

APPELLATE CIVIL.

1912
December, 5.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Raftq.
AJUDHIA PANDE AND OTHERS (PLAINTIFFS) v. INAYAT-ULLAH AND OTHERS
(DEFENDANTS).*

Civil Procedure Code (1908), section 11—Res judicata—Prior and subsequent mortgages—Suit by first mortgagee impleading second, but no decree as to rights of first mortgagee—Suit for sale by prior mortgagee not barred.

A second mortgagee brought a suit for sale on his mortgage, in which he impleaded the first mortgagee and asked to redeem. The first mortgagee did not appear. The plaintiff got a decree for sale, but the decree did not either give him redemption of the first mortgage or direct the property to be sold subject to the first mortgage. Held that the first mortgagee was not precluded from subsequently bringing a suit for sale on his mortgage. *Srinivasa Rao Sahab v. Yamunabhai Ammal* (1), *Katchalai Mudali v. Kuppanna Mudali* (2) followed. *Sri Gopal v. Pirthi Singh* (3), *Nattu Krishnama Chariar v. Annangara Chariar* (4) and *Gopal Lal v. Benarasi Pershad Chowdhry* (5) distinguished.

THE facts of this case were, briefly, as follows :—The mortgage bond in suit was executed in favour of the plaintiff No. 1 and the ancestor of the other plaintiffs. A subsequent mortgage was executed in favour of Ram Saran. In a suit brought by Ram Saran on foot of his mortgage he admitted the existence of the plaintiff's prior mortgage and impleaded the plaintiff No. 1 and some of the predecessors in interest of the other plaintiffs as prior mortgagees. Among the reliefs claimed in that suit Ram Saran offered to be allowed to redeem the prior mortgage. In that suit the prior mortgagees, who had been thus impleaded, entered no appearance and made no defence. The decree which was passed embodied a copy of the plaint in which the prior mortgage was mentioned, but in the operative part of the decree there was no mention of that mortgage and no direction that the sale should be subject to any prior incumbrance. The property was sold in execution of that decree and purchased by Inayat-ullah, who obtained possession. Thereafter the plaintiffs brought the present suit on foot of their mortgage. The court of first

*Second Appeal No. 965 of 1911, from a decree of H. E. P. Rose, Additional Judge of Gorakhpur, dated the 15th of August, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 20th of March, 1911.

(1) (1905) I.L.R., 20 Mad., 84. (3) (1902) I.L.R., 24 All., 429.

(2) M.W.N., 1912, p. 41. (4) (1907) I.L.R., 30 Mad., 353.

(5) (1904) I.L.R., 31 Cal., 428.

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instance decreed the suit. On appeal the District Judge held that the suit was barred by *res judicata*, inasmuch as the present plaintiffs had taken no steps about their mortgage although they had been impleaded in Ram Saran's suit. The plaintiffs thereupon appealed to the High Court.

Munshi *Jang Bahadur Lal*, for the appellants :—

The suit is not barred by *res judicata*; for the matter now in issue, namely, the mortgage sued on, was not at all in issue in the previous suit. In that suit the existence of this mortgage was admitted in the plaint itself and was not denied by any party. There was no dispute about the matter, and it was, therefore, not in issue between the parties. So there was no need for the present plaintiffs to appear and prove their mortgage in that suit. The case is thus different from those relied on by the lower appellate court namely :—*Sri Gopal v. Pirthi Singh*, (1) *Gopal Lal v. Benarasi Pershad Chowdhry* (2) and *Nattu Krishnama Charriar v. Annangara Charriar* (3). In the first two cases the prior mortgage upon which the subsequent suit was brought was not set out or admitted by the plaintiffs in the previous suit; in fact the holder of that prior mortgage was impleaded not as such but in a different capacity. It was, therefore, his duty to disclose and prove his prior mortgage. The third case was that of a holder of two successive mortgages who had obtained a decree on foot of his first mortgage without disclosing the second, and then brought a suit upon the second mortgage. In the present case the plaintiff in the former suit not only disclosed and admitted the prior mortgage but actually offered to redeem it. Nothing, therefore, remained to be done by the prior mortgagees in that suit the omission to do which can operate as a bar under explanation IV to section 11 of the Code of Civil Procedure. I rely also on the following cases :—*Katchalai Mudali v. Kuppanna Mudali* (4) *Arunachala Reddi v. Perumal Reddi* (5) *Srinivasa Rao Saheb v. Yamunabhai Ammall* (6). The same remarks which have already been submitted with reference to the cases relied on by the lower appellate court apply to the two

(1) (1902) I.L.R., 24 All., 429.

(4) M.W.N., (1912), p. 41.

(2) (1904) I.L.R., 31 Calc., 428.

(5) (1910) 21 M.L.J., 635.

(3) (1907) I.L.R., 30 Mad., 358.

(6) (1905) I.L.R., 29 Mad., 84.

following cases:—*Gajadhar Tebi v. Bhagwanta* (1), *Mahabir Pershad Singh v. Prabhu Singh* (2). In the latter case the existence alone of the mortgage had been admitted and not its priority, which should, therefore, have been established.

