

In these circumstances we find no force in the present application and dismiss it accordingly.

In view of the difficulties in which the applicants find themselves we allow them a period of three months to make proper arrangement for deposit of the court-fee.

Application rejected.

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APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

LASA DIN (PLAINTIFF-APPELLANT) v. MOHAMMAD ABDUL SHAKOOR AND ANOTHER (DEFENDANTS-RESPONDENTS)*

1940

January, 19

Civil Procedure Code (Act V of 1908), Order XXXIV, rule 1, and Order I, rule 9—Non-compliance with provisions of Order XXXIV, rule 1, whether fatal to suit—Order I, rule 9 whether applies to mortgage suits—Transfer of Property (Amending) Act (XX of 1929), section 67-A, whether has retrospective effect—Law prior to amendment—Holder of two independent mortgages on same property, whether can sue on each of them separately.

Non-compliance with the provisions of Order XXXIV, rule 1, is not necessarily fatal to a suit to enforce a mortgage and Order I, rule 9, applies to mortgage suits as well. *Mahmood Ali Khan v. Ali Mirza Khan* (1), relied on.

Present section 67-A of the Transfer of Property Act has no retrospective effect. *Ko aung Bye v. Ko Po Kyaing* (2), *V. R. S. Chettiar Firm v. Ya Ya* (3), and *Corporation of Calcutta v. Arunchandra Singha* (4), relied on.

According to the law in these provinces before the Amending Act of 1929 added section 67-A to the Transfer of Property Act, the holder of two independent mortgages over the same property was not bound to disclose his second mortgage at the time of suing on his first mortgage so that his failure in that respect did not debar him from bringing a subsequent suit to enforce the second mortgage. *Sundar Singh v. Bholu* (5), and *Bansidhar v. Jagmohan Das* (6), relied on. *Dhondo Ramchandra Kulkarni v. Bhikaji walad Gopal* (7), referred to.

Mr. *D. K. Seth*, for the appellant.

Mr. *Naimullah*, for the respondent.

*Second Civil Appeal No. 110 of 1937, against the order of Mr. Bhagwati Prasad, Civil Judge of Lucknow, dated the 27th of October, 1936.

(1) (1934) I.L.R., 10 Luck., 70.

(2) (1931) A.I.R., Ran., 208.

(3) (1933) A.I.R., Ran., 377.

(4) (1933) I.L.R., 60 Cal., 1470.

(5) (1898) I.L.R., 20 All., 322.

(6) (1925) 12 O.L.J., 127.

(7) (1914) I.L.R., 39 Bom., 138.

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ZIAUL HASAN, J.:—This is a plaintiff's second appeal in a suit on a mortgage.

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One Bhao Singh died long ago possessed of 18 bighas 16 biswas bhayachara share in village Kankarabad in tahsil Lucknow leaving his widow Mst. Rukmin and two daughters, Jasauda Kuar and Suraj Kuar. On his death the property came into the possession of his widow, Mst. Rukmin. She died in 1924 and there appeared on the scene three brothers, Bhujang Singh Raghunath Singh and Kesri Singh, sons of Baldeo Singh, who claimed Bhao Singh's property as his reversionary heirs. They set up their title to the property in the mutation court but mutation was made in favour of the daughters. On the 2nd April, 1924, two of the three reversioners, namely, Bhujang Singh and Raghunath Singh mortgaged 1 bigha out of half of Bhujan Singh's property to the present plaintiff-appellant by Ex. 1. A few months later on the 23rd September, 1924, all the three claimants sold one-half of 18 bighas 16 biswas to Banke Lal and Nisar Husain in order to raise money for litigation in the civil court. On the 31st May, 1926, when Raghunath Singh had died issueless, Bhujang Singh, Kesari Singh, Banke Lal and Nisar Husain filed a suit for possession of the entire property against the daughters of Bhao Singh. This suit was eventually compromised between the parties on the 21st April, 1927 (Ex. B-6) by which one-half of the property was to go to the plaintiffs of the suit in this manner, that one-fourth was to be taken by Bhujang Singh and Kesri Singh and the remaining one-fourth by Banke Lal and Nisar Husain, while the remaining moiety was to be kept by the daughters of Bhao Singh.

On the 18th October, 1937, Kesri Singh gifted his entire share to Nand Lal Singh and Chandan Singh, sons of his brother Bhujang Singh, and on the 16th February, 1928, Bhujang Singh and his two sons mortgaged four bighas of land to the plaintiff appellant by Ex. B-4. The present defendant No. 2, Abdul Shakoor,

held a decree against Bhujang Singh and in execution of that decree brought to sale and purchased 2 bighas out of the four bighas and odd share obtained by Bhujang Singh and his brother by the compromise of the 21st April, 1927. On the 15th February, 1935, the present appellant brought a suit on foot of the mortgage of the 16th February, 1928 (Ex. B-4) and impleaded Bhujang Singh, his son Nand Lal Singh and Abdul Shakoor, Chandan Singh the other son of Bhujang Singh having died by that time. This suit was decreed against Bhujang Singh and Nand Lal Singh's two bighas and dismissed against Abdul Shakoor because so far as the two bighas purchased by him were concerned, the mortgage Ex. B-4 was held to be invalid against him on account of previous attachment.

