

1897

BRIJ LAL
v.
THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL.

1897

November 10.

the present application. The sections upon which the learned Judge purported to act contain no words depriving him of jurisdiction. We set aside the order of the Judge and return the application to be readmitted upon his file and dealt with according to law. The costs will be charged to the estate.

FULL BENCH.

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

SRI GOPAL (PLAINTIFF) v. PIRTHI SINGH AND OTHERS (DEFENDANTS)*
Civil Procedure Code, section 13, Explanation II—Res judicata—Matter which might and ought to have been made ground of defence in a former suit—Mortgage—Prior and subsequent mortgagees.

Held that the holder of three prior mortgages over the same property, who, in answer to suits brought by the holders of other mortgages over that property of dates subsequent to his, had pleaded his rights under one only of the mortgages held by him, was barred by reason of Explanation II to section 13 of the Code of Civil Procedure from afterwards bringing a suit for sale upon one of the remaining mortgages, which he might and ought to have pleaded as an answer *pro tanto* to the suits of the other mortgagees. *Mahabir Prasad Singh v. Maenaghten* (1), *Kameswar Parshad v. Raj Kumari Ruttan Kuar* (2), *Kailash Mondul v. Baroda Sundari Dasi* (3), *Sheonagar Singh v. Sita Ram Singh* (4), and *Mata Din Kasodhan v. Kazim Husain* (5), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Ram Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Messrs. *Abdul Majid* and *Abdul Raouf*, for the respondents.

The judgment of the Court [EDGE, C. J., BLAIR, BANERJI, BURKITT and AIKMAN, J. J.] was delivered by EDGE, C. J. :—

This is a suit for sale under section 88 of the Transfer of Property Act, 1882. The plaintiff is the representative of

* Second Appeal No. 1028 of 1894, from a decree of L. G. Evans, Esqr., District Judge of Aligarh, dated the 12th June 1894, confirming a decree of Batu Ganga Saran, Subordinate Judge of Aligarh, dated the 12th August 1893.

(1) L. R., 16 I. A., 107; S. O., I. L. R.,

16 Calc., 682.

(2) I. L. R., 20 Calc., 79.

(3) I. L. R., 24 Calc., 711.

(4) I. L. R., 24 Calc., 616.

(5) I. L. R., 18 All., 433.

one Ishur Das deceased. Ishur Das obtained three mortgages over the property in question. The first was made on the 21st of July 1871, the second on the 7th of February 1874, and the third on the 16th of July 1874. The present suit is brought on the mortgage of the 7th of February 1874. The mortgagors had also executed the following mortgages of this property, *viz.* a mortgage to Murli Singh and Sarnam Singh made on the 30th of August 1872, and a mortgage to Bhagwan Das on the 18th of August 1876. On the 11th of July 1883 Ishur Das brought a suit for sale on his mortgage of the 21st of July 1871, and on the 3rd of September 1883 he obtained a decree for sale. To that suit the other mortgagees were not parties. Under the decree in that suit $1\frac{1}{4}$ biswas were sold and were purchased by Ishur Das. Murli and Sarnam brought a suit for sale on the 15th of August 1883 on their mortgage of the 30th of August 1872, and got a decree on the 13th of December 1883. The other mortgagees were not made parties to that suit. In execution of that decree $1\frac{1}{4}$ biswas were sold, and were purchased by Murli and Sarnam. On the 27th of July 1888, Ishur Das being dead, his representatives brought a suit for sale on Ishur Das' mortgage of the 16th of July 1874. They obtained a decree for sale on the 26th of September 1888. The other mortgagees were not made parties to that suit. In execution of that decree 1 biswa $7\frac{1}{2}$ biswansis were sold and were purchased by Bechai Lal, one of the defendants to this suit. On the 18th of August 1888 Sri Ram, the then representative of Bhagwan Das, the holder of the fifth mortgage, brought a suit for sale on Bhagwan Das' mortgage of the 18th of August 1876, and made the representatives of Ishur Das parties to that suit. The representatives of Ishur Das pleaded their rights under the mortgage in favour of Ishur Das of the 21st of July 1871, but made no mention of the mortgage of the 7th of February 1874, nor did they raise any question as to their rights under that mortgage. In that suit Sri Ram, on the 19th of December 1889, obtained a decree for sale, subject to his redeeming Ishur Das' mortgage of

1897

SRI GOPAL
v.
PIRTHI
SINGH.

