1923.

RANJIT SAHI v. MAULAVI MUHAMMAD QASIM.

KULWANT SAHAY, J.

of the shares of the different defendants also amongst themselves, and therefore in such a case the value, for the purposes of jurisdiction cannot be the value of the plaintiff's share only, because the Court deals with the entire estate and effects partition not only of the plaintiff's share but of the defendants' shares also. Moreover a decree in a partition suit is engrossed on a stamped paper as required by Article 45 of the Indian Stamp Act, the stamp duty being payable not only on the value of the plaintiff's share but on the value of all the shares separated and this clearly shows that the value of the plaintiff's share alone cannot determine the jurisdiction of the Court. The Calcutta High Court has uniformly adopted this view and I feel inclined to follow the same. In my opinion the preliminary objection fails and the appeal was properly presented to this Court.

The result is that the decree of the learned Subordinate Judge is set aside and the case is sent back to him for disposal.

DAS, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

LAL BEHARI SINGH

v.

GUR PRASAD SINGH.*

1923.

Jan. 31,

Code of Civil Procedure, 1909 (*Act V of* 1908), *section* 11—Res judicata—*Mortgage suit—allegation by person impleaded as subsequent mortgagee that he is prior mortgagee—suit decreed* ex parte—*Suit in which such mortgagee again asserts the priority of his bond, whether barred.*

Where a person who is impleaded in a suit on a mortgage on the allegation that he is a puisne mortgagee files a written

* Appeal from Original Decree No. 101 of 1920, from a decision of B. Satish Chandra Mitra, Subordinate Judge of Monghyr, dated the 21st January, 1920.

1923.

LAL BEHARI SINGH v. GUR PRASAD SINGH.

statement alleging that he is a prior mortgagee, but does not otherwise contest the suit, and the judgment in that suit proceeds on the assumption that he is a puisne mortgagee, he is not entitled subsequently to allege in a suit on his own bond that he is a prior mortgagee.

Lachmi Narayan Marwari v. *Chaudhuri Bhagwat Singh*(1), *Radha Kishun* v. *Khurshed Hossein*(2), *Muhammad Ibrahim Hussain Khan* v. *Ambika Prasad Singh*(3), and *Srigopal* v. *Pirthi Singh*(4), referred to.

Appeal by the plaintiffs.

This was an appeal by the plaintiffs against a decree of the Subordinate Judge of Monghyr dismissing their suit to enforce a mortgage bond. The bond was dated the 1st November, 1903, and it was executed by the defendants Nos. 1 and 2 and one Hargobind Prasad Singh, father of the defendants Nos. 5 and 6, in favour of Amrit Singh and Uzir Singh whose heirs and representatives the plaintiffs were, for a sum of Rs. 2,000. The property mortgaged therein was a 2-annas 7-*dams* 10-*cowries* 11-*bouris* share of village Asthawan. Defendants 3 to 6 were the members of the family of defendants 1 and 2 and defendants 7 to 15 were alleged to be subsequent purchasers and mortgagees. The suit was contested by the defendant No. 11 and by the guardian *ad litem* of defendant No. 6. The other defendants did not appear. The only respondent who contested this appeal was defendant No. 11 who raised various pleas in bar of the suit, the principal pleas being that the suit was barred by *res judicata* and that the suit was bad for non-joinder of parties. The Subordinate Judge dismissed the suit holding that it was barred by *res judicata* and that it was bad for non-joinder of parties. Three points were taken by the Vakil for the plaintiffs-appellants: *First*, that the Court below was wrong in holding that the suit was barred by *res*

(1) (1920) 58 Ind. Cas. 33.

(2) (1920) I. L. R. 47 Cal. 662; L. R. 47 I. A. 11.

(3) (1912) I. L. R. 39 Cal. 527; L. R. 39 I. A. 68.

(4) (1902) 24 All. 429; L. R. 29 I. A. 118.

judicata; *secondly*, that it was wrong in holding that the suit was bad for non-joinder of parties; and *thirdly*, that the Court below was wrong in dismissing the whole suit, whereas he ought in any event to have passed a decree for sale of the share of the mortgaged properties not covered by the mortgage of the defendant No. 11.

Susil Madhab Mullick and *Guru Saran Prasad*, for the appellants.

K. P. Jayaswal (with him *Bimola Charan Sinha*), for the respondent.

KULWANT SAHAY, J., (after stating the facts set out above, proceeded as follows) :—

