

1923

Dec. 6th

APPELLATE CIVIL.

Before Mr. Justice Prall

MAUNG SAN MYAING

v.

U PON GYAW.*

Necessary parties to a mortgage suit—Prior mortgage—Person claiming by a title paramount to that of the mortgagor—Civil Procedure Code (V of 1908), Order 34, rule 1.

Held, that in a suit to enforce a mortgage, a prior mortgagee or a person claiming to retain possession of the land by a title paramount to that of the mortgagor, is not a necessary party and that the question of his paramount title cannot be litigated in that suit.

Jaggessar Dutt v. Bhuban Mohan Mitra (1906), 33 Cal., 425—*followed*.

Nga Paw E v. Nga Sin, U.B.R. (1910-13), 92—*distinguished*.

Gour's Transfer of Property Act—*referred to*.

Dutt—for the Appellant.

Mukerjee—for the Respondent.

PRALL, J.—Plaintiff sued for a mortgage decree and sale of certain land against the mortgagors—defendants 1 and 2. Defendants 1 and 2 admitted the claim.

The third defendant was added as a party because his name appeared in the revenue map as mortgagee and he was in possession.

The third defendant Maung San Myaing admittedly was not a party to the mortgage on which plaintiff sued.

He set up a title paramount, denied that he was a necessary party and challenged the jurisdiction of the Court alleging that the suit had been undervalued. Plaintiff was granted a decree in both courts against all defendants.

* Civil Second Appeal No. 178 of 1923 from the District Court of Myingyan in Civil Appeal No. 20 of 1923.

Third defendant now appeals on the ground that he was not a necessary party to the suit, that the court had no jurisdiction and that the mortgage was not proved against him amongst other grounds.

1923
MAUNG
SAN MYAING
v.
U PON GYAW.

Under Order 34, rule 1, all persons having an interest in the mortgage security or in the right of redemption must be joined as parties.

PRATT, J.

Appellant set up a prior mortgage, which he alleged had been converted into a sale. It is clear from the explanation that a prior mortgagee is not a necessary party to the suit.

Appellant is in possession and claims to be owner. He challenges plaintiff's right to mortgage the land.

It must be taken as settled law that the question of his paramount title could not be litigated in the present suit.

The question is exhaustively discussed in Gour's Transfer of Property Act, paragraphs 2096, 7-8 and and 2130, where the authorities are cited in detail.

In *Jaggewar Dutt v. Bhuban Mohan Mitra* (1), which is one of the leading cases on the point it was clearly laid down by a Bench of the Calcutta High Court that a plaintiff-mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and has set up a title paramount to that of the mortgagor and mortgagee. The facts in the case of *Nga Paw E v. Nga Sin* (2) relied upon by the Appellate Court were not similar. I hold therefore that appellant was not a necessary party to the suit. Appellant's contention that the mortgage was not proved as against him must also succeed, and on this ground the suit as against third defendant ought to have been dismissed.

(1) (1906), 33 Cal., 425.

(2) U.B.R. 1910-13, 92.

1923
 MAUNG
 SAN MYAING
 v.
 U PON GYAW.
 PRATT, J.

It is not necessary to go into the other grounds of appeal.

The decree against third defendant Maung San Myaing cannot stand.

The appeal is allowed and the decrees of the lower Courts as against the present appellant will be set aside and the suit against him dismissed. Appellant will be allowed costs throughout.

1923
 Dec. 10

APPELLATE CIVIL.

Before Mr. Justice Young, Officiating Chief Justice, and Mr. Justice Carr.

RAJ CHANDRA DHAR

v.

MESSRS. K. D. O. C. RAY.*

Ex-parte decree, appeal from an—Relevancy or otherwise of the question of due service of summons—Proper course to question due service or propriety of proceeding ex-parte—Civil Procedure Code (V of 1908), Order IX.—Waiver of service.

Held that in an appeal from an *ex-parte* decree the only question with which the Appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree and that the question of due service of the summons is the subject matter not of an appeal from the decree but of a special proceeding under Order 9 of the Civil Procedure Code.

Held further, that where a defendant puts in appearance, he must be taken to have waived the non-service of summons on him.

Jonardhan Dobe v. Ramdow Singh, 23 Cal., 738; *Hummi v. Aziz-ud-Din*, 39 All., 143—*followed*.

Sadlu Krishna Ayyah v. Kuppan Ayyangar, 30 Mad., 54—*dissented from*.

The facts of this appeal are fully stated in the judgment of the learned officiating Chief Justice reported below.

Lambert (senior)—for the Appellant.

Chari—for the Respondent.

YOUNG, OFFICIATING CHIEF JUSTICE.—The only arguments raised before us in this appeal were whether the appellant had been duly served with a summons,

* Civil First Appeal No. 311 of 1922.