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rule 13 (2), shows that the time for any payment of this sort to be made is after the preliminary decree has been passed in the administration suit. As this case never got to the position when there was a preliminary administration decree under which the payment could be made he was under no necessity to pay any court-fees at all.

I would, therefore, alter the decree by striking out the order that the appellant must pay court-fees in the sum of Rs. 1,325 but otherwise I would dismiss the appeal with costs in favour of the respondents (one set only).

MOSELY, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Shaw.

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May 25.

S.R.M.S. SUBRAMANIAN CHETTYAR

v.

V.K. SHIVALKER AND OTHERS.*

Mortgage—Mortgagee advancing his own money or of another—Benamidar *mortgagee—Right to sue—Mortgagee named in document—Dismissal of suit—Leave to bring fresh suit.*

A Court has no power to dismiss a suit with liberty to bring a fresh suit. *Fateh Singh* v. *Jagannath*, I.L.R. 47 All. 158, referred to.

A mortgage in the ordinary way is executed by a mortgagor in favour of the mortgagee. The mortgagee may be the person who advances the money or he may be advancing funds belonging to some other person who allows the mortgagee named in the document to hold himself out as the true mortgagee, *i.e.*, he is a *benamidar*. The mortgagee named in the mortgage has a right to sue on the mortgage whether the funds advanced belonged to him or to some other person.

Gur Narayan v. *Sheo Lal*, 46 I.A. 1; *Narayan Vagle* v. *Mohidin*, I.L.R. 49 Bom. 832; *Parmeshwar Dat* v. *Anardan Dat*, I.L.R. 37 All. 113; *Sachitanand*[a] v. *Baloram*, I.L.R. 24 Cal. 644; *Singa Pillay* v. *Reddy*, I.L.R. 41 Mad. 435, referred to.

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* Civil First Appeal No. 31 of 1937 from the judgment of the District Court of Meiktila in Civil Regular No. 2 of 1936.

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MANIAN CHETTYAR v. V. K. SHIVALKER.

Hay (with him *B. K. B. Naidu*) for the appellant.

Aiyangar for the 1st and 2nd respondents.

Clark for the 3rd respondent.

Myo Kin for the 4th respondent.

BAGULEY, J.—This appeal arises out of a mortgage suit. The proceedings began with a straightforward plaint in which the plaintiff is described as "S.R.M.S. Subramani Chettiar, son of Ramaswami Chettiar, * * * aged 49 and residing at Nemathanpatti, Ramnad District." Obviously the plaintiff is an individual. The defendants were Shivalker and B. C. Chetty, who were mortgagors, and R.M.N. Nagappa Chettiar who was impleaded as a puisne mortgagee of some of the properties mortgaged. The first and second defendants filed a joint written statement in which they admitted the mortgage but pleaded that it had been settled and they were not liable to pay anything at all. They raised a subsidiary point with regard to the mortgaged properties saying that the properties were partnership properties and that the partnership had been dissolved, the first defendant taking over all liabilities to the knowledge of the plaintiff. The third defendant, however, filed a written statement in which he denies almost everything in the plaint. He states that the suit mortgage was executed in favour of the firm of S.R.M.S. and not in favour of Subramanian personally. He states that the plaintiff's agent was not authorized to institute the suit on behalf of the firm and that the suit was not maintainable by the plaintiff. He also raises other pleas with which it is not necessary now to deal.

It may be mentioned at this stage that the mortgage itself is stated to have been entered into between Shivalker, B. C. Chetty and "S.R.M.S. Subramanian Chettiar, son of Ramaswami Chettiar now residing at

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Meiktila and employed as money-lender, hereinafter called mortgagee." It was the duty of the Court to interpret the document when it was in perfectly clear language and I do not quite understand why the learned Judge did not deal with the question of who was the mortgagee immediately. A good deal of subsequent confusion has arisen from the continuous argument as to the question of in whose "favour" the mortgage was. In a mortgage document there must be a mortgagor and a mortgagee and the mortgagee is the person who can sue on the mortgage.

After written statements had been filed the case was fixed for the framing of issues and on the 11th July Mr. Ghose for the plaintiff asked for time as it might be necessary to amend the plaint. On the 3rd August an amended plaint was filed. In this plaint the plaintiff is again clearly a man being described as "S.R.M.S. Subramanian Chettyar, son of Ramaswami Chettyar, * * * * * * money-lender, aged 49 and residing at Nemathampatty." The same three defendants were sued as before but an addition was made by adding P.S.V. Alamelu Achi. The plaint begins on the same lines as before. There is a new paragraph stating that although the fourth defendant herein has no present interest or right in the subject matter of the suit, she has been impleaded "to avoid the contentions of the other defendants", the idea being that she had been the partner of Subramanian Chettyar in the S.R.M.S. Firm. The firm, however, had been dissolved before the filing of the suit and P.S.V. Alamelu Achi had made over her interest in the firm in consideration of a payment by the plaintiff.

