

accused persons of offences under section 147, 353 read with sections 149 and 379 read with section 149, Indian Penal Code. There could be, we need hardly say, no conviction under any of the two latter sections, unless there was an unlawful assembly within the meaning of section 143. For these reasons we think that the conviction and sentences in this case must be set aside. We order accordingly.

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[428] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Geidt.

GOPAL LAL v. BENARASI PERSHAD CHOWDHRY.*

[11th, 12th and 16th February, 1904.]

Res judicata—Civil Procedure Code (Act XIV of 1859), s. 13, Exp. II—Prior mortgage, omission to plead as a defence in a former mortgage suit—Mortgage suit—Transfer of Property Act (IV of 1882), s. 85.

If a prior mortgagee is made a party to a suit brought by a subsequent mortgagee on a mortgage bond of certain property, but omits to enter appearance and set up his prior right and claim that he should be paid off or that the property should be sold subject to his mortgage, his mortgage lien must be deemed to be extinguished. A suit subsequently brought by him or his heirs on his mortgage is barred by Explanation II of s. 13 of the Civil Procedure Code.

Sri Gopal v. Pirthi Singh (1) followed.

[Foll. 2 C. L. J. 574; 36 Cal. 103=5 C. L. J. 611; 26 I. C. 860. Cons. 1 C. L. J. 327. Dist. 9 C. L. J. 78=3 I. C. 686; 24 I. C. 17; 42=18 C. W. N. 1013. Ref. 39 Cal. 522; 95 All. 111.]

APPEAL by the defendant No. 5, Gopal Lal.

A mortgage bond dated the 23rd May 1885 was executed by three persons, (1) Rang Lal Singh, husband of the defendant No. 4 and father of the defendant No. 1, First Party, (2) Rachha Singh, father of the defendants Nos. 2 and 3, First Party, and (3) Rajpati Singh, in favour of Hari Pershad Chowdhry, father of the plaintiffs, for the sum of Rs. 2,000, whereby a number of properties were hypothecated to secure payment of the debt. Some of these properties were mortgaged by the same mortgagors and Jitan Singh, defendant No. 2, to Gopal Lal, the defendant No. 5, Second Party, by a bond dated the 22nd February, 1887. In 1891 Gopal Lal instituted a suit on his mortgage and made the said Hari Pershad Chowdhry a defendant in the suit, describing him as a subsequent mortgagee and purchaser. Hari Pershad did not appear in the suit and plead his prior mortgage. The suit was [429] decreed and the properties mortgaged were purchased by Gopal Lal in execution of the decree.

The present suit was instituted by the plaintiffs on the mortgage bond of the 23rd May 1885, the defendant No. 5 being made a party to the suit on the ground that he had purchased some of the mortgaged properties. Separate written statements were filed by the defendants Nos. 4 and 5. The latter contended, amongst other things, that as in the previous suit brought by him on the basis of his mortgage bond, he had made the father of the plaintiffs a defendant in that suit, the latter ought to have disclosed in that suit that he had a prior right of mortgage under the bond now in suit and to have prayed that the sale in that suit

* Appeal from Original Decree No. 59 of 1901, against the decree of Tara Prasanna Banerjee, Subordinate Judge of Monghyr, dated the 29th of November 1900.

(1) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.

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might be made subject to his prior mortgage or that the properties might be sold free from all incumbrances. But as that was not done, the plaintiffs lost their right and their suit was barred by section 13 of the Code of Civil Procedure.

