

APPELLATE CIVIL.

1901
December 10.*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

BANSIDHAR (DEFENDANT) v. GAYA PRASAD (PLAINTIFF).*

Mortgage by conditional sale—Prior and puisne mortgagees—Payment by puisne mortgagee, defendant in prior mortgagee's suit for foreclosure, of amount due on the prior mortgage—Application by such puisne mortgagee for an order absolute for foreclosure—Application refused—Separate suit by puisne mortgagee for foreclosure—Act No. IV of 1882 (Transfer of Property Act), section 74—Civil Procedure Code, section 244.

In July, 1889, one Fateh Chand executed a mortgage by conditional sale of a certain village in favour of Bansidhar and Kunj Bihari Lal. In October, 1889, Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of Bansidhar and Anant Ram. In October, 1891, Anant Ram transferred his interest in the second mortgage to Gaya Prasad. In September, 1893, Bansidhar and Kunj Bihari instituted a suit for foreclosure of their mortgage. To that suit Raj Kumar, the son of the original mortgagor, and Gaya Prasad were made defendants. On the same date Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of October, 1889. On the 22nd December foreclosure decrees were passed in both suits, and six months' time was allowed for redemption. The time allowed for redemption was extended from time to time, and ultimately, on the 3rd of January, 1896, Gaya Prasad paid into Court the sum which was due to the mortgagees on the mortgage, of July 1889, which sum was drawn out by the mortgagees. Subsequently to this payment into Court Gaya Prasad applied to the Court in the suit on the prior mortgage, and prayed that the right of the defendant in that suit to redeem the mortgaged property might be extinguished and an order absolute for foreclosure granted in the applicant's favour. This application was refused, on the ground that Gaya Prasad was only entitled to bring a suit for foreclosure and "had not acquired the status of a decree-holder," and that while he was a defendant, he could not execute the decree as a decree-holder and could not get a decree for absolute foreclosure. There was no appeal from this order, but Gaya Prasad submitted to it and brought a separate suit for foreclosure.

Held that under the above circumstances no such separate suit for foreclosure would lie.

Kedar Nath v. Lalji Sahai (1), *Oudh Behari Lal v. Nageshar Lal* (2) and *Ajudhia Pershad v. Baldeo Singh* (3) referred to.

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

* First Appeal No. 215 of 1898 from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Mainpuri, dated the 23rd June 1896.

(1) (1889) I. L. R., 12 All., 61. (2) (1890) I. L. R., 13 All., 278.

(3) (1894) I. L. R., 21 Calc., 818

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Pandit *Moti Lal Nehru*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Mainpuri, passed in favour of the plaintiff, Gaya Prasad. The suit was brought for foreclosure of the village Patara in the district of Mainpuri under a mortgage by way of conditional sale, without giving the mortgagor and puisne mortgagees an opportunity of redeeming, and in the alternative, for foreclosure giving a right of redemption to some of the defendants, and also claiming, in case a decree for foreclosure should not be granted, recovery from the defendant, Bansidhar, of a sum of Rs. 7,546-8-0 and interest.

The Subordinate Judge gave a decree for foreclosure.

The facts are shortly as follows:—

On the 20th of July, 1889, one Chaudhri Fateh Chand executed a mortgage by conditional sale of the village Patara in favour of the appellant and of one Kunj Bihari Lal to secure repayment of a sum of Rs. 7,101 and interest.

On the 22nd of October, 1891, Chaudhri Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of the appellant and of one Anant Ram to secure repayment of a sum of Rs. 10,000 and interest.

On the 1st of October, 1891, Anant Ram transferred his interest in this mortgage to the respondent, Gaya Prasad. On the 27th of September, 1893, the appellants, Bansidhar and Kunj Bihari Lal, instituted a suit, No. 123 of 1893, for foreclosure, under their mortgage of the 20th of July, 1889, against Chaudhri Raj Kumar, the only son of the mortgagor, Chaudhri Fateh Chand, who was then dead, as the principal defendant, and also against the respondent, Gaya Prasad, as a puisne incumbrancer.

On the same date Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of the 22nd of October, 1889. On the 22nd of December, 1894, foreclosure decrees were passed in both these suits, and six months' time was allowed for redemption. The time for redemption was extended from time to time until ultimately, on the 3rd of January, 1896, Gaya Prasad, the respondent in the present suit, in order to prevent an order absolute for foreclosure being passed against him, paid into Court the

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sum which was then due to the mortgagees on foot of the mortgage of the 20th of July, 1889, namely, the sum of Rs. 15,093. This money was subsequently drawn out of Court by the appellants, Bansidhar and Kunj Bihari Lal, the mortgagees.

