any statutory right of occupancy. There is no suggestion of any such right here and the decree of the Subordinate Judge is therefore right.

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RAGHUBIR SINGH v. JETHU MAHTON.

Appeals allowed.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Mullick, J.

SITAL PRASAD RAY

v.

ASHO SINGH.*

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July, 26.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXIV, rule* 1, *Order* 1, *rules* 9 *and* 10—*mortgage suit—parties—whether puisne mortgagee is a necessary party in suit on a prior mortgage.*

Order 1, rule 9, of the Code of Civil Procedure, 1908, is not subordinate to Order XXXIV, rule 1.

Girwar Narain Mahton v. *Mussammat Makbunessa*(1), dissented from.

The combined effect of Order 1, rule 9, and Order XXXIV, rule 1, in so far as mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but that failure to add one or more such persons should not have the effect of defeating the suit if the court, in their absence, can deal with the maters in controversy so far as regards the rights and interests of the parties actually before it.

If no decree can be passed without affecting the rights of absent parties the suit cannot proceed in their absence and should be dismissed.

If, however, the rights of the parties actually before it can be determined in the suit leaving the rights and interests

* Second Appeal No. 524 of 1921, from a decision of E. L. Tanner, Esqr., District Judge of Santhal Parganas, dated the 25th September, 1920, affirming decision of Babu Satish Chandra Mukherji, Subordinate Judge of Deoghar, dated the 28th June, 1920.

(1) (1916) 1 Pat. L. J. 468, *dictum.*

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of others unaffected, then, even though the other parties might properly have been added, the Court should determine the matters in controversy between the parties actually present.

Jogendra Nath Singh v. *The Secretary of State for India*(1), approved.

In a suit on a mortgage by a prior mortgagee a subsequent mortgagee may be a proper party, but is not a necessary party.

Mata Din Kasodhan v. *Kazim Hussain*(2), not approved.

Umesh Chandra Sircar v. *Zahur Fatima*(3), referred to.

This was a suit by the sons of the mortgagee on a bond executed by the father of the first two defendants. The period of limitation for the suit expired on the 12th April, 1919, the date on which the suit was instituted. After the issues had been framed it transpired that Lachman Jha Narone, defendant second party, held a subsequent mortgage on the property. The latter pleaded that the whole suit was bad for non-joinder. The trial Court dismissed the suit. The plaintiffs appealed to the High Court.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Noresh Chandra Sinha and *Nitai Chandra Ghosh*, for the appellants.

Susil Madhab Mullick, *S. S. Bose* and *Norendra Nath Sen*, for the respondents.

DAWSON MILLER, C. J.—The question for decision in this appeal is whether the suit is bad for non-joinder of parties. The appellants on the 12th April, 1919, instituted the suit to enforce a mortgage executed in favour of their father in 1906 by the father of the first two defendants. The mortgage debt was repayable

(1) (1912) 16 Cal. L. J. 385. (2) (1891) I. L. R. 13 All. 432, F.B.
(3) (1891) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201.

on the 13th April, 1907, and the limitation period for bringing a suit on the bond expired on the day the suit was instituted. The first two defendants as legal representatives of the deceased mortgagor were alone impleaded as defendants. It subsequently transpired after the issues were framed that one Lachman Jha Narone held a subsequent mortgage on the same property executed in 1910 on which a sum of about Rs. 2,600 was due at the date of the suit. Lachman Jha Narone was subsequently added as a party, but too late to save limitation, and he pleads that the whole suit is bad for non-joinder of parties under Order XXXIV, rule 1, of the Civil Procedure Code, and should be dismissed.

The learned Subordinate Judge before whom the case came for trial considered that the defect was fatal and dismissed the suit.

The learned District Judge on appeal considered that the defect was in the particular circumstances of the case not a bar to the whole suit if the plaintiffs were not aware of the puisne mortgagee's interest, which apparently was the case, and that the suit might be tried as between the parties originally on the record but, in view of the authority of this Court in *Girwar Narain Mahton* v. *Mussammat Makbunessa* (1) he felt himself bound to dismiss the suit. From that decision the plaintiffs have preferred this appeal to the High Court.

