

## APPELLATE CIVIL.

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

DWARKA PRASAD AND OTHERS (DEFENDANTS) *v.* ULFAT RAI (PLAINTIFF) AND MATHURA PRASAD AND ANOTHER (DEFENDANTS).\*

1931

February, 11

*Mortgage—A mortgagee holding two mortgages—Suit on subsequent mortgage—Existence of prior mortgage not disclosed—Maintainability of later suit on the prior mortgage.*

A puisne mortgagee is not bound to implead a prior mortgagee, subject to whose encumbrance the mortgaged property can be sold. It is not at all necessary for the subsequent mortgagee to declare prior encumbrances existing in favour of third persons or of himself. If a person holding two mortgages sues on the subsequent mortgage and obtains a decree for its enforcement, and does not get his prior mortgage specifically mentioned in the sale proclamation drawn up in execution of the decree, the prior mortgage is not extinguished thereby nor is his remedy thereon barred.

Mr. H. C. Mukerji, for the appellants.

Mr. P. L. Banerji, for the respondents.

PULLAN and NIAMAT-ULLAH, JJ.:—This is a defendants' appeal arising out of a suit brought by the plaintiff respondent for enforcement of a mortgage deed executed by the second respondent Mathura Prasad, by sale of the mortgaged property. The appellants are subsequent transferees. Both the courts below have decreed the plaintiff's suit. Hence this appeal.

The only ground pressed in appeal is that the plaintiff omitted to mention the mortgage now in suit in an earlier suit based on a subsequent mortgage, and he is, therefore, precluded from enforcing the mortgage which ought to have been, but was not, mentioned. This question does not seem to have been raised and

\*Second Appeal No. 65 of 1929, from a decree of Banarsi Das Kankon, Second Additional Subordinate Judge of Farrukhabad, dated the 19th of May, 1928, confirming a decree of S. M. Munir, Munsif of Kanauj, dated the 1st of December, 1926.

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argued in the courts below. The judgments of the two courts are silent on that point. We do not, however, wish to base our judgment solely on that aspect of the matter. We think the contention must fail on its merits.

A puisne mortgagee is not bound to implead a prior mortgagee, subject to whose encumbrance the mortgaged property can be sold in enforcement of the subsequent mortgage. We fail to understand why it is necessary for the subsequent mortgagee to declare prior encumbrances in favour of third persons or himself. Reliance is placed on the judgment of ASHWORTH, J., in *Ram Saran v. Abdul Ghaffar* (1). The learned Judge has expressed himself in an *obiter dictum* as follows: "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 the first mortgage and has it entered in the sale proclamation." The learned Judge has quoted no authority, statutory or otherwise, in support of his view, nor is it clear whether an omission to declare the prior mortgage will, in his view, preclude the mortgagee from suing on foot of such prior mortgage. The learned Judge apparently had in mind the necessity of prior encumbrances being mentioned in the sale proclamation. We do not think he intended to lay down that if a subsequent mortgagee did not have his prior mortgage specifically mentioned in the sale proclamation drawn up in execution of a decree passed for enforcement of the subsequent mortgage, the prior mortgage is extinguished or that the mortgagee's remedy is barred. We are satisfied that the contention put forward before us has no force. The appeal is dismissed with costs.

(1) (1928) I.L.R., 50 All., 742 (747).