APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra, and Mr. Justice A. G. P. Pullan.

1928
November, 8.

ABDUL WAHID KHAN AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* SHEIKH ALI HUSAIN (DEFENDANT-RESPONDENT).*

Civil Procedure Code (Act V of 1908), section 11 and order XXXIV, rule 1—Res judicata—*Mortgage—Prior mortgagee impleaded in a suit brought by puisne mortgagee—Prior mortgagee's remedy when barred by the rule of* res judicata.

If a prior mortgagee with a paramount title is impleaded in a suit brought by the puisne mortgagee and there is no contest in that suit regarding the prior mortgage the right of the prior mortgagee would not be lost to him. If, however, there is a controversy and that controversy is decided against him whether by actual decision or in default, his remedy would be barred and the rule of *res judicata* would stand in his way in asserting his claim under the prior mortgage *Radhe Kishun* v. *Khurshed Hossein* (1), followed. *Bansi Dhar* v. *Jagmohan Das* (2), relied upon.

Messrs. *Niamatullah* and *Naimullah*, for the appellants.

Mr. *M. Wasim*, for the respondent.

MISRA and PULLAN, JJ. :—This is an appeal arising out of a declaratory suit which has been dismissed by the two lower courts.

The facts of the case are that one Mohammad Khan was the owner of a 3 annas share in village Bargadhi which constitutes a hamlet of a bigger village Chhachhundahi-Singhahya, mahal Mustahkam, pargana Utraula, district Gonda. This share of 3 annas now represents a 6 annas share by virtue of partition. Mohammad Khan

*Second Civil Appeal No. 146 of 1928, against the decree of S. Asghar Hasan, Additional District Judge of Gonda, dated the 20th of January, 1928, confirming the decree of Syed Shaukat Husain, Additional Subordinate Judge of Gonda, dated the 12th of May, 1927, dismissing the plaintiffs' claim.

(1) (1920) L. R., 47 I. A., 11. (2) (1928) I. L. R., 3 Luck., 472.

1928

ABDUL WAHID KHAN v. SHEIKH ALI HUSAIN.

Misra and Pullan, JJ.

mortgaged the aforesaid share in favour of two persons, named Abdul Wahid Khan and Bhiku, who were the plaintiffs in the court of first instance and the appellants before this Court. The mortgage was a usufructuary mortgage executed on the 14th of November, 1914, for a consideration of Rs. 5,000. Subsequently on the 19th of May, 1915, Mohammad Khan executed a simple mortgage-deed in respect of 2 annas share out of the same property in favour of Syed Ali Husain the defendant-respondent. About a month later, that is on the 17th of June, 1915, Mohammad Khan executed two deeds of further charge, one for Rs. 1,100 in favour of Abdul Wahid Khan named above and the other for Rs. 100 in favour of Bhiku also named above. Abdul Wahid Khan has died during the pendency of the appeal and is now represented by Musammat Sandal and others (appellants Nos. 1 to 5) who are his legal representatives.

On the 10th of April, 1923, Syed Ali Husain instituted a suit for sale of the mortgaged property (2 annas share) in the court of the Subordinate Judge of Gonda on the basis of his mortgage-deed, dated the 19th of May, 1915. He impleaded Mohammad Khan, the mortgagor, and several other persons as defendants in the suit. Two of these persons were Abdul Wahid Khan and Bhiku who were arrayed as defendants Nos. 39 and 40 in that suit. They were impleaded on the allegation that they were subsequent transferees of the property in suit (*vide* exhibit 2). Abdul Wahid Khan and Bhiku did not put in an appearance and the preliminary decree for sale was passed *ex parte* in favour of Syed Ali Husain on the 25th of October, 1924. The decree was for recovery of Rs. 29,469-13-10 by sale of the property mortgaged.

On the 29th of August, 1925, Abdul Wahid Khan, and Bhiku, the plaintiffs of the present suit, and who were defendants Nos. 39 and 40 in the suit for sale

1928

ABDUL WAHID KHAN v. SHEIKH ALI HUSAIN.

Misra and Pullan, JJ.

brought by the respondent, put in an application in the court of the Subordinate Judge of Gonda to the effect that they were mortgagees in possession, under the deed dated the 14th of November, 1914, and the two deeds of further charge, both dated the 17th of June, 1925 in regard to the 3 annas share, against 2 annas out of which the decree for sale had been obtained by Syed Ali Husain, and that their lien in respect of the three aforesaid mortgages be declared at the time of the sale (*vide* exhibit 4). The parties appeared before the court on the 29th of August, 1925. Abdul Wahid Khan and Bhiku were present in person with Babu Avadh Behari Lal, pleader, and Syed Ali Husain the decree-holder was present through his agent Syed Iqbal Husain. On behalf of the decree-holder the deed of Rs. 5,000 of 1914 was admitted and no objection was raised in respect thereof. But the other two deeds of further charge executed in 1915 were not admitted. Thereafter a decree absolute for sale was passed on the 7th of October, 1925.

