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APPELLATE CIVIL.

1900
July 31st.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

BALDEO SINGH AND OTHERS (DEFENDANTS) v. JAGGU RAM AND
ANOTHER (PLAINTIFFS).*

Act No. IV of 1882 (*Transfer of Property Act*), sections 67, 75, 85, 101—
*Mortgage—Foreclosure—Parties—Suit for foreclosure by prior mort-
gagee without making holder of subsequent registered mortgage a
party.*

A prior mortgagee (by conditional sale) brought a suit for foreclosure and obtained a decree without making party to the suit a second mortgagee (by usufructuary mortgage) whose mortgage was registered. The second mortgagee, having unsuccessfully objected when the prior mortgagee proceeded to take possession through the Court, sued for and obtained a declaration that he was not bound by the foreclosure decree. The prior mortgagee thereupon sued the second mortgagee, praying that the latter, if he failed to redeem the prior mortgage, might be debarred of his right to redeem, and that in that case possession should be given to the plaintiff. Held that the contention of the second mortgagee that all that the prior mortgagee was entitled to was to obtain possession on redeeming the second mortgage could not be sustained, and that the prior mortgagee was entitled to the decree prayed for. *Venkata v. Kannam* (1), *Krishnan v. Chadayan Kuttu Haji* (2), *Raihabai v. Shamrao Vinayak* (3), *Desai Lalubhai Jethabai v. Mundas Kuberdas* (4), and *Mohan Manor v. Togu Uka* (5) referred to.

THE facts of this case sufficiently appear from the judgment of Henderson, J.

Mr. W. K. Porter for the appellants.

Mr. Abdul Majid for the respondent.

HENDERSON, J.—The defendants-appellants are second mortgagees, and under this mortgage, which was a registered usufructuary mortgage, they are in possession of the mortgaged property.

* Second Appeal No. 306 of 1898 from a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 25th January 1898, confirming a decree of Maulvi Muhammad Abdur Rahim, Munsif of Ghazipur, dated the 8th November 1897.

(1) (1882) I. L. R., 5 Mad., 184.

(3) (1881) I. L. R., 8 Bom., 168.

(2) (1892) I. L. R., 17 Mad., 17.

(4) (1895) I. L. R., 20 Bom., 390.

(5) (1885) I. L. R., 10 Bom., 224.

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The plaintiffs respondents held a prior mortgage by conditional sale, and it appears that they brought a previous suit upon their mortgage for foreclosure without making the defendants appellants parties to their suit. The second mortgage was a registered mortgage, and according to the decisions of this Court, and amongst them the decision of a Full Bench, which is binding upon us, the plaintiffs, when they brought this suit, must be taken to have had notice within the meaning of section 85 of the Transfer of Property Act of the second mortgage, and were therefore bound under that section to have made the second mortgagees parties. The plaintiffs obtained a decree for foreclosure and possession, but when they proceeded to take possession through the Court the defendants-appellants objected that they were not bound by the decree, and that their possession as usufructuary mortgagees could not be disturbed. Their objections having been disallowed, they sued for and obtained a declaration that they were not bound by the foreclosure decree. The plaintiffs thereupon brought the present suit against the defendants appellants, praying that the latter, if they failed to redeem their (the plaintiffs') mortgage, might be debarred of their right to redeem, and that in that case possession should be given to the plaintiffs. The plaintiffs, it should be mentioned, claim the benefit of section 101 of the Transfer of Property Act; in other words, they claim for the purposes of this suit to have their mortgage treated as still continuing to subsist notwithstanding the decree for foreclosure which they obtained against the mortgagor.

It has been contended before us on behalf of the appellants that the plaintiffs not having in the previous suit given the defendants an opportunity of redeeming their mortgage, are not entitled now to insist upon the defendants redeeming or being foreclosed, and that all they are entitled to is to obtain possession on redeeming the defendants' mortgage. This contention was raised for the first time in second appeal, but we allowed the matter to be argued, and gave the respondent an opportunity of meeting the contention.

