

APPELLATE CIVIL.

1903
January 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.
RAGHUBAR DAYAL AND ANOTHER (PLAINTIFFS) v. JWALA SINGH AND
OTHERS (DEFENDANTS).*

Civil Procedure Code, section 44—Misjoinder of causes of action—Suit including claims under two separate mortgage-deeds.

Held that section 44 of the Code of Civil Procedure has no application to the case of a plaintiff who, holding two mortgage deeds over separate properties, joins both in one suit for sale or foreclosure. *Chidambara Pillai v. Ramasami Pillai* (1) and *Ambika Dat v. Ram Udit Pande* (2), referred to.

THIS was a suit for recovery of money, or in default of payment for foreclosure, based upon two mortgages by conditional sale, both executed on the same date, but relating to different properties and for different amounts. The defendants were the representatives in interest of the original mortgagor. Amongst other pleas the defendants objected that in view of section 44 of the Code of Civil Procedure there was a misjoinder of causes of action which was not permissible except by leave of the Court, and such leave not having been obtained, the suit must fail.

The Court of first instance (Subordinate Judge of Cawnpore) accepted this contention, and accordingly gave the plaintiffs a decree upon one only of the two mortgages in suit, dismissing the suit so far as the other mortgage was concerned. From this decree the plaintiffs appealed to the High Court, urging that the lower Court was wrong in considering section 44 of the Code of Civil Procedure to be applicable to the suit, and that in any case, if the section was applicable, the Court ought not to have dismissed part of the suit, but ought to have returned the plaint for amendment.

Mr. E. A. Howard, for the appellants.

Munshi Jang Bahadur Lal, for the respondents.

STANLEY, C.J., and BURKITT, J.—The plaintiffs in this suit held from the predecessor in title of the defendants a mortgage by way of conditional sale, dated the 4th April, 1883, of a zamindari share in certain villages and also of *khudkasht*.

* First Appeal No. 220 of 1900, from a decree of Munshi Sheo Sahai, Officiating Subordinate Judge of Cawnpore, dated the 8th day of August, 1900.

(1) (1882) I. L. R., 5 Mad., 161.

(2) (1895) I. L. R., 17 All., 274.

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lands. They likewise, under a similar mortgage by way of conditional sale of the same date, held certain *sir* land from the same party. In the suit out of which this appeal has arisen the plaintiffs sought to realize the amount of the two mortgages by foreclosure of the mortgaged properties. An objection was taken in the Court below to the joining of the two causes of action arising upon the two mortgage-deeds in the same suit, and the learned Subordinate Judge acceded to the objection, holding that it was well-founded under section 44 of the Code of Civil Procedure. The plaintiffs' claim accordingly was decreed in respect of one of the mortgage deeds, but as regards the other it was dismissed. From this decree plaintiffs have preferred this appeal. It appears to us that the Subordinate Judge was in error in applying to the case the provisions of section 44, inasmuch as the suit which was instituted by the plaintiffs was a suit for the recovery of moneys due on foot of the respective mortgage-deeds, and in default of payment of the amounts which should be found to be due thereunder for foreclosure of the mortgaged property. If the suit be regarded as a suit for the recovery of money, then clearly section 44 has no application. If, on the other hand, it be regarded as a suit for the recovery of immovable property, section 44 would likewise have no application, inasmuch as no cause of action other than the causes of action in respect of which the suit for the recovery of immovable property was brought, was joined with the suit. A similar question came before the Madras High Court in the case of *Chidambara Pillai v. Ramasami Pillai* (1). The learned Judges there held that "section 44 prohibits, not the joinder of several causes of action entitling a plaintiff to the recovery of immovable property, but a joinder with such causes of action of causes of action of a different character, except as excepted in the section." Likewise in the case in this High Court of *Ambika Dat v. Ram Udit Pande* (2), it was held that "where a zamindari share and *sir* land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, a suit to pre-empt both the zamindari share and the *sir* land was not liable to be defeated on the

(1) (1882) I. L. R., 5 Mad., 161.

(2) (1895) I. L. R., 17 All., 274.

ground of misjoinder of causes of action." In his judgment, Aikman, J., observes:—"I find myself unable to hold that the terms of section 44 apply to this case." He then refers to the case in the Madras High Court to which we have referred, and concurs in the interpretation there put upon the provisions of section 44. We also think that this case does not come within the provisions of section 44, and that the Subordinate Judge was in error. We must allow the appeal and remand the case under the provisions of section 562 of the Code of Civil Procedure for trial as regards the mortgage by conditional sale of the *sir* lands. We may observe that if the Subordinate Judge had considered it inadvisable to try the two causes of action arising under the two mortgages in the same suit, it was open to him under the provisions of section 45 to order separate trials. He did not, however, do so, labouring under the mistake that section 44, and not section 45, applied to the case.

The appellants will be entitled in any event to the costs of this appeal.

Appeal decreed and cause remanded.

Before Mr. Justice Blair.

SALIG RAM (DECREE-HOLDER) v. MURADAN AND OTHERS (JUDGMENT-DEBTORS).*

Act No. IV of 1882 (Transfer of Property Act), sections 86 and 87—Mortgage—Redemption—Redemption possible at any time until an order absolute under section 87 has been made.

A mortgagor who has obtained a decree for redemption may pay in the decretal amount, and obtain redemption at any time up to the making of an order absolute under section 87 of the Transfer of Property Act, 1882. Nor is the mortgagor deprived of his right to redeem by the fact that under an order of Court, not being an order under section 87, the mortgagee has been put into possession of the mortgaged property. *Nihalí v. Mittar Sen* (1) and *Somesh v. Ram Krishna Chowdhry* (2) followed.

THIS was an appeal arising out of proceedings in execution of a decree for foreclosure of a mortgage. The decree-holder

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* Second Appeal No. 841 of 1901, from an order of Maulvi Syed Tajamul Husain, Subordinate Judge of Farrukhabad, dated the 6th day of August, 1901, reversing the decree of Babu Hari Mohan Banerji, Munsif of Fatehgarh, dated the 3rd day of May 1901.

(1) (1898) I. L. R., 20 All., 448.

(2) (1900) I. L. R., 27 Calc., 705.