

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice
Bisheshwar Nath Srivastava.

1929
December,
9.

SAIYED MEHDI ALI AND OTHERS (PLAIN'TIFFS-APPELLANTS)
v. SAIYED WILAYAT HUSAIN KHAN AND ANOTHER
(DEFENDANTS-RESPONDENTS).*

Civil Procedure Code (Act V of 1908), section 11, Explanation 4—Res judicata—Mortgagee's suit to enforce the mortgage impleading deceased mortgagor's brother as his heir and legal representative—Omission of mortgagor's heir to plead his paramount title—Subsequent suit to enforce the paramount title, if barred by the rule of res judicata—Evidence—Certificate of guardianship, admissibility of, as evidence of age—Second appeal—Appellate court accepting a certificate of guardianship as sufficient evidence of age—High Court's power to interfere with the finding about age.

A mortgagee plaintiff should not ordinarily be allowed in his suit based on the mortgage, to raise a controversy as regards the title of a third person who is not connected with the mortgage and claims a paramount title and a plea of *res judicata* in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless there has been an actual decision in respect of the paramount title.

Where, therefore, the mortgagor being dead the mortgagee in his suit on the basis of the mortgage impleaded his brother as one of the heirs and legal representatives of the mortgagor the fact that this brother did not in that suit set up his paramount title would not bar by the rule of *res judicata* a subsequent suit brought to enforce that paramount title. *Jaggewar Dutt v. Bhuban Mohan Mitra* (1), *Joti Prasad v. Aziz Khan* (2), *Gobardhan v. Munna Lal* (3), *Radha Kishun v. Khurshed Hossein* (4), and *Abdul Wahid Khan v. Ali Husain* (5), relied on.

A certificate of guardianship issued in Oudh is a record made by a public servant in the discharge of his official duties and an entry in such a certificate is relevant and admissible in

*Second Civil Appeal No. 177 of 1929, against the decree of Chaudhri Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 23rd of February, 1929, upholding the decree of Kunwar Pratap Bikram Shah, Second Munsif, Lucknow, in addition to strength, dated the 31st of January, 1928, dismissing the plaintiff's appeal.

(1) (1906) I.L.R., 33 Cal., 425. (2) (1908) I.L.R., 31 All., 11.

(3) (1918) I.L.R., 40 All., 584. (4) (1919) I.L.R., 47 I.A., 11.

(5) (1928) I.L.R., 4 Luck., 250=6 O.W.N., 1.

proof of the age of a particular person. *Mohan Lal v. Muhammad Adil* (1), and *Ameer Hasan v. Mohammad Ejaz Husain* (2) relied on.

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Where the lower appellate court accepts the entry in a certificate of guardianship as sufficient evidence regarding the age of the person to whom that certificate relates it is not open to a High Court in second appeal to question that finding of the lower appellate court.

Mr. *Ghulam Hasnain Naqvi*, for the appellants.

Messrs. *Ghulam Hasan* and *Shahanshah Husain*, for the respondents.

STUART, C. J. and SRIVASTAVA, J. :—This is an appeal by the plaintiffs who have been unsuccessful in both the lower courts. The facts of the case which have given rise to this appeal are lengthy and complicated. We will state them so far as they are necessary for the proper understanding and determination of the points which require decision in the appeal.

One Nawab Sultan Begum, the daughter of Muhammad Ali Shah, King of Oudh, owned some house property which she transferred by a sale deed, dated the 8th of November, 1865, in favour of her four sons Nawab Jafar Ali Khan, Qazim Ali Khan, Sadiq Ali Khan and Raza Ali Khan. She had also left two daughters one of whom, Zeenat Ara, brought a suit impugning the sale deed and on the 19th of August, 1895, obtained a decree against her four brothers for her one-tenth share. Nawab Jafar Ali Khan mortgaged his four-annas share in the said property. The mortgagee obtained a decree for sale on foot of the mortgage-deed and one-fifth of the materials of the houses was put to sale. The aforesaid one-fifth share of the materials was purchased by one Ali Jan Khan. On the 16th of April, 1901, Raza Ali Khan made a mortgage of his one-fourth share in favour of Ahmad Husain. Four days later, on the 20th of April, 1901, Raza Ali Khan purchased from Ali Jan his rights

(1) (1925) 2 O.W.N., 601.

