1929.

NARAYAN MAHARANA v. KING-EMPEROR.

COURTNEY TERRELL, C. J.

The numerous adjournments allowed by Magistrates in petty criminal cases and the great time which elapses between the original offence and the ultimate judgment indicate the need of a very drastic revision of the practice. The trivial offence committed in this case took place nearly a year ago and the legal costs incurred must have been enormous. Magistrates should refrain from granting adjournments save in cases where they are clearly necessitated for the purpose of justice. In a petty criminal case both parties should appear on the first day of hearing ready for the completion of the entire trial at a single hearing. If this case had been investigated on these lines the hearing should not have taken more than an hour and a half at the outside. The application for revision is rejected.

JAMES, J.—I agree.

APPELLATE CIVIL.

Before Terrell, C. J. and James, J.

1929.

April, 25.

KOI SAHU

v.

ATUL KRISHNA GHOSH.*

Res judicata—Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 11, *Explanation IV—puisne mortgagee, mortgage suit by—purchaser of equity of redemption claiming also paramount interest—party to the suit—prior interest not mentioned—suit decreed—subsequent suit based on prior interest, whether barred by res judicata.*

Where, in a mortgage suit by a puisne mortgagee, a purchaser of the equity of redemption, who also claimed to be the holder of a paramount interest, was impleaded as a defendant without his prior interest having been mentioned, and where such person has not submitted his claim as holder of the paramount interest to the court, the existence or validity of the

Circuit Court, Cuttack. Second Appeal no. 61 of 1927, from a decision of Babu Rangalal Chatterji, Additional Subordinate Judge of Cuttack, dated the 27th August, 1927, reversing a decision of Babu Nirmal Chandra Chowdhury, Munsif of Bhadrak, dated the 9th September, 1926.

prior interest will not be deemed to have been submitted to the decision of the Court; nor, having regard to the nature of a mortgage suit, can it be said that it " might and ought to have been made a ground of defence or attack " within the meaning of Explanation IV to section 11, Code of Civil Procedure, 1908, and, therefore, the decision in the mortgage suit does not operate as res judicata in a subsequent suit brought on the basis of that prior interest.

Radha Kishun v. *Khurshed Hossain* (1), relied on.

Krishna Doyal Gir v. *Syed Md. Amirul Hasan* (2), not followed.

Srimanta Seal v. *Bindubasini Dasi* (3), doubted.

Lal Behari Singh v. *Gur Prashad Singh* (4) and *Lachhmi Narayan Marwari* v. *Chaudhuri Bhagwat Singh* (5), referred to.

Appeal by the plaintiff.

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

S. N. Das Gupta, for the appellant.

S. N. Roy, for the respondent.

COURTNEY TERRELL, C.J.—This is an appeal from a decision of the Subordinate Judge of Cuttack allowing an appeal from a decision of the Munsif and dismissing the plaintiff's suit for a declaration of title to the disputed land. The facts are simple. On the 21st July, 1906, the predecessor-in-interest of defendants nos. 2, 3 and 4 sold the land in dispute to the plaintiff. On the 29th July the same predecessors mortgaged the same land together with other properties to defendant no. 1, that is to say as to part of the land mortgaged the mortgagors having parted with their interest to the plaintiff had no title. Subsequently to the mortgage the same predecessors sold a further portion of the land which they had previously mortgaged to defendant no. 1 to the plaintiff. The portion so sold was

(1) (1920) I. L. R. 47 Cal. 662, P. C.
(2) (1914-15) 19 Cal. W. N. 942.
(3) (1923) 38 Cal. L. J. 183.
(4) (1923) I. L. R. 2 Pat. 435.
(5) (1920) 58 Ind. Cas. 58.

1930.

KOI SAHU v. ATUL KRISHNA GHOSH.

COURTNEY TERRELL, C. J.

other than that already sold to the plaintiff on the 21st July, 1906. In the year 1915 defendant no. 1 sued to enforce his security. To his plaint he scheduled a list of the properties mortgaged and shewed it as including the plots of land the subject of the sale of the 21st July, 1906. He made the predecessors of defendants nos. 2, 3 and 4 defendants they being the mortgagors and he also impleaded the plaintiff as a defendant stating as against this defendant that he (the present plaintiff) claimed an interest by reason of the sale which took place after the date of the mortgage. No reference was made to the earlier sale of July 1906. The present defendant no. 1 obtained an ex parte decree in the mortgage suit in 1916. The property was put up to sale and was purchased by the mortgagee on the 15th June, 1925. He applied for and obtained delivery of possession from the Civil Court and dispossessed the present plaintiff. The present plaintiff applied to the Court under Order XXI, rule 100, of the Civil Procedure Code to get possession but this remedy was refused the Court holding that the plaintiff was himself a judgment-debtor. He therefore now sues for a declaration that the ex parte mortgage decree is not binding on the properties purchased by him in 1906 prior to the mortgage taken by defendant no. 1.

