

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

GANGA PRASAD (DEFENDANT) v. CHUNNI LAL (PLAINTIFF).

*Mortgage—Mortgage by mortgagee of his rights as such but without assignment—
Rights of sub-mortgagee as against original mortgagee.*

1895
December 6.

R and others mortgaged certain immovable property to N. K. N. K. made a sub-mortgage to C. L. purporting to mortgage to him his rights as mortgagee, but without assigning his mortgage to C. L. Upon this title C. L. sued for sale of the property mortgaged by R and others to N. K.

Held that C. L. was not entitled to bring the property mortgaged to N. K. to sale, but at most to obtain a decree for money against N. K., in execution of which he might possibly have attached, if it had not been paid off, the mortgage held by N. K.

THE facts of this case are as follows :—

Rupa and others, or their predecessors in title, had mortgaged certain immovable property by two mortgages, dated the 21st of July 1869 and the 18th of February 1873, to one Nand Kishore. Nand Kishore by a bond dated the 19th February 1890 purported to mortgage his rights as mortgagee under the said mortgage to Chunni Lal for Rs. 290. On the 18th of July 1892 Chunni Lal instituted a suit against Nand Kishore and the mortgagors for recovery of the money advanced by him, with interest, by sale of the mortgaged property, and he also applied for an injunction to restrain the mortgagors from redeeming the mortgage. The injunction prayed for was granted, but meanwhile, on the same date that the suit of Chunni Lal was instituted, the mortgagors redeemed the mortgage in favour of Nand Kishore and made a fresh mortgage in favour of one Ganga Prasad. Ganga Prasad was accordingly made a party as defendant to the suit.

In answer to this suit Nand Kishore pleaded that the mortgage had been redeemed and was no longer subsisting ; the original mortgagors raised a similar plea, and also pleaded that they had no notice of the plaintiff's debt. Ganga Prasad, the subsequent mortgagee, pleaded that he had acted in good faith and without knowledge of the plaintiff's debt.

Second Appeal No. 1259 of 1893 from a decree of Rai Pandit Indar Narain, Additional Subordinate Judge of Meerut, dated the 25th May 1893, confirming a decree of Maulvi Muhammad Abdul Latif, Munsif of Kharja, dated the 10th January 1893.

1895

GANGA PRA-
SAD
v.
CHUNNI LAL.

The Court of first instance (Munsif of Khurja) gave the plaintiff a decree under section 88 of the Transfer of Property Act for sale of the mortgaged property.

The mortgagors and the second mortgagee appealed, and the lower appellate court (Subordinate Judge of Meerut) dismissed the appeal.

The defendant Ganga Prasad appealed to the High Court.

Pandit *Moti Lal* for the appellant.

Munshi *Gobind Prasad* for the respondent.

EDGE, C. J., and BURKITT, J.—Rupa and others mortgaged immovable property to Nand Kishore. Nand Kishore made a sub-mortgage to Churni Lal, the present plaintiff, *i.e.*, purported to mortgage to him his rights as mortgagee, but did not assign his mortgage to him. Churni Lal has brought this suit for sale of the property mortgaged by Rupa and others; in other words, he seeks to get the debt due from Nand Kishore to him paid by sale of the property of Rupa and others, who were not his mortgagors. He has obtained a decree for money against Nand Kishore, and he has also obtained a decree for sale of the property mortgaged by Rupa and others. Ganga Prasad, who was a party to the suit, was a mortgagee of some of the lands from Rupa and others subsequent to the mortgage to Nand Kishore. Ganga Prasad has paid off Nand Kishore's mortgage and has thus become sole mortgagee of the lands in question as far as the parties to this suit are concerned. He has appealed against so much of the decree below as was a decree for sale of the property mortgaged by Rupa and others. It is inconceivable to us how any Subordinate Judge could have given the plaintiff a decree for sale under section 88 of Act No. IV of 1882 of property which was not mortgaged to him. The sole right of Churni Lal was to get a decree for money against Nand Kishore, and then under that decree he might possibly have attached, if it had not been paid off, the mortgage held by Nand Kishore. The granting of a decree for sale is not the only extraordinary part of the decree of the Court below. The Court actually made an order for an injunction restraining the mortgagors from discharging by payment the mortgage which they had made. We fail to see upon

what principle any such order could have been made. We dismiss the appeal with costs, and set aside so much of the decree below as decreed a sale and an injunction.

Appeal dismissed.

1895

GANGA PRA-
SAD
v.
CHUNNI LAL.

1895
December 6.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

NAJJU KHAN (PLAINTIFF) v. IMTIAZ-UD-DIN (DEFENDANT).*

Co-sharers—Rights of co-sharers as to erection of buildings on joint land.

One of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners. *Shadi v. Anup Singh* (1) referred to.

THE facts of this case appear from the order of reference made by Banerji, J., which was as follows:—

“This appeal relates to a certain building called a *seh-dari*, which the respondent has erected upon land belonging jointly to him and to the appellants. The lower appellate Court has found that the building was constructed without the acquiescence of the appellants, but it has dismissed his claim for the removal of the building and for the restoration of the site to its former position, on the ground that the appellants have not proved any substantial injury. The Subordinate Judge has not referred to any authority in support of his view, but he had evidently in his mind the ruling of this Court in *Paras Ram v. Sherjit* (2). The soundness of the proposition laid down in that case was questioned at least in the judgment of the learned Chief Justice in the Full Bench case of *Shadi v. Anup Singh* (1). The question being one of importance, and having regard to the rulings referred to above, I deem it desirable that this case should go before a Bench of two Judges.”

Pandit *Moti Lal* for the appellants.

• The respondent was not represented.

EDGE, C. J., and BURKITT, J.—One co-sharer erected a new building on some common land without the consent or acquiescence

* Second Appeal No. 1250 of 1893, from a decree of Pandit Baj Nath, Subordinate Judge of Moradabad, dated the 17th May 1893, modifying a decree of Babu Sheo Prasad, Munsif of Bijnor, dated the 14th December 1891.

(1) I. L. R., 12 All., 436.

(2) I. L. R., 9 All., 661.