The case of *Girwar Narain Mahton* v. *Mussammat Makbunessa* (1) was a case in which the original mortgagees had died and the suit was instituted by twenty-one plaintiffs describing themselves as heirs and successors of the original mortgagees. It turned out, however, that there were other descendants of the original mortgagees who were jointly interested with the plaintiffs in the mortgage and who had not been

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(1) (1916) 1 Pat. L. J. 468.

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joined as parties up to the time when the case came up for trial by which time their right to sue was barred by limitation. It was held that, as the mortgage was indivisible, if all the parties entitled to share in the money due on the mortgage were not upon the record, the suit must be dismissed in its entirety. In the course of the judgment it was stated that Order 1, rule 9, of the Civil Procedure Code was subordinate to Order XXXIV, rule 1, which makes it imperative that all persons interested in the mortgage security shall be joined as plaintiffs. As the absent plaintiffs in that case were undoubtedly necessary parties to enable the Court to pronounce a decree in the suit I have no doubt the decision was right but the dictum that Order 1, rule 9, is subordinate to Order XXXIV, rule 1, was not necessary for the determination of the suit and, in my opinion, this dictum is not justified upon a reference to the wording of those rules.

Order XXXIV, rule 1, provides as follows:—

(1) Subject to the provisions of this Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties in any suit relating to the mortgage.

The *Explanation* appended to the rule provides that a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgagee. It is to be observed that the rule just quoted is subject to the provisions of the Code, and Order I, rule 9, of the Code provides that:

No suit shall be defeated by reason of the mis-joinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

The Court also has power under rule 10 of the same Order to add parties subject to the provisions of the Limitation Act. It would hardly seem accurate therefore to describe the provisions of Order 1, rule 9, as being subject to Order XXXIV, rule 1. On the

contrary Order XXXIV, rule 1, is expressly declared to be subject to the provisions of the Code of which Order 1, rule 9, forms a part. It seems to me that the combined effect of these rules in so far as mortgages are concerned, is that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties but that failure to add one or more such persons should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. It is a fundamental rule of procedure that the Court cannot, by its decree, affect the rights of those who are not parties to the suit. If, therefore, no decree can be passed without affecting the rights of absent parties the suit cannot proceed in their absence and should be dismissed. If, however, the rights of the parties actually before it can be determined in the suit leaving the rights and interests of others unaffected I can see no reason why, even if other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present.

The opinion which has sometimes been expressed that the provisions of Order 1, rule 9, are subject to Order XXXIV, rule 1, has no doubt been to some extent induced by the fact that the proviso relating to notice in the repealed section 85 of the Transfer of Property Act has not been re-enacted in Order XXXIV, rule 1, of the Code of 1908, which now supersedes section 85 of the earlier Act. The proviso appears to have created an impression, which in some cases has been given effect to, that where a plaintiff had no notice of the interest of puisne mortgagees or others interested in the mortgaged property and has not joined them they might nevertheless be bound by a decree obtained

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against the mortgagor in their absence. To obviate the possibility of such an error the words of the old section have not been re-enacted as presumably they were considered unnecessary. This does not, however, in my opinion, lead to the conclusion that a suit is necessarily bad if certain persons who ought to be joined in order to enable the Court to dispose of all questions affecting the rights of the persons interested in the property are not joined. Whether a person is a necessary party to the suit in the sense that it cannot proceed in his absence must depend upon whether the decision would necessarily affect the interests of that party. An instance of such a case arises under section 45 of the Contract Act where the interest of joint promisees are involved. In that case a claim cannot be enforced by one alone of the promisees all of whom are jointly interested. So also in the case of joint mortgagees, one alone cannot ordinarily maintain a suit on the mortgage which is one and indivisible. The suit must be brought to enforce the mortgage as a whole or not at all. It cannot be enforced piecemeal. The whole interest must, therefore, be represented as the Court cannot, by its decree, bind those who are not parties. Similarly a suit to recover property against co-sharers all of whom are jointly interested cannot proceed in the absence of one or more of them. This principle is of course subject to the rule that a person may, in certain cases, sue, or be sued, in a representative capacity. But if a decree can be passed and given effect to in so far as the rights of the parties actually before the Court are concerned without interfering with the interests of others there seems to me no reason why the suit should not proceed. The difference between those who may be proper parties to the suit and therefore properly impleaded and those who are necessary parties without whom the suit cannot proceed is pointed out by Mukherji, J., in *Jogendra Nath Singh* v. *The Secretary of State for India* (1) where that learned Judge lays down that two