1897

SRI GOPAL
v.
PIRTHI
SINGH.

the 21st of July 1871. Sri Ram is dead and Musammat Janki, his representative, is one of the defendants to this suit. Murli Singh and Sarnam Singh are also defendants. The other defendants not already mentioned are the representatives of the mortgagors. On the 24th of September 1888 Murli and Sarnam brought a suit for redemption under section 92 of the Transfer of Property Act, 1882, against Ishur Das' representatives in respect of the $1\frac{1}{2}$ biswas which they had purchased in execution of the decree of the 13th of December 1883. On the 25th of July 1889 Murli and Sarnam got a decree for redemption on payment of the proportionate amount due to Ishur Das' representatives in respect of the sale of the $1\frac{1}{2}$ biswas under the mortgage of the 21st of July 1871. In that suit the representatives of Ishur Das did not plead their rights under the mortgage of the 7th of February 1874.

The first Court dismissed this suit. The plaintiff appealed, and the Court of first appeal dismissed the appeal, holding that the suit was barred by the operation of section 43 of the Code of Civil Procedure and also by the operation of section 13 of that Code. From that decree this appeal has been brought.

The contention as to the application of section 43 of the Code of Civil Procedure is that Ishur Das when he brought his suit on the 11th of July 1883, on the mortgage of the 21st of July 1871, should have also claimed to sell the mortgaged property under the mortgages of the 7th of February 1874 and the 16th of July 1874. We do not think it necessary to express any opinion upon that question further than this, that we are not prepared to endorse the decision of the Court of first appeal so far as it applied section 43 to this case.

The real point upon which, in our opinion, this case turns is whether or not section 13 of the Code of Civil Procedure applies. It is quite certain that in order to make section 13 applicable it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one to

which Explanation II applies. Indeed Explanation II to section 13 of the Code would be meaningless if it were necessary in a case which was covered by it that the matter should have been heard and finally decided in the previous suit. Their Lordships of the Privy Council in *Mahabir Parshad v. Macnaghten* (1) applied section 13 of the Code of Civil Procedure where the matter raised in the second suit had not been directly or indirectly raised, heard or decided in the previous suit. In that case they held that the matter of the second suit was matter which ought to have been made ground of defence in the former suit between the same parties, and that the appellants before them, who were defendants in the former suit, were barred from insisting on it "exceptio*ne rei judicate*". In *Kameswar Parshad v. Raj Kumari Ruttan Koer* (2) their Lordships took the same view of section 13 and of the effect of Explanation II to that section. In referring to the matter to which it was sought to apply the doctrine of *res judicata*, their Lordships say (at page 85):—"That it might have been made a ground of attack is clear. That it ought to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter ought to have been made a ground of attack in the former suit, and therefore that it should be deemed to be a matter directly and substantially in issue in the former suit and is *res judicata*."

That decision also shows that it is not necessary for the application of section 13, when Explanation II applies, that the matter in question should have been heard and finally decided in the previous suit. The decisions to which we have referred appear to us to be inconsistent with the decision in *Kailash Mondul v. Baroda Sundari Dasi* (3). We do not

(1) L. R. 16 I. A., 107; s. c., I. L. R.
16 Calc., 682.

(2) I. L. R., 20 Calc., 79.

(3) I. L. R., 24 Calc., 711.

1897

SRI GOPAL

v.

