

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

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February, 28

RAM SARAN AND ANOTHER (PLAINTIFFS) v. ABDUL GHAF-
FAR AND ANOTHER (DEFENDANTS).*

*Civil Procedure Code, order XXXIV, rule 1—Mortgage—
Several mortgages held by same mortgagee over same
property—Right to sue on the mortgages independently
of each other.*

Per IQBAL AHMAD, J. :—In view of the provisions of order XXXIV, rule 1, of the Code of Civil Procedure it is open to a subsequent mortgagee to put his mortgage into suit without impleading the prior mortgagee. That being so, it is open to a person holding two mortgages over the same property to put his second mortgage into suit without claiming to enforce his first mortgage, provided he expressly declares his intention of reserving his rights as a prior mortgagee and claims to sell the property in enforcement of the second mortgage subject to his rights as a prior mortgagee.

Per ASHWORTH, J. :—Where a person holds two mortgages over the same property, he cannot sue on the first mortgage alone without foregoing the second mortgage. He can, however, sue and sell on a second mortgage provided that he declares the existence of a first mortgage and has it entered in the sale proclamation. If he does not do so, then he must be deemed to have foregone the first mortgage.

Sundar Singh v. Bholu (1), *Mata Din Kasodhan v. Kazim Husain* (2), and *Ram Shankar Lal v. Ganesh Prasad* (3), referred to.

THE plaintiffs held four mortgages over the same property. They put the last mortgage into suit and obtained a decree. In suing on the last mortgage they disclosed the existence of the previous mortgages and prayed for sale of the mortgaged property subject to these incumbrances. A decree was passed in their favour and in execution thereof the property in dispute along with some other property was sold

* Second Appeal No. 1938 of 1925, from a decree of E. T. Thurston, District Judge of Budaun, dated the 11th of November, 1925, reversing a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 30th of August, 1924.

(1) (1898) I. L. R., 20 All., 322. (2) (1891) I. L. R., 13 All., 432.

(3) (1907) I. L. R., 29 All., 365.

and was purchased by defendant No. 2. The plaintiffs then brought the present suit for enforcement of one of the earlier mortgages. The trial court held that they were entitled to a decree for sale of the property purchased by defendant No. 2 in terms of the relief prayed for in the plaint. On appeal the lower appellate court agreed with the findings of the trial court on all points but one. It held that the plaintiffs were not entitled to sell the property in dispute a second time in enforcement of their prior mortgage, and, therefore, were not entitled to get a decree against the contesting defendant (No. 2). The court accordingly reversed the decree of the trial court and dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Babu *Piari Lal Banerji* and Pandit *Narmadeshwar Prasad Upadhiya*, for the appellants.

Mr. *Akhtar Husain Khan*, for the respondents.

IQBAL AHMAD, J.—This appeal must be allowed and the decision of the trial court must be restored. There is nothing in law to prevent a person holding two independent mortgages over the same property from putting the subsequent mortgage into suit first and then bringing a second suit on the basis of the first mortgage held by him, provided that while bringing a suit on the basis of the second mortgage he proclaimed the existence of the first mortgage over the property mortgaged. If a mortgagee having two mortgages over the same property puts the later mortgage into suit and discloses the existence of the first mortgage and obtains a decree on the basis of the second mortgage for sale of the property subject to the prior mortgage, and that decree is put into execution and the property is sold subject to the prior mortgage, the auction-purchaser purchases the property subject to the first mortgage, and it is not open to him to resist a suit for sale on the basis of the first mortgage on

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the ground that the property once having been sold in execution of the decree obtained by the mortgagee on the basis of the second mortgage is not liable again to be sold in execution of the decree obtained on the basis of the first mortgage. The proposition of law enunciated above finds support from the Full Bench decision of this Court in *Sundar Singh v. Bholu* (1). It is to be noted that the observation of the learned Judges in that case, that "one thing is quite clear, that the plaintiffs cannot sell the property twice over, and they cannot sell under the second decree subject to the first", can not now be held to be good law inasmuch as that observation was based on the Full Bench decision of this Court in *Mata Din Kasodhan v. Kazim Husain* (2), and the binding nature of that decision has been taken away by the later Full Bench decision of this Court in *Ram Shankar Lal v. Ganesh Prasad* (3). In view of the provisions of order XXXIV, rule 1, of the Code of Civil Procedure, it cannot be doubted that it is open to a subsequent mortgagee to put his mortgage into suit without impleading the prior mortgagee. That being so, it is open to a person holding two mortgages over the same property to put his second mortgage into suit without claiming to enforce his first mortgage, provided he expressly declares his intention of reserving his rights as a prior mortgagee and claims to sell the property in enforcement of the second mortgage subject to his rights as a prior mortgagee.

