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authority for the other proposition that upon the death of her husband the widow passes again into her father's *gotra*. In the absence of any clear authority we are not prepared to accept the contention of learned counsel for the respondents and we hold that Nritya Kali passed out of her father's *gotra* upon her first marriage and therefore the marriage between herself and a Mukerji, which marriage was celebrated somewhere about the year 1886, was a valid marriage; and that her sons are legitimate issue and the legal representatives of Purnananda, the founder of the endowed property.

As we have already observed, the legal representatives of the founder are entitled to succeed as *shebaits* where no appointment has been validly made under the provisions of the deed of endowment. If follows that the plaintiffs are entitled to possession of the endowed property.

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## FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Harries*

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*April*, 21

RAM DHAN AND ANOTHER (DEFENDANTS) *v.* CHUNNI KUNWARI (PLAINTIFF)*

*Civil Procedure Code, section* 11, *explanation IV—Constructive* res judicata—*Suit by second mortgagee, in which validity of first mortgagee's decree was admitted—Third mortgagee, created after the suit, paid off the first mortgagee's decree—Third mortgagee impleaded in suit as a subsequent transferee—Third mortgagee not appearing and setting up a claim of priority by payment of first mortgagee's decree—Subsequent suit claiming such priority—Whether barred by* res judicata.

The first mortgagee obtained a decree for sale on his mortgage and purchased the property at the execution sale. Before

*Second Appeal No. 1467 of 1933, from a decree of Muhammad Zamiruddin, Additional Subordinate Judge of Bareilly, dated the 16th of August, 1933, reversing a decree of Jamil Ahmad, Additional Munsif of Bareilly, dated the 7th of May, 1931.

the sale was confirmed the second mortgagee (who was the same person as the first mortgagee) brought a suit on his mortgage, in which he set forth the first mortgage and the execution sale thereon; he claimed that he should be paid the surplus sale proceeds, but that in case the previous execution sale was set aside then the mortgaged property should be sold for realisation of his money. A third mortgage was created after the filing of this suit, and the third mortgagee discharged the first mortgagee's decree, and the execution sale was set aside. The second mortgagee then impleaded the third mortgagee as a subsequent transferee in the suit, but made no mention of the discharge of the first mortgagee's decree by the third mortgagee. The third mortgagee did not appear and set up a claim of priority on the ground of having discharged the first mortgagee's decree, and the suit was decreed without any provision as to whether the sale was to be subject to, or free from, any prior encumbrance. The third mortgagee then brought a suit for a declaration that she had the rights of a prior mortgagee by reason of the discharge of the first mortgagee's decree:

*Held,* that the suit was not barred by *res judicata* by reason of the *ex parte* decree passed in the second mortgagee's suit, in which the third mortgagee had not appeared and expressly claimed her right of priority; for, the validity of the prior mortgage decree was not in any way disputed by the second mortgagee in his suit—indeed it was expressly admitted—and therefore the matter was not in issue at all and there was no occasion for the third mortgagee to set up the validity of that mortgage decree or the rights acquired by her *pendente lite*. She was a necessary party in her capacity as a subsequent transferee, but not a necessary party in her capacity as a prior mortgagee. As the validity of the prior mortgage was admitted in the plaint, and she was professedly impleaded as a subsequent transferee, there could be no reason to require that she must necessarily have appeared in court and set up rights under the prior mortgage which was not disputed by the plaintiff.

If the decree had directed that the property was to be sold free from any prior encumbrances the result might have been different, but there was no such direction in the present case.

*Sri Gopal* v. *Pirthi Singh* (1) and *Mahomed Ibrahim Hossain* v. *Ambika Pershad Singh* (2), distinguished.

Messrs. *G. S. Pathak* and *Gopalji Mehrotra*, for the appellants.

(1) (1902) I.L.R., 24 All., 429. (2) (1912) I.L.R., 39 Cal., 527.

