

Before Mr. Justice Tyrrell and Mr. Justice Duthoit.

NIRMAN SINGH (DEFENDANT) v. PHULMAN SINGH (PLAINTIFF).*

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July 11.

Res judicata—Act X of 1877 (Civil Procedure Code), s. 13.

H, the proprietor of a one-third share of a certain undivided estate, made a gift of such share to *P*. He subsequently in February, 1875, gave a mortgage of such share, in his capacity as *P*'s guardian, to *N* and *S* the two other co-sharers of such estate. In March, 1878, *P*, having attained his age of majority, brought a suit, as a co-sharer of such estate, under such gift, against *N* and *S* for possession of certain land appertaining to such estate, on the ground that they were using such land as if they were the sole proprietors thereof. The lower appellate Court, observing that such land was the property of the three co-sharers, that the mortgage of *P*'s rights to *N* and *S* did not affect those rights as such, and that *N* and *S* were not justified in using such land as if they were the exclusive proprietors thereof, gave *P* a decree for possession of one-third share of such land. *N* and *S* appealed to the High Court on the ground that *P* should not have been awarded possession, as they were in possession of such land as mortgagees. The High Court remanded the case for the determination of the issue thus raised by *N* and *S*; and the lower appellate Court found that *N* and *S* were in possession of *P*'s share of such estate as mortgagees under the mortgage made by *H* above referred to, and of such land as such. *P* did not take any objection to this finding; and it was adopted by the High Court and embodied in its final decree. In October, 1879, *P* sued *N* for possession of his share in such estate, claiming under the gift from *H*, and alleging that the mortgage of such share by *H* to *N* was invalid. Held that, inasmuch as such mortgage was matter substantially in issue in the former suit, the matter in issue in the second suit was *res judicata* under Explanations I and II, s. 13 of Act X of 1877.

ON the 25th February, 1875, one Hukm Singh mortgaged, by way of conditional sale, his shares of certain undivided villages to one Ramdin. Nirman Singh, defendant in the present suit, a co-sharer of such villages, thereupon sued Ramdin to enforce his right of pre-emption in respect of such sale and obtained a decree for such shares. In March, 1878, Phulman Singh, the plaintiff in the present suit, sued Nirman Singh and one Sital Singh, co-sharers in such villages, for possession of a certain plot of waste land appertaining to one of such villages, on which there was a ruined house, for compensation for the removal of a wall thereon, and to have the wall constructed thereon by them removed. The Court of first instance dismissed this suit for reasons which it is not material to state. On appeal by Phulman Singh the District

* Second Appeal, No. 1273 of 1880, from a decree of W. Kaye, Esq., Judge of Gorakhpur, dated the 10th September, 1880, affirming a decree of Maulvi Nazir Ali, Munsif of Bansi, dated the 28th January, 1880.

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Court found that Hukm Singh, Nirman Singh, and Sital Singh were co-sharers in the villages in question; that Hukm Singh had made a gift of his shares to Phulman Singh, and then mortgaged them to Nirman Singh and Sital Singh in his character as Phulman Singh's guardian. The Court then observed in its decision, which was dated the 23rd July, 1878, as follows:—"It is not shown that the mortgage carries with it any right to build on the land: Defendants are acting in respect of this bit of waste land as if it were their exclusive property, whereas it is clear from the admissions of Sital Singh that he and Hukm Singh were two co-sharers out of (apparently) three in the mahál: this piece of waste land, not being appropriated for the purposes of a habitation (for which object it had long been disused) must be considered as the property of all three co-sharers, and the mortgage rights which the defendants, two of the three, have obtained over the proprietary rights of the third (plaintiff) do not affect those rights as proprietary rights; the defendants therefore in building a wall on the land without regard to plaintiff's wishes or consent are committing an act which could only be justified by their being exclusive proprietors, and are thereby virtually dispossessing plaintiff from his proprietary right of one-third in the land over which they hold a mortgage: this act of defendants is a good ground of action and plaintiff seeks relief by claiming possession." In the event the District Court gave Phulman Singh a decree for possession of one-third of the land in dispute, and directing the defendants to discontinue the building they had begun until Phulman Singh gave his consent to its continuance. Nirman Singh and Sital Singh appealed to the High Court from that decree on the ground, amongst others, that the land in dispute being in their possession as mortgagees, the District Court should not have awarded Phulman Singh possession. The High Court, being of opinion that it must be distinctly determined whether or not Nirman Singh and Sital Singh were in possession of Phulman Singh's share as mortgagees, before the appeal could be satisfactorily disposed of, remanded the case to the District Court for that purpose. The District Court found that Nirman Singh and Sital Singh were in possession of Phulman Singh's share as mortgagees, and of the land in suit as such. On the