As pointed out in *Venkata v. Kannam* (1) to render a decree for foreclosure effectual, the mortgagees must make subsequent

(1) (1882) I. L. R., 5 Mad., 184, p. 187.

incumbrancers parties to the suit, if he has notice of them. The decree for foreclosure therefore was not binding upon the defendants, who were not parties to the suit in which it was made; that is to say, it did not deprive the defendants of their right to redeem the prior mortgage; but between the plaintiffs and the mortgagor it was a binding decree, and absolutely debarred the mortgagor of his right to redeem the property—*vide Krishnan v. Chadayan Kutti Haji* (1), *Radhabai v. Shamray Vinayak* (2)—and had the defendants been made parties to the suit, they also would have been similarly debarred if they did not take advantage of the opportunity given to them to redeem. The fact that the plaintiffs did not in their first suit make the defendants parties cannot, in my opinion, bar the present suit. Neither section 43 of the Code of Civil Procedure nor section 85 of the Transfer of Property Act, to which reference has been made, has any application, and I know of no general principle of law which stands in the way of the plaintiffs bringing this suit with the object of getting the full benefit of the security which they held. The cases of *Desai Lallubhai Jethabai v. Mundas Kuberdas* (3), *Krishnan v. Chadayan* (1) and *Mohan Manor v. Togu Uka* (4) support the view that the present suit will lie, and that the defendant is only entitled to retain possession upon his redeeming the plaintiffs' mortgage. The decree in each of these cases upon the first mortgage was for sale and not for foreclosure as in the present case, but to my mind that circumstance makes no difference in principle. The case of *Radhabai v. Shamray Vinayak* (2), which is referred to in *Desai Lallubhai Jethabai v. Mundas Kuberdas* (3), does not conflict with the view taken in the cases quoted; for although in that case the purchaser under a decree upon a prior mortgage, to which decree the subsequent mortgagee in possession was not a party, was not allowed to foreclose and get possession, but only to redeem, the purchaser bought the mortgaged property with notice, at the time of the sale, of the subsequent mortgage. When mortgaged property is brought to sale under a decree upon a first mortgage, the purchaser takes it free from all subsequent incumbrances, but a subsequent mortgagee, if he was not a party to the suit in which

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the decree was obtained, is still, as he was before, entitled to redeem the property, if he so wishes—*Mohan Manor v. Togu Uka* (1). The fact that a first mortgagee claims to foreclose and obtains a foreclosure decree ought not in principle to put a subsequent mortgagee who was not a party to the suit or the purchaser under a sale under a decree upon the subsequent mortgage in a worse position than he would have been had the first mortgagee obtained a decree for sale instead of for foreclosure.

Then it has been contended that section 75 of the Transfer of Property Act, which provides that "every second or other subsequent mortgagee has as regards redemption and foreclosure the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees and the same rights against subsequent mortgagees, if any, as he has against his mortgagor," does not apply to the case of a first mortgagee, and therefore such a mortgagee has not as regards foreclosure the same rights against subsequent mortgagees as he has against his mortgagor.

In my opinion this contention is not sound. The first mortgagee has full power under section 67 of the Transfer of Property Act to bring a suit against his mortgagor to foreclose the mortgage. If there are subsequent mortgagees of whom he has notice, he is bound to make them parties to his suit, and if, having been made parties, they do not exercise their right to redeem the first mortgage, he can get a decree for foreclosure, which will for ever debar the subsequent mortgagees also of their right to redeem.

I am of opinion that the defendants were not entitled to insist on the plaintiffs redeeming their mortgage, but that the plaintiffs were entitled to get possession from the defendants, unless the latter should redeem their prior mortgage.

As this is the effect of the decree of the lower appellate Court, I would dismiss this appeal with costs.

BURKITT, J.—I am of the same opinion and for the same reasons.

Appeal dismissed.