

would not be entitled to obtain possession of the property. In those proceedings they did not deny the plaintiffs' title. Under these circumstances the Court below exercised a proper discretion in not allowing costs.

We dismiss the objections.

Appeal dismissed.

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*Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji,
Mr. Justice Burkitt and Mr Justice Aikman.*

BALMAKUND AND ANOTHER (PLAINTIFFS) v. MUSAMMAT SANGARI
AND ANOTHER (DEFENDANTS).*

Civil Procedure Code section 43—Act No. IV of 1882 (Transfer of Property Act) section 85—Cause of action—Rights inter se of two mortgagees of the same property from the same mortgagor.

Two persons each held a mortgage over the same property from the same mortgagor. The mortgages were both executed on the same day. The mortgagees each instituted a suit for sale on the same day and obtained decrees, in execution of which they had the mortgaged property put up for sale, and each purchased it at the sale under his decree respectively. Neither mortgagee made the other a party to the suit on his mortgage. The representative of one of the mortgagee decree-holders, Musammat Sangari, got possession of the mortgaged property and held it as against the other mortgagee decree-holder or his representatives. Thereupon the representatives of the other mortgagee brought their suit for possession of a moiety of the property, or in the alternative for redemption of the other mortgage.

Held that such suit was not barred either by the provisions of section 43 of the Code of Civil Procedure or by reason of those of section 85 of the Transfer of Property Act, 1882.

The facts of this case are fully stated in the judgment of Knox, J., as also in those of Banerji, J. and of Burkitt, J.

Pandit *Sunder Lal* and Maulvi *Ghulam Mujtaba*, for the appellants.

Babu *Durga Charan Banerji* and Babu *Satyra Chander Mukerji*, for the respondents.

* Second appeal No. 183 of 1894, from a decree of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 14th October 1893, confirming a decree of Maulvi Mazhar Hasau, Subordinate Judge of Aligarh, dated the 24th December 1892.

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KNOX, J.—One Jhamman Singh, on the 23rd of January, 1894, executed two separate mortgage deeds over a $3\frac{1}{4}$ biswa share of zamindari property situate in mauza Ankheri. One of these was in favour of Paramsukh and the second in favour of Puran Mal.

On the 22nd of January, 1886, each of the mortgagees, as represented by their heirs, instituted a separate suit against Jhamman Singh for recovery of the mortgage money and for enforcement of his lien over the mortgaged property. In each case the other mortgagee was made no party to the suit.

The suit brought by the heirs of Paramsukh terminated in a decree on the 1st of March, 1886, and that brought by the heirs of Puran Mal in a decree dated the 5th of April, 1886.

Sangari, the heir of Puran Mal, brought the property to sale on the 20th of July, 1888, and purchased it. The heirs of Paramsukh, the appellants, did the same on the 20th of April 1889, and also themselves purchased it. Musammatt Sangari had, however, been first in securing mutation of names in her favour in the Collector's records and in getting possession over the property, and she applied for partition. The appellants objected, but as they were not in possession, their objection was disallowed.

They accordingly instituted the present suit claiming that a decree might be given declaring their lien to be prior to that of Musammatt Sangari, or that a moiety of the property might be awarded them, or that they might be allowed to redeem the mortgage, subject to the payment of Musammatt Sangari's lien. The Judge held that, as Balmukand in his first suit could, and should, have made Musammatt Sangari a party to the case, and settled the question of proof and of priority and of his right to redeem, and as he had not done so, he could bring no second suit for the purpose under section 43 of the Code of Civil Procedure. He based his decision to this effect upon an unreported decision of this Court in F. A. No. 190 of 1889, and dismissed the appellants' suit.

The appellants then came to this Court contending that their suit was not barred by section 43 of the Code of Civil Procedure.

The Division Bench of this Court considering that this point had been dealt with differently in two unreported decisions of this Court, *viz.*, F. A. No. 190 of 1889, decided on the 22nd of June, 1891, and S. A. No. 1042 of 1892, dated the 20th of July 1895, referred the point for decision by a Full Bench of this Court.

It is admitted that Jhamman is not a necessary party to this suit. We are unanimously of opinion that the suit is not barred by section 43. That section is one which has no reference to array of parties. We are not now concerned with the former suit instituted by the appellants. The contention was pressed upon us that as section 85 of the Transfer of Property Act required that in the first suit brought by the appellant Musammat Sangari should have been joined as a party, and as the appellants were entitled when they brought their first suit both to the remedy against Jhamman Singh, *viz.* recovery of the mortgage money and enforcement of their lien in default, and to the remedy against Musammat Sangari, *viz.* redemption of the mortgaged property, subject to the payment of what was due to Musammat Sangari in respect of their cause of action, and as they omitted to sue for the latter remedy they cannot now sue for it.

