

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran
Nath Misra.

1926
March, 16.

GANGA PRASAD (DEFENDANT-APPELLANT) v. GANESH
PRASAD AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Mortgage—Foreclosure decree, whether can be obtained against prior mortgagees—Priority with respect to mortgages not containing a condition of foreclosure and incorporated in the subsequent mortgage having condition for foreclosure—Civil Procedure Code, order 34, rule 4, sub-clause (2)—Power of court to pass a decree for sale instead of foreclosure.

Held, that in a suit for foreclosure the plaintiff is entitled to a decree for foreclosure on the basis of his mortgage-deed against the mortgagors and the subsequent mortgagees, but cannot obtain that decree against prior mortgagees, nor for the purpose of obtaining such a decree can he be allowed to rely on the prior mortgages which existed in his favour and had now been incorporated in his own subsequent mortgage, if those deeds did not contain any condition as to foreclosure.

In a suit for foreclosure it is permissible to a court to pass a decree for sale in lieu of a decree for foreclosure where the deed on the basis of which the suit is brought gives authority to realize the money by sale of the mortgaged property and also in view of the fact that under the provisions of order 34, rule 4, sub-clause (2) of the Code of Civil Procedure according to which the court is, in a suit for foreclosure, authorized, at the instance of the plaintiff or any person interested either in the mortgage money or in the right of redemption, to pass a decree for sale in lieu of a decree for foreclosure.

Messrs. *John Jackson, R. B. Lall and R. N. Shakla*, for the appellants.

Mr. Niamat Ullah, for the respondents.

HASAN and MISRA, JJ. :—This appeal arises out of a foreclosure suit. The plaintiff, *Puttu Lal*,

* First Civil Appeal No. 78 of 1924, against the decree of Gopindra Bhushan Chatterjee, Subordinate Judge of Rae Bareilly, dated the 29th of September, 1924.

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brought the present suit for foreclosure on the basis of a mortgage-deed executed in his favour by defendant No. 1 on his own behalf and as guardian of his minor son, defendant No. 2, on the 31st of October, 1919. The sum secured by the mortgage was Rs. 36,000 and it contained a condition that if the mortgage money, together with interest stipulated therein, was not paid within a period of three years, the mortgagee would have at his option the right to foreclose the mortgage or to realize his money by sale. The interest agreed upon in the deed was at the rate of 10 annas per cent. per mensem, with six monthly rests. The plaintiff claimed a sum of Rs. 44,898-6 by foreclosure of the mortgaged property. The aforesaid deed of mortgage incorporated three prior deeds, one dated the 8th of February, 1913 for Rs. 7,000 (exhibit F4), another dated the 9th of March, 1914 for Rs. 4,351 (exhibit F3), and the third dated the 8th of January, 1916 for Rs. 11,000 (exhibit F5), all these being in favour of the plaintiff.

Defendant No. 3, Ganga Prasad, the appellant before us, defendants Nos. 4, 5 and 6, namely, Jadunath Prasad, Harnath Prasad and Baladin Sah, were all impleaded on the allegation that they were subsequent mortgagees. All these defendants denied that they were subsequent mortgagees and alleged that their mortgages were of dates prior to the date of the mortgage in favour of the plaintiff, on which the suit had been brought.

The appellant-defendant No. 3 set up a mortgage-deed, dated the 25th of July, 1916 in respect of a portion of the mortgaged property. The defence put forward by him was to the effect that he had already obtained a decree on the basis of his mortgage-deed and the plaintiff was a party to that

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decree. His contention was that he was not bound to pay the mortgage of the plaintiff which was a mortgage subsequent to his. He further contended that, in any case, the plaintiff was not entitled to a foreclosure decree against him.

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Defendants Nos. 4 and 5 (respondents Nos. 6 and 7) set up a mortgage-deed dated the 26th of June, 1917 in their favour, and contended that they also were prior and not subsequent mortgagees as alleged by the plaintiff.

Defendant No. 6 (respondent No. 8) set up a mortgage-deed dated the 3rd of February, 1919, and also claimed to be a prior mortgagee. He also contended that the deeds, in lieu of which the mortgage-deed dated the 31st of October, 1919 had been executed in favour of the plaintiff, contained no provision for foreclosure and the plaintiff could not, therefore, claim the right to foreclose the property. He alleged that he had also obtained a decree on the basis of his mortgage-deed, and in that suit the question of priority between him and the plaintiff had already been determined.

