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February 17.

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

SUNDAR SINGH AND OTHERS (PLAINTIFFS) v. BHOLU AND OTHERS
(DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 85—Civil Procedure Code, section 43.—Cause of action—Mortgage—Holder of two mortgages on the same property suing separately on each.

There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit.

THE plaintiffs in this case held a mortgage of certain property from one Bholu, dated the 21st of October 1878. In January 1883 they acquired the mortgagee interest in a mortgage given by Bholu over the same property in August 1882. In December 1890 the plaintiffs obtained a decree for sale on the mortgage of October 1878. In the suit in which that decree was obtained the plaintiffs made no mention of their claim under the mortgage of August 1882. In May 1893 the plaintiffs, not yet having executed their decree obtained on the former mortgage in December 1890, brought the present suit asking for a decree for sale in virtue of their second mortgage of August 1882.

The Court of first instance (Subordinate Judge of Aligarh) dismissed the suit as being barred by the provisions of section 43 of the Code of Civil Procedure. The plaintiffs appealed. The lower appellate Court (District Judge of Aligarh) dismissed the appeal, holding that the suit was barred by the operation of section 43 of the Code of Civil Procedure read with section 85 of the Transfer of Property Act, 1882. From this decree the plaintiffs appealed to the High Court.

Mr. W. K. Porter, for the appellants.—Neither of the sections upon which the judgment and decree of the lower appellate Court were based applied to the facts of the case. Section 43 of the Code of Civil Procedure did not apply, because the plaintiffs'

* Second Appeal No. 1030 of 1894, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 18th June 1894, confirming a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 10th July 1893.

two mortgages gave rise to two separate causes of action. Section 85 of the Transfer of Property Act could not apply, because all the necessary parties were in fact on the record. So long as the plaintiffs had not executed their first decree by sale of the mortgage property there was nothing in law to prevent their getting a decree on their second mortgage and executing both decrees together.

Pandit *Sundar Lal*, for the respondents.—Section 67 of Act No. IV. of 1882 contemplates a sale of the “property” as distinguished from merely the bare rights and interests of a mortgagor, and section 85 insists upon the joinder in a suit for sale of all persons having a claim based on a mortgage of the property sought to be sold with the object of either redeeming or foreclosing them, so that the property may be sold from the mortgage in favour of the person so joined—*Mata Din Kasodhan v. Kazim Husain* (1). If the mortgage in suit had been assigned to a third person the plaintiffs would have been bound to implead him in their suit on the bond of the 21st of October 1878 and the sale in execution of the decree on the mortgage of the 21st of October 1878, would have been free of the incumbrance of of the mortgage in suit. The plaintiffs being the mortgagees under both the mortgages, in obtaining their decree on the mortgage of the 21st of October 1878, must be taken to have abandoned their claim on their second mortgage.

The judgment of the Court (EDGE, C. J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by EDGE, C. J.:—This appeal has been referred to the Full Bench. The plaintiffs were mortgagees under a mortgage of the 21st of October 1878. On that mortgage they obtained, on the 2nd of December 1896, a decree for sale under section 88 of the Transfer of Property Act. Before they brought the suit in which they obtained that decree the plaintiffs had become assignees of a mortgage of the 1st of August 1882, which was made to a third party by the same mortgagor and which mortgaged the same property as that

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which was mortgaged by the mortgage of the 21st of October 1878. The mortgage of 1882 was a mortgage by which it was agreed that the amount of the mortgage debt should be payable on demand. The present suit, which was brought on the 10th of May 1893, was brought for the enforcement of the mortgage of 1882, and in this suit the plaintiffs seek a decree for sale under section 88 of Act No. IV of 1882. The first Court dismissed the suit, applying section 43 of Act No. XIV of 1882 and section 85 of Act No. IV of 1882. The application of section 43 had reference to the previous suit. What application section 85 of Act No. IV of 1882 could have had to this case it is impossible to say: all the necessary parties were before the Court. The plaintiffs appealed and the Court of first appeal dismissed their appeal on the same grounds. From that decree dismissing their appeal this appeal has been brought.

Each suit was a suit for the enforcement of the security which was given for the debt. Consequently each suit was a suit in respect of which the cause of action was different from the cause of action in the other. Section 43 of the Code of Civil Procedure could have no application to such a case as this. This is conceded by the learned advocate for the respondents. So far as we are aware there is nothing in the Code of Civil Procedure or in the Transfer of Property Act which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit. Here the plaintiffs were entitled to obtain their decree for sale on the mortgage of 1878. It appears to us that their having obtained that decree can be no bar to their right to obtain a decree for sale on the mortgage of 1882. What benefit the two decrees will be to the plaintiffs it is difficult to see, except that the plaintiffs may execute one of these decrees by sale of the property, and, if there is a surplus arising from the sale, they may probably attach that surplus in execution of the other decree. One thing is quite clear, that the plaintiffs cannot sell the property twice

over, and they cannot sell under the second decree subject to the first. That would be selling the equity of redemption, a right which is not acknowledged or recognized by Act No. IV of 1882, and would be a mischief which has been struck at by section 99 of that Act. This Court in *Mata Din Kasodhan v. Kazim Husain* (1), which has been followed in many other cases, has recognized that the intention of the Legislature was to put an end to the abuses which existed before Act No. IV of 1882 came into force, and that there can be no sale of the equity of redemption apart from the property itself at the instance of the mortgagee.

We allow this appeal with costs, and we set aside the decrees of the lower appellate Court and of the Court of first instance with costs and remand this case under section 562 of the Code of Civil Procedure to the Court of first instance to be disposed of on the merits.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Burkitt.
BHAGIRATHI MISR (PLAINTIFF) v. SHEOBHIC AND OTHERS
(DEFENDANTS)*

Hindu law—Joint Hindu family—Rights of son in joint ancestral property—Mortgage.

A member of a joint Hindu family has no power in his father's life-time to make a mortgage of any part of the ancestral family property. *Balghobind Das v. Narain Lal* (2) and *Madho Parshad v. Mehrban Singh* (3) referred to.

THE facts of this case are as follows :—

The land in question in the suit was the ancestral property of one Mattu and his son Daulat. Mattu sold the greater portion of the property to the plaintiffs by deed dated the 15th of January

Second Appeal No. 1185 of 1895, from a decree of Babu Mohan Lal, Subordinate Judge of Jaunpur, dated the 19th September 1895, modifying a decree of Maulvi Shah Amjad-ullah, Munsif of Jaunpur, dated the 18th June 1895.

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

(2) I. L. R., 15 All., 339.

(3) I. L. R., 18 Calc., 157.

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