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May, 16.

Before Mr. Justice Ryves and Mr. Justice Lyle.

SANWAL SINGH (DEFENDANT) *v.* GANESHI LAL (PLAINTIFF).*

Civil Procedure Code (1908), *order XXXIV, rule* 1 ; *order I, rule* 9—*Parties to suit—Mortgage—Joint mortgage of separate properties—Suit barred as against one mortgagee—Remaining property liable for whole debt.*

The separate properties of two mortgagors were jointly mortgaged to secure one debt The mortgagee sued for sale just within limitation, making one of the heirs of one mortgagor a party defendant, and stating that nothing had been heard of the other for twenty-five years. In the written statement it was pleaded that this heir was alive, but by that time the suit as against him was time-barred.

Held that the unimpleaded heir of the mortgagor was not a necessary party to the suit, and that the suit might be proceeded with against the other representative of the mortgagor and his separate property for the whole amount due on the mortgage.

Jai Gobind v *Jas Ram* (1) followed. *Gendan Lal* v. *Babu Ram* (2) distinguished. *Imam Ali* v. *Baij Nath Ram Sahu* (3), *Hakim Lal* v. *Ram Lal* (4), *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (5), *Haro Kumari* v. *Eastern Mortgage Co.*, (6) and *Debendra Nath Sen* v. *Mirza Abdul Samad* (7) referred to.

ONE Umrao Singh in 1880 executed a mortgage of certain property in favour of the plaintiff's father. In 1910 the plaintiff instituted a suit for sale on the basis of this mortgage against Sanwal Singh, son of Angad Singh, one of the two sons of Umrao Singh, and alleged that, although there was, or had been, another son Mangal Singh, he had not been heard of for twenty-five years. In the written statement it was pleaded that Mangal Singh was alive, and was a necessary party to the suit.

The lower appellate court found that Mangal Singh was alive; that he and Sanwal Singh were separate, and that the suit would not fail because Mangal Singh had not been impleaded, and decreed the plaintiff's claim against the property standing in the name of Sanwal Singh. The defendant thereupon appealed to the High Court.

Pandit *Braj Nath Vyas*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RYVES and LYLE, JJ :—This was a suit to recover Rs. 920, the principal and interest due on a mortgage executed by Umrao

* Second Appeal No 1040 of 1912 from a decree of E. C Allen, District Judge of Mainpuri, dated the 4th of May, 1912, modifying a decree of Jawad Husain, Munsif of Shikohabad, dated the 23rd of January, 1911.

(1) Weekly Notes, 1898, p. 120.
(2) (1911) 9 A. L. J., 86.
(3) (1906) I. L. R., 33 Calc., 613.
(4) (1907) 6 C. L. J., 46.
(5) (1905) I. L. R., 29 Mad., 217.
(6) (1907) 7 C. L. J., 274.
(7) (1906) 10 C. L. J., 150

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Singh on the 12th of July, 1880, in favour of the plaintiff's father, by sale of the mortgaged property.

It was stated in the plaint that Umrao Singh, the mortgagor, died leaving two sons, Mangal Singh and Angad Singh. The plaint recites:—"Mangal Singh has not been heard of for a long time, that is, for about twenty-five years, and Angad Singh died childless. In the public *khewat* the names of Mangal Singh, who has not been heard of, and of Sanwal Singh, defendant, stand recorded in the column of the mortgagor against the property mortgaged. Besides Sanwal Singh, defendant, no other heir of Umrao Singh, principal mortgagor, and of Mangal Singh, who has not been heard of, is in existence." This suit was instituted on the 2nd of August, 1910. In the written statement it was stated that Mangal Singh was alive and was in the service of the Indore State, and that he was a necessary party to the suit and that the claim was bad for non-joinder of a necessary party. This written statement was filed on the 24th of November, 1910. The courts below have decreed the suit and have directed that the whole amount claimed should be recovered by the sale of the property entered in the name of Sanwal Singh, and have excluded the share standing in the name of Mangal Singh. The learned District Judge found, *inter alia*, (1) that Mangal Singh was alive, (2) that Mangal Singh and Sanwal Singh were separate, (3) that the suit should not be dismissed altogether because he had not been made a party.

Before us, in second appeal, two only of the pleas taken in the memorandum of appeal, have been pressed; first that on the finding that Mangal Singh was alive the whole suit should have been dismissed, as he had not been made a party, and secondly, that in any event, the half of the property recorded in Sanwal Singh's name ought not to have been made liable for more than half of the money claimed.

On the first point, reliance is placed on order XXXIV, rule 1, of the Code of Civil Procedure and *Gendan Lal* v. *Babu Ram* (1). This case, however, does not apply, although some observations of the learned Judges and particularly those of Mr. JUSTICE KARAMAT HUSAIN are against the appellant. We do not think

(1) (1911) 9 A. L. J., 86.

order XXXIV, rule 1, really has any application in the present case. That rule requires all persons having an interest in the mortgaged security to be joined in the suit. Now this mortgage was time-barred long ago on the proper construction of the law of limitation as laid down by their Lordships of the Privy Council.

