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April, 30.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Abdul Raoof.

GOBARDHAN (DEFENDANT) *v.* MUNNA LAL (PLAINTIFF*.)

Civil Procedure Code (1908), *section* 11, *explanation* V—*Mortgage—Suit for sale—Person claiming paramount title impleaded—Decree in favour of mortgagee plaintiff—Suit by paramount owner for declaration of title —Res judicata.*

In a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. *Joti Prasad* v. *Aziz Khan* (1) and *Jaggeswar Dutt* v. *Bhuban, Mohan Mitra* (2) referred to.

Two suits for sale on separate mortgages of the same property were filed, and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit. The party so impleaded was in reality the owner of a considerable portion of the property comprised in the mortgages sued upon, though he was not impleaded in that capacity. In the first suit the puisne mortgagee did not appear. In the second he attempted to set up his paramount title, but was not allowed to do so. The mortgagors likewise attempted to set up the paramount title of the person impleaded as puisne mortgagee, and in their case also the defence was ruled out. In the result, decrees were passed in favour of the plaintiff. The puisne mortgagee then brought a suit for a declaration of his title to part of the mortgaged property. *Held*, that the suit was not barred by anything which had happened in the course of the previous litigation. *Girija Kanta Chakrabutty* v. *Mohim Chandra Acharjya* (3) referred to.

THE facts of this case were as follows :—

Misri Lal and Murli held two mortgages, dated the 20th of October, 1906 and the 8th of April, 1908, respectively, in both of which the same 4¾ biswas of a certain village were mortgaged. Subsequently the mortgagors mortgaged 1 biswa out of the 4¾ biswas to Munna Lal. Misri Lal and Murli brought two suits on their two mortgages, and in each suit they impleaded Munna Lal as a subsequent mortgagee. In the first suit, based on the earlier mortgage, Munna Lal did not appear, but the mortgagors raised a plea that they were the owners of only 1 biswa out of the 4¾ biswas which they had mortgaged and that Munna Lal was the owner of the remaining 3¾ biswas.

* Second Appeal No. 1600 of 1916, from a decree of D. R. Lyle, District Judge of Agra, dated the 30th of August, 1916, confirming a decree of Pirthvi Nath, Subordinate Judge of Muttra, dated the 18th of June, 1915

(1) (1908) I. L. R., 31 All., 11.
(2) (1906) I. L. R., 33 Calc., 425.
(3) (1915) 35 Indian Cases, 204.

An issue was framed on the point, but the court decided that the mortgagors were estopped from impugning the validity of their mortgage, and decreed on the 25th of January, 1913, the sale of the whole property. In the second suit Munna Lal appeared and set up his title to the 3¾ biswas. The court held that the question of Munna Lal's paramount title could not be decided in that suit and decreed the suit in respect of the whole property on the 26th of March, 1914, and said that Munna Lal might bring a separate suit to try the question of his title. Munna Lal then brought a suit for that purpose and claimed a declaration that the 3¾ biswas belonged to him and were not liable to be sold in execution of the decrees obtained by Misri Lal and Murli. The defendants raised, *inter alia*, the plea that the two decrees aforesaid operated as *res judicata* and that Munna Lal could not now raise the question of his title. Both the lower courts overruled this objection, and finding on the merits in favour of Munna Lal, decreed his suit. Hence this appeal.

Mr. *A. H. C. Hamilton* (with him Babu *Sheo Dihal Sinha*), for the appellants:—

The question as to whether the mortgagors owned the whole of the 4¾ biswas or whether Munna Lal owned 3¾ biswas out of it is *res judicata* between the parties. Munna Lal was a party to the suits brought on the two mortgages. In the second of those two suits the court did not decide the question of Munna Lal's ownership and expressly left the matter open for a future suit. But in the first suit an issue was framed as to the extent of the mortgagor's share in the property mortgaged, and that issue was decided against Munna Lal. It was immaterial that he was absent and did not defend the suit. The decree in the first suit operates as *res judicata*. I am supported by the ruling in *Shyama Charan Banerji* v. *Mrinmayi Debi* (1). Although in the second suit the question was not gone into and determined, yet it having been determined between the same parties in the first suit, the decree in the first suit constitutes a *res judicata*.

The Hon'ble Munshi *Narayan Prasad Asthana*, for the respondent:—

In the previous suits Munna Lal had been impleaded only as a subsequent mortgagee, and in the capacity he could raise only

(1) (1905) I. L. R., 31 Calc., 79.