The first and second defendants objected to the addition of P.S.V. Alamelu Achi as they said that they knew nothing about her and that the mortgage was a transaction between the first and second defendants and

the plaintiff. They stated that they knew nothing about the plaintiff having any partner or the mortgage having been given to the partnership. The third defendant filed an objection. The grounds of his objection are somewhat difficult to understand. Alamelu Achi had been brought on the record because of his objection. Having caused her to be brought on the record, he objected to her remaining there. It strikes me as an objection made merely for the sake of objecting.

Arguments were heard with regard to the amendment of the plaint and on the 14th September there is an order passed in the diary :

" Mr. Ghose definitely states that the mortgage was executed in favour of the plaintiff personally and not in favour of the firm."

[The District Judge ordered Alamelu Achi to be added as a party and summons issued to her at the third defendant's expense. The next day the agent of the plaintiff filed a petition stating that he discovered from the account books recently received that the deed was executed during, and therefore on behalf of, the partnership, but that the deed being in favour of the plaintiff and as the partnership had ceased to exist before the date of the suit the plaintiff could maintain the suit. He asked that the petition be kept on the record. This was allowed and the District Judge noted " Mr. Guha for Mr. Ghose for plaintiff states definitely now that the mortgage was in favour of the firm." On the 18th December the plaintiff applied again to be allowed to amend the plaint to the effect that the plaintiff was a mortgagee on behalf of the firm, that the fourth defendant had no interest, and the deed being in his name he was entitled to sue. The first, second and third defendants raised objections. After setting out these facts and commenting upon them, the judgment of the High Court proceeded :]

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The point for which so far as I can see orders were required was whether the plaintiff should be allowed to amend his plaint or not. If amendment were allowed fresh written statements should have been called for if the defendants wished to file them. If the amendment was not allowed then the case would have to proceed on the pleadings as they existed : that would be on the second amended plaint. The order passed, however, was on quite different lines. After giving the history of the case there appears the following passage :

"The matter when boiled down comes to this :—In the original plaint the plaintiff states that the mortgage was executed in his favour personally, * * * * * the plaintiff now says that the mortgage was executed in favour of the firm and that he now wants to sue the defendants as the sole surviving partner of the firm as the partnership between him and Alamelu has been dissolved."

This is not a correct statement of the facts. In each one of the plaints and proposed plaints the plaintiff is described as a man, as he is described as the son of Ramaswami Chettyar, a Hindu of the Natukottai Chettyar caste. A firm could have no father and no caste : so obviously the plaintiff throughout is described as a man. The order, however, goes on to say

"that the plaintiff in his personal capacity has no cause of action to bring the suit but as a surviving partner he has and that he is now asking the Court to substitute practically another person as plaintiff."

The order says

"he cannot be allowed to do this as it would mean not only change of *persona* but alteration of the basis of the claim altogether";

so instead of passing an order with regard to the amendment of the plaint, the Court proceeded to

dismiss the suit with costs on the uncontested scale with liberty to the plaintiff to file a fresh suit. It is against the decree drawn up on this order that the present appeal has been filed and cross-objections have been filed by the first, second and third defendants asking that they be given full costs instead of costs on the uncontested scale which is all that was allowed by the trial Court.

The order as it stands is manifestly wrong. Courts have no power to dismiss a suit with liberty to bring a fresh one, *vide Fateh Singh* v. *Jagannath Bakhsh Singh* (1). This was a case in which the Court had dismissed the suit giving the parties " liberty to file a fresh suit for possession." When a fresh suit was filed it was contended on behalf of the plaintiff that expressing himself in the way he did the Judge was purporting to act under O. XXIII. The Court of the Judicial Commissioner rejected the contention and on appeal to the Privy Council their Lordships agreed with the finding of the Judicial Commissioner :

" There was no application for leave to withdraw the suit, nor was it withdrawn : it was dismissed. And the power of the learned Judge ceased upon this dismissal. It may have been unfortunate for the plaintiffs that the learned Judge thought that he had a power which he did not possess."

The order has therefore obviously to be altered. The question is the way in which it should be altered. There can be no doubt that the plaintiff has been led astray by his legal advisers. It is clear from the internal evidence that the plaintiff personally has been consulting with one lawyer in Madras, his agent has been consulting with another lawyer Mr. Ghose in Meiktila and the particular admission which was recorded and

(1) (1924) I.L.R. 47 All. 158.

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has been used against him was by Mr. Guha on behalf of Mr. Ghose. It also seems clear to me that the words used were used without their proper connotation being understood. To say that a mortgage is executed in favour of somebody is a slipshod mode of expression which has a somewhat doubtful meaning. A mortgage in the ordinary way is executed by a mortgagor in favour of a mortgagee. The mortgagee may be the person who advances the money or he may be advancing funds belonging to some other person who allows the mortgagee named in the document to hold himself out as the true mortgagee, *i.e.*, he is a *benamidar*. The person who has a right to sue on the mortgage is the mortgagee named in the mortgage whether the funds used were his own or of some other person. Mr. Hay began his argument by contending at some length that a *benamidar* can sue on a deed executed in his favour even though the money advanced is not his own and it was unfortunate that he spent so much time in doing so because the advocates for the respondents agreed that this was the case. There is no reported ruling of this Court on the point, but it is clear beyond all doubt, *vide Gur Narayan* v. *Sheo Lal Singh* (1); *Parmeshwar Dat* v. *Anardan Dat* (2); *Narayan Keshav Vagle* v. *Kaji Gulam Mohidin* (3); *Sachitananda Mohapatra* v. *Baloram Gorain* (4) and *Singa Pillay* v. *Ayyaneri Govinda Reddy* (5).