The first point of *res judicata* arises under the following circumstances: It appears that Babu Bihari Lal, a cousin of defendant No. 11, had a mortgage, dated the 26th January, 1908, over 1-anna 8-*dams* 10-*cowris* of *Mauza* Asthawan, executed in his favour by the predecessors of defendants Nos. 1 and 2 for a sum of Rs. 9,625. After the death of Babu Bihari Lal, the defendant No. 11 brought a suit on the said mortgage. That was suit No. 78 of 1914, and a certified copy of the plaint of that suit has been produced and marked as *Exhibit 5* in this case. In that suit Amrit Singh and Kamta Prasad Singh, who are plaintiffs Nos. 1 and 7 in the present action, were impleaded as defendants and in the plaint it was alleged that they were subsequent mortgagees inasmuch as the plaintiff's (the present defendant No. 11) mortgage was executed to satisfy a prior mortgage of the year 1895, and, therefore, he acquired a priority over the mortgage of the present plaintiffs. Kamta Prasad Singh did not appear in that suit, but Amrit Singh filed a written statement, which is marked *Exhibit 4* in this case, and in that written statement Amrit Singh alleged that his mortgage was prior to the mortgage of defendant No. 11 and the latter could claim no priority over him. After filing this written statement Amrit Singh or Kamta Prasad Singh never appeared in this suit and never took any steps to prove their priority

1923.

LAL BEHARI SINGH *v.* GUR PRASAD SINGH.

KULWANT SAHAY, J.

over the mortgage of the defendant No. 11. The learned Subordinate Judge who decided that suit, in his judgment, dated the 5th May, 1916, which is marked *Exhibit 7* in this case, proceeded on the assumption that Amrit Singh and Kamta Prasad Singh were subsequent mortgagees and the decree in that suit, which is marked *Exhibit 6* in this case, directed:

> "That the defendants do pay the decretal amount within four months and that in case of default the same be realized by sale of the mortagaged property."

Thereafter Amrit Singh filed a petition on the 20th July, 1916, for a rehearing of the suit under Order IX, rule 13, Civil Procedure Code, but this application was also dismissed. Therefore, the position was that in the suit No. 78 of 1914, the defendant No. 11 clearly alleged that his mortgage was prior to that of the present plaintiffs and the decree in that suit directed the sale of the property in the event the defendants in that suit, including the plaintiffs in the present suit, failed to pay up the decretal amount. The decree was executed in due course and the mortgage property, 1-anna 8-*dams* 10-*cowris* in Asthawan, was sold and purchased by the defendant No. 11. The plaintiffs in the present suit contend that as their mortgage was in fact prior to that of the defendant No. 11, they were not necessary parties in the suit of the defendant No. 11 and that it was not necessary for them to prove their priority in that suit and therefore the decree passed in that suit does not operate as *res judicata* in the present suit. This contention cannot be sustained. It may be that as a matter of fact the plaintiffs' mortgage was prior in time to that of the defendant No. 11. It is very likely that the allegation of the defendant No. 11 in his plaint of the suit of 1914 that he was entitled to priority on account of the money advanced under his bond being used in satisfying a prior debt was false. But it was on the allegation, true or false, that the plaintiffs in the present action had a subsequent mortgage that they were impleaded as parties in that suit. It was their

1923.

LAL BEHARI SINGH v. GUR PRASAD SINGH.

KULWANT SAHAY, J.

duty in that suit to prove that that allegation was incorrect. The mere filing of the written statement in that suit was not sufficient. It was no proof of priority but a mere allegation of priority, and once their mortgage was attacked as being subsequent to that of the defendant No. 11, it was their bounden duty to prove that it was not so. Having failed to appear and prove their priority in the suit of 1914 the plaintiffs, in my opinion, are now estopped from claiming their priority in the present suit. Reliance has been placed by the learned Vakil for the appellants on the case of *Lachmi Narayan Marwari* v. *Chaudhuri Bhagwat Singh* (1), but in that case it does not appear that in the suit of the subsequent mortgagee wherein the prior mortgagee was made a party there was any allegation disputing his priority and from the report of the judgment of that case it does not appear what was the form of the decree passed in that case. As a matter of fact, from the extract of the judgment of the Deputy Commissioner, Subordinate Judge, given in the report of that case, it appears that the question of priority was left open. In any event Sultan Ahmed, J., in that case clearly says: "At the same time the puisne mortgagee may make a prior mortgagee a party to the suit. If he does so, the purpose of making a prior mortgagee party should be clearly stated; but, if no purpose is given in the plaint or provided for in the decree, the prior mortgage will not be affected by the judgment in any way. Where no relief is claimed, the subject-matter of the action is the interest of the mortgagor *minus* the interest of the first mortgagee, and in such a suit, in my opinion, no investigation as to the validity or extent of the prior mortgage can possibly be made." In the case now before us the purpose of making the present plaintiffs parties in the suit of defendant No. 11 was clearly stated and the decree clearly directed the present plaintiffs to pay up the decree and in the event of their failure, a sale of the mortgage property was ordered. This case, therefore, does not help the appellants. Mr. *Susil*

(1) (1920) 58 Ind. Cas. 33.

1923.

LAL BEHARI SINGH v. GUR PRASAD SINGH.

KULWANT SAHAY, J.