Having paid the amount so due, Gaya Prasad acquired all the rights and powers of the first mortgagees in respect of the mortgaged property by virtue of section 74 of the Transfer of Property Act. He thereupon, on the 3rd of August, 1897, made an application to the Court in the first mentioned mortgage suit, and prayed in it that the right of the defendant in that suit to redeem the mortgaged property might be extinguished, and an order absolute for foreclosure granted in his (the applicant's) favour. The learned Subordinate Judge, by an order dated the 6th November, 1897, refused this application on the ground, as he says in his judgment, that Gaya Prasad, by paying off the mortgage debt and so becoming the representative of the mortgagees under section 74 of the Act to which we have referred, was only entitled to bring a suit for foreclosure, and "had not acquired the status of a decree-holder," and that while he was a defendant he could not execute the decree as a decree-holder, and could not get a decree for absolute foreclosure. There was no appeal from this order. Gaya Prasad acquiesced in it and brought the present suit.

The appellant, Bansidhar, alone of the defendants, has defended the suit, and his principal defence was that the suit does not lie, inasmuch as a decree for foreclosure of the property in question has already been passed in a suit to which the plaintiff, Gaya Prasad, is a party, and that the questions sought to be raised in this suit were determinable on an application for execution in the former suit under section 244 of the Civil Procedure Code, and not by a separate suit.

The Subordinate Judge did not accede to this contention, but gave a decree for foreclosure in favour of the plaintiff-respondent, holding that the decree passed in favour of Bansidhar and Kunj Bihari Lal in suit No. 123 of 1893 had, under section 86 of the Transfer of Property Act, been fully satisfied by the payment made by Gaya Prasad, and that "after the satisfaction of the prior debt there remained no dispute between the decree-holders"

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(*sic*). We presume by this last paragraph that he intended to convey that between the original decree-holders and the representatives of the mortgagor there remained no dispute for determination. We do not clearly understand the reasons assigned by the learned Subordinate Judge for his judgment, but we presume that he meant by it that, inasmuch as the plaintiffs, the prior mortgagees, had been paid off, there was no party interested as a decree-holder before the Court who could enforce execution of the decree, and that consequently section 244 of the Code of Civil Procedure had no application. This is the most favourable construction for the respondent which we can put upon the language of the judgment. Is this view correct? It seems to us clear that Gaya Prasad, who, as second mortgagee, was a party to the suit, when he paid off the claim of the plaintiffs, acquired under section 74 of the Transfer of Property Act all the rights and powers of the first mortgagees, the decree-holders, in respect of the mortgaged property, and in effect stepped into the shoes of the plaintiffs, so far as regarded the enforcement of their rights. He practically became the decree-holder in place of the original decree-holders. The suit was not thereby terminated, nor did the plaintiffs cease to be parties to it, although they ceased no doubt to have any substantial interest in its further prosecution. It still remained for the Court to adjust the rights and liabilities of all parties to the suit in respect of the mortgaged property and in respect of costs; and if necessary for that purpose, to make and enforce an absolute order for foreclosure. The right which belonged to the plaintiffs to have the primary decree effectually worked out by execution passed to Gaya Prasad by virtue of section 74 of the Act above referred to, he having satisfied the claim of the plaintiffs. With the change of interest so caused the suit continued to be a subsisting suit. If this is not the effect of the section, and if payment under it terminates a suit, it is obvious that serious loss in costs and time would be incurred by puisne mortgagees—parties to the suit—who might be desirous of redeeming or of enforcing their claims, inasmuch as in order to redeem or enforce their claims, they would be obliged to institute separate suits, and the costs incurred by them in the earlier suit would be thrown away. If, as we

think, the suit continued as a subsisting suit after the payment of the plaintiff's claim, and if Gaya Prasad acquired a right to prosecute the suit with a view to protect his own interests, then it is clear upon the authorities in this Court that the application which was made by him for an order absolute for foreclosure was proper, and the only application he could make, and was an application in execution under section 244 of the Code of Civil Procedure and ought to have been granted.