PIETHE
SINGH.

consider that their Lordships intended to depart in *Sheosagar Singh v. Sitaram Singh* (2) from the interpretation of section 13 of the Code of Civil Procedure which they had adopted in the two cases before their Lordships to which we have referred. In the last mentioned case in I. L. R., 24 Cal., 616, their Lordships had not to consider the effect of Explanation II.

As we have said, Sri Ram on the 18th of August brought a suit for sale on Bhagwan Das' mortgage of the 18th of August 1876. That mortgage was the last mortgage of the series. All the other mortgages had priority: consequently the holders of the prior mortgages were entitled to plead their mortgages as a bar to a decree for sale without prior redemption of their mortgages. Now the representatives of Ishur Das pleaded one only of their mortgages, *viz.* that of the 21st of July 1871. They might have pleaded the mortgage now in suit, *viz.* that of the 7th of February 1874. If they had pleaded that mortgage, Sri Ram could only have obtained a decree for sale subject, before the decree became operative to effect a sale, to his redeeming not only the mortgage of the 21st of July 1871, but that of the 7th of February 1874. It was held by this Court in Full Bench in *Mata Din Kasodhan v. Kazim Husain* (3) that a decree for sale under the Transfer of Property Act is a decree for sale of the mortgaged property, and that a decree for sale under that Act cannot be made for sale of property "subject to a mortgage." Before the passing of the Transfer of Property Act decrees for sale were made of all sorts of interests in properties mortgaged. Properties were sold subject to one, two, three, four and six mortgages. Persons interested were not made parties to the suits, and endless litigation was the result. One reason for the passing of the Transfer of Property Act was to strike at the shameful abuses which had arisen by reason of the procedure allowed by some of the Courts in the enforcement of mortgages, procedure which often only benefited the legal profession—no doubt a very deserving body of men—and ended in the ruin

(1) I. L. R., 24 Cal., 616.

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

of the unfortunate mortgagor, if not of one or more of the mortgagees. In order to strike at that system section 85 of the Transfer of Property Act was introduced to bring all persons interested before the Court in one suit, so that their rights might be dealt with and disposed of. The causes which led to the passing of that section and of other sections of the Transfer of Property Act are fully explained in *Mata Din Kasodhan v. Kazim Husain* (1), *Janki Prasad v. Kishen Dât* (2), and *Bhawani Prasad v. Kallu* (3). In our opinion not only might the representatives of Ishur Das have pleaded their mortgage of the 7th of February 1874, but they ought to have done so, and if they had done so, no decree for sale could have been made without these rights being protected by the decree. They not having done what they might and ought to have done as an answer *pro tanto* to the suit of Sri Ram, we are of opinion that section 13 of the Code of Civil Procedure applies and that the present suit for sale is barred. A decree for sale as against Murlî and Sarnam would be useless, for the property could not legally be sold so long as there was no right to sell as against Musummat Janki, the representative of Bhagwan Das.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

POKHPAL SINGH (DEFENDANT) *v.* BISHAN SINGH (PLAINTIFF).*

Act No. XV of 1877 (Indian Limitation Act) Sch. ii, Arts. 114, 148—Limitation—Mortgage—Suit by a mortgagor for recovery of possession from a mortgagee holding over after expiry of the term of a usufructuary mortgage.

When a mortgagee in possession under a usufructuary mortgage, holds over after the time limited in the mortgage deed for surrender of the property, his

* Second Appeal No. 892 of 1896 from a decree of Jala Piari Lal, Officiating District Judge of Mainpuri, dated the 23rd July 1896, confirming a decree of Manvi Muhammad Mazhar Husain Khan, Subordinate Judge of Mainpuri, dated the 13th June 1895.

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

(2) I. L. R., 16 All., 475.

(3) I. L. R., 17 All., 537, at p. 559.

1897

SRI GOPAL
v.
PIRKH
SINGH.

1897

November 11.