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Messrs. *B. Malik* and *S. N. Gupta*, for the respondent.

SULAIMAN, C.J., BENNET and HARRIES, JJ.:—It appears that on the 16th August, 1918, a simple mortgage deed was executed by Karam Ali in favour of the defendants appellants and their mother Mst. Jaidei. On the 22nd August, 1922, a decree for sale was obtained on this mortgage, which was followed by a final decree. The property was put up for sale in execution of this decree and was purchased at auction by the defendants, the then decree-holders, on the 21st December, 1926. The decree was for over Rs.2,000 and the property was sold for about Rs.3,700, there being a surplus amount of Rs.1,065.

In the meantime the defendants had taken another mortgage from Karam Ali on the 18th July, 1923. Before the auction sale which had been held in execution of the decree in the first mortgage could be confirmed, the defendants brought a second suit on the 22nd December, 1926, on the basis of the second mortgage. In their plaint the present defendants clearly admitted the existence of the previous mortgage and even mentioned that in execution of their mortgage decree they had purchased the mortgaged property at auction and there was a surplus of Rs.1,065 left over. They did not implead the present plaintiff Mst. Chunni Kunwar as she had not come on the scene by that time. The reliefs claimed were: (*a*) a declaration that the plaintiffs were prior mortgagees against the defendants who had then been impleaded and were entitled to receive the entire surplus purchase money at the auction sale held on the 21st December, 1926, in execution of the decree of 1922, (*b*) a decree for recovery of the amount left outstanding after the payment of the surplus purchase money to be realised; and (*c*) "if the sale of the mortgaged property be for some reason set aside, the claim with costs be ordered to be paid from the defendant, and in case of default in payment the mortgaged property be sold and the claim be satisfied out of the purchase money".

It is therefore obvious that the present defendants who were plaintiffs at that time were admitting the validity of the prior mortgage and the binding character of the mortgage decree and the propriety of their having purchased the property in satisfaction of the mortgage debt, leaving a surplus of Rs.1,065 only, and asked for the payment of only the surplus purchase money in the first instance, thereby clearly admitting that they were entitled only to this surplus amount under the second mortgage decree. It is also clear that they contemplated the contingency of the sale of the mortgaged property being for some reason set aside, as by that time it had not yet been confirmed, and in that event they asked for a decree for the whole amount due under the second mortgage. It cannot therefore be contended for a moment that the defendants in the latter event intended to give up their first mortgage decree altogether. It is impossible to put any such interpretation on the plaint.

On the 17th January, 1927, the mortgagor executed a usufructuary mortgage in favour of the present plaintiff Chunni Kunwar, leaving money in her hands for payment of the first mortgage decree. She deposited the amount on the 20th January, 1927, and at some later, but unknown, date, the auction sale in favour of the present defendants was set aside. On the 7th February, 1927, the present defendants in their suit filed an application asking that Mst. Chunni Kunwar be impleaded as a subsequent transferee, presumably because she had taken the usufructuary mortgage. There was no allegation that she had paid off the prior mortgage decree and should be impleaded as a prior mortgagee. Of course there was no allegation against her when the plaint was filed, and no amendments were made therein, except the addition of her name as a subsequent transferee. Service was duly effected on her, but she did not appear to contest the claim, nor filed any written statement. The suit for the amount due on the second mortgage was decreed on the 14th April, 1927. The decree, however,

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did not say that the property would be sold free from any previous incumbrances.

The defendants then put their decree in execution and claimed a sale of the mortgaged property. Upon this the present suit was instituted by Mst. Chunni Kunwar for a declaration that she had the rights of a prior mortgagee on account of her discharge of the prior mortgage decree. The present defendants resisted the claim on two main grounds among others: (1) That not having set up her prior mortgagee rights in the suit of the second mortgagee, the defence was barred by the principle of *res judicata;* and (2) that by payment of the mortgage decree she acquired no rights of subrogation as the claim on the mortgage of 1918 would now be barred by time.