Maulvi *Muhammad Ishaq*, for the respondents:—

The suit is barred by *res judicata*. Although in Ram Saran's suit the existence of the prior mortgage was admitted by him and he offered to redeem it, yet the decree that was passed in that suit did not provide for the prior mortgage but ordered the sale free from any incumbrance. It was the duty of the prior mortgagees, who were made parties, to safeguard their interests by taking care to see that a proper decree, making due provision for their rights, was passed. They did not do so, nor did they get the decree amended or corrected. The result is that they have lost those rights and can not enforce them in a subsequent suit. *Vide* p. 437 of I. L. R., 24 All., cited already. This duty of theirs could not be dispensed with by reason merely of the fact that Ram Saran had admitted their mortgage. Moreover, the mortgagors, who were parties to Ram Saran's suit, did not admit the prior mortgage. It was the duty of the prior mortgagees, therefore, to prove their mortgage as against the mortgagors. In the case in I. L. R., 29 Mad., 84, the mortgagor, too, had admitted the prior mortgage. As regards the mortgagors or their representatives in interest, therefore, the prior mortgagees are precluded from setting up their mortgage. The cases relied on by the lower appellate court and the last two cases cited by the appellants support me.

Munshi *Jang Bahadur Lal*, in reply:—

The fact that the decree in the previous suit did not in terms reserve the rights of the prior mortgagees does not necessarily defeat those rights. *Vide* I. L. R., 29 Mad., 84, and M. W. N., 1912, p. 41, cited above.

KNOX and MUHAMMAD RAFIQ, J. J.:—It appears that one Ram Phal Man Tiwari executed a deed of mortgage in favour of Guptar Pande and Ajudhia Pande on the 20th of September, 1890. Ram Phal Man executed another mortgage subsequently in 1892 in respect of the same property in favour of Ram Saran. In 1897

(1) (1912) I.L.R., 34 All., 599.

(2) (1908) 9 C.L.J., 78.

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Ram Saran brought a suit on the basis of the mortgage of 1892 for the recovery of the mortgage money by sale of the hypothecated property. The suit was brought against Ram Phal Man mortgagor and against Ajudhia Pande and some of the legal representatives of Guptar Pande, who had died prior to the institution of the suit. Some other subsequent transferees were also impleaded in the case as defendants. Ram Saran prayed for the relief, among others, that he should be allowed to redeem the prior mortgage of 1890 in favour of Guptar Pande and Ajudhia Pande. The mortgagor and the prior mortgagees did not defend the suit or put in any appearance in court. The court trying the case of Ram Saran framed two issues only which related to the execution and registration of the mortgage deed of 1892 by Ram Phal Man. A decree was passed in favour of Ram Saran for the amount of the mortgage money, which was to be realized by sale of the hypothecated property. The decree did not declare any charge of the prior mortgage on the property to be sold in execution of the decree of Ram Saran. In execution of the latter decree Inayat-ullah Chaudhri became the purchaser of the property sold.

On the 2nd of August, 1910, Ajudhia Pande and the legal representatives of Guptar Pande deceased instituted a suit in the court of the Subordinate Judge of Gorakhpur to recover the mortgage money due on the mortgage of the 2nd of September, 1890. The claim was brought against the legal representatives of the original mortgagor, Inayat-ullah Chaudhri, the auction purchaser, and some subsequent transferees. The claim was resisted on the ground, among others, that it was barred by *res judicata*, inasmuch as the prior mortgagees being defendants in the suit of Ram Saran failed to prove the amount of their debt, in consequence of which the relief of Ram Saran regarding the redemption of the prior mortgage could not be allowed.

The court of first instance did not accept this defence and decreed the claim. On appeal the learned Additional Judge of Gorakhpur accepted the plea of *res judicata* and reversed the decree of the first court and dismissed the claim of the prior mortgagees. The learned Judge came to the conclusion that the plea of *res judicata* barred the claim of the plaintiffs appellants

on the authority of the cases :--*Sri Gopal v. Pirthi Singh* (1), *Nattu Krishnama Chariar v. Annangara Chariar* (2) and *Gopal Lal v. Benarasi Pershad Chowdhry*(3).

The case has been argued before us fully and at some length by the learned counsel for both sides and some additional authorities have been cited before us. The cases referred to by the learned Additional Judge and some other cases on the same point go to show that if a prior mortgagee is a defendant in the suit brought by the subsequent mortgagee in which the debt of the prior mortgagee *i.e.*, the debt prior to the debt in suit is not mentioned and the prior mortgagee omits to set up his claim on his prior mortgage, a subsequent suit would be barred under section 11 of the Code of Civil Procedure. These cases are no authority for holding that the plea of *res judicata* applies to the present case. In the case before us the debt of the prior mortgagee was admitted by Ram Saran in his plaint, and in fact he offered to redeem that debt. There was no occasion for the prior mortgagees to come to court and to bring to its notice their prior debt. In fact in two cases, namely, *Srinivasa Rao Saheb v. Yamunabhai Ammall* (4) and *Katchalai Mudali v. Kuppanna Mudali* (5), it has been held that under such circumstances the plea of *res judicata* does not apply. We are therefore of opinion that the claim of the plaintiffs appellants is not barred by section 11 of the Code of Civil Procedure. We accept the appeal, set aside the decree of the lower appellate court and remand the case to that court for determination according to law. The appellants will get their costs in this Court. Other costs will follow the event.

Appeal decreed and cause remanded.

(1) (1902) I.L.R., 24 All., 429.

(3) (1904) I.L.R., 21 Calc., 423.

(2) (1907) I.L.R., 30 Mad., 353.

(4) (1905) I.L.R., 29 Mad., 84.

(5) M.W.N. (1912), p. 41.