In the suit giving rise to the present appeal it was agreed in the courts below that the plaintiff had four mortgages over the property in dispute. He put the last mortgage into suit and obtained a decree. In suing on the last mortgage he had disclosed the existence of the previous mortgages and prayed for sale of the property subject to the incumbrances evidenced by those

(1) (1898) I. L. R., 20 All., 322.

(2) (1891) I. L. R., 13 All., 432.

(3) (1907) I. L. R., 29 All., 385.

mortgages. A decree was eventually passed in his favour and in execution of that decree the property in dispute along with some other property was sold subject to the prior mortgages. The property in dispute was purchased by defendant No. 2 who is the contesting respondent before us. Then the plaintiff brought the suit giving rise to the present appeal for enforcement of an earlier mortgage held by him. The trial court held that he was entitled to a decree for sale of the property purchased by the contesting respondent in terms of the reliefs prayed for in the plaint.

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The lower appellate court agreed with the findings of the trial court on all points except one. It held that the plaintiff was not entitled to sell the property in dispute a second time in enforcement of his prior mortgage and as such was not entitled to get a decree against the contesting respondent. In view of this finding the lower appellate court reversed the decree of the trial court and dismissed the plaintiff's suit.

I have given my reasons for disagreeing with the view of law taken by the lower appellate court and for agreeing with the trial court in holding that the plaintiff is entitled to get a decree for sale of the property purchased by the contesting respondent and to enforce the decree by sale of the property in his hands.

The other points on which the suit of the plaintiff was resisted by the contesting respondent in the courts below were found against him by both the courts below and the findings of those courts have not been assailed in argument before us.

The result is that I would allow the appeal, set aside the decree of the lower appellate court and restore the decree of the trial court with costs in all courts.

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ASHWORTH, J. :—I concur, but I would like to point out the present effect of the decision in *Sundar Singh v. Bholu* (1). That decision was to the following effect :—

“The holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, may obtain a decree for sale on each of them in a separate suit.”

It was expressed in the same judgement as an *obiter dictum* that, if two such separate decrees were obtained, the decree-holder could not sell the property twice over. The reason for the latter opinion was clearly the decision in *Mata Din Kasodhan v. Kazim Husain* (2) that what is sold must be the property itself and not the equity of redemption.

The case of *Sundar Singh v. Bholu* is no longer, in my opinion, good authority for holding that the holder of two mortgages can sue on his first mortgage without disclosing the second, or even if he discloses the second, can put the property up for sale on the first mortgage without foregoing all his rights under the second mortgage. That may have been good law at the time when the decision was passed, but it ceases to be good law by reason of the provision of rule 1 of order XXXIV, which while it allows a second mortgagee to sue on his mortgage without joining the first mortgagee as party, on the other hand does not allow the first mortgagee to sue without joining the second mortgagee. The *obiter dictum* no longer holds good. It relied upon *Mata Din Kasodhan's* case which has been overruled by the Full Bench decision in *Ram Shankar Lal v. Ganesh Prasad* (3). In that decision it is held that the words “mortgaged property,” as used throughout Chapter IV of the Transfer of Property Act, means the interest in specific immovable property which the mortgagor professes to

(1) (1898) I. L. R., 20 All., 322.

(2) (1891) I. L. R., 13 All., 432.

(3) (1907) I. L. R., 29 All., 365.

transfer, whatever that interest may be. It follows that the equity of redemption may be sold apart from the corporeal property. It is to be observed that none of the decisions quoted apply to a case where the holder of two mortgages sues on the second mortgage without disclosing the first mortgage. In such a case, in my opinion, it should be held that he is estopped from pleading that what was sold was a mere equity of redemption if he allows the sale proclamation to be issued as if the actual property and not merely the equity of redemption was being sold. In such a case the holder of two mortgages suing on the second mortgage occupies a different position to the holder of a second mortgage where a different person is the holder of a first mortgage. In the latter case a purchaser is put on his guard to see what property is sold. When one person is holder of both the mortgages and sells the property under the second mortgage without any mention of his own prior incumbrance, the purchaser is entitled to treat the sale proclamation as an assurance by the mortgagee that he, the mortgagee, has no prior incumbrance over the property.

The state of the law then appears to me to be this. Where a person holds two mortgages over the same property, he cannot sue on the first mortgage alone without foregoing the second mortgage. He can, however, sue and sell on a second mortgage provided that he declares the existence of a first mortgage and has it entered in the sale proclamation. If he does not do this, then he must be deemed to have foregone the first mortgage.

BY THE COURT.—The appeal is allowed, the decision of the lower appellate court is set aside and that of the court of first instance restored. Costs here and in the court below will be paid by the defendants to the plaintiffs.

Appeal allowed.

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