As the second question has been considered recently by a Full Bench of this Court in *Alam Ali* v. *Beni Charan* (1), it has not been referred to us. But the first question has been referred to us in the following form: "In the circumstances of the present case, does the *ex parte* decree obtained on the 14th April. 1927, by the defendants appellants operate as *res judicata* for the purposes of the present suit, and is the declaration now sought for by the plaintiff respondent therefore barred?"

*Prima facie* it would appear that when the validity of the prior mortgage decree was in no way disputed by the then plaintiffs, and indeed was expressly admitted inasmuch as only the surplus amount was claimed in the first instance, it cannot be seriously contended that the binding character of that mortgage decree was in any way a matter in issue in the previous suit. The plaintiffs had not attempted to impugn the rights under that mortgage decree. Accordingly even though subsequently during the pendency of that suit those rights devolved upon the present plaintiff, who had then been impleaded as a subsequent transferee, there was no occasion for her to set up the validity of that mortgage decree or the

(1) (1935) I.L.R., 58 All., 602.

rights acquired by her *pendente lite*. The matter not having been put in issue by the plaintiffs on the date on which the plaint was filed on the 22nd December, 1926, the defendant Chunni Kunwar was not called upon to appear and set up her prior rights. Under the explanation to order XXXIV, rule 1 it is not necessary for a puisne mortgagee to implead a prior mortgagee, and he may without impugning such a mortgage claim to sell the property subject to it. A person who has taken a subsequent mortgage and also possesses prior mortgagees' rights has a dual capacity. She is a necessary party in her capacity as a subsequent transferee, but not a necessary party in her capacity as a prior mortgagee. If therefore the validity of the prior mortgage is admitted in the plaint and she has been professedly impleaded as a subsequent transferee, there seems no reason to require that she must of necessity appear in court and set up rights under the prior mortgage which is not disputed by the plaintiffs.

The learned advocate for the appellant relies strongly on the case of *Sri Gopal* v. *Pirthi Singh* (1). In that case suits had been brought on mortgages of 1872 and 1874 successively without impleading other mortgagees, and decrees were obtained thereon. Then a suit was brought on a mortgage of 1876 impleading the mortgagees of 1872 and 1874. In the plaint the plaintiff had clearly sought to establish that charge as having priority over the earlier mortgages above referred to, upon the ground that the money thereby secured had been borrowed to pay and had been applied in paying certain other charges on the same property of still earlier date, all being prior to 1871 (see page 435). Thus the plaintiff had put in issue his claim of priority over the mortgages of 1874. The mortgagee Ishur Das set up his prior claims under a mortgage of 21st July, 1871, but he altogether omitted to set up his claim under a mortgage of 7th February, 1874. The plaintiff's suit was

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

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decreed for payment of the money due against the defendants and the decree declared that in default of payment the plaintiff would be entitled to sell the mortgaged property "which was free from all encumbrances", and also the remaining properties in satisfying the amount of certain prior debts detailed at the foot of the judgment. In this list the mortgage of the 7th February, 1874, was not included. It was accordingly held both by this High Court and also by their Lordships of the Privy Council that the omission to set up the rights under the mortgage of 7th February, 1874, was fatal and the claim made in a subsequent suit was barred by the principle of *res judicata*. That was a case in which the plaintiff had never admitted the priority of the mortgage of the 7th February, 1874, and where the decree had expressly ordered the sale of certain property free from all encumbrances and the sale of the remaining properties subject only to certain specified prior debts and no others. That case is accordingly distinguishable from the present one.

