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MAHADEO
SINGH
v.
SHEO KARAN
SINGH.

of her deceased husband's estate and a daughter in possession of her deceased father's estate. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs in all courts.

Appeal allowed.

1913
June, 17.

Before Mr. Justice Sir Paramada Charan Banerji and Mr. Justice Tudball.
ALAM SINGH (PLAINTIFF) v. GOKAL SINGH AND OTHERS (DEFENDANTS).
Civil Procedure Code (1908), order XXXIV, rule 1.—Mortgage—Suit for sale—Intentional non-joinder of subsequent mortgagee—Effect of such non-joinder.
Subsequently to the execution of a mortgage of a 4 biswa zamindari share in favour of A. S. the mortgagor executed a further (usufructuary) mortgage of a portion of the same share in favour of A. S. and his brother N. S. A. S. brought a suit for sale on the earlier mortgage, but without making N. S. a party thereto. *Held*, that the effect of the nonjoinder of N. S. would not be the total dismissal of the suit, but only of so much of it as related to that portion of the property which was covered by the subsequent mortgage.

THE facts of this case were as follows:—

A simple mortgage, hypothecating a 4 biswa zamindari share, was executed on the 21st of April, 1892, in favour of Alam Singh. On the 28th of June, 1895, a usufructuary mortgage of 1½ biswas out of the 4 biswas was executed in favour of Alam Singh and his separated brother, Narain Singh. Alam Singh brought a suit on the prior mortgage. He did not mention the second mortgage and did not make Narain Singh a party to the suit. Objection on this score was taken at the earliest opportunity by the transferee of the equity of redemption. The existence of the second mortgage was proved, and the plaintiff was called upon to make Narain Singh a defendant. The plaintiff refused to do so on the ground that at that time the suit had become time-barred as against Narain Singh. The court of first instance dismissed the suit on the ground that Narain Singh was a necessary party and had not been impleaded. This decision was upheld by the lower appellate court. The plaintiff appealed to the High Court.

Mr. E. A. Howard, for the appellant:—

A subsequent mortgagee is, no doubt, a necessary party and order XXXIV, rule 1, requires him to be impleaded. But failure

*Second Appeal No. 1388 of 1912 from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 7th of June, 1912, confirming a decree of Rama Das, Munsif of Etah, dated the 2nd of February, 1911.

to implead him does not necessarily entail the dismissal of the suit altogether. Order XXXIV, rule 1, is expressly made subject to the other provisions of the Code; it is therefore, governed by order I, rule 9. The court should have determined the rights of the parties actually before it. Narain Singh would neither be bound nor affected by the decree; he could enforce his right of redemption in a subsequent suit. The case of *Ram Charan Lal v. Muhammad Rashid-ud-din* (1) is in my favour. In any event, the whole suit should not have been dismissed, but only to the extent of the property comprised in the second mortgage.

Babu Binoy Kumar Mukerji (with him Munshi Gobind Prasad), for the respondents :—

Previous to the enactment of the present Code of Civil Procedure it was well established that the deliberate non-joinder of a subsequent mortgagee was fatal to the suit. The question is how far the provisions of order I, rule 9, are to govern order XXXIV, rule 1. On this point I rely on the observations at page 553 of the report of the case of *Hori Lal v. Munman Kunwar* (2). The plaintiff was well aware of the existence of the second mortgage, as he himself was one of the mortgagees thereunder. This is a case of deliberate non-joinder of a necessary party. Moreover, when called upon to make Narain Singh a party, the plaintiff refused to do so. The provisions of order XXXIV, rule 1, would become quite nugatory if cases like the present could go on with impunity, and the result would be a perplexing multiplicity of suits. At all events, the suit should be dismissed at least to the extent of the property comprised in the second mortgage. This suit is now time-barred as against Narain Singh; as against the property comprised in his mortgage, the suit must be dismissed.

Mr. E. A. Howard replied.

BANERJI and TUDBALL JJ.:—This was a suit for sale under a mortgage, dated the 21st of April, 1892, executed in favour of the plaintiff, Alam Singh, by one Chatar Singh. The first set of defendants are the legal representatives of the mortgagor, who is now dead. The other defendants are subsequent transferees of the mortgaged property. It appears that on the 28th of June, 1895, a usufructuary mortgage of 1 biswa, 10 biswansis, out of the mortgaged

(1) (1912) 10 A.L.J., 134.

(2) (1912) I.L.R., 34 All 549.

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property, the extent of which is 4 biswas, was made in favour of the plaintiff, Alam Singh, and Narain Singh, his brother. Narain Singh was not made a party to the suit. On the ground that Narain Singh was a necessary party to the suit under order XXXIV, rule 1, of the Code of Civil Procedure and had not been made a party, the court of first instance dismissed the suit. The decree of that court has been affirmed by the lower appellate court. The plaintiff has preferred this appeal, and it is contended on his behalf that the claim ought not to have been totally dismissed.

There can be no doubt that Narain Singh, as subsequent mortgagee of a portion of the mortgaged property, had an interest in the equity of redemption and was, therefore, a necessary party within the meaning of order XXXIV, rule 1, of the Code of Civil Procedure. The effect, however, of the omission of Narain Singh from the suit was, in our opinion, not the total dismissal of the suit, but only of so much of it as related to the 1 biswa, 10 biswansis, of which Narain Singh is a subsequent mortgagee. There still remains the remaining 2 biswas, 10 biswansis and as to this, the omission of Narain Singh did not affect the claim. The plaintiff, if he is entitled to a decree, is entitled to realize the amount of his mortgage from the remainder of the mortgaged property. The courts below ought, therefore, to have tried the case as between the persons who were parties to the suit in respect of the portion of the mortgaged property which was unaffected by the subsequent mortgage in favour of Narain Singh and the plaintiff.

We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance with directions to readmit it under its original number in the register and to try it on the merits. If the court finds that the plaintiff is entitled to a decree, the decree should be confined to the 2½ biswas which are not comprised in the mortgage of the 28th of June, 1895. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.