Twelve years, and not sixty years, as had been held in these provinces, was the period within which, ordinarily, such a suit should be instituted. The plaintiff's suit on this mortgage would have been time-barred, had not the Legislature added section 31 to the Limitation Act. Under the provisions of that section the suit was in time up to the 8th of August, 1910. The plaint was filed only a few days before this date. The plaintiff stated then that he had no knowledge whatever of the existence of Mangal Singh and that was the reason why he was not made a party. By the time the written statement was filed, the claim against Mangal Singh was time-barred and the mortgage as against him and his property was extinguished. We do not think it was the duty of the plaintiff to bring on the record a person against whom no claim could be enforced in the suit. At the time of the trial of the suit there was no mortgage subsisting on the property of Mangal Singh. The only property which could be made liable for the mortgage money was the share in possession of Sanwal Singh. In this share Mangal Singh had no concern. He would not, therefore, seem to be a person having any interest in the subsisting mortgage security.

The question may be looked at from another point of view also. Order I, rule 9, provides that no suit shall be dismissed by reason of misjoinder or non-joinder of persons. That rule does not apply when a cause of action arises against a number of persons jointly, because in that case when one of such persons is eliminated, no cause of action subsists against the rest of them. If it does not subsist against all, it cannot subsist against any. In this case, however, the property has been divided, and portions of it are held separately by Mangal Singh and Sanwal Singh. No cause of action arises against them jointly, and the failure to implead Mangal Singh is no reason for dismissing the suit against Sanwal Singh.

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On the second point, reliance is pleased on *Imam Ali* v. *Baij Nath Ram Sahu* (1). In that case the ruling of this Court in *Jai Gobind* v. *Jas Ram* (2) was dissented from. But this opinion, as stated on page 121 of the report in I. L. R., 33 Calc., has not been consistently adopted even in the Calcutta Court. In *Hakim Lal* v. *Ram Lal* (3), the ruling in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (4), which supports us, was dissented from. In *Haro Kumari* v. *Eastern Mortgage Company* (5), however, the learned Judges considered the rulings in I. L. R., 33 Calc., p. 613 and in I. L. R., 29 Mad., p. 217 and stated:—"We consider the rule laid down in the last mentioned case is correct." In *Debendra Nath Sen* v. *Abdul Samad* (6) MOOKERJI, J., who also delivered the judgement in I. L. R., 33 Calc., p. 613, referred, apparently with approval, to the ruling in I. L. R., 29 Mad., 217 and to the ruling in C. L. J., Vol. VII, p. 274, and stated, as reported at page 175 :—" The general rule unquestionably is that a mortgagee cannot be required, at the instance of a purchaser of a part of the premises, to apportion his mortgage-debt among the several parts into which the property has been divided and to look to each only for the proportionate share, unless circumstances have happened, the effect of which, in fact and in law, is to create a severance of the security." It seems, therefore, that the rule in I. L. R., 33 Calc., p. 613, was intended to govern the particular facts of that case on the point, and not to lay down any general rule. But, be that as it may, it seems to us that we should follow the ruling of this Court in A. W. N., 1898, p. 120, with which we entirely agree. It was laid down in that case that " if two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole debt, and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property." In this case, if the original mortgagor had been alive it would have been open to the plaintiff to bring to sale the whole or any part of the mortgaged property in the mortgagor's possession, and we do not see any reason why the right of the mortgagee should, in any way, be cut down

(1) (1906) I. L. R., 33 Calc., 613.
(2) Weekly Notes, 1898, p. 120.
(3) (1907) 6 C. L. J., 46.
(4) (1905) I. L. R., 29 Mad., 217.
(5) (1907) 7 C. L. J., 274.
(6) (1906) 10 C. L. J., 150.

or prejudiced owing to the fact that after the mortgagor's death the mortgaged property was divided without the mortgagee's permission, into two separate shares and separately possessed by two persons. We, therefore, think that the decree of the lower court was right and we dismiss this appeal with costs.

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Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

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SRI KISHAN LAL (PETITIONER) *v.* KASHMIRO AND OTHERS (OPPOSITE PARTIES.)*

Civil Procedure Code (1908), *section* 110—*Appeal to His Majesty in Council—Requirements to be fulfilled before grant of certificate—Decree involving some question respecting property of the value of ten thousand rupees or upwards.*

The value of the subject matter of the suit in the court of first instance was over Rs. 10,000, but the value of the subject matter in dispute on appeal to His Majesty in Council was less than Rs. 10,000. On the other hand, the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid.

Held that the provisions of section 110 of the Code of Civil Procedure applied and a certificate should be granted. It was not necessary that at the time of presenting the application for leave to appeal there should be pending in a court a dispute respecting other property of the value of Rs. 10,000. *Macfarlane* v. *Leclaire* (1), *Musammat Aliman* v. *Musammat Hasiba* (2) and *Ananda Chandra Bose* v. *Brough on* (3) referred to.

THIS was an application for leave to appeal to His Majesty in Council against a judgement of RICHARDS, C. J., and BANERJI, J., reversing a decree of the Subordinate Judge of Meerut.

The facts, so far as they are material to the purposes of this report, are as follows :—

There was a dispute between the heirs of one Harnam Prasad as to the division of the family property. The family was possessed of property worth over Rs. 1,60,000, among which were certain mortgagee rights. The matter was referred to arbitration by the male heirs, and an award was made in 1893, by which all the property, including the mortgagee rights, was divided among the defendant, Musammat Kashmiro, the widow of the deceased, and certain persons who claimed to be members of the joint family with the deceased, the plaintiff being amongst them. The

* Privy Council Appeal No. 6 of 1913.

(1) (1882) 15 Moo. P. C., 181. (2) (1897) 1 C. W. N., (Notes) 93.
(3) (1872) 9 B. L. R., 423.