

APPELLATE CIVIL.

1928
February, 3.

Before Mr. Justice Wazir Hasan and Mr. Justice
A. G. P. Pullan.

BANSIDHAR (DECREE-HOLDER-APPELLANT) v. JAGMOHAN
DAS (APPLICANT) AND ANOTHER* (JUDGMENT-DEBTOR-
RESPONDENTS).*

Res judicata—Prior mortgagee impleaded as a defendant in a suit by a subsequent mortgagee but not pressing for an inquiry into his mortgage—Application of prior mortgagee for entry of his mortgage in the sale proclamation as a prior encumbrance, whether barred by *res judicata*—Transfer of Property Act (IV of 1882), section 101—Equity of redemption and rights of mortgagee vesting in one person—Mortgagee's intention to keep alive the mortgage.

Where in a suit brought by a subsequent mortgagee the prior mortgagee was impleaded as a defendant, but he did not press for an inquiry in respect of his mortgage, he is not barred by the rule of *res judicata* in having his mortgage entered in the sale proclamation as a prior encumbrance. According to the rules of procedure the prior mortgagee is not a necessary party to the suit by a subsequent mortgagee and an issue directed towards the inquiry into the existence or validity of a claim on a prior mortgage cannot be treated as an issue directly and substantially in issue in the suit.

Where the equity of redemption vests in the mortgagee the question whether the mortgagee intended or not to keep alive his mortgage must be decided in favour of the mortgagee being kept alive unless it is shown that it was not for the benefit of the mortgagee to keep the mortgage alive. *Sivagami Achi v. Subramania Ayyar* (1), *Darshan Singh v. Arjun Singh* (2) and *Hanwant Ram v. Ram Harakh* (3), referred to. *Radha Kishun v. Khurshed Hossein* (4), followed.

Messrs. Niamat Ullah, Bhawani Shankar and Hakim Uddin, for the appellant.

Messrs. Ali Zaheer, Daya Kishan Seth and S. H. Ahmad, for the respondents.

*Execution of Decree Appeal No. 58 of 1927, against the order of Mahmud Hasan, 3rd Additional District Judge of Lucknow, dated the 22nd of August, 1927, upholding the order of Kishun Lal Kaul, Subordinate Judge of Lucknow, dated the 31st of January, 1927.

(1) (1904) I.L.R., 27 Mad., 259. (2) (1926) 3, O. W. N., 741.
(3) (1927) 1 Luck., Cas., 277. (4) (1920) I.L.R., 47 I.A., 11.

HASAN and PULLAN, JJ. :—This is an appeal from the order of the 3rd Additional District Judge of Lucknow, dated the 22nd of August, 1927, in proceedings relating to the execution of a decree. By the order under appeal the order of the court of first instance was affirmed.

1928

BANSIDHAR
v.
JAGMOHAN
DAS.

The facts are as follows :—

The village of Aqilpur, pargana Lucknow, in the district of Lucknow, was owned by one Lala Behari Lal. On the 3rd of January, 1913, Lala Behari Lal transferred the village just now mentioned by way of a usufructuary mortgage to Lala Jagmohan Das, respondent, for a consideration of Rs. 20,000. In pursuance of the mortgage, it is agreed, the mortgagee entered into the possession of the village of Aqilpur. On the 12th of October, 1914, Lala Behari Lal borrowed a sum of Rs. 2,000 from Bansidhar, appellant, and hypothecated the village of Aqilpur by way of security for repayment of the loan. On the 17th of April, 1915, Lala Behari Lal sold the village of Aqilpur to one Lala Indar Prasad. The bulk of the purchase-money was directed to be paid by the vendee to Lala Jagmohan Das in satisfaction of the mortgage of the 3rd of January, 1913, but was not so paid. Lala Jagmohan Das and Lala Indar Prasad are brothers. On a partition of the family property in the year 1916 the interest which Lala Indar Prasad had acquired in the village of Aqilpur under the sale of the 17th of April, 1915, was allotted to the share of Lala Jagmohan Das and from that period of time the mortgagee's interest under the mortgage of the 3rd of January, 1913, and the equity of redemption came to be vested in Lala Jagmohan Das. In the year 1922 Lala Bansidhar brought a suit for the recovery of the mortgage-money due to him under the bond of the 12th of October, 1914, and the relief for which prayer was made in that suit was the sale of the village of Aqilpur. Lala

1928

BANSIDHAR
v.
JAGMOHAN
DAS.

Hasan and
Pullan, JJ.

Jagmohan Das and Lala Behari Lal, were impleaded as defendants. In the plaint Lala Bansidhar altogether omitted to make any reference to the mortgage of the 3rd of January, 1913. Lala Jagmohan Das in his written statement disclosed the mortgage. In this state of pleadings an issue was framed by the court for the purpose of making an inquiry as to the existence of the mortgage of the 3rd of January, 1913. At a subsequent stage of the proceedings the issue was struck off on the ground that Lala Jagmohan Das did not desire to press for an inquiry in respect of his mortgage just now mentioned. The result was that a decree for sale of the village of Aqilpur was passed in favour of Lala Bansidhar.