(2) (1928) 6 O.W.N., 51.

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in the one-fifth of the materials which had been purchased by him. Subsequently Raza Ali Khan made two mortgages one on the 21st of August, 1901, in favour of his previous mortgagee Ahmad Husain for his one-fourth share and one-fifth of the materials purchased by him and the other on the 28th of September, 1901, in favour of Wilayat Husain, defendant No. 1 in respect of a three-fourths share in the house property. It is not easy to say how he arrogated to himself the ownership of the three-fourths share, but it appears to have included his one-fourth share, the one-fourth share of Qazim Ali Khan which he said he was going to purchase and the one-fifth share in the materials which he had acquired from Ali Jan. Raza Ali Khan died on the 21st of September, 1907. On the day following his death Wilayat Husain instituted a suit for sale on the basis of his mortgage deed, dated the 28th of September, 1901, against the heirs of Raza Ali Khan. One of the heirs impleaded in the suit was Jafar Ali Khan, the brother of Raza Ali Khan. Jafar Ali Khan did not appear to defend the suit and it was decided against him *ex parte*. The other heirs of Raza Ali Khan made a compromise with Wilayat Husain and ultimately on the 13th of January, 1908, a decree for sale was passed on the basis of the compromise as against the contesting defendants and *ex parte* against Jafar Ali Khan, in respect of a twenty-seven-fortieth share in the houses instead of the three-fourth share which was mortgaged. This share was evidently fixed at three-fourth of nine-tenths, this being the share left to the sons after excluding the one-tenth share for which Zeenat Ara had obtained a decree in her favour. On the 28th of September, 1908, Jafar Ali Khan sold his one-fourth share in the site of the houses and one-twentieth share in the materials which had remained unsold, to one Abdul Ali. The latter died on the 13th of February, 1909, leaving three minor sons who are the plaintiffs-appellants before us. On the 4th of

April, 1910, one Hakim Fazl Ali, the maternal uncle of the minor sons of Abdul Ali, acting as their next friend, made an application under order XXI, rule 58 of the Code of Civil Procedure objecting to the sale of Jafar Ali's one-fourth share in the site of the houses, in execution of Wilayat Husain's decree. This application was rejected on the 16th of April, 1910. It appears that subsequently the whole property which formed the subject of the decree in Wilayat Husain's favour was put to sale and purchased by Wilayat Husain himself who obtained a sale certificate in respect of it on the 7th of November, 1910, and also obtained possession under a warrant for delivery of possession, dated the 6th of February, 1911. It may be mentioned that Wilayat Husain also purchased the one-tenth share for which Zeenat Ara had obtained a decree in her favour, under two sale deeds, one dated the 25th of November, 1910, and the other dated the 24th of May, 1911. Thereafter on the 7th of April, 1914, Wilayat Husain also obtained a decree for partition of the share purchased by him, against Sirdar Mahal defendant No. 2, widow of Sadiq Ali Khan. On the 13th of June, 1912, the Maharaja of Mahmudabad was appointed guardian of the person and property of the three minor sons of Abdul Ali Khan. Two of these sons attained majority before the institution of the present suit. On the 20th of December, 1926, this suit was instituted by and on behalf of the three sons of Abdul Ali for possession by partition of a one-fourth share in the land forming the site of all the houses in question which was sold by Jafar Ali Khan to their father.

Wilayat Husain, defendant No. 1, contested the suit on various grounds but the only defences which are material for the purposes of this appeal are those based on the grounds of *res judicata*, limitation and the plea about the extent of the plaintiffs' share.

Both the lower courts have found that as the plaintiffs derive their title from Jafar Ali Khan they are bound

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by the decree obtained by Wilayat Husain against him and their claim is, therefore, barred by the principle of *res judicata*. On the question of limitation the finding of the lower appellate court is that plaintiff No. 1 has failed to prove that he attained majority within three years of the institution of the present suit. It has therefore held that the claim of plaintiff No. 1 is barred by time. Lastly as regards the extent of the plaintiffs' share both the lower courts have found that the plaintiffs could not as transferees of the interest of Jafar Ali be entitled to more than one-fourth of nine-tenths after excluding Zeenat Ara's share.

