paid off the prior mortgage as alleged by him and that the plaintiffs had wilfully omitted mention of this fact in their plaint, reversed the decree of the Munsif and dismissed the plaintiffs' suit.

The plaintiffs thereupon appealed to the High Court.

Babu *Ratan Chand*, for the appellant.

Pandit *Sunder Lal*, for the respondent.

BLAIR and BURKITT, JJ.—This is a suit by the holders of a second mortgage duly registered to recover by sale of the mortgaged property principal and interest due to them upon a bond executed in their favor by the second defendant. The first defendant and sole respondent here is the purchaser from the second defendant of the equity of redemption, and a certain amount of the purchase money was left with the vendee for the payment of a mortgage debt due under a mortgage of older date than that of the plaintiffs. It must be taken to be the fact that the plaintiffs had knowledge of such prior incumbrance. The second defendant by his purchase became full owner of the hypothecated land, subject to plaintiffs' mortgage; that is to say, the equity of redemption had passed to him, and the further equity arising out of his payment of the money due under the prior mortgage by which it had become extinguished. By virtue of his equity of redemption he had become entitled to relieve the land of the plaintiffs' second mortgage by payment, and by this payment, which extinguished the first mortgage, he was entitled to protect himself against a suit for sale instituted by the plaintiffs upon their second mortgage,

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because such payment unquestionably gave him a right to have, in priority to them, satisfaction of his lien, as though he stood in the shoes of the first mortgagee. But it would be incorrect to say that he was ever a mortgagee. The plaintiffs in their suit impleaded the mortgagor and his assignee, but made no mention of the lien acquired by defendant No. I. The lower appellate Court, reversing the decree of the Munsif, has refused on a plaint so drawn to allow the claim of the plaintiffs, subject to the repayment of the lien of defendant No. I, as decreed by the Munsif. The only question before us is whether upon account of the omission of all mention of the respondent's lien the suit ought to have been dismissed, although on a properly drawn plaint the plaintiffs would have been entitled to the decree given by the Munsif. Upon this preliminary point the plaintiffs' suit has been dismissed. The lower appellate Court acted upon the authority of the case of *Salig Ram v. Har Charan Lal* (1). The head-note correctly sums up the ruling in that case:—"Where a second mortgagee coming into Court and denying or ignoring the title of a prior mortgagee asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee." The *ratio decidendi* is thus expressed in the judgment:—"It is a suit brought on a false statement of facts or upon a suppression of material facts." In that case the defendant had been mortgagee prior to his purchase of the equity, and, had such purchase never taken place, must necessarily have been impleaded by a second mortgagee suing his mortgagor for enforcement of lien. The existence of such a mortgage must have been known to the second mortgagee and the rights of the first mortgagor perfectly understood. But the rights of the purchaser of an equity of redemption who had never been a mortgagee at all, but had obtained a right by repayment to use the first mortgage as a shield, are much less generally known and understood. Indeed the Munsif remarks that "it is likely that the plaintiffs' knowledge of the prior incumbrances and

(1) I. L. R., 12-All., 548.

of their discharge by the defendant-vendee caused to the plaintiffs doubt and uncertainty." This case does not appear to us to fall strictly within the ruling above quoted, and we are unable to lay down, as a rule of universal application, the principle that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled. It seems to us that each case should be dealt with on its own merits. We reverse the finding of the lower appellate Court on the preliminary point, and remand the case to that Court under s. 562 of the Code of Civil Procedure with directions to restore it to its place on the register of first appeals and dispose of it upon the merits. This appeal is decreed with costs.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

GANGA DEI v. SHER SINGH.

Criminal Procedure Code, s. 195—Sanction to prosecute—Sanction in respect of an offence committed in the course of a civil suit of over Rs. 5,000 in value—Appeal.

Where sanction to prosecute is granted in respect of one of the offences referred to in s. 195 of the Code of Criminal Procedure, such offence having been committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an application under s. 195 of the Code of Criminal Procedure for revocation of the order granting sanction will lie.

THE facts of this case are as follows:—

One Sher Singh, plaintiff in a civil suit before the Subordinate Judge of Shábjahánpur, applied to the Subordinate Judge's Court for permission to prosecute the defendant in the suit, Ganga Dei, for making false statements in, and not giving proper answers to, interrogatories administered under s. 121 of the Code of Civil Procedure. On this application the Court gave sanction for the prosecution of the defendant in the following terms—"Under the reasons given in this Court's judgment, dated 27th June 1893, the Court grants permission to the plaintiff to prove in the Criminal Court the defendant's false statement or the offence under s. 188 of the Indian Penal Code, or both offences, against her."

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