Subsequently on the 5th September, 1935, Lasa Din plaintiff brought the suit from which this appeal has arisen on foot of the mortgage of the 2nd April, 1924 (Ex. 1). In this suit he impleaded only Bhujang Singh and Abdul Shakoor. The suit was contested by Abdul Shakoor but was *ex parte* against Bhujang Singh. Abdul Shakoor raised various pleas in defence but they were overruled by the trial court and the suit was decreed against both the defendants. The court however reduced interest under the Agriculturists' Relief Act. Defendant No. 2 appealed against the decree and the learned Civil Judge of Lucknow who heard the appeal dismissed the plaintiff's suit in its entirety on two grounds, namely, first, that the plaintiff failed to implead certain transferees of the property and secondly, that as he did not sue on the mortgage in suit along with the mortgage of the 15th February, 1928, (Ex. B-4) he had lost his rights under the mortgage in suit. The plaintiff brings this second appeal against the dismissal of his suit.

I am of opinion that neither of the two grounds mentioned above was sufficient for the dismissal of the plaintiff's suit.

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As for non-joinder of parties no doubt Order XXXIV, rule 1, Civil Procedure Code, provides that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to a suit relating to a mortgage but this provision is subject to the other provisions of the Code and one of the provisions of the Code contained in Order I, rule 9, is that no suit shall be defeated by reason of misjoinder or non-joinder of parties and that the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. In *Mahmood Ali Khan v. Ali Mirza Khan* (1), it was held that non-compliance with the provisions of Order XXXIV, rule 1, is not necessarily fatal to a suit to enforce a mortgage and that Order I, rule 9 applies to mortgage suits as well. It was therefore wrong on the part of the lower appellate court to dismiss the plaintiff's suit on the ground that some parties whom it considered necessary were not impleaded.

As regards the second ground on which the suit had been dismissed, present section 67-A of the Transfer of Property Act, which was added by the amending Act of 1929, no doubt lays down that a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of which he has the right to obtain the same kind of decree under section 67 and who sues to obtain such a decree on anyone of the mortgages, shall in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due; but it has been held that section 67-A has no retrospective effect—vide *Ko Aung Bye v. Ko Po Kyaing* (2), and *R. S. Chettiar Firm v. Ya Ya* (3). In the Calcutta case of *Corporation of Calcutta v. Arunchandru Singha* (4), it is remarked at page 1475—

“Section 67A of the Transfer of Property Act was inserted by section 32 of the Amending Act XX of 1929.

Section 63 of the Amending Act provides that so far as is

(1) (1934) I.L.R., 10 Luck., 70.

(2) (1931) A.I.R., Ran., 208.

(3) (1933) A.I.R., Ran., 377.

(4) (1933) I.L.R., 60 Cal., 1470.

material, nothing in section 32 of the Amending Act shall be deemed in any way to effect—

“(a) the terms or incidents of any transfer of property made or effected before the 1st April, 1930, and
“(c) any right, title obligation or liability already acquired, accrued or incurred before such date.”

The learned Judge of the lower court has relied on the case of *Dhondo Ramchandra Kulkarni v. Bhikaji walad Gopal* (1), but the view enunciated in that case was contrary to what was the law in this province before the Amending Act added section 67-A to the Transfer of Property Act. In the case of *Sundar Singh v. Bholu* (2), it was held that there is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit. Similarly, the Court of the Judicial Commissioner of Oudh following the case of *Sundar Singh v. Bholu* (2) held in *Bansidhar v. Jagmohan Das* (3) that the holder of two independent mortgages over the same property is not bound to disclose his second mortgage at the time of suing on his first mortgage so that his failure in that respect does not debar him from bringing a subsequent suit to enforce the second mortgage. As the mortgage in suit was executed in 1924, section 67-A of the Transfer of Property Act has no application and the plaintiff appellant was not according to the view prevalent in these parts bound to sue on both the mortgages together.

Although I am of opinion that the plaintiff's suit should not have been thrown out on the grounds on which the learned Judge of the lower appellate court proceeded, nevertheless the suit cannot succeed as against defendant No. 2, for another reason. It has already been noted that the present appellant No. 2, was impleaded by the plaintiff in his previous suit on the mortgage Ex. B-4. This means that according to

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the plaintiff, defendant No. 2, was a transferee of a portion of the property mortgaged by Ex. B-4. The deed Ex. B-4 however clearly states that the mortgaged property is subject to no encumbrance whatever except two, one dated the 25th November, 1927, and the other dated the 3rd January, 1928, in favour of Babu Lal, Hazari Lal, Munshi Lal, Parmeshar Din and Jagdamba Prasad. This means that the 4 bighas of land mortgaged by Ex. B-4, with which defendant No. 2, was concerned was not subject to the mortgage of the 2nd April, 1924, (Ex. 1) and the plaintiff-appellant cannot in my opinion go behind this statement of his mortgagors.

The appeal is decreed in part against Bhujang Singh respondent No. 1, but dismissed as against Abdul Shakoor, respondent No. 2, with costs. The suit of the plaintiff appellant will be decreed with costs in respect of the two bighas of land held by Bhujang Singh only. Six months' time from this date will be allowed under Order XXXIV, rule 4, Civil Procedure Code.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice Radha Krishna Srivastava

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FATEH CHAND (DEFENDANT-APPELLANT) v. L. KUNJ
 BEHARI LAL (PLAINTIFF-RESPONDENT)*

Tort—Malicious prosecution—Presence or absence of reasonable and probable cause can be inferred from facts of case and is a question of law—Second appeal against finding about absence of reasonable and probable cause, if can lie—Presumption of absence of reasonable and probable cause, when arises.

The presence or absence of reasonable and probable cause is a question relating to the state of the mind of the accuser and has to be inferred from the facts of each particular case. The question whether the inference from certain facts is correct or not is a question of law. Therefore the finding of the lower appellate court that there was an absence of reasonable and

*Second Civil Appeal No. 336 of 1937, against the order of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 25th of May, 1937.