

REVISIONAL CIVIL.

Before Mr. Justice A. G. P. Pullan.

JAGANNATH (DEFENDANT-APPELLANT) v. SHEO 1929
 SHANKAR AND ANOTHER (PLAINTIFF AND DEFENDANT August, 8.
 RESPONDANTS).

Mortgage—Suit for redemption by puisne mortgagee against prior mortgagee and the latter's sub-mortgagee—Decree for redemption passed in absence of sub-mortgagee—Sub-mortgagee's subsequent suit against his mortgagor for recovery of his money—Decision in previous suit, if operates as res judicata—Civil Procedure Code (Act V of 1908), section 11—Transfer of Property Act (IV of 1882), section 68.

In a suit for redemption by a puisne mortgagee against the prior mortgagee and his sub-mortgagee it is not incumbent on the sub-mortgagee to claim payment of the amount due to him. The sub-mortgagee by failing to claim his money risks his security but he is not thereby stopped from bringing a suit against his own mortgagor to recover the sum advanced by him under section 68 of the Transfer of Property Act. *Narayan Vithal Maval v Ganoji* (1), and *Gokul Das v. Debi Prasad* (2), referred to.

Where in a suit for redemption by a puisne mortgagee against the prior mortgagee and his sub-mortgagee the sub-mortgagee did not appear and the prior mortgagee stated that the sub-mortgage was fictitious and the court decided the suit treating the sub-mortgage as fictitious the decision in that suit does not operate as *res judicata* in a subsequent suit by the sub-mortgagee against the prior mortgagee for recovery of his money as the matter was not in issue in that suit to the knowledge of the sub-mortgagee whose presence in that suit was not compulsory, it being not incumbent on him to claim his money in the redemption suit.

Mr. Sorendra Nath Srivastava, holding brief of
 Mr. Radha Krishna, for the applicant.

* Section 25 Application No. 40 of 1929, against the order of Pandit Sheo Narain Terari, Subordinate Judge of Unao, dated the 8th of April, 1929.

(1) (1891) I.L.R., 15 Bom., 692.

(2) (1906) I.L.R., 28 All., 638.

1929

JAGANNATH

v.

SHEO
SHANKAR.

Mr. *Zahur Ahmad*, for the opposite party.

PULLAN, J. :—This is an application for revision of an order passed by a Judge of the Small Cause Court. The plaintiff Sheo Shankar is a sub-mortgagee and he has brought this suit under section 68 of the Transfer of Property Act to recover his share in the sub-mortgage executed in his favour on the 17th of June, 1921, by the prior mortgagee Jagannath. This Jagannath had in his favour a mortgage, dated the 5th of June, 1912, and this was redeemed by one Sidh Gopal, a puisne mortgagee, by means of a suit in the Court of the Munsif which was decided on the 28th of November, 1927. In that suit the present plaintiff was impleaded as a defendant. He made no appearance and in his absence a decree was passed for redemption on payment of a sum of Rs. 1,200 to Jagannath.

This application has been admitted on the ground that the lower court made a mistake in law and that he should have held that the decision of the Munsif, dated the 28th of November, 1927, operates as *res judicata* against the present suit. The plea of *res judicata* was taken in the court below in reference only to an alleged finding by the Munsif that the sub-mortgage in favour of the present plaintiff was fictitious. What the Munsif said was ‘the defendant No. 1 (i.e., Jagannath) swears that the mortgage deed executed by him in favour of the defendants Nos. 2 and 3 (one of whom is the present plaintiff) is fictitious. Under the circumstances I decree the plaintiff’s claim for redemption on payment of the sum of Rs. 1,200. No doubt this is equivalent to a finding by the Munsif that the sub-mortgage can be disregarded as being fictitious, but it is evident that this finding is based entirely on a statement made in court by Jagannath and the matter was not in issue to the knowledge of the present plaintiff whose presence at the date of hearing was not compulsory.

The lower court was therefore, right in holding that the judgment of the Munsif, in so far as this finding is concerned, did not operate as *res judicata* in the present suit. But in the grounds of revision before me a slightly different position is taken. It is argued, not that this specific finding of the Munsif operates as *res judicata*, but that the failure of the present plaintiff to claim the amount due on his sub-mortgage in the previous suit is the bar. It is sought to bring this omission under Explanation (4) of section 11 of the Code of Civil Procedure. It is argued that the sub-mortgagee was a necessary party to a suit for redemption and that he must claim payment of his sub-mortgage in the redemption suit. Reliance is placed on a ruling of the Bombay High Court reported in *Narayan Vithal Maval v. Ganoji* (1) and on a ruling of the Allahabad High Court reported in *Gokul Das v. Debi Prasad* (2), but neither of these rulings help the applicant in the present case. All that they lay down is that if the person claiming redemption so desires he is entitled to have an account taken of the sub-mortgages, if any. But there is nothing in these rulings or, as far as I know, elsewhere which makes it incumbent on the sub-mortgagee to claim payment in the redemption suit. By failing to do so he risks his security but it has never been held that he cannot bring a suit against his own mortgagor to recover the sum advanced by him under section 68 of the Transfer of Property Act. Thus I am unable to find that the lower court is in error either on the issue which he decided or on the question raised in a different form for the first time in this Court. The plaintiff was entitled to his decree, and I reject the application with costs.

Application rejected.

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Pullan, J.

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(2) (1906) I.L.R., 28 All., 638.