The Munsif granted a decree but the Subordinate Judge on appeal held that since the plaintiff had been made a party to the mortgage suit the plaintiff was bound by the decision in that suit and that the issue as between the plaintiff and the defendant no. 1 was barred as res judicata.

The whole question raised upon this appeal has turned upon this point. The plaintiff admits that having acquired a title subsequent to the mortgage to a portion of the mortgaged land he was a necessary party to the mortgage suit but that he was not bound to set up his paramount title acquired in July 1906 prior to the date of the mortgage. The defendants, however, contend that having been made a party to the

mortgage suit and it being an issue whether the property mortgaged could properly be put to sale it was incumbent upon the plaintiff in that suit to set up any defence upon which he could rely to defeat the defendant's right of sale; that he had failed to rely upon that prior title and therefore that the contention that he has a prior title is for ever barred as res judicata.

Now the nature of res judicata is defined by section 11 of the Code of Civil Procedure which states :—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation IV is as follows :—

"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is only by reason of this explanation that the defendants are able to raise their plea of res judicata. In a mortgage suit it is essential to implead parties such as subsequent mortgagees who have derived their title subsequent to the mortgage sued on but it has long been held that transactions prior to the date of the mortgage are foreign to the purpose of a mortgage suit and that a party impleaded by reason of such a prior title may apply for dismissal from the suit; and in such circumstances he is not debarred from raising his prior title in subsequent proceedings. In order to apply *Explanation IV* of section 11 of the Code of Civil Procedure it would be necessary to hold that the prior sale of July 1906 "might and ought to have been made a ground of defence" to the mortgage suit by the present plaintiff. To sustain the plea of res judicata on the section apart from the explanation it is incumbent on the defendant no. 1 to show that there was a distinct reference by the defendant to the plaintiff's prior title and that it was sought in the mortgage suit to displace that title in favour of that of the mortgagee. It is quite clear that nothing of the sort was

1929.

KOI SAHU v. ATUL KRISHNA GHOSH.

COURTNEY TERRELL, C. J.

done in this case and the mere statement in the plaint of the claim to sell the specific plots, the subject of the prior sale, and the fact that the plaintiff in this suit was made a defendant in the prior suit are not enough to have raised such an issue before the Court which tried the mortgage suit. It is clear that for the defendants' plea of res judicata to succeed upon the section it would be necessary to shew that in the former case they had either specifically or otherwise attacked the validity of the sale. In coming to this conclusion I have followed the reasoning, as I understand it, of the Privy Council in the case of *Radha Kishun* v. *Khurshed Hossain*(1). In the case of *Lal Behari Singh* v. *Gur Prasad Singh*(2) it was decided that where a person who is impleaded in a suit on a mortgage on the allegation that he is a puisne mortgagee files a written 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. On the other hand it may be said that if a person who is in fact a prior mortgagee has not in the prior case submitted his claim as a prior mortgagee to the Court and the plaintiff in the mortgage suit has himself not mentioned the prior mortgage it cannot be maintained that the existence or validity of the prior interest has been submitted to the decision of the Court; nor having regard to the nature of a mortgage suit can it be said that it " might and ought to have been made a ground of defence or attack ". In the report of the judgment of Kulwant Sahay, J. in the last mentioned case at page 440 there is what I take to be a serious misprint. The learned Judge in commenting upon the case of *Radha Kishun* v. *Khurshed Hossain* (1) is represented as having said " The plaint of the prior suit was not produced and their Lordships held that in the absence of any proof

(1) (1920) I. L. R. 47 Cal. 662, P. C.
(2) (1923) I .L. R. 2 Pat. 435.

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". I think it is quite clear that the words "it must be assumed" should read in view of the decision referred to "it must *not* be assumed" otherwise the observations of the learned Judge would be stultified. The learned Judge also quotes the decision of Sultan Ahmad, J. in *Lachmi Narayan Marwari* v. *Chaudhuri Bhagwat Singh*(1) where that learned Judge 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." As I have said in the present case there was no attempt on the part of defendant no. 1 when he was a plaintiff in the mortgage suit to make any reference to the plaintiff's prior interest or any attack upon its validity.

The defendants have strongly relied upon the judgment of Mukharji, J. of the Calcutta High Court in *Srimanta Seal* v. *Bindubasini Dasi*(2). In that case, however, which was heard in June 1922 the decision of the Privy Council above referred to was not cited. The facts were as follows:—In July 1909 a family known as the Kundus executed a mortgage of their holding (which was not transferable) to defendants nos. 1 and 2. In December of the same year their right, title and interest was purchased by one Barmani at a sale in execution of a money decree and the purchaser obtained delivery of possession in January 1910. In February Barmani assigned the holding to the plaintiff. The defendants (mortgagees) sued to enforce their security joining the mortgagors and also the plaintiff and obtained a decree. The plaintiff

(1) (1920) 58 Ind. Cas. 33. (2) (1923) 38 Cal. L. J. 183.