Madhab Mullick, for the appellants, also relies upon the case of *Radha Kishun* v. *Khurshed Hossein* (1). That case, far from supporting the plaintiffs, is an authority in favour of the proposition that where a prior mortgagee is impleaded as a defendant in an action on a subsequent mortgage and it is sought to displace the prior title and to postpone it to the title of the plaintiffs it is the duty of the prior mortgagee to prove his prior mortgagee. In that case the prior mortgagee was joined as a defendant, but it did not appear whether any and what relief was sought against him. The plaint of the prior suit was not produced and their Lordships held that in the absence of any proof as to the allegation upon which the prior mortgagee was made a party it must be assumed that he was made a party as a prior mortgagee and the case came within the terms of section 96 of the Transfer of Property Act. Sir Lawrence Jenkins in delivering the judgment observed as follows: "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 Bukhtaur 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 Bukhtaur Mull's priority." In the present case, the defendant No. 11 in the former suit did allege a distinct case in the plaint in derogation of the present plaintiffs' priority. Therefore this case supports the view taken by me and it does not help the plaintiffs-appellants. In this connection reference may be made to *Muhammad Ibrahim Hussain Khan* v. *Ambika Prasad Singh* (2) where their Lordships of the Judicial Committee of the Privy Council in dealing with a case similar to the present case held that it was incumbent on the prior mortgagee to set up his rights under the prior mortgage, and, not having done so, section 13, *Explanation 2*, of the Code of Civil Procedure, 1882, applied, and that

---

(1) (1920) I. L. R. 47 Cal. 662; L. R. 47 I. A. 11.
(2) (1912) I. L. R. 39 Cal. 527; L. R. 39 I. A. 68.

1923.

LAL BEHARI SINGH
v.
GUR PRASAD SINGH.

KULWANT SAHAY, J.

the claim of the plaintiffs was barred. Reference may also be made in this connection to the case of *Srigopal* v. *Pirthi Singh* (1) where a similar view was taken. that the present suit in so far as it relates to 1-anna I therefore agree with the Subordinate Judge in holding 8-*dams* 10-*cowris* of Asthawan is barred by *res judicata*.

As regards the second point taken by the learned Vakil for the appellant, it appears that Gopal Saran, the defendant No. 3 has a minor son named Chinta Saran who has not been made a party in this suit. The learned Subordinate Judge has held that the whole suit is bad inasmuch as Chinta Saran is a necessary party and that on account of this defect the whole suit ought to be dismissed. The learned Counsel for the respondent does not support this part of the judgment and in my opinion, having regard to the circumstances of the case, it can safely be held that Gopal Saran represents the interests of his son and that the suit ought not to fail on this ground.

As regards the third point, as I have already stated, the property mortgaged in the bond of the plaintiffs was a 2-annas 17-*dams* 15-*cowris* 11-*bouris* share of the village Asthawan and only 1-anna 8-*dams* 10-*cowris* was mortgaged in the bond of the defendant No. 11 and purchased by him. There is no reason why the plaintiffs should not get a mortgage decree for the sale of the remaining share of 1-anna 9-*dams* 5-*cowris* 11-*bouris* of Asthawan.

The result, therefore, is that the decree of the Court below will be modified and an ordinary mortgage decree will be passed in favour of the plaintiffs for the sum that may be found due on an account being taken for principal and interest at the bond rate up to the date of decree and for four months thereafter. The defendants, other than the defendant No. 11 must pay up the amount within four months from this date, failing therein 1-anna 9-*dams* 5-*cowris* 11-*bouris* share of *mauza* Asthawan will be sold for realization thereof. The principal amount is to carry interest at the bond

(1) (1902) 24 All. 429; L. R. 29 I. A. 118.

1923.

LAL BEHARI SINGH *v.* GUR PRASAD SINGH.

rate up to the date of decree and for four months thereafter and after that the entire amount will carry interest at 6 *per cent. per annum*. The defendant No 11 (respondent) is entitled to the costs of this appeal.

DAS, J.—I agree

Decree modified.

REVISIONAL CIVIL.

Before Mullick and Bucknill, J. J.

GREAT INDIAN PENINSULAR RAILWAY COMPANY

v.

*JITAN RAM.**

1923.

Jan. 31.

Railways Act, 1890 (*Act IX of* 1890), *sections* 72, 15, 152—*Risk Note Form B—Consignment of goods at owner's r.sk—loss of part of consignment—suit for compensation for non-delivery*—onus probandi—*Contract Act*, 1872 (*IX of* 1872), *section* 161.

Where a person who had entrusted three bales of twist to a railway company for carriage at owner's risk (Risk Note Form B), sued the Company for compensation for non-delivery of one of the bales, *held*, that the suit was on the contract and not in tort.

Held, further, on a plea that the company was exonerated from liability for the loss by the terms of the contract, (*i*) that the burden of proof lay in the first instance upon the company to prove that the loss was such as was contemplated by the contract, and that when this had been done it shifted upon the plaintiff to shew that the loss was due to the wilful neglect of the company or its servants;

(*ii*) that the loss referred to in the contract was loss to the owner, and, therefore, that delivery to a person other than the consignee was such a loss as was contemplated by the contract;

---

* Civil Revision No. 236 of 1922, against a decision of Mr. A. N. Mitter, Second Subordinate Judge of Gaya, dated the 27th March, 1922.