

APPELLATE CIVIL.

1901
June 13.*Before Mr. Justice Burkitt and Mr. Justice Chamier.*

RAM LAL, (JUDGMENT-DEBTOR) v. SIL CHAND AND OTHERS (DECREE-HOLDERS).*

Mortgage—Prior and subsequent mortgagees—Costs recoverable from puisne mortgagees—Act No. IV of 1882 (Transfer of Property Act), section 90.

A prior mortgagee in a suit upon his mortgage prayed for an order for costs against a puisne mortgagee personally. No such order was contained in the decree passed under section 88 of Act No. IV of 1882. Held that the prior mortgagee was not entitled to a decree under section 90 of the Act against the puisne mortgagee for the amount of the costs.

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

Mr. *D. N. Banerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

BURKITT and CHAMIER, JJ.—This is an appeal against an order in execution allowing plaintiff's application to be granted a decree under section 90 of the Transfer of Property Act. The facts of the case are somewhat involved. They are as follows:—

Certain property was mortgaged to one Gopal Das, now represented by the respondents. The same property was afterwards mortgaged to one Ram Lal, the defendant appellant here. Subsequently both mortgagees sued the mortgagor for sale on their mortgages, but neither of them made the other mortgagee a party to his suit. Ram Lal put his decree into execution, had the mortgaged property put up for sale, purchased it himself, and got possession. Subsequently Gopal Das attempted to do the same, but, on the objection of Ram Lal, the attempt failed. Thereupon the respondents, the representatives of Gopal Das, brought a suit, in which they impleaded Ram Lal. That suit, was one for sale of the mortgaged property, and the plaintiffs in it, the respondents here, asked that a separate decree for costs might be given against Ram Lal. For some reason or other unknown to us the Court omitted to comply with their request, and gave an ordinary decree for sale under section 88 of the

* Second Appeal No. 834 of 1899 from an order of F. E. Taylor, Esq., District Judge of Shahjahanpur, dated the 25th August 1899, confirming an order of Babu Nihal Chandra, Officiating Subordinate Judge of Shahjahanpur, dated the 28th January 1899.

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Transfer of Property Act. The amount for which the property was to be sold included principal, interest, and costs of the suit then pending. An opportunity of redeeming within six months was provided for Ram Lal, but, it is to be especially remarked, no separate decree for costs was given against him. On appeal some modification as to the amount was made, but otherwise the first decree remained untouched. On that decree a sale has taken place, of which the proceeds have not been sufficient to discharge the amount decreed. The present application has been made against Ram Lal. It is an application under section 90 of the Transfer of Property Act, and it alleges that the proceeds of the sale being insufficient to discharge the amount decreed, the respondents are entitled against Ram Lal to the decree provided for by section 90 of the Act. The application is not to recover the whole of the balance remaining due after the sale, but is to recover the amount of costs for which the respondents allege Ram Lal to be liable.

It is contended, and we think rightly, that Ram Lal, under the circumstances of this case, is not a person against whom a decree under section 90 of the Act can be passed. In the first place (as is admitted for the respondents), the money which it is sought to recover from Ram Lal, by a decree under section 90 of Act, is not money which was due upon the mortgage. It is not any sum for which the mortgagor or the mortgaged property is liable, but merely costs against Ram Lal, alleged to have been adjudged against him as one of the defendants in the suit.

Secondly, it is perfectly clear that the word "defendant" in section 90 of the Transfer of Property Act must mean the mortgagor defendant, and that the money recoverable under this section is money recoverable, by reason of the proceeds of the mortgaged property proving insufficient to pay off the decree passed under section 89, from the person whose property had been mortgaged and sold, if legally recoverable from him.

The whole tenor and wording of section 90 abundantly show, in our opinion, that the persons affected by it are the mortgagee who has brought the property to sale, and the mortgagor whose property on being sold has not sufficed to satisfy the

decree. Now here Ram Lal was not the mortgagor; he was a mortgagee—a puisne mortgagee who was impleaded to give him an opportunity of redeeming a prior incumbrance.

It cannot be said of him that any property of his was sold, or was, when sold, insufficient to discharge the decree, and that, in our opinion, is a necessary condition before a decree can be passed under section 90. Moreover, there is another matter to which we ought to refer. Costs, as a rule, are in the discretion of the Court. No order was made in the mortgage suit to the effect that Ram Lal personally should pay any costs, and yet the applicants here pick out from the decree under section 89 a certain specified sum which they allege to be costs recoverable from Ram Lal personally, and ask for a decree against him under section 90. We fail to see how we can say that the amount which respondents here desire to recover from Ram Lal was legally recoverable from him under section 90. Respondents ask us to follow them in picking out of the general decree for sale a certain sum, to ear-mark that sum as costs payable by Ram Lal, alone, and then to pass a decree against him under section 90 for that amount. We are unable to adopt such a course.

It seems to us that the blunder which vitiated the respondents' case took place when the first decree in the case was given. The plaintiffs then, by their prayer for relief, asked for a separate decree for costs against Ram Lal. No such decree was given. It was clearly their duty then to have asked the Court to amend its decree and to give them the decree they had prayed for. This they did not do, nor did they appeal; they have only their own laches to thank for the result. We must decline to help them to get rid of the effect of their carelessness by giving them a decree to which they are not entitled under section 90 of the Transfer of Property Act against Ram Lal. For the above reasons we allow this appeal. We set aside with costs the concurrent decisions of the two lower Courts, and direct that respondents' application for a decree under section 90 of the Transfer of Property Act be dismissed.

Appellant to have costs in all Courts.

Appeal decreed.

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