1929.

KOI SAHU v. ATUL KRISHNA GHOSH.

COURTNEY TERRELL, C. J.

commenced the suit under discussion for a declaration of title and for an injunction to restrain the execution of the decree alleging that the mortgage was inoperative because the holding was non-transferable and that the decree passed thereon was equally inoperative and he moreover set up a title which he did not claim as having come into existence prior to the mortgage but as constituted by a settlement from the superior landlord taken in September of 1910. The learned Judge held that although the plaintiff had been joined in the mortgage suit as the purchaser of the equity of redemption by reason of his assignment from Barmani in February 1910 that he could nevertheless have set up his subsequent paramount title derived from the landlords and that the decree obtained in the mortgage suit was operative against him and that he was bound by the result of the sale in execution which was passed in his presence. This decision was as I have said passed without reference to the reasoning of the Privy Council in *Radha Kishun* v. *Khurshed Hossain* (1) above referred to and the facts moreover differ from those in the present case because the plaintiff sought to rely not upon a title derived prior to the mortgage but on a title derived subsequent to the mortgage and in any case I venture with the greatest hesitation and respect for the learned Judge to doubt whether that decision is well founded, for the question really was whether the plaintiff not only might but ought to have set up his paramount title.

The defendants also relied upon a decision of the Calcutta High Court in 1914 prior to the Privy Council decision of 1919. This was the case of *Krishn Doyal Gir* v. *Syed Md. Amirul Hassan*(2). Apart from the fact that this decision preceded the decision of the Privy Council I have to make the further comment that it was based upon facts which differ from those of the present case. The prior mortgagee had been made a party to the mortgage suit upon the

(1) (1920) I. L. R. 47 Cal. 662, P. C.
(2) (1914-15) 19 Cal. W. N. 942.

general allegation by the plaintiff in the mortgage suit that he together with several other defendants in the mortgage suit had asserted "some connection with the properties mortgaged under the plaintiff's bond; therefore they have been added as defendants to give them a chance of redemption of the mortgage". In that case it was held that on this challenge he ought to have relied upon his prior mortgage and that the matter was governed by the doctrine of res judicata. Having regard to the general nature of the challenge I do not think that this decision is an authority in favour of the defendants, moreover the reasoning of the decision is not, in my opinion, satisfactory and having regard to the decision of the Privy Council before referred to I am not disposed to follow it.

Upon general grounds it seems to me that the contention of the defendants is of an extremely technical character. It is conceded on their behalf that a person impleaded as having an interest acquired prior to the mortgage is not bound to submit the priority of his mortgage to the arbitration of the Court unless he chooses to do so and his challenge is accepted by the other party. Yet if he has any other interest acquired subsequently to the mortgage he is according to their contention compelled to appear and submit any prior rights which he may have to adjudication of the Court. I cannot see why the existence of his subsequent rights should make any difference to his position as a prior mortgagee. Moreover, if the defendants' contention were right the mere fact that the owner of the prior interest was impleaded as having a subsequent interest even if he had in fact no such subsequent interest would compel him to disclose and submit to adjudication such subsequent interest. This is quite contrary to the principle that in a mortgage suit it is not competent to the Court without the consent of the person having the prior interest to enter into the validity and force of such prior interest.

In my opinion the judgment of the Subordinate Judge was wrong and should be reversed and the

1929.

KOI SAHU v. ATUL KRISHNA GHOSH.

judgment of the Munsif should be restored. The defendant no. 1 who has contested this case will pay the costs throughout.

JAMES, J.—I agree.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Macpherson and Dhavle, JJ.

SUCHIT RAUT

v.

KING-EMPEROR.*

1929.

April, 29.

Post Office Act, 1898 (*Act VI of* 1898), *section* 64—*Penal Code*, 1860 (*Act XLV of* 1860), *sections* 420 *and* 511—*Blank papers sent under insured cover—whether trial should be under the special Act or the general law.*

The principle that where a particular set of acts or omissions constitute an offence under the general law and also under a special law the prosecution should be under the special law, is confined to cases where the offences are coincident or practically so.

Kuloda Prasad Majumdar v. Emperor (1), distinguished.

A person sent only blank papers in a cover insured for Rs. 900 and addressed to himself, and, on delivery of the cover, stated that the cover had contained currency notes to the value of Rs. 900 and made claim for the same. He was charged under sections 420/511 and 419 of the Penal Code and also under section 64 of the Post Office Act, although no sanction for the prosecution had been obtained under section 72 of that Act. He was convicted of attempting to cheat under section 420/511 and acquitted of the other charges. In revision it

*Criminal Revision no. 127 of 1929, from an order of Rai Bahadur J. Chattarji, Sessions Judge of Saran, dated the 25th January, 1929, modifying an order of Babu S. N. Singh, Deputy Magistrate of Chapra, dated the 17th December, 1928.

(1) (1906-07) 11 Cal. W. N. 100.