This contention is based upon a misconception of the term 'cause of action.'

The appellants had two separate causes of action at the time they instituted this suit in the Court of the Subordinate Judge of Aligarh, namely, that against Jhamman Singh and that against Musammat Sangari. The object with which section 85 was specially enacted was to enable the various incumbrances on one property (and each incumbrance represents a separate cause of action) to be brought into one suit and so save multiplicity of actions. It was never intended to, and could never, operate as a section fusing all causes of action arising out of each incumbrance into one consolidated cause of action. The provisions of section 85 of the Transfer of Property Act and of section 43 of the Code of Civil Procedure in no way govern the present suit.

I would therefore dismiss Jhamman Singh from the suit.

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I would allow the appeal as against Musammat Sangari, and, setting aside the judgment and decree of the lower Court on the preliminary point, would remand the case to the Court below with directions to restore it to its file of pending appeals and dispose of it according to law.

BANERJI, J.—The question we have to determine upon this reference is whether the suit of the plaintiffs appellants offends against the 43rd section of the Code of Civil Procedure. The facts out of which the question has arisen are these. One Jhamman Singh executed two simple mortgages of the same property on the 23rd of January, 1874, one in favour of Param Sukh and the other in favour of Puran Mal. In 1886, the legal representatives of the two mortgagees, who had in the meantime died, brought two suits for sale, one in respect of each mortgage, and a decree for sale was made in each suit. Neither plaintiff joined the other mortgagee as a party to his suit. Musammat Sangari, the widow and legal representative of Puran Mal, caused the property now in suit, which was a part of the mortgaged property, to be sold in execution of her decree on the 20th of July, 1888, and purchased it herself. Subsequently, on the 20th of April, 1889, the legal representatives of the other mortgagee caused the same property to be sold in execution of their decree, and the present plaintiffs became the purchasers. Musammat Sangari, however, obtained possession. Thereupon the present suit was brought. The plaintiffs alleged that the mortgage in favour of Param Sukh had priority over the other mortgage, and therefore they alone were entitled to possession of the property, and that in any case they were entitled to half the property. They further urged that as the legal representatives of Param Sukh were not parties to Sangari's suit for sale the plaintiffs were entitled to redeem the mortgage made in favour of Sangari's husband, Puran Mal. The plaintiffs accordingly sued for possession, and prayed that in the event of a decree for possession not being granted a decree should be made in their favour for redemption of Puran Mal's mortgage.

The lower appellate Court has dismissed the claim for possession upon the finding that Param Sukh's mortgage was not prior to the other mortgage. It has dismissed the claim for redemption on the ground that as the representatives of Param Sukh were bound to join the other mortgagee as a party to their suit for sale and to seek to redeem the mortgage held by him, the present claim is barred by the provisions of section 43 of the Code of Civil Procedure. It is the correctness of this last ruling of the learned Judge below which has been questioned in this appeal.

In my opinion the 43rd section of the Code of Civil Procedure is no bar to the plaintiff's suit for redemption of the mortgage held by Puran Mal.

That section provides against what is called the splitting of a cause of action, and is founded on the maxim that no one shall be twice vexed for one and the same cause. (See Whitley Stokes' Anglo-Indian Codes, Vol. II, p. 490). The section in my opinion forbids the institution of a second suit against the same defendant or his representatives in interest upon the same cause of action which was the foundation of the first suit. As observed by their Lordships of the Privy Council in *The Rajah of Pittapur v. Sri Rajah Venkata Mahipati Surya* (1) with reference to the corresponding section of Act No. VIII of 1859,—“that section does not say that every suit shall include every cause of action or every claim which the party has, but ‘every suit shall include the whole of the claim arising out of the cause of action’—meaning the cause of action for which the suit is brought,” that is, as section 43 of Act No. XIV of 1882 sets forth, “the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.” It is clear that in order that the said section may be applicable two things are essential: first, that both the suits must arise out of the same cause of action; and, secondly, that they must be between the same parties or between parties under whom they or any of them claim. Unless the cause of

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action be the same, there cannot be an omission or relinquishment of any portion of the claim which the plaintiff is entitled to make in respect thereof, and unless the defendant be the same person or his representative in interest, no one will be twice vexed for the same cause. A plaintiff's cause of action is not only the right which he asserts, but the infringement of that right by the defendant. Where the plaintiff's right is infringed by more persons than one and by different acts done separately by each of them, the plaintiff has a separate cause of action against each of those persons. The omission therefore to implead one of them in a suit brought against another cannot bar a subsequent suit against the person not so impleaded. Section 43 appears in a Chapter of the Code which relates to the frame of a suit and not to the array of parties, and this circumstance also shows that it has no application where the parties to the two suits are not the same persons or their representatives in interest. This view is supported by observations contained in the ruling of the Calcutta High Court in *Sabeer Khan v. Kalli Doss Dey* (1).