Subsequently another application was put in by Abdul Wahid Khan and Bhiku on the 18th of October, 1926, praying for the same relief (*vide* exhibit 6). On the 19th of October the Subordinate Judge passed an order to the effect that as prior transferees they were not necessary parties to the suit brought by Syed Ali Husain and if they wanted priority in respect of that deed they could bring a regular suit for the purpose and get the question settled (*vide* exhibit 7). Abdul Wahid Khan and Bhiku thereupon brought the present declaratory suit on the 27th of November, 1926, and this is the suit in which the present appeal has been filed. The relief prayed for by them was to the effect that they had a prior charge under their mortgage, dated the 14th of November, 1914, and the defendant Syed Ali Husain who had purchased the 2 annas share mortgaged to him on the 20th of October, 1928, could not get possession of the

property without redeeming the said mortgage in favour of the plaintiffs.

The defendant, Syed Ali Husain, contested the suit on the ground that the plaintiffs had lost all their rights under the mortgage-deed, dated the 14th of November, 1914, since they had not set up those rights in the suit brought by him and in which they had been impleaded as defendants. In short his contention was to the effect that the decree for sale obtained by him, in execution of which he had purchased the 2 annas share, was *res judicata* between the parties so far as the above mortgage was concerned.

Misra and Pullan, JJ.

The Additional Subordinate Judge of Gonda, to whose file the suit had been transferred, accepted the defence of the respondent Syed Ali Husain and has, by his decree dated the 12th of May, 1927, dismissed the plaintiffs' suit. The decree passed by him has been affirmed by the learned Additional District Judge of Gonda by his decree, dated the 20th of January, 1928.

The plaintiffs have appealed to this Court against the decrees passed by the courts below dismissing their suit and the only question involved in the case is whether the decree for sale obtained by the respondent bars the plaintiffs-appellants from claiming the relief asked for by them on the basis of their mortgage, dated the 14th of November, 1914.

We have heard the parties at great length and have come to the conclusion that the appeal must be allowed and we now proceed to give our reasons for taking that view.

The latest case decided by the Privy Council on the subject will be found reported in *Radha Kishun* v. *Khurshed Hossein* (1). The facts of that case were that one Ragha Kishun, the appellant, had instituted a suit for

(1) (1920) L.R., 47 I.A., 11 : s. c. I.L.R., 47 Calc., 662.

1928

ABDUL WAHID KHAN v. SHEIKH ALI HUSAIN.

Misra and Pullan, JJ.

recovery of his mortgage-money by sale of the property mortgaged on the basis of a mortgage, dated the 13th of May, 1892, of which he had taken a transfer from one Bakhtawar Mal, the original mortgagee. A portion of the property in suit had been previously mortgaged to the defnedants by means of a usufructuary mortgage, called *zerpeshgi*, on the 25th of February, 1891, and was then subsequently mortgaged to the same defendants under a simple deed of mortgage, dated the 28th of April, 1894.

In 1906 a suit was brought by the defendants for recovery of their money under the deed of 1894. In that suit the appellant Radha Kishun was also impleaded and the decree for sale was passed against him also. Radha Kishun, the appellant, then subsequently in 1907 brought a suit on the basis of his mortgage of 1892 and impleaded the mortgagees under the deed of 1894 as parties to the said suit. Their defence was that the appellant could not obtain a decree in respect of the property mortgaged to them since Radha Kishun being a party to the suit of 1906 brought by them had never put forward his mortgage of 1892 as a defence in the case, and that therefore the decree passed in their favour in the year 1906 operated as *res judicata* in their favour and in the face of that decree the suit of Radha Kishun the appellant was not maintainable This defence was accepted by both the courts in India and Radha Kishun's suit was consequently dismissed.

