

APPELLATE CIVIL.

1900

January 4.*Before Mr. Justice Blair and Mr. Justice Burkitt.*

MEHRBANO (DEFENDANT) v. NADIR ALI AND ANOTHER (PLAINTIFFS).^{*}
*Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—
 Prior and subsequent mortgagees—Effect of non-compliance with
 section 85.*

A prior mortgagee, without making a puisne mortgagee a party to his suit, sued on his mortgage, obtained a decree for sale, sold the mortgaged property, and purchased it himself. Subsequently the puisne mortgagee holding a mortgage over the same property brought his mortgage into suit without making the prior mortgagee a party, and obtained a decree for sale. *Held* that the puisne mortgagee could not bring the mortgaged property to sale in execution of such decree. *Janki Prasad v. Kishen Das* (1), followed.

THE facts of this case are as follows:—

Dilawar Ali owned 6½ biswas of the village in suit. This share he hypothecated to Banwari Das by means of four deeds executed on different dates in the years 1874, 1875 and 1876. After the execution of at least two of these deeds Dilawar Ali mortgaged the same property to Narain Das. Banwari Das sued on his deeds before Act No. IV of 1882 came into force, and obtained a decree. He did not make Narain Das, the subsequent incumbrancer, a party to that suit. Narain Das sued in 1886, and obtained a decree. He did not make Banwari Das a party to his suit. Banwari Das, in execution of his decree, brought the mortgaged property to sale and purchased it himself. Narain Das sold his decree, but when the purchaser attempted to execute it by sale of the property, objection was taken by the representatives of Banwari Das, the first mortgagee.

The suit, out of which the present appeal arose, was brought by the representatives of Banwari Das for a declaration that the decree held by the defendant as purchaser from Narain Das could not be executed as against them. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit. On appeal the lower appellate Court (Additional Judge of Moradabad) reversed the decree of the Subordinate Judge and gave the

^{*} Second Appeal No. 605 of 1897, from a decree of H. W. Lyle, Esq., Additional District Judge of Moradabad, dated the 25th May 1897, reversing a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 2nd September 1896.

plaintiffs the declaration which they sought. The defendant thereupon appealed to the High Court.

Mr. S. *Amiruddin* for the appellant.

The Hon'ble Mr. *Conlan* and Maulvi *Ghulam Mujtaba* for the respondents.

BLAIR and BURKITT, JJ.—In this case the contending parties are practically the first and second mortgagees or their representatives. The first mortgagee, who is represented by the plaintiffs-respondents, sued upon his mortgages, obtained decrees for sale, and in execution purchased the mortgaged property. To his suit he did not make the puisne mortgagee a party, as he was bound to do under the provisions of section 85 of the Transfer of Property Act. The puisne mortgagee, who is represented by the defendant-appellant, in his turn instituted a suit upon his mortgage: he did not make the latter a party to his suit. The puisne mortgagee obtained a decree for sale, and has now put up and advertised the mortgaged property for sale. Thereupon the plaintiffs, the representatives of the prior incumbrancer, have instituted this suit, in which they ask for a declaration that that property is not liable to be sold in execution of the decree held by the defendant puisne mortgagee. A decree has been given by the lower appellate Court in terms of the prayer for relief. The meaning of the decree under appeal we take to be that the defendant the puisne mortgagee cannot bring to sale the mortgaged property in execution of a decree in a suit to which the prior mortgagee was no party. If that is the meaning of the decree it is, in our opinion, a perfectly right decree. For our authority we refer to the case of *Janki Prasad v. Kushen Dat* (1). Broadly stated, the effect of the ruling in that case is that a mortgagee, who has obtained a decree for sale in a suit to which he did not make other mortgagees parties, cannot bring the mortgaged property to sale in execution of that decree. It is immaterial that in the case we have just cited the parties who were prevented from bringing the mortgaged property to sale were the first mortgagees, and that in this case the party sought to be prevented from bringing the mortgaged property to sale is the representative of the second mortgagee. Indeed, the case would

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(1) (1894) I. L. R., 18 All., 478; at pp. 482, 483.

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be, if anything, stronger against the second mortgagee than against the first mortgagee. In our opinion the defendant-appellant here is not entitled to bring this property to sale in execution of the decree for sale which she holds. It may be that in a properly constituted suit with a proper array of parties and in a suit in which she offers to redeem the prior mortgages the appellant may be entitled to bring the property to sale after such redemption. As to that matter, however, it is unnecessary for us to express any opinion. We think that the decree of the Court below as interpreted above is a correct decree. We dismiss this appeal with costs.

Appeal dismissed.

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January 10.

Before Mr. Justice Knox and Mr. Justice Blair.

BARKAT-UN-NISSA (APPLICANT) v. ABDUL AZIZ (OPPOSITE PARTY).
*
Civil Procedure Code, section 505—Criminal Procedure Code, section 145
—Order of Magistrate for maintenance of possession no bar to the
appointment of a receiver by a Civil Court.

The fact that there exists in respect of any immovable property an order of a Magistrate passed under section 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by section 505 of the Code of Civil Procedure of appointing a receiver in respect of the same property.

THE facts of this case sufficiently appear from the order of the Court.

The Hon'ble Mr. Conlan, Mr. W. K. Porter and Maulvi Ghulam Mujtaba, for the appellant.

Mr. S. Amir-ud-din, for the respondent.

KNOX and BLAIR, JJ.—This is an appeal from an order passed by the Subordinate Judge of Moradabad on the 29th July, 1899, refusing to appoint a receiver to certain property, the subject of a suit before him. The ground on which the learned Subordinate Judge bases his refusal is that in suits like this one before him, there is no rule for the appointment of a receiver, and injunctions only are deemed sufficient. He adds that there is no reasonable cause for the appointment of a receiver. Now as to the circumstances of the case. The respondent Maulvi Abdul Aziz is a

* First Appeal No. 77 of 1899 from an order of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 29th July 1899.