It is contended on behalf of the respondent that, according to the ruling of the majority of the Full Bench in *Matadin Kasodhan v. Kazim Husain* (2), a subsequent mortgagee who brings a suit for sale must redeem the prior mortgage in order to obtain a decree for sale, and that the result of this ruling is that the cause of action of a subsequent mortgagee in a suit for sale brought by him is the same both against his mortgagor and the prior mortgagee. I am unable to agree with this contention. Section 85 of Act No. IV of 1882 no doubt requires that a mortgagee bringing a suit for sale must join as a party to his suit every person who has an interest in the mortgaged property, of whose interest he has notice. As a prior mortgagee is a person who has an interest in the mortgaged property, he is a necessary party to the suit for sale brought by a puisne mortgagee, provided that the latter has notice of the prior mortgage. The omission to join such a prior mortgagee in the subsequent mortgagee's suit entails, according to

(1) I. W. R., 199.

(2) I. L. R., 13 All., 432.

the ruling of the Full Bench in *Mutadin's* case, the dismissal of the suit. But it does not bar the subsequent institution of a properly framed suit against the prior mortgagee for redemption of the mortgage. Such a bar, if it existed, must be sought elsewhere than in the Transfer of Property Act. It is urged that section 43 of the Code of Civil Procedure imposes the bar. But in my opinion that section, providing as it does against the splitting of causes of action, cannot apply unless the cause of action for both the suits is the same. A puisne mortgagee's cause of action as against a prior mortgagee to redeem the prior mortgage is not the same cause of action that he has against the mortgagor for the sale of the mortgaged property. The cause of action for the claim for redemption is the plaintiff's title as subsequent mortgagee and the refusal of the prior mortgagee to grant redemption. The cause of action for the claim for sale is his title as mortgagee (and it is immaterial whether he is the first mortgagee or a subsequent mortgagee) and the refusal of the mortgagor to pay the mortgage money. These causes of action are certainly not identical, and it is not right to say that a subsequent mortgagee's suit to redeem a prior mortgage and to foreclose the right of redemption of his mortgagor is founded on the same cause of action.

In the present case Musammat Sangari ought undoubtedly to have been joined as a party to the suit brought by the legal representatives of Param Sukh, and for this non-compliance with the provisions of section 85 of Act No. IV of 1882 their suit should, according to the ruling of the Full Bench referred to above, have been dismissed. They, however, obtained a decree against their mortgagor. The circumstance of their not joining in that suit persons who were necessary parties to it could not preclude them, or the plaintiffs, who stand in their shoes, from bringing the present suit against Musammat Sangari, who was not a party to the first suit, and will not therefore be subjected to the vexation of a second suit. Moreover, as I have shown above, the cause of action against her is not the same as that against the

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mortgagor. The present suit is not therefore obnoxious to the bar of the former suit under section 43 of the Code of Civil Procedure, or under any other rule of law, and it has been improperly dismissed as against Musammat Sangari.

As against Jhamman Singh defendant the plaintiffs had no cause of action for their present claim. He has ceased to have any interests in the property in question, those interests having passed to the other parties to the suit. He was not therefore a necessary party to the plaintiff's suit, and the decree for the dismissal of the suit as against him must be sustained.

I would allow the appeal against Musammat Sangari and remand the case to the Court below under section 562 of the Code of Civil Procedure for trial on the merits. Costs here and hitherto to follow the event.

BURKITT, J.—In this case two persons held each a mortgage over the same property from the same mortgagor. The mortgages were both executed on the same day. The mortgagees each instituted a suit for sale on the same day and obtained decrees, in execution of which they had the mortgaged property put up for sale and each purchased it at the sale under his decree. The respondent, Musammat Sangari (widow and representative of one of the mortgagees decree-holders) took prompt measures to obtain the benefit of her purchase, got herself put into possession of the property and successfully resisted all effort of the rival mortgagees decree-holders auction purchasers to oust her. The rival mortgagees decree-holders auction purchasers have now instituted this suit in which they have impleaded all necessary (and one unnecessary) parties. They asked for three reliefs. The first has been abandoned and need not be mentioned. In the second relief they asked for possession of a moiety of the property, and in the third they in the alternative asked to be allowed to redeem.

The Court of first instance dismissed the suit. The plaintiffs appealed, urging that theirs was the prior mortgage and that they were entitled to redeem.