On appeal their Lordships of the Privy Council took a different view and Sir LAWRENCE JENKINS in delivering the judgment of the Judicial Committee observed as follows :—

> "The rule of *res judicata* is contained in section 11 of the Code of Civil Procedure, 1908, which provides that no court shall try any

suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a court competent to try such subsequent suit, and has been heard and finally decided. Had this been an exhaustive statement of the rule it obviously would not have supported the plea in the facts of this case, and so reliance has been placed on explanation IV which provides that any matter which might and ought to have been made ground of defence in such former suit shall be deemed to have been directly and substantially in issue in such suit. The mortgage-deed of May 13, 1892, it is urged, might and ought to have been made a ground of defence in the former suit No. 100 of 1906, and by the omission the present suit is barred. The rule is clear; the controversy is narrowed down to the question whether the facts invite its application. It becomes necessary, therefore, to see what was the position of Bakhtawar Mal in the former suit No. 100 of 1906. It was a suit brought by the Sahus to enforce against the mortgagor their mortgage deed of April, 24, 1894. Bakhtawar Mal was joined as a defendant, but whether any or what relief was sought against him does not appear. Bakhtawar Mal's mortgage was prior to that on which the Sahus sued, and its validity is now admitted.

Misra and Pullan, JJ.

The case, therefore, came within the terms of section 96 of the Transfer of Property Act,

1928

ABDUL WAHID KHAN v. SHEIKH ALI HUSAIN.

Misra and Pullan, JJ.

1882, which expressely provides that where property the sale of which is directed is subject to a prior mortgage the court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. The implication of the section is that without such consent the property could not be so sold.

Bakhtawar Mal'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 Bakhtawar Mal'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 Bakhtawar Mal'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.

The Sahus, therefore, have failed to establish the conditions essential to their plea, and they alone are responsible for this defect. The plaint in suit No. 100 of 1906 has not been produced and this omission is not supplied

by the summary of the plaint set out in the extracts from the decree. That summary still leaves the contents of the plaint a matter of mere conjecture and certainly does not show that Bakhtawar Mal's mortgage was attacked. The decree, too, is open to the same comment. In arriving at this conclusion their Lordships have not overlooked the authorities cited at the Bar, but so far as they are binding on this Board they are clearly distinguishable."

Misra and Pullan, JJ.

The rule of law laid down by their Lordships in the above case is to the effect that if a prior mortgagee with a paramount title is impleaded in a suit brought by the puisne mortgagee and there is no contest in that suit regarding the prior mortgage the right of the prior mortgagee would not be lost to him. If, however, there is a controversy and that controversy is decided against him whether by actual decision or in default, his remedy would be barred and the rule of *res judicata* would stand in his way in asserting his claim under the prior mortgage.

This question was recently discussed by a Bench of this Court to which one of us was a party in a case reported in *Bansi Dhar* v. *Jagmohan Das* (1). In that case also a prior mortgagee was a party to the suit and set up his claim under his mortgage which was of a prior date. It appears that subsequently he withdrew his claim based on the prior mortgage and a decree was passed. It was held by this Court that under those circumstances the question of the prior mortgage not having been inquired into could not be treated as an issue directly and substantially raised in the previous suit, and that the claim of the prior mortgagee was not in any way affected

(1) (1928) I. L. R., 3 Luck., 472 : s. c. 5 O. W. N., 210.

1928

WAHID ABDUL KHAN v. SHEIKH ALI HUSAIN.

by the decree which had been obtained by the puisne mortgagee.

Reliance has been placed before us, as was done in the court below, upon several cases decided by their Lordships of the Privy Council and also by the different High Courts in India. Some of those decisions, it is sufficient for us to observe, were cases which had arisen before the passing of the present Code of Civil Procedure in which it has been clearly laid down (*vide* order XXXIV, rule 1) that a puisne mortgagee may sue either for foreclosure or for sale without making a prior mortgagee a party to the suit and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. It therefore appears to us that whatever may have been the state of law prior to the passing of the Code of Civil Procedure, 1908, it is clear that after the passing of the Act of 1908 the mere fact that a prior mortgagee has been made a party to a suit brought by the puisne mortgagee would not destroy his prior mortgage unless there is a clear controversy in that suit and the controversy decided adversely to him.

Misra and Pullan, JJ.

The only point which we have therefore to decide is whether in the suit brought by the respondent Syed Ali Husain there was any controversy relating to the prior mortgage of the appellants, and whether that controversy resulted in an adjudication against them either expressly or impliedly. We may mention that this would in each case depend upon the facts and the circumstances existing in that case. The rule of law is clear but the actual point to be decided in each case is whether the facts of that case are such as would invite the application of that rule.

We now turn to the facts of the present case. We have got on the record the plaint of the former suit brought by the respondent Syed Ali Husain. It is exhibit 2. It is clear from paragraph 8 of the plaint that

defendants Nos. 39 and 40 were impleaded as puisne mortgagees. The actual words used in that paragraph are "*bataur muntaqil ilaihim mabad*" which when translated mean "as subsequent transferees". Our attention has not been drawn to any other allegation in the plaint besides this from which it may appear that the rights of defendants Nos. 39 and 40, who are the plaintiffs in the present suit, as prior mortgagees were, in any way, denied. There can be no doubt, as would appear from the facts of the case stated above, that these defendants were puisne mortgagees or subsequent transferees, as the respondent called them in his plaint, by virtue of the two deeds of further charge, dated the 17th of June, 1915.