Naturally in the circumstances mentioned above, the decree directed the sale of the property without mentioning either that the sale was to be free from incumbrance or that it was to be subject to an incumbrance. When in execution proceedings of this decree a sale proclamation came to be prepared as required by rule 66 of order XXI of the Code of Civil Procedure Lala Jagmohan Das applied to the court seized of those proceedings for an entry of the mortgage of the 3rd of January, 1913, to be made in the sale proclamation. The decree-holder, Lala Bansidhar resisted this application but the courts below have passed an order in favour of Lala Jagmohan Das, directing that the mortgage of the 3rd of January, 1913, be entered in the sale proclamation. It is against this order that the present appeal has been preferred by Lala Bansidhar.

At the hearing of the appeal a preliminary objection was raised by the learned Counsel for the respondent to the effect that no appeal lay, and in support of the objection reliance was placed upon a Full Bench decision of the High Court at Madras in the case of *Sivagami Achi v. Subramania Ayyar* (1). But having regard to the

(1) (1904) I.L.R., 27 Mad., 259.

fact that we have heard the appeal on its merits and come to the conclusion that it fails we refrain to express any opinion on the question raised in the preliminary objection.

1928

 BANSIDHAR
 v.
 JAGMOHAN
 DAS.

In support of the appeal two points were urged: (1) that the inquiry into the claim of Lala Jagmohan Das to have the mortgage of the 3rd of January, 1913, entered in the sale proclamation as a prior incumbrance was barred by the rule of *res judicata* having regard to what had transpired before the passing of the decree; and (2) that the mortgage of the 3rd of January, 1913, was extinguished by reason of the allotment of the village of Aqilpur to the share of Lala Jagmohan Das at the partition of the family property in the year 1916.

*Hasan and
 Pullan, JJ.*

We are of opinion that there is no substance in either of the two grounds. It appears to us that the conduct of Lala Jagmohan Das in withdrawing the issue which was raised in the suit amounted to no more than an abandonment of a plea which was wholly foreign to the substance of the suit. We cannot construe that act of Lala Jagmohan Das as an abandonment of his rights if he had any under the mortgage of the 3rd of January, 1913. That the plea bearing on that mortgage was wholly unnecessary for the proper decision of that suit is clear from the fact that the suit was brought by the subsequent mortgagee. According to the rules of procedure the prior mortgagee was not a necessary party to the suit and an issue directed towards the inquiry into the existence or validity of a claim on a prior mortgage cannot in the circumstances be treated as an issue directly and substantially arising in the suit. The latest pronouncement of their Lordships of the Judicial Committee on the point of view which we have just now expressed is to be found in *Radha Kishun v. Khurshed Hossein* (1).

(1) (1920) L.R., 47 I.A., 11.

1928

BANSIDHAR
v.
JAGMOHAN
DAS.

Hasan and
Pullan, JJ.

In support of the second ground three circumstances are relied upon for the purpose of showing that Lala Jagmohan Das did not intend to keep alive the incumbrance of the 3rd of January, 1913. Those circumstances are : (1) the act of Lala Jagmohan Das in withdrawing the issue, to which reference has been made in the preceding portion of this judgment; (2) the entry of his name as a proprietor and not as a mortgagee also in the *khewat* of the village for the year 1923-1924, and (3) his statement contained in a security-bond which he executed in 1923 to the effect that he was the proprietor of the village of Aqilpur.

As to the precise proposition of law bearing on the subject of merger, it is not necessary for us to enter into any elaborate discussion. We have had to state it on previous occasions. It will suffice to refer to two cases, *Darshan Singh v. Arjun Singh* (1); and *Hanwant Ram v. Ram Harakh* (2). The last-mentioned case was decided by this Bench. According to the view of law expressed in the above cases the question must be decided in favour of Lala Jagmohan Das unless the appellant succeeds in showing that it was not for the benefit of Lala Jagmohan Das to keep the mortgage of the 3rd of January, 1913, alive. Now the three circumstances referred to above do not lead to any such conclusion. As to the first, it is enough to say that in no manner it indicates Lala Jagmohan Das's intention to abandon his rights under the mortgage of the 3rd of January, 1913. The abandonment of the issue which had arisen in the suit does not, in our opinion, as we have already said, amount to an abandonment of rights. As to the second circumstance, the entry in the *khewat* does not show any intention of Lala Jagmohan Das in respect of the mortgage of the 3rd of January, 1913. The entry is correct so far as it goes but the absence of an entry in the same

(1) (1926) 3 O. W. N., 741.

(2) (1927) 1 Luck., Cas., 277.

register to the effect that Lala Jagmohan Das was also a mortgagee in possession cannot by any stretch of imagination lead to an inference of Jagmohan Das's intention to extinguish his rights under the mortgage in question. The third circumstance is equally of no consequence whatsoever. The security bond merely describes the proprietary interest of Lala Jagmohan Das in the village of Aqilpur. It does not disclose one way or the other as to what his intentions were in respect of his mortgagee's interest in the same village.

Before we take leave of this case we may mention that the question which has at present arisen relates merely to the preparation of the sale proclamation and is as to whether in that proclamation the mortgage of the 3rd of January, 1913, should or should not be shown as a prior incumbrance. We think that it has rightly been held by the courts below that there is no bar to its being so shown and that it should be shown. This is the only effect of the order under appeal and of our order.

The appeal fails and is dismissed with costs.

Appeal dismissed.

1928

BANSIDHAR
v.
JAGMOHAN
DAS.

*Hasan and
Fullan, JJ.*