The learned counsel for the plaintiffs-appellants questioned the correctness of the findings of the lower appellate court on all the three points set forth above. His first contention is as regards *res judicata*. The position with regard to this question is this: Wilayat Husain the mortgagee brought a suit on foot of his mortgage, dated the 28th of September, 1901, praying therein for sale of the three-fourths share mortgaged by Raza Ali. As the mortgagor Raza Ali had died before the suit so it was instituted against his heirs. One of them was his brother Jafar Ali and he was accordingly impleaded as one of the heirs and legal representatives of Raza Ali. Jafar Ali did not appear to defend the suit and the claim was decreed against him in respect of twenty-seven-fortieth share in the property, *ex parte*. The learned Subordinate Judge has found that as Jafar Ali was a party to the suit he ought to have contested it on the ground that the share mortgaged by Raza Ali was more than his legitimate share and as he failed to do so therefore the claim set up by the plaintiffs who claimed through Jafar Ali is barred by the rule of constructive *res judicata* under explanation 4 of section 11 of the Code of Civil Procedure. The argument urged by the plaintiffs-appellants is that as it was a suit based on a mortgage and Jafar Ali was impleaded as a representative of the mortgagor, it was not incumbent

on him in that suit to set up his paramount title and his failure to do so cannot attract the application of explanation 4 of section 11 of the Code of Civil Procedure to the case. In *Jaggewar Dutt v. Bhuban Mohan Mitwa* (1) it was held that the ordinary rule was that a plaintiff mortgagee could not be allowed so to frame his suit as to draw into controversy the title of a third party, who was in no way connected with the mortgage and who had set up a title paramount to that of the mortgagor and mortgagee. This case was referred to and followed by the Allahabad High Court in *Joti Prasad v. Aziz Khan* (2). In *Gobardhan v. Munna Lal* (3), a Bench consisting of Sir PRAMODA CHARAN BANERJI and ABDUL RAOOF, JJ., decided that in a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee was not a necessary party and the question of the paramount title could not be litigated in such a suit. The facts of this case were that two suits for sale on separate mortgages of the same property were filed and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit. The party so impleaded was in reality the owner of a considerable portion of the property comprised in the mortgages sued upon, though he was not impleaded in that capacity. In one of these suits the puisne mortgagee did not appear and the suit was decreed against him *ex parte*. This puisne mortgagee then brought a suit for declaration of his title to part of the mortgaged property. Applying the principle set forth above, their Lordships of the Allahabad High Court held that the suit was not barred by anything which had happened in the course of the previous litigation. In *Radha Kishun v. Khurshed Hossein* (4) the facts were these: Second mortgagees sued for a sale-decree under the Transfer of Property Act, 1882, joining as a party the first mortgagee who did not appear. A decree was made and the

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property was bought by the second mortgagees. The first mortgagee afterwards sued for a sale decree. It did not appear that in the former suit the second mortgagees had attacked the first mortgage or sought to postpone it to their own. It was held that the decree in the former suit was not *res judicata* under section 11 of the Code of Civil Procedure, 1908, against the first mortgagee and that he was entitled to a sale decree. In the course of their judgment, their Lordships of the Judicial Committee remarked as follows :—

“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.”

Lastly, in a case decided by a Bench of this Court, *Abdul Wahid Khan v. Ali Husain* (1) it was decided that if a prior mortgagee with a paramount title is impleaded in a subsequent 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.

The principles deducible from the above decisions are: *Firstly*, that the mortgagee plaintiff should not ordinarily be allowed, in his suit based on the mortgage, to raise a controversy as regards the title of a third person who is not connected with the mortgage and claims a

(1) (1928) I.L.R., 4 Luck., 250=6 O.W.N., 1.

paramount title, and *secondly* as a corollary of the above, that the plea of *res judicata* in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless the paramount title has been expressly the subject of controversy and there has been an actual decision in respect of it. But the matter might be considered from another stand-point. The words of explanation 4 of section 11 are:—"Any matter which *might and ought* to have been made ground of defence of attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It is true that Jafar Ali Khan might have set up his rights of ownership in respect of the one-fourth share in the land forming the site of the houses as a ground of defence in that suit but the further question is whether he ought to have raised that defence in the said suit. We have pointed out that in mortgage suits the ordinary rule is not to draw into controversy questions regarding a paramount title. It follows, therefore, that if Jafar Ali who had been impleaded only as a representative of the mortgagor had raised such a plea in defence it would have been entirely in the discretion of the court to allow the question regarding his paramount title to be litigated in that suit or not. If the matter was one the adjudication in respect of which depended upon the discretion of the court trying the suit, it can hardly be said to be a matter which "ought to have been made ground of defence." We are not in the circumstances prepared to hold that it was incumbent on Jafar Ali to raise a controversy as regards his title as owner in that suit. We are, therefore, of opinion that the present suit is not barred by the rule of *res judicata*.