The District Judge found that the appellants were not the prior mortgagees, and on the question of redemption he held that, as the appellants had not made the respondent Musammat Sangari a party to their suit for sale on their mortgage they were debarred by section 43 of the Code of Civil Procedure from instituting this suit. He came to that decision on the strength of an *obiter dictum* in an unreported case in this Court.

In second appeal to this Court the appellants contend that the learned District Judge was wrong in his decision on section 43 of the Code of Civil Procedure.

The respondent Jhamman, the original mortgagor, has been again quite unnecessarily impleaded as a respondent. He now has no possible interest in the property comprised in the mortgages. I think he should be dismissed from the suit with costs.

At the hearing of this appeal it was admitted by the learned advocate for the respondent Musammat Sangari that the suit as framed was not in any way barred by section 85 of the Transfer of Property Act. But he supported the ruling of the Court below that the suit was barred by the provisions of section 43 of the Code of Civil Procedure. His argument, as I understood it, was that the appellants when instituting their suit for sale on their mortgage ought under section 85 of the Transfer of Property Act to have impleaded the present respondent Musammat Sangari, who also held a mortgage of which they had notice over the property they sought to bring to sale. So far the argument of the learned advocate is sound. As a condition precedent to obtaining a decree for sale section 85 of Act No. IV of 1882 does make it imperative on a mortgagee to implead every person having an interest in the property comprised in the mortgage of whose interest the plaintiff mortgagee has notice. The appellants certainly ought not to have got their decree, nor should the respondent Musammat Sangari, who was *in pari delicto*, have obtained hers. Next, the learned advocate referring to the rule established in this Court by the case of *Matadin Kasodhan*

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v. *Kazim Husain* (1) that a puisne mortgagee seeking to bring to sale the mortgaged property must redeem a prior incumbrance and cannot sell subject to it, contended that among the remedies which the appellants had on their cause of action when suing their mortgagor for sale of the mortgaged property was one to redeem the prior incumbrance, and that, as they had not impleaded the person against whom that relief could be granted, they were barred from instituting this suit by section 43 of Code. To that contention I am unable to accede. Section 43 is in my opinion a provision as to the cause of action, and its object is to prevent the same party or his representatives from being more than once sued on the same cause of action or on any part of it. As against their mortgagor Jhamman the appellants put in suit the whole of the cause of action they had against him, when they, alleging the execution of the mortgage and the failure of the mortgagor to pay the amount due on it, asked for a decree for sale of the mortgaged property in default of payment by the mortgagor. They in that way exhausted their whole cause of action against their mortgagor and did not omit or relinquish any part of it so as to subject themselves to the penalty provided by the second clause of section 43. It is true, no doubt, that being, as found by the lower appellate Court, puisne mortgagees they had a cause of action against the respondent Musammat Sangari for redemption, and for that reason, and also because of section 85 of the Transfer of Property Act, they might have impleaded her and redeemed her prior mortgage. But that matter does not bring the case within section 43 of the Code of Civil Procedure. The appellants' cause of action as against their mortgagor Jhamman was not the same cause of action as that as against the respondent Musammat Sangari, their rival mortgagee. Section 43 nowhere prescribes that where one person has two distinct causes of action, different in their nature and in their incidents, respecting the same property, one against one person and other against another person, he is bound to join those causes in one suit. The section lays down no rule as to who is to be

impleaded as a defendant, and does no more than provide that the plaintiff must include in the relief he asks for in his plaint the whole claim he is entitled to make in respect of his cause of action against the defendant. Here, as I have shown above, the appellants did in their suit against their mortgagor make the whole of the claim they were entitled to make on their cause of action against him. It is the wording of section 85 of the Transfer of Property Act, and not that of section 43 of the Code of Civil Procedure, which rendered it incumbent on them to have impleaded the respondent and to have joined their cause of action against her in their suit against their mortgagor. But their omission to do so does not bring their present suit within the purview of section 43 of the Code of Civil Procedure.

I would therefore allow this appeal. I would dismiss the respondent Jhamman from the suit with costs as an unnecessary party, and, holding that the suit was not barred by section 43 of the Code of Civil Procedure, I would remand the record to the lower appellate Court under section 562 of the Code of Civil Procedure for a decision on the issues remaining untried. Costs of this appeal to follow the event.

BLAIR, J.—I concur in the order proposed by my brother Burkitt for the reasons on which it is based.

AIKMAN, J.—I concur in the conclusion arrived at by my learned colleagues and in the judgment of my brother Banerji. It is the more satisfactory that we have been able to arrive at this conclusion, because, if it were otherwise, the respondent Sangari would be benefiting by the failure to comply with the provisions of section 85 of the Transfer of Property Act. I also concur in the order proposed.

Appeal decreed and cause remanded

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