

APPELLATE CIVIL.

1915
December, 10.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

DUJAI (PLAINTIFF) v. SHIAM LAL AND OTHERS (DEFENDANTS).*

Second appeal—Finding of fact—Benami transaction—Suit by husband on mortgage in name of wife—Wife impleaded as defendant—Presumption.

Held (1) that the question whether a person who sues on a mortgage, not being the mortgagee named in the document, is or is not the true owner of the mortgage is not a question of fact, and (2) that where a person so suing impleaded the nominal mortgagee (who was his wife) as a defendant and no objection was taken by her, there was a reasonable inference that the plaintiff's statement, that he was true owner of the mortgage sued on, was as between himself and his wife, correct.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal, which was as follows :—

“It is conceded on behalf of the appellants that this appeal must be dismissed as against the substituted respondent Shambhu Nath, as the latter was not made a party to this appeal till more than six months after the death of his father, Sheokoti Lal. In the circumstances the appeal may proceed as against the other respondents in respect of half of the house in question. The suit is based on a mortgage made by one Nanku in favour of Musammam Sumaria, the wife of a man called Dujai. Sumaria brought a suit in 1906 for the sale of the property mortgaged, but she impleaded as defendant a step-sister of Nanku, then deceased, who was not the heir of Nanku. The result was that, although that suit was decreed and the property was purchased by a man named Kangali, one of the appellants before me, Kangali took nothing by his purchase. Dujai brought the present suit on the mortgage, alleging that he was in reality a mortgagee, although the mortgage was made in favour of his wife, Sumaria. The lower appellate court having examined all the evidence and considering the previous litigation has come to the conclusion that Dujai has failed to establish that he was in reality the mortgagee of the house in question. On this finding the lower appellate court has dismissed the suit. In second appeal it is contended that the finding is not one which cannot be challenged in second appeal, i.e., that it is in reality a question what inference should be drawn from certain facts which are proved and that a wrong inference has been drawn. I cannot accept this contention. Dujai had to prove that he was in reality the mortgagee. He gave no direct evidence of it, but he asked the court to infer from certain previous proceedings that he must have been the owner. I agree with the lower appellate court that the proceedings in question do not necessarily lead to any such conclusion. I must accept the finding that Dujai has failed to make out his case. The appeal is dismissed with costs.”

*Appeal No. 62 of 1915 under section 10 of the Letters Patent.

The plaintiff appealed.

Munshi *Kanhaiya Lal*, for the appellant.

Pandit *Rama Kant Malaviya*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal arises out of a suit on foot of a mortgage, dated November, 1900, executed by one Nanku in favour of one Musammat Sumaria. The mortgage purported to be a mortgage of the whole house. In the events which have happened it is admitted that Nanku had no right to mortgage more than half the house and the plaintiffs in no event were entitled to a decree for sale of more than the half of the house which belonged to Nanku.

The facts connected with the suit are somewhat complicated and are fully set forth in the judgement of the learned District Judge. The court of first instance decreed the plaintiff's claim for sale of the whole house, though from the judgement it is pretty clear that it only intended to give a decree for half. The lower appellate court dismissed the plaintiff's suit. An appeal was filed in this Court and a learned Judge dismissed the appeal.

It is only necessary for us to refer to so much of the facts as relate to the present Letters Patent appeal. As already stated, the mortgage was made in favour of one Musammat Sumaria. She is the wife of the appellant Dujai. Dujai when he instituted the present suit made a number of persons defendants as persons interested in the equity of redemption, and he also made his own wife Sumaria a party. He alleged in the plaint that she had no interest in the mortgage which had been made in her name as *benamidar* for the plaintiff Dujai. Musammat Sumaria did not defend the suit or deny the allegations contained in the plaint as to the position which she occupied in relation to the mortgage. We must now mention another matter. In the year 1906 Musammat Sumaria brought a suit on foot of this very same mortgage. Nanku was then dead, and she pleaded as legal representative of the mortgagor, one Musammat Murti. A decree was obtained and the property was put to sale and half of the house was purchased by the co-plaintiff, Kangali. When Kangali together with Sheokoti Lal (the purchaser of the other half of the house) sued for possession his suit was defeated upon the ground that the representative of the mortgagor was not Musammat Murti, and that

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therefore, he acquired no title. It further appears that the purchase money which Kangali had paid was attached by a creditor of Dujai on the allegation that Dujai was the real mortgagee and that the purchase money of half the house belonged to him. Dujai attempted to defeat the claim of the attaching creditor by alleging that the mortgage belonged to his wife. This gentleman, however, was not believed and the attaching creditor succeeded in getting the money. This litigation rather shows that Dujai was, as he alleges, the real mortgagee.

In the lower appellate court it was contended on behalf of the appellants (i.e. the defendants in the suit, or some of them) that Musammat Sumaria was the owner of the mortgage, and that as she was not a plaintiff the suit could not be maintained by Dujai. The lower appellate court chiefly relying on the fact that Dujai had sworn that the money attached on the former occasion was that of his wife, decided that he was not the owner and that therefore he could not maintain the suit. The learned Judge of this Court held that this was a finding of fact behind which the Court could not go in second appeal.

It seems to us that the only person concerned to deny the truth of Dujai's statement in the present litigation that he was the real mortgagee was his wife the defendant Sumaria. If she had appeared and denied her husband's title, she might have confronted him with his previous statement. She did not, however, put in an appearance at all.

It is argued in the present Letters Patent appeal on behalf of Dujai that, he having made Sumaria a defendant and she having set up no defence, Dujai could give a good discharge to the defendants in the event of their redeeming the property and that if a decree was passed under the circumstances in favour of Dujai, the Musammat could never sue again. It seems to us that the contention has force. If Dujai, instead of making his wife a *pro forma* defendant with the allegation that she was merely a *benamidar* for him, had made her a co-plaintiff with exactly the same allegation, the question could not possibly arise. We may suppose another possible case to illustrate the point. A man brings a suit on foot of a mortgage adding a person to the array of defendants with the allegation that this person holds the mortgage as

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benamidar for him and that he has been made a defendant because he refuses to join as plaintiff. It can hardly be said in such a case, if the alleged *benamidar* omitted to defend the suit or to deny the allegation of the plaintiff, that a decree could not be made if the mortgage was duly proved and *prima facie* proof of the ownership was given. There seems little distinction between this and making (as in the present case) the wife a *pro forma* defendant. We need hardly say the case would be very different if the defendants could have shown that Musammât Sumaria could not have herself sued and that that was the reason for substituting Dujai as plaintiff.

The only point left undecided by the lower appellate court was the question whether or not Dujai and Kangali could maintain the present suit having regard to the litigation in 1906. These two persons under the circumstances of the present case were quite entitled to join as plaintiffs, their rights *inter se* being a question for themselves. Kangali had purchased the property in the previous suit and paid for it and Dujai had voluntarily joined him as a plaintiff. The present suit could be maintained against all persons who were not made parties to the previous litigation and it is not alleged that any of the defendants in the present suit were defendants in the litigation of 1906, except Sheokoti Lal, against whom no relief is now sought or can be given.

The result is that we allow the appeal, set aside the decree of the learned Judge of this Court and also of the lower appellate court and restore the decree of the court of first instance, with this modification that the decree will be for sale of only the half of the house which belonged to Nanku. We make the usual mortgage decree and extend the time for six months from this date. The plaintiff appellant will have his costs in all courts proportionate to his success against Khedu Lal.

Appeal decreed.