The next contention is as regards limitation. It is admitted by the learned counsel for the appellants that there is no evidence as regards the age of plaintiff No. 1 except exhibit C3, the certificate of guardianship. This document only shows that plaintiff No. 1 was to attain

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majority in December, 1923. It does not mention the date on which he would become major. The present suit was instituted on the 20th of December, 1926. It was the duty of the plaintiff to show that he attained majority on some date after the 20th of December. There can be no presumption that he attained majority after the 20th and not before that date. As he has failed to give any evidence to prove the date of his birth, we think the lower court is correct in holding that this claim is beyond time. In this connection we might also mention that the learned counsel for the defendants-respondents impugned the finding of the lower appellate court about the claim of plaintiffs Nos. 2 and 3 being within time. We think the defendants' contention also to be without force. The argument urged by the defendants-respondents is that the entry in the certificate of guardianship is not sufficient evidence to prove the age of plaintiffs Nos. 2 and 3. It has been held in *Mohan Lal v. Muhammad Adil* (1) and *Ameer Hasan v. Mohammad Ejaz Husain* (2) that a certificate of guardianship issued in Oudh is a record made by a public servant in the discharge of his official duties and an entry in such a certificate is relevant and admissible in proof of the age of a particular person. The lower appellate court having accepted the said entry as sufficient evidence regarding the age of these two plaintiffs, it is not open to us in second appeal to question the finding of the lower appellate court.

Lastly it was contended by the plaintiffs-appellants that the share of the plaintiffs is one-fourth and not one-fourth of nine-tenths as found by the lower appellate court. The argument is that although Zeenat Ara had obtained a decree for her one-tenth share yet there is no evidence to show that she ever put the decree into execution or obtained possession of that share. We do not think that the absence of positive evidence regarding the execution of Zeenat Ara's decree is of any consequence.

(1) (1925) 2 O.W.N., 601.

(2) (1926) 6 O.W.N., 51.

There can be no doubt that her legal share in the inheritance of her mother Sultan Begum was one-tenth and that she had got a decree for that share. It was never pleaded that she did not get possession of the share or that she lost it by adverse possession. Further we have the fact that the share decreed in her favour was purchased by Wilayat Husain under two sale deeds to which reference has been made before. We, therefore, agree with the lower appellate court that the share available for distribution among the four sons of Sultan Begum was only nine-tenths and that the share of Jafar Ali could only be one-fourth of nine-tenths.

The result, therefore, is that we allow the appeal, set aside the decision of the lower appellate court and give the plaintiffs Nos. 2 and 3, Syed Hadi Ali and Syed Ibad Ali a decree for possession by partition of two-thirds of nine-fortieths of the land forming the site of the three houses in suit together with proportionate costs in all three courts. A preliminary decree for partition will be prepared accordingly.

Appeal allowed.

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Before Mr. Justice Wazir Hasan and Mr. Justice Bisheshwar Nath Srivastava.

MAHANT NARAIN DAS (PLAINTIFF-APPELLANT) v. BABU ASA RAM (DEFENDANT-RESPONDENT).*

United Provinces Land Revenue Act (III of 1901), sections 111(a) and (b) and 233—Jurisdiction of civil and revenue courts—Partition—Suit instituted by a co-sharer in a civil court for determination of a question of title before filing objections in partition court—Revenue court postponing partition proceedings till the decision of civil court—Jurisdiction of civil court to try the suit about title, if barred.

The whole object of clauses (a) and (b) of section 111 of the United Provinces Land Revenue Act is to avoid a clash

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*Second Civil Appeal No. 217 of 1929, against the decree of Pandit Krishna Lal Kaul, Additional Subordinate Judge of Fyzabad, dated the 23rd of April, 1920, confirming the decree of Babu Shiva Gopal Mathur, Munsif of Fyzabad, dated the 22nd of December, 1928, dismissing the plaintiff's suit.