The learned advocate next relies on the case of *Mahomed Ibrahim Hossain* v. *Ambika Pershad Singh* (1). In that case the heirs of Mst. Alfan were impleaded as puisne mortgagees having the right to redeem. As noted in the judgment of the High Court at page 539. "The plaintiffs asked for sale of the mortgaged properties free from the liens of all the puisne mortgagees." The prior rights of the heirs of Alfan were never admitted by the plaintiffs in their plaint and in fact they had been impleaded exclusively as subsequent transferees. The Calcutta High Court considered that the case was governed by the ruling of their Lordships in the case of *Sri Gopal* v. *Pirthi Singh* (2). Their Lordships of the Privy Council formed the view that the heirs of Alfan having been made defendants to those suits, and not having set up in those suits such rights as they had under the prior mortgage, their claim in the later suit was

(1) (1912) I.L.R., 39 Cal., 527. (2) (1902) I.L.R., 24 All., 429.

barred by the principle of *res judicata*. As in that case the plaintiffs had not admitted in the plaint that the prior mortgagee rights were even subsisting and had asked for the sale of the mortgaged properties free from the liens of all the defendants, the case is obviously distinguishable from the present case.

In a later case, *Radha Kishun* v. *Khurshed Hossein* (1), their Lordships have laid down the law clearly. In a suit brought by the second mortgagees who were certain Sahus, a prior mortgagee Bakhtaur Mull was impleaded as a defendant, "but whether any or what relief was sought against him did not appear" (page 668). Their Lordships, after pointing out that the implications of the terms of section 96 of the Transfer of Property Act were that without the consent of the prior mortgagee the mortgaged property could not be sold free from his mortgage, remarked (page 669): "Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently, to sustain the plea of *res judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority. But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a court of law is the same." Their Lordships accordingly held that Bakhtaur Mull's mortgage not having been impugned expressly, he was not prevented by any principle of *res judicata* from setting up his rights under that mortgage in a subsequent suit.

The case before us is much stronger inasmuch as here not only the present plaintiff's rights were not, and could

(1) (1919) I.L.R., 47 Cal., 662.

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not be, impugned in the plaint when it was filed on the 22nd December, 1926, but it was clearly admitted that the prior mortgage was subsisting and was paramount. The case is similar to the cases decided by this Court in *Ajudhia Pande* v. *Inayat-ullah* (1) and *Collector of Moradabad* v. *Muhammed Hidayat Ali Khan* (2).

In our opinion the claim of the plaintiff that she has acquired rights by payment of the money due on the prior mortgage decree is not barred by the principle of *res judicata*.

The answers to both parts of the question referred to us are in the negative.

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*Before Mr. Justice Thom, Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh*

1936
*April*, 22

MAIKOO LAL AND ANOTHER (APPLICANTS) *v.* SANTOO AND OTHERS (OPPOSITE-PARTIES)*

*Succession Act* (XXXIX *of* 1925), *section* 63—*Will—Attestation—Attesting witnesses not signing but affixing their marks—Validity—"Sign"—General Clauses Act* (X *of* 1897), *section* 3(52)—*Interpretation of statutes—Ambiguity.*

A will is validly attested, within the meaning of the provisions of section 63 of the Succession Act, if either of the two necessary attesting witnesses has merely affixed his mark to the will.

In view of the definition of "sign" as given in section 3(52) of the General Clauses Act the word "sign" in clause (*c*) of section 63 of the Succession Act should be interpreted to include affixing a mark, although the section is ambiguous inasmuch as a distinction has been drawn in clauses (*a*) and (*b*) of the section between signing and affixing a mark.

Where a section is ambiguous and two interpretations are possible, that interpretation should prevail which is most consistent with reason, common sense and convenience.

Mr. *Ram Nama Prasad*, for the appellants.

Messrs. *S. N. Seth* and *Brij Narain Mehrotra*, for the respondents.

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*First Appeal No. 54 of 1935, from an order of S. Iftikhar Husain, Additional District Judge of Cawnpore, dated the 19th of January, 1935.

(1) (1912) I.L.R., 35 All., 111. (2) (1926) I.L.R., 48 All., 554.