return of this finding, to which Phulman Singh did not take any objection, the High Court made the following order, dated the 5th August, 1879:—"The finding has been returned on the issue remitted by this Court, and the result is that the plaintiff's claim to have the wall demolished and a one-third share in the land as proprietor to that extent declared in his favour are decreed: the Judge appears to have awarded possession, though his judgment is not altogether clear on the point: but plaintiff is not entitled to more than the finding of the lower appellate Court on the issue remitted would give him, and that is merely such possession as the circumstances of the case admit of without prejudice to the possession of the mortgagees, the defendants; and to prevent any misunderstanding the appeal is partially decreed, and the lower appellate Court's judgment modified accordingly." In October, 1879, Phulman Singh instituted the present suit against Nirman Singh, in which he claimed possession of the shares in question by virtue of the gift to him by Hukm Singh, alleging that the mortgage in February, 1875, to Ramdin by Hukm Singh his guardian was invalid, such mortgage having been made without legal necessity and without benefit to him. The defendant set up as a defence to the suit that such mortgage had been made "by lawful authority and under legal necessity and for the benefit" of the plaintiff. The Court of first instance decided that such mortgage was invalid, having been made without authority and without legal necessity, and gave the plaintiff a decree for possession of the shares. On appeal by the defendant the lower appellate Court affirmed this decision, holding further that the question whether such mortgage was valid or invalid was not a matter substantially at issue in the former suit between the plaintiff and the defendant, although its validity might have been attacked in that suit, and that therefore such question was not under s. 13 of Act X. of 1877 *res judicata*. On second appeal to the High Court it was contended on behalf of the defendant that, inasmuch as in the former suit between the parties, the plaintiff had not impugned the validity of the mortgage, and the defendant's possession thereunder had been established, the present suit to set aside the mortgage was not maintainable.

Mr. *Amir-ud-din* and *Lala Lala Prasad*, for the appellant.

Munshi Sukh Ram and *Maulvi Mehdi Hasan*, for the respondent.

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The judgment of the Court (TYRRELL, J., and DUTHOIT, J.,) was delivered by

TYRRELL, J.—We have referred to the various proceedings in the former litigation between the parties to this appeal, and we find that the plea of *res judicata* raised here among other pleas by the defendant-appellant is valid and must be allowed. In March, 1878, Phulman Singh, having recently attained his majority, brought an action on the basis of his deed of gift of the property of Hukm Singh against Nirman Singh, alleging trespass on a piece of land once the property of the said Hukm Singh, and part of the estate given by him to Phulman Singh. In that case the District Appellate Court found that “Hukm Singh made a gift of his share in the property to the plaintiff and then mortgaged plaintiff’s share to the defendant in his character of guardian of the plaintiff: it is not shown that the mortgage carries with it any right to make buildings on the land &c. &c.” This finding was found in second appeal to be deficient in precision, and the case was remanded by this Court on the 6th May, 1879, for an explicit finding on evidence “whether the defendant was in possession of the plaintiff’s share as mortgagee.” The return to this remand certified that the “vakils for the plaintiff allow that the defendant is in possession of the share by virtue of the mortgage” (now in question): and that the subject-matter in dispute (then) was some land on which was a ruined house, which land is in possession of defendant as (plaintiff’s) mortgagee.” This finding was adopted by this Court, and became embodied in its final decree of the 5th August, 1879, in that case. Thus it is clear that the mortgage executed in February, 1875, by Hukm Singh, in his personal character and as representing his ward and donee Phulman Singh, in favour of the representative of the present defendant-appellant was matter substantially in issue in the suit mentioned above between the same parties: and the matter in issue in the present suit is therefore *res judicata* in the fullest sense and extent of s. 13 of the Civil Procedure Code, and of the first and second Explanations thereof. This finding precludes the necessity for considering the other pleas in appeal. The decrees of the Courts below are set aside and the appeal is decreed with costs.

Appeal allowed.