We may also mention that there was another defendant in the suit, namely, defendant No. 7 (respondent No. 9), whose position as a prior mortgagee was admitted by the plaintiff and there was, therefore, no contest between him and the plaintiff in the court below.

The suit was tried by the learned Subordinate Judge of Rae Bareilly, and one of the issues fixed in the case was whether the plaintiff had priority against defendants Nos. 3 to 6 as alleged by him and to what extent? So far as defendant No. 6 was concerned he did not give any finding because a compromise was arrived at between him and the plaintiff. Regarding defendant No. 3 he found that

defendant No. 3 had filed a suit on the basis of his mortgage to which the present plaintiff was a party and it had been decided in that suit that the plaintiff had a priority over defendant No. 3 to the extent of Rs. 26,521-9-3 (exhibits 6 and 13). Regarding defendants Nos. 4 and 5, he found that they had also brought a suit on the basis of their mortgage, and it had been decided in that suit that the plaintiff had a priority to the extent of Rs. 29,397-15-9 (exhibits 12 and 16). The learned Subordinate Judge was of opinion that the matter having been decided in the suits mentioned above the question of the extent of priority was *res judicata*.

In result the learned Subordinate Judge passed a decree for foreclosure in favour of the plaintiff for Rs. 35,383-5-9 plus interest on the same at the contractual rate with proportionate costs. He also declared that as against the appellant, defendant No. 3, the plaintiff had a priority to the extent of Rs. 26,521-9-3 plus interest at the contractual rate and proportionate costs, and similarly as against defendants Nos. 4 and 5 to the extent of Rs. 29,397-15-9 plus interest at the contractual rate and proportionate costs. He ordered that if defendant No. 3 or defendants Nos. 4 and 5 paid the amount due on account of the prior mortgages standing in plaintiff's favour he (the plaintiff) will stand redeemed to that extent and the sum so paid to him will be deducted out of the total amount decreed to him, and in that event he will be entitled to a foreclosure decree in respect of the balance of his decree, but subject to the incumbrances in favour of defendants Nos 3, 4 and 5. As to defendant No. 6 he ordered that as a result of the compromise between him and the plaintiff, his mortgage had been paid off, and he had, therefore, no interest left in the

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mortgaged property. As to defendant No. 7 he declared that the foreclosure decree passed in favour of the plaintiff was subject to the prior charge existing in favour of the said defendant.

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Defendant No. 3 has come up in appeal to this Court and the point argued on his behalf by Mr. Jackson, the learned Counsel for the appellant, was that the order of the learned Subordinate Judge, so far as it compelled his client defendant No. 3 (now appellant before us) to pay the sum of Rs. 26,521-9-3 was unjust and erroneous. His main contention was that the plaintiff had come into Court on the basis of the mortgage dated the 31st of October, 1919, which was subsequent to the mortgage in favour of his client dated the 25th of July, 1917, and under those circumstances the plaintiff could not be allowed to foreclose the mortgaged property in a manner so as to prejudice his client's interest. He further contended that the prior mortgages standing in favour of the plaintiff now incorporated in the deed in suit did not contain any condition as to foreclosure and consequently the plaintiff was not entitled to get a foreclosure decree against defendant No. 3.

After hearing Counsel for both sides at length we have come to the conclusion that the contention put forward by the learned Counsel for the appellant must prevail. The plaintiff may be entitled to a decree for foreclosure on the basis of his mortgage-deed against the mortgagors and the subsequent mortgagees, but cannot obtain that decree against prior mortgagees, nor for the purpose of obtaining such a decree can he be allowed to rely on the prior mortgages which existed in his favour and had now been incorporated in his own subsequent mortgage, because those deeds did not contain any condition as to foreclosure.