(1) (1912) 16 Cal. L. J. 385.

conditions must be satisfied in order that a defendant may be considered a necessary party, namely, *first*, there must be a right to some relief against him in respect of the matter involved in the suit, and, *secondly*, his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In Pomeroy on *Remedies*, section 330, it is said:

"Necessary parties, defendants, are those without whom no decree at all can be rendered: proper parties, defendants, are those whose presence renders the decree more effectual: and all the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise and of all the rights which are connected with the subject matter of the controversy."

From this it may be deduced that a necessary party is a proper party but a proper party is not always a necessary party. That the puisne mortgagee in the present case is a proper party there can be no question as his rights might be determined in the suit. But can it be said that his presence is necessary to enable the Court to adjudicate between the parties actually before it? I think not. That decrees have frequently been passed in a suit for sale between the prior mortgagee and the mortgagor in the absence of a puisne encumbrancer cannot be disputed. The reports abound with such cases. The decree, however, in such a case, cannot affect the interest of the puisne mortgagee who is not a party and if the decretal amount should remain unpaid and a sale take place in execution of the decree of the prior mortgagee, the property would be sold subject to the rights of the puisne encumbrancer who would be in no worse position after the sale than he was before it. If not redeemed he can himself redeem the prior encumbrance and bring the property to sale to secure payment of his own and the prior mortgage or he can sue for a sale of the property subject to the prior mortgage. It is true that the Allahabad High Court, for reasons which have not commended themselves to any other High Court in India, have held that a puisne mortgagee who did not elect to redeem a prior encumbrance, although he was not a party to

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the suit instituted by the prior encumbrancer, had no right to sell the property subject to the prior encumbrance [see *Mata Din Kasodhan* v. *Kazim Hussain* (1)], and in that and subsequent cases they have held that the prior mortgagee was bound to make a puisne mortgagee a party to a suit for sale upon the prior mortgage. I am unable to follow the decision of the majority of the Full Bench in *Mata Din's* case (1) which conflicts with the views of other High Courts and apparently with the dictum of the Privy Council in *Umesh Chandra Sircar* v. *Zahur Fatima* (2). If, therefore, the puisne encumbrancer's position is rendered no worse by a decree in his absence at the suit of the prior mortgagee, I can see no reason why the Court should not be competent to try a suit and determine the issues in dispute between the parties actually before it merely because of the absence of a party who would be in no way prejudiced thereby. In my opinion the appeal should be allowed, the decree of the learned District Judge affirming that of the trial Court in so far as it dismisses the suit against the defendants first party should be set aside and the case remanded to the trial Court to be determined on the merits. The suit as against the puisne mortgagee (defendant 2nd party) is dismissed without costs. The appellant is entitled to the costs of this appeal and in both the Lower Courts against the defendant 1st party.

As the case has been remanded after setting aside the decision of the Court below on a preliminary point, under Order XLI, rule 23, the appellant is entitled to a certificate authorizing him to receive back from the Collector the full amount of the Court-fee paid by him on the Memorandum of Appeal in this Court and on the Memorandum of Appeal in the Court below

MULLICK, J.—I agree.

Case remanded.

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(1) (1891) I. L. R. 13 All. 432, F. B.

(2) (1891) I. L. R. 18 Cal. 164; L. R. 17 I. A. 201.