In the case of *Kidar Nath v. Lalji Sahai* (1), it was held by a Full Bench of this Court that the order mentioned in section 87 of the Transfer of Property Act, *i.e.*, an order absolute for foreclosure, is an order in execution of the primary decree for foreclosure, and is appealable as a decree under section 244 read with section 2 of the Civil Procedure Code. This decision was followed by a Full Bench of this Court in the case of *Oudh Behari Lal v. Nageshar Lal* (2). A different view upon this question was taken by the Calcutta High Court in the case of *Ajudhia Pershad v. Baldeo Singh* (3), which has been followed by that Court in several later decisions. We, however, are bound by rulings of the Full Bench of this Court. The learned advocate for the respondent, recognizing that the decisions of this Court were against him on this question had recourse to an ingenious argument. He says that in suit No. 123 of 1893, the suit in which his client, Gaya Prasad, paid the amount of the prior mortgagee's claim, Bansidhar was not a party in the capacity of a puisne incumbrancer, but in that of a prior mortgagee only, and that, inasmuch as his claim in that suit as a prior mortgagee was satisfied, the suit came to an end so far as he was concerned, and no claim which he had as puisne mortgagee could have been determined in that suit, and that a separate suit became necessary for the purpose of having the questions decided, which are raised in the present litigation. We wholly fail to appreciate this contention. Bansidhar was first mortgagee and also a puisne incumbrancer. He could not as first mortgagee sue himself as a puisne mortgagee, and therefore he was not named a party defendant as well as a plaintiff, but he made his co-mortgagee in the puisne mortgage a defendant, as such puisne mortgagee, so

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that all persons who had an interest in the mortgaged property might be represented before the Court. The personality of a plaintiff to a suit of this kind cannot be split up so as to enable him or any other party to say that he was before the Court in respect of one interest which he possessed in the mortgaged property and not of another. If, instead of an order for foreclosure, an order for sale had been made, and the property had been sold and conveyed to a stranger, could Bansidhar have afterwards been listened to, if he contended that the sale was not binding on him as a puisne mortgagee, inasmuch as he was not a party to the suit as a puisne mortgagee, but only as a first mortgagee? Clearly not. So here when Bansidhar sought the aid of the Court as a plaintiff in the enforcement of his right as first mortgagee, he necessarily submitted for the Court's adjudication all questions arising in regard to his rights or liabilities generally in respect of the mortgaged property.

But another point has been made by the learned pleader for the respondent. He argues that, inasmuch as the mortgagor has not appealed from the decree which has been passed in this suit, the appellant has no *locus standi* for appealing. An obvious answer to this is, that the plaintiff-respondent made the appellant a party to the suit, and that a decree has been passed against him. It does not, therefore, lie in the respondent's mouth now to say that the appellant has not a right to appeal.

The decision of the Subordinate Judge in the former suit refusing to give Gaya Prasad an order absolute for foreclosure was a wrong decision, and would most certainly have been set aside on appeal, but Gaya Prasad submitted to and acquiesced in it, and he must take the consequences.

For the foregoing reasons we are of opinion that this suit is not maintainable. We hold that it is barred by the provisions of sections 244 of the Civil Procedure Code, and that the plaintiff-respondent has mistaken his remedy, and should have appealed against the order of the 6th of November, 1897, instead of instituting a separate suit. We therefore allow this appeal. We set aside the decree of the lower court as against all the persons impleaded as defendants, and we direct that the suit do stand dismissed.

The case is a hard one upon the respondent, for in bringing the suit he followed the ruling of the Subordinate Judge after the latter had refused to give him an order to which he was entitled. The appellant was represented at the hearing of that application, and must have acquiesced in, if he did not support, the ruling.

Under these circumstances we do not think that this is a case in which costs should be awarded to the appellant, and we accordingly make no order as to costs of this appeal.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.
DELHI AND LONDON BANK, LIMITED (PLAINTIFF), v. BHIKARI DAS
AND OTHERS (DEFENDANTS).*

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Act No. IV of 1882 (Transfer of Property Act), section 74—Mortgage—Rights of prior and puisne incumbrancers inter se.

The puisne mortgagees instituted a suit on their mortgage without making the prior mortgagees parties thereto, and got a decree for sale on the 6th April, 1895, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st September, 1896.

The prior mortgagees instituted a suit on their mortgage without making the puisne mortgagees parties thereto, and got a decree for sale on the 11th December, 1894, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st November, 1896, and obtained possession thereof on the 21st January, 1897.

The puisne mortgagees then sued the prior mortgagees, claiming possession of the property purchased by the latter on payment of the actual purchase-money, or of the sum which was due upon their mortgage at the date of the institution of their suit.

Held—(1) that the puisne mortgagees were entitled to be put into possession on payment to the prior mortgagees of the sum which was actually due upon the prior mortgage at the date upon which the prior mortgagees purchased, and (2) that such possession was, as to the property included in their own mortgage, proprietary; but, as to the property not so included, possession as mortgagees only: they were not entitled to the rights of the prior mortgagees as purchasers of the equity of redemption.

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

Mr. W. M. Colvin (for whom Babu Durga Charan Banerji) and Mr. D. N. Banerji, for the appellants.

* First Appeal No. 258 of 1898 from a decree of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Shahjahanpur, dated the 15th August 1898.