We are, therefore, unable to infer by necessary implication that the respondent in his suit actually intended to raise any controversy regarding the right of the plaintiffs of the present suit in respect of their prior mortgage, dated the 14th of November, 1914. It can very well be said that the only thing which the respondent wanted in that case was to destroy the rights of the present plaintiffs as they existed under their two deeds of further charge, dated the 17th of June, 1915. It has been strenuously argued on behalf of the respondent that the mere fact that the plaintiffs of the present suit were impleaded, in the suit brought by the respondent, as subsequent transferees, was sufficient to show that the respondent denied their rights as prior mortgagees. We regret we are unable to take that view. If no subsequent mortgages had existed in favour of the plaintiffs of the present suit and the respondent impleaded them in his suit as defendants on the allegation that they were subsequent transferees, there would have been some room for argument that the respondent wanted to assail their rights as prior mortgagees. We are to a great extent supported in this conclusion of ours by what the agent

1928

ABDUL WAHID KHAN v. SHEIKH ALI HUSAIN.

Misra and Pullan, JJ.

of the decree-holder himself stated before the court on the 29th of August, 1925, when the parties were present before the Subordinate Judge. The plaintiffs of the present suit had asked the court to declare their lien in respect of the deed of 1914 and the two deeds of further charge of the year 1915. It was clearly stated on behalf of the decree-holder in reply that there was no objection so far as the deed of 1914 was concerned, but the right of the applicants, so far as the deeds of 1915 were concerned, was denied. It was contended on behalf of the respondent that nothing which was stated on behalf of the decree-holder after the passing of the decree should be taken into consideration in deciding whether the question relating to the prior mortgage was in controversy in the suit brought by the respondent. We regret we are unable to exclude this evidence from our consideration. The evidence consists of a statement made by the agent of the respondent and is good evidence to show what he actually understood in that case when he impleaded the plaintiffs of the present suit as defendants, calling them subsequent transferees.

We are, therefore, of opinion that when the respondent Ali Husain impleaded the plaintiffs of the present suit as defendants in his own suit he never intended to question their rights as prior mortgagees under the deed of 1914. Indeed, as observed by their Lordships of the Privy Council in the case quoted above, it was necessary for him, if he wanted to destroy the title of the plaintiffs in the present suit, to lodge a distinct case in his plaint in derogation of the claim of the appellants relating to priority in respect of the deed of 1914. We, therefore, hold that the rule of *res judicata* which has been applied in the present case by the courts below does not stand in the way of the plaintiffs, and that his suit must be decreed.

1928

ABDUL WAHID KHAN v. SHEIKH ALI KHAN

There is no other question regarding which the parties are at issue, the mortgage in favour of the plaintiffs-appellants being admitted throughout.

We, therefore, set aside the decrees of the courts below and grant a decree to the plaintiffs-appellants that their suit, as brought, will stand decreed with costs in all three courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

SHEIKH MOHAMMAD ALI, (PLAINTIFF-APPELLANT) v. SHEIKH MUMTAZ ALI, (DEFENDANT-RESPONDENT).* 1928 *November*, 9.

Heir of a deceased tenant obtaining certain rights from the landlord—Rights, whether acquired for his exclusive advantage or for the benefit of all the heirs of the deceased holder—Possession of the heir, whether on behalf of all the heirs of the deceased tenant—Other heirs of deceased, whether can claim partition.

Where certain plots came in the possession of a person as heir of the previous holder of those plots any rights obtained by him in respect of those plots while in such possession must be ascribed to the rights of the deceased holder whose heir he happened to be and any benefit derived by him must be considered as benefit derived by him not for his exclusive advantage but for all the heirs of the deceased holder and his possession must be considered not only on his behalf but on behalf of all the heirs and the other heirs can claim partition of those plots as co-sharers.

Mr. *M. Wasim*, for the appellant.

Mr. *Naimullah*, for the respondent.

*Second Civil Appeal No. 298 of 1928, against the decree of S. M. Ahmad Karim, Subordinate Judge of Sultanpur, dated the 23rd of May, 1928, setting aside the decree of Pandit Shiam Manohar Tewari, Munsif of Musafirkhana at Sultanpur, dated the 6th of February, 1928, decreeing the plaintiff's claim.