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those pleas which the mortgagors themselves could raise. He, therefore, could not raise any plea which would detract from the validity of the mortgages. No doubt he also filled another character by virtue of his paramount title in respect of 3¾ biswas. But this title he could not put in issue in that suit, nor could the court adjudicate upon it. In the first suit the court held that the mortgagors were estopped from disputing the extent of the share, and any pronouncement on the question of Munna Lal's ownership was in the nature of *obiter dictum*, and not conclusive. The question of his title was not a matter directly and substantially in issue in the mortgage suit, and the decree does not operate as *res judicata*. I rely on the following cases:—*Joti Prasad* v. *Aziz Khan* (1), *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (2), and *Girija Kanta Chakrabutty* v. *Mohim Chandra Acharjya* (3).

Mr. *A. H. C. Hamilton*, in reply:—

There is a passage at p. 439 of the case in I. L. R., 33 Calc., cited by the respondent, which shows that where in a mortgage suit a question of paramount title is gone into and determined, it is an effective decision on the point. There is no reason why such a decision should not have the force of *res judicata*.

BANERJI and ABDUL RAOOF, JJ.:—This appeal arises out of a suit brought under the following circumstances. Sohan Lal and Shiam Lal, defendants, executed two mortgages in favour of Misri Lal and Murli on the 20th of October, 1906 and the 8th of April, 1908, respectively. In both mortgages the same property, namely, 4¾ biswas of mauza Behta, mahal Munna Lal, was mortgaged. Subsequently to these mortgages, the mortgagors mortgaged a one biswa share out of the aforesaid 4¾ biswas in favour of Munna Lal. The mortgagees brought two separate suits on the basis of the two mortgages, and impleaded as defendants to each suit not only the mortgagors but Munna Lal also. Munna Lal was made a party to each of these suits as subsequent mortgagee of a one biswa share. The first suit was decreed on the 25th of January, 1913, and the second on the 26th of March, 1914. In the first suit Munna Lal did not appear, but the mortgagors raised the plea that they were the owners of a one biswa

(1) (1908) I. L. R., 31 All., 11. (2) (1905) I. L. R., 33 Calc., 425.
(3) (1915) 35 Indian Cases, 294.

share only and were not competent to mortgage the remaining 3¾ biswas, which, they alleged, belonged to Munna Lal. The court framed an issue as to the extent of the mortgagors' rights and the validity of the mortgage as regards 3¾ biswas, and decided that the mortgagors were estopped from asserting that the whole of the property which they professed to mortgage did not belong to them. In the course of the judgment the court made some remarks as to Munna Lal's rights, and in the end made a decree for the sale of the whole of the mortgaged property, namely, the 4¾ biswa share in mauza Behta. In the second suit brought upon the second mortgage Munna Lal did appear and he put forward the contention that the 3¾ biswas belonged to him and that the mortgagors had no right to mortgage that share. The court held that as Munna Lal set up a paramount title as regards the 3¾ biswa share, the question of his title could not be tried in the suit, and refused to try it, but it made a decree for the sale of the 4¾ biswas. In that suit the court distinctly said that Munna Lal's remedy was to bring a suit of his own to try the question of his title. The present suit was thereupon instituted by Munna Lal and he asked for a declaration that the mortgagors were the owners of only a one biswa share and that the mortgagees had no right to put to auction sale, in execution of the two decrees obtained by them, any portion of the remaining 3¾ biswa share, which, he alleged, belonged exclusively to him and not to the mortgagors. Both the court of first instance and the lower appellate court found that the 3¾ biswas claimed by the plaintiff belonged to the plaintiff and that the mortgagors Sohan Lal and Shiam Lal were owners of one biswa only. It was contended in the courts below, that the previous decrees obtained by the mortgagees operated as *res judicata* and the question of the plaintiff's alleged title could not be re-opened and litigated in a separate suit brought by the plaintiff. This plea was overruled by the courts below. It has been repeated in the appeal before us. Mr. *Hamilton*, who appears for the appellants, has conceded that as in the second suit brought on the basis of the second mortgage decided by the Subordinate Judge on the 26th of March, 1914, the court distinctly refused to try the issue as to the title of Munna Lal in respect of 3¾ biswas, the decision in that case cannot be held to be *res*

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judicata; but he contends that the decision in the earlier suit has the effect of *res judicata*. As we have said above, both the courts below have found that the property claimed by the plaintiff Munna Lal belongs to him. We have, therefore, to consider whether Munna Lal is precluded by any provisions of law from putting forward the title which has been found to exist in him and in respect of which we are bound to accept the finding of the court below. In order to determine whether the question of Munna Lal's title is *res judicata*, we have to see whether in the previous suit this question was directly and substantially in issue. We must take it as settled law that in a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. We may refer to the decision of this Court in *Joti Prasad* v. *Aziz Khan* (1). That case followed a ruling of the Calcutta High Court in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (2). It is true that in the present instance Munna Lal was made a party to the suit brought by the mortgagees on the basis of the first mortgage, but he was made a party, not as a person claiming a paramount title, but as subsequent mortgagee of a one biswa share and thus representing the mortgagors as regards that share. As such representative he could not raise the question of his paramount title. That apparently was the reason why he did not appear in the suit. He filled two capacities in that litigation; viz., first, that of a subsequent mortgagee and as such representing the mortgagors as regards a part of the mortgaged property; and secondly, as a person setting up a paramount title in respect of 3¾ biswas. The question of his paramount title could not be litigated in that suit. Therefore no issue could be framed in regard to that question and no such issue could be determined as an issue which arose directly and substantially, as between him and the mortgagee. The mortgagors it is true, asserted that Munna Lal owned a 3¾ biswas share and that they, the mortgagors, were not competent to mortgage that share and to the extent of that share the mortgage was invalid. It is in reference to this plea that an issue was framed as to the right