It was argued by the learned advocate for the respondent that when in the suit brought by the appellant it had been declared that the plaintiff in the present case would have priority to the extent of Rs. 26,521-9-3 "under the deed in suit", the meaning of it was that the terms of the latter deed had been declared as binding upon the appellant. We regret we cannot accept this argument. No such interpretation can be placed upon the decree obtained by the appellant on the basis of his mortgage. What the decree meant was that the present deed of the plaintiff had priority over the deed in favour of the appellant to the extent of Rs. 26,521-9-3 as stated above. The words "under exhibit D2" in exhibit 13 cannot possibly mean that the idea was to incorporate all the terms of the deed in suit, which was filed as exhibit D2 in the previous suit by the appellant. We are of opinion that the decree for foreclosure passed by the court below against the appellant cannot be sustained.

In our opinion the proper decree to be passed in the case in order to fully protect the rights of the parties would be a decree for sale. Such a course would be permissible to us both in view of the fact that the deed on which the plaintiff has brought the present suit gives him authority to realize his money by sale of the mortgaged property, and also in view of the fact that under the provisions of order XXXIV, rule 4, sub-clause (2), according to which the court is, in a suit for foreclosure, authorized, at the instance of the plaintiff or any person interested either in the mortgage money or in the right of redemption, to pass a decree for sale in lieu of a decree for foreclosure. We think that the present case is one where a decree for sale should be passed in order to protect the rights of all the parties.

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We, therefore, set aside the decree for foreclosure passed by the court below in plaintiff's favour and pass a decree for sale directing that the property should be sold and out of the proceeds of the sale the plaintiff should be paid a sum of Rs. 26,521-9-3 plus interest at the contractual rate and proportionate costs and after that defendant No. 3 should be paid the money due to him under his decree dated the 10th of August, 1922 (exhibit 13) passed in suit No. 100 of 1921, and after that defendants Nos. 4 and 5 should be paid the sum due to them under their decree also dated the 10th of August, 1922 (exhibit 12) passed in suit No. 194 of 1922, and if after the satisfaction of these decrees any money still remains in hand, that will be paid to the present plaintiff towards his mortgage dated the 31st of October, 1919. The mortgagor will, of course, be entitled to the surplus, if any.

We also wish to mention that defendant No. 7 is admittedly a prior mortgagee whose claim is admitted by all the parties in this case. He has, however, not chosen to appear either personally or through a pleader in this Court, and we have not, therefore, been able to pass any order regarding his mortgage. We may, however, invite the attention of the court which may happen to execute the decree that it may with the consent of defendant No. 7 direct that the property be sold free from his mortgage, also giving him priority over all, viz., defendant No. 3, defendants Nos. 4 and 5, and the plaintiff.

The appeal is, therefore, allowed and in lieu of the decree for foreclosure passed by the learned Subordinate Judge a fresh decree for sale embodying the conditions mentioned above will now be prepared in this Court under the provisions of order XXXIV,

rule 4, the time for payment being extended to six months from this date. The parties will bear their own costs in this appeal.

Appeal allowed.

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REVISIONAL CRIMINAL.

Before Mr. Justice Wazir Hasan.

KING-EMPEROR (APPELLANT) v. RAM NATH BUX
SINGH (COMPLAINANT-RESPONDENT).*

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Criminal Procedure Code, section 476, sub-section (1) and section 195, sub-section (1), clauses (a), (b) and (c)—Complaint—Section 476, sub-section (1) of the Criminal Procedure Code authorizes complaints of offences under section 195, sub-section (1), clauses (b) and (c) only.

Held, that section 476, sub-section (1) of the Code of Criminal Procedure, does not authorize a complaint with reference to offences described in section 195, sub-section (1), clause (a), committed in or in relation to a proceeding in a court. The jurisdiction to make a complaint under that sub-section is limited to such cases as are provided for in sub-section (1), clause (b) or clause (c) of section 195 only.

Mr. *Ali Zaheer*, for the applicant.

Government Advocate (Mr. *G. H. Thomas*), for the Crown.

HASAN, J.:—This is a reference under section 438 of the Code of Criminal Procedure 1898, by the Sessions Judge of Sitapur. The circumstances in which the reference has arisen are as follows:—

In execution of a simple money decree passed by the court of the Munsif of Sitapur in favour of Dilaram Sah against one Thakur Ramnath Bakhsh Singh a village belonging to the judgment-debtor was

* Criminal Reference No. 42 of 1926.