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I agree therefore that the appeal should be dismissed with costs.

S. A. K.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Wort and Varma, JJ.*

1937. November, 12.

SHAIKH TAHIR HUSSAIN

*v.*

SYED BASIRUL HAQUE.*

*Mortgage—prior mortgagee also holding a subsequent mortgage impleaded as a puisne mortgagee—suit on basis of prior mortgage, when barred by res judicata.*

*D* brought a mortgage suit and impleaded *P* as a subsequent mortgagee in the suit and having obtained a mortgage decree dispossessed the plaintiff who had an usufructuary mortgage of a prior date. *P* had in his written statement pleaded that he was a prior and not a subsequent mortgagee but no adjudication was made. *P* thereafter brought the present suit and prayed for a mortgage decree in respect of sudbharna money and it was contended that the decree in the mortgage suit was res judicata.

*Held*, that in order to sustain the plea of res judicata it was necessary for the plaintiff in the former action to allege or claim some relief against the holder of the prior mortgage, in other words, to allege a distinct case in their plaint in derogation of the priority and this not having been done the suit was not barred by res judicata.

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

*Syed Mahomed Ibrahim Hossein Khan* v. *Ambika Persad Singh*(2) *and Brijmohan Singh* v. *Dukhan Singh*(3), distinguished.

*Appeal from Appellate Decree no. 400 of 1935, from a decision of Babu Nirmal Chandra Ghosh, Subordinate Judge of Monghyr, dated the 15th of March, 1935, reversing a decision of Babu Jugal Kishore Narayan, Munsif of Begusarai, dated the 27th of November, 1933.

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.
(2) (1912) I. L. R. 39 Cal. 527; L. R. 39 Ind. App. 68.
(3) (1930) 11 Pat. L. T. 883.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Wort, J.

*Khurshed Husnain* and *Ahmad Raza*, for the appellant,

*S. M. Mullick* and *A. C. Roy*, for the respondents.

WORT, J.—This appeal raises a question as to priority of mortgages and a question whether in the events which have happened the action of the appellant who was the plaintiff in the Court below was barred by res judicata.

The facts are simple. The plaintiff-appellant had a usufructuary mortgage, dated the 30th of November, 1910; he also had a simple mortgage of the 29th of October, 1919. The defendant-respondents in the meantime had obtained a simple mortgage of the same property executed on the 12th of May, 1913, and in 1926 brought an action on that simple mortgage impleading the present appellant, who as I have already said was the plaintiff in the action in the court below, as a puisne mortgagee, and in the plaint (which my learned brother has read) claimed the relief which is usually claimed in an action of that kind calling upon the principal mortgagor and the present plaintiff-appellant to redeem if they thought fit. It is quite clear that no relief was claimed in that plaint against the present plaintiff-appellant, who was one of the defendants in that action, in his capacity as prior mortgagee under the usufructuary mortgage, dated the 30th of November, 1910, although as defendant in that action the present plaintiff-appellant mentioned in his written statement the prior mortgage of 1910. In that case the decree was passed without any reference to the prior mortgage but in the judgment this passage appears:

"Defendants 1 and 6 of the 2nd party (i.e., the present plaintiff-appellants) have prior as well as subsequent bonds. The matter requires no adjudication. It is sufficient that the defendants have asserted their claim."

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As I have said nothing was mentioned in the decree and the property was sold and purchased by the then plaintiffs. Subsequently in 1932 this action was brought by the plaintiff-appellant against the defendants amongst others who were the plaintiffs in the former action claiming possession of the property. Clause (*iii*) of the relief claimed in the plaint was:

> "The Court may be pleased to hold that as the defendant 1st party made purchase subsequent to the sudbharna bond, he is liable to pay the sudbharna money and a mortgage decree for the sudbharna money Rs. 1,124 odd.....may be passed subject to the mortgage lien on the *sudbharna and the mortgaged property.*"

Shortly stated the Judge of the lower appellate court in allowing the appeal and reversing the decision of the trial court has held that the decree in the former suit of 1926 is a bar on the principle of res judicata to the plaintiff's present action.

It seems to me that the only question which really arises is, whether the decision of their Lordships of the Judicial Committee of the Privy Council in *Radha Kishun* v. *Khurshed Hossein*(1) is distinguishable from the facts of the present case. There in the circumstances which I shall state in a moment their Lordships of the Judicial Committee held that the action of the plaintiff in the matter before them was not barred on the principle of res judicata. The facts of that case were slightly different but in only one material point. There the plaintiff had brought an action against his mortgagors and the assignor of the plaintiff was joined as a prior mortgagee. No relief was claimed against him and judgment was obtained, the decree being silent as to the prior mortgage. Their Lordships of the Judicial Committee, as I have already said, held that the action which the plaintiff admittedly brought was not barred on the principle of res judicata. It will be seen that the difference between the facts of that case and those of the present case is this, that whereas in the case before the Privy Council the plaintiff was admittedly

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.

joined as a prior mortgagee in this case he is joined admittedly as a puisne mortgagee and relief was claimed accordingly. There is perhaps the other difference which does not distinguish the case on principle and that is that in the case before us mention was made of the prior mortgage.

WORT, J.