Had these cases been known and understood in the trial Court I have no doubt all this confusion would not have arisen. A further confusion was caused by references to *P.R.M.P.R. Chettyar* v. *Muniyandi Servai* (6) and *K.S.A.V. Chettiar Firm* v. *Mahmoo* (7). These

(1) (1918) 46 I.A. 1.
(2) (1914) I.L.R. 37 All. 113.
(3) (1925) I L.R. 49 Bom. 832.
(4) (1897) I.L.R. 24 Cal. 644.
(5) (1917) I.L R. 41 Mad. 435.
(6) (1932) I.L.R. 10 Ran. 257.
(7) (1934) I.L.R. 13 Ran. 87.

are really not very much to the point. In the first case the wording of the promissory note began

"The promissory note written and given in favour of Muniandy Servai * * * * by Ramanathan Chettyar, son of P.R.M.P.R. Perichiappa Chettyar * * * * . This sum of rupees eleven thousand I promise to pay on demand, either to you or your order",

and the note is signed "P.R.M.P.R. Ramanathan Chettyar." In this case it was held that the body of the promissory note showed that it was given by a man and not by a firm. The basis of this decision, I take it, is that Ramanathan Chettyar described himself as the son of somebody and went on to say "I promise to pay." On the other hand in *K.S.A.V. Chettiar Firm*'s case (1) the promissory note was signed by two persons in favour of "K.S.A.V. Ramiah Raja", and it was held, giving effect to the ordinary custom of Chettyar firms, that this must mean that the promise to pay was given to the K.S.A.V. Firm and not to Ramiah Raja personally.

In the present case it is quite clear that the plaintiff throughout described himself as a man. Throughout he gave his father's name, his caste and his age, so obviously the plaintiff is a man and not a firm. In the mortgage deed sued upon the mortgagee is described as "S.R.M.S. Subramanian Chettiar son of Ramaswami Chettiar now residing at Meiktila and employed as money-lender." A firm has no father and cannot be described as residing anywhere, nor is it customary in the English language to refer to a firm as employed. This mortgagee is a man. On the authority of the law admitted by both sides, from whichever source the money might have come the person named in the mortgage deed as mortgagee can sue and I regard these admissions of the mortgage having been in favour of

(1) (1934) I.L.R. 13 Ran. 87.

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the firm as being no more than saying that the money advanced was the firm's money, but as has been pointed out, it is quite immaterial whose money it was that was advanced. The proposed amended plaint of the 18th December introduces a new defendant really for the benefit of the other defendants for any decree passed on the mortgage will bind her and if a decree is given in favour of Subramanian Chettyar the defendants will have a complete quittance.

I would therefore set aside the decree of the trial Court dismissing the suit and remand the case to the trial Court for disposal on its merits, the plaint dated the 18th December 1936 being the basis of the suit but if the plaintiff wishes to amend that plaint by one more artistically drafted he may apply for leave to do so. The defendants will of course have liberty to file written statements in reply to that plaint. In view of this order the cross-objections must necessarily fail.

There remains the question of costs of this appeal. In fact the learned Judge dismissed the suit on a preliminary point because he held that the plaintiff could not sue. The remand is therefore one under Order XLI rule 23 and the appellant will be entitled to a refund of the stamp on the memorandum of appeal. So far as the costs of this appeal are concerned I consider that they are unnecessary costs entirely due to the factious opposition of the third defendant. It makes no difference to him who is the plaintiff. If the mortgage is good and has not been settled as alleged by the present first and second defendants, the defendants have got to lose whoever the plaintiff is. On the other hand the plaintiff is to blame because instead of standing up to the objections raised by the third defendant he tried to twist and turn to meet everything. It would have been better had he taken his stand on his original plaint and gone to trial. Both

these parties are to blame for unnecessary costs. The first and second defendants on the other hand put up a straightforward defence. They admitted the mortgage and pleaded that it had been settled and they have been dragged to this Court at the instance of the other parties. I would therefore direct that the plaintiff and the third defendant do pay their costs of this appeal in any event. As regards the first and second defendants I would fix their advocate's fee at ten gold mohurs and would direct that if the mortgage suit in the event is successful their costs of this appeal should be borne by the third defendant. On the other hand if the mortgage suit is unsuccessful their costs will be borne by the plaintiff. So far as the fourth defendant is concerned she has taken no active part in this appeal. She has generally supported the plaintiff and I would pass no order as to her costs. The cross-objections are dismissed without costs.

SHAW, J.—I agree.