(1) (1908) I. L. R., 31 All., 11. (2) (1906) I. L. R., 33 Calc., 425.

of the mortgagors to mortgage the whole of the 4¾ biswas. The court decided that the mortgagors who had made the mortgage were estopped from questioning the validity of the mortgage and asserting that they were not the owners of the property which they mortgaged on the representation that they were the owners thereof. In the course of the judgment the learned Subordinate Judge made some observations in respect to Munna Lal, but these observations were nothing more than *obiter dicta* and could not, as between the mortgagees and Munna Lal, be treated as a decision on the question of the paramount title of Munna Lal. In this view it cannot be said that the question of Munna Lal's title has become *res judicata* by reason of the decision in the previous suit. It may be, as observed in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1), that if Munna Lal had allowed the question of his paramount title to be determined in the suit, he might not be permitted in appeal to contend that the decree of the court below was vitiated by reason of the determination of that question, but that was not the case here. In the present suit Munna Lal did not appear, and he did not put into issue the question of his title in respect of the 3¾ biswas share. That question, therefore, remained an open question as between him and the mortgagee and he is entitled in a subsequent suit to raise the same question It is true that the decree in the previous suit was a decree for the sale of the whole of the 4¾ biswas, but that is the only decree which could be made in the previous suit, and, so far as the 3¾ biswas share is concerned, Munna Lal must be treated as if he was not a party to the previous suit. The principle of the decision of the Calcutta High Court in *Girija Kanta Chakarbuttiy* v. *Mohim Chandra Acharjya* (2) is applicable to the present case. There in a suit by a mortgagee the legal representative of one of the mortgagors who had died was made a party as representing the mortgagor. A decree was obtained against him and the property was sold. The auction purchaser having been resisted in obtaining possession of a portion of the property sold brought a suit for possession. In that suit the representative of the mortgagor, who had been a party to the previous suit, set up an independent title to the property claimed.

(1) (1906) I. L. R., 33 Calc., 425. (2) (1915) 35 Indian Cases, 294.

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It was held that he was not precluded from raising the question of his title by reason of the previous decree passed against him. In this case Munna Lal was a party to the suit as representing the mortgagor in respect of a one biswa share. He could no made a party as claiming paramount title to the remaining 3¾ biswas. The fact of a decree having been passed against him as representative of the mortgagors could not, upon the principle of the ruling to which we have referred and on general principles, preclude him from bringing a suit of his own to try the question of his title, and the court from granting a decree to him in respect of the title which it has found to exist. In this view we are of opinion that the appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

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Before Justice Sir Pramada Charan Banerji and Mr. Justice Abdul Raoof.

HINGU SINGH AND OTHERS (DEFENDANTS) *v.* JHURI SINGH AND OTHERS (PLAINTIFFS) AND RAMBAZ SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *order IX, rules 3 and 6—One plaintiff out of six present—Appearing plaintiff general attorney for the others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on same cause of action barred.*

On the date fixed for the hearing of a suit neither the defendants nor their pleader appeared. The plaintiffs' pleader also did not appear, but one of the plaintiffs was present. He was also the general attorney of the other plaintiffs. The court dismissed the suit for "want of prosecution." The plaintiffs applied to have the dismissal set aside, but their application was refused on the ground that their remedy was by means of a separate suit. They consequently brought a second suit claiming the same reliefs as they had claimed in the former suit. *Held* that, inasmuch as all the plaintiffs must be deemed to have been present through the plaintiff who had appeared and was general attorney for the non-appearing plaintiffs, the suit must be regarded as having been dismissed on the merits, and not under order IX, rule 3, of the Code of Civil Procedure, and a second suit on the same cause of action was therefore barred.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *S. M. Sulaiman*, for the appellants.

Mr. *M. L. Agarwala*, for the respondents.

BANERJI and ABDUL RAOOF, JJ. :—This is a somewhat unfortunate case. The facts which have given rise to it are as follows.

* First Appeal No. 113 of 1917, from an order of Shekhar Nath Banerji, Subordinate Judge of Jaunpur, dated the 11th of June, 1917.