Before dealing with the authority quoted I would refer to one other fact, reference to which has already been made, that is, the observation made by the Judge in the former suit in this case, that no adjudication on the prior mortgage was necessary but it was sufficient that the defendants asserted their claim. Quite apart from the principle to be applied to this case, it will be seen that the plaintiff-appellant was in difficulty; he had nothing to appeal against and any observation made in the judgment was an observation to his benefit. If any party had any grievance with regard to the matter, it was the plaintiffs in that action, that is to say, if they were desirous of attacking the validity of the prior mortgagee's mortgage. To complete the history of this case, when the property was sold in execution of the former decree an application was made by the present plaintiff-appellant under section 47 of the Code of Civil Procedure, but upholding the contention of the opposite party it was held by the Judge deciding that case that the present plaintiff-appellant had no locus standi. It is urged by Mr. Sushil Madhab Mullick on behalf of the respondents that this appeal is incompetent because the appellant should have appealed from the decision under section 47 of the Code of Civil Procedure. That argument in my judgment is unfounded. It seems to me that the decision of the learned Judge under section 47 was correct. The respondents were not judgment-debtors; and if they were judgment-debtors, they were only judgment-debtors, not in the capacity of prior mortgagees but in their capacity as subsequent mortgagees in which capacity the plaintiff had joined them. They were entitled to no relief under section 47 as subsequent

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mortgagees, and they were not judgment-debtors as I have pointed out and repeat, in the action as prior mortgagees, because nothing was decided with regard to the prior mortgage.

Now, it seems to me that the point decided in *Radha Kishun's* case(1) a reference to which has already been made (the judgment being delivered by Sir Lawrence Jenkins on behalf of the Board) was to this effect: "It was a suit brought by the Sahus to enforce against the mortgagor their mortgage deed of April 24, 1894. Bakhtaur Mull was joined as a defendant, but whether any or what relief was sought against him does not appear". Then later Sir Lawrence Jenkins observes: "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 Bakhtaur 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 Bakhtaur Mull's priority". Then the following passage occurs: "But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a Court of law is the same." It is quite clear in my judgment that the gravamen of the decision of their Lordships of the Judicial Committee of the Privy Council was that in order to sustain the plea of res judicata it was necessary for the plaintiffs in the former action to allege or claim some relief against the holder of the prior mortgage, in other words, to use the expression of Sir Lawrence Jenkins, "to allege a distinct case in their plaint in derogation of the priority". The one contended for by Mr. Sushil Madhab Mullick is that although the claim for relief against the present plaintiff-appellant was as subsequent mortgagee, they

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.

(the respondents) also sued him in his capacity as prior mortgagee. The correct view in my judgment would be that the respondents sued the appellant in the capacity which they stated in their plaint and more particularly by reason of the fact that under Order XXXIV, rule 1, the *Explanation* makes it no longer necessary to join the prior mortgagee as a party to the suit on mortgage.

"A puisne mortgagee may sue" says the *Explanation* "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 mortgage."

I mention that in particular as their Lordships of the Judicial Committee of the Privy Council, in referring to one of the leading cases on this point, viz., *Syed Mahomed Ibrahim Hossein Khan* v. *Ambika Persad Singh*(1) say that it is a decision which although binding on them can be distinguished. And I think, if I may say so, the distinguishing feature of this case is that at the time that decision was arrived at section 85 of the Transfer of Property Act existed, under which, on the construction placed upon it by the High Courts in India, it was necessary to join prior mortgagees as persons interested in the security. That as I say appears to me to be the distinguishing feature and makes the decision inapplicable to the facts of the present case.

I need mention only one other case and that is the decision of Ross, J. and Jwala Prasad, J. in *Brijmohan Singh* v. *Dukhan Singh*(2). That was a case in which the plaintiff claimed priority by reason of subrogation. Ross, J., in delivering the judgment of the Court, in the latter part of his judgment made a statement of what he thought were the principles which emerged from the various decisions relating to this matter and the third proposition is this:

(1) (1912) I. L. R. 39 Cal. 527; L. R. 39 Ind. App. 68.

(2) (1930) 11 Pat. L. T. 883.

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"Where the party impleaded is a puisne mortgagee and therefore, a necessary party, but claims priority, he must assert and prove his priority, otherwise he is barred."

I am not quite sure, if I may say so with great respect to the learned Judge, exactly what the learned Judge there means. If the facts which were visualised by the learned Judge were such as appeared in the case which he then decided, I could quite understand the proposition—'if he claims priority he must assert and prove it'. But where, as in this case, the priority of the mortgage was admitted, where the plaintiffs made no attempt to attack it, and where it did not depend on proof of facts as was the case in that decided by Mr. Justice Ross, I have some doubt whether the proposition would apply. But with great respect to the learned Judge it must be stated that his statement of the law was unnecessary for the purpose of the decision of that case, the learned Judge having come to the conclusion that the plaintiff was not entitled in that case to rely upon the doctrine of subrogation.

In my judgment, as I have already indicated, the facts of this case cannot be distinguished from the facts to which the principle laid down in the case of *Radha Kishun*(1) applies. For that reason I would hold that the decision of the learned Judge in the Court below was erroneous and must be set aside and the judgment of the trial court restored.

The appeal is therefore allowed. The appellant is entitled to his costs in this Court and in the Court below.

VARMA, J.—I agree.

J. K.

*Appeal allowed.*

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.