Upon the pleadings, several issues were framed by the Subordinate Judge, the more important of which were (1) whether at the time of the execution of the bond, Rang Lal and Rachha lived as members of a joint Mitakshara family with their brother Puchhya Singh, and if so, whether it was open to the defendant No. 5 to contend that the bond given by the two brothers for their own shares in the family property was invalid (issue No. 3), (ii) whether Puchhya Singh was a necessary party to the suit (issue No. 4), and (iii) whether section 13 of the Civil Procedure Code applied to the case (issue No. 5), besides some particular issues relating to some of the mortgaged properties. The Subordinate Judge decided the principal issues in the plaintiffs' favour. On the 5th issue he observed: "This issue has not been pressed before me by the pleader for the defendant No. 5. I am also unable to see how this objection can arise at all. The plea of *res judicata* is therefore disallowed." The suit was decreed for the full amount claimed (Rs. 7,000) with interest, in the usual form, the decretal sum being directed to be realized by the sale of the mortgaged properties subject to certain conditions.

Dr. *Rashbehary Ghose* (Babu *Jogesh Chandra Dey* with him), for the appellant, submitted on the question of *res judicata*, that an erroneous admission of the appellant's pleader in the [430] Court below on a point of law did not bind the appellant: *Jotindra Mohan Tagore v. Ganendra Mohan Tagore* (1) and *Beni Pershad Koeri v. Dudhnath Roy* (2). *Res judicata* may be pleaded at the appellate stage: *Muhammad Ismail v. Chatter Singh* (3). The plaintiffs' father having omitted to set up his prior charge in the mortgage suit brought by the appellant, the present suit is barred by Explanation II of section 13 of the Civil Procedure Code: *Sri Gopal v. Pirthi Singh* (4), and the judgment of the Allahabad High Court in that case (5). Reference was also made to the decision of the Calcutta High Court dated the 18th December 1903, in Appeals from Original Decrees Nos. 295 and 301 of 1899 (6).

Babu *Saligram Singh* (Babu *Narendra Kumar Bose* with him), for the respondents, submitted that the principle of estoppel did not apply to the present case, and that the point being a new one, ought not to be allowed to be taken now.

RAMPINI AND GEIDT, JJ. The suit out of which this appeal arises was one brought to enforce a registered mortgage bond, dated the 23rd May, 1885, for Rs. 2,000, executed by two brothers Rachha Singh and Rang Lal Singh and by the son of Rang Lal Singh in favour of the father of the plaintiffs. The Subordinate Judge has given the plaintiffs a decree. The defendant No. 5, who is the auction purchaser of the properties 1 to 3 only, appeals.

The grounds of his appeal are (1) that the suit is barred by the rule of *res judicata*; (2) that the mortgages having been executed by two only of the members of an undivided Hindu family governed by the Mitakshara law and not by a third member, *viz.*, a third brother named Puchhya

(1) (1872) 9 B. L. R. 377; 18 W. R. 359.

(2) (1899) I. L. R. 27 Cal. 156; L. R. 26 I. A. 216.

(3) (1881) I. L. R. 4 All. 69.

(4) (1902) I. L. R. 24 Ad. 429; L. R. 29 I. A. 118.

(5) (1897) I. L. R. 20 All. 110.

(6) Unreported.

Singh, is void ; (3) that the defendant-appellant is not precluded from contending that it is void ; (4) that the mortgage being void, the plaintiffs are not entitled to a charge on the mortgaged property ; and (5) that [431] Puchhya Singh is a necessary party to the suit. It appears to us that the first of these pleas must prevail. It is admitted that the father of the present plaintiffs was a defendant in a suit brought by the present appellant Gopal Lal in 1891 to enforce a registered mortgage bond dated 22nd February 1887 and in which he prayed for the sale of the mortgaged properties free from incumbrance. He at first described the father of the plaintiffs, who was defendant No. 1 in that suit, as a subsequent mortgagee and purchaser. In a petition dated 28th April 1891, he described him as having purchased property No. 6, subsequently to the date of his mortgage. Now the father of the plaintiffs made no appearance in this suit. The suit was decreed. The Judge gave the mortgagors and their alienees an opportunity of redeeming the mortgage and directed that, failing redemption, the plaintiff was entitled to sell the properties.

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Now, it seems to us that under Explanation II to section 13 of the Code of Civil Procedure, the father of the present plaintiff, was bound in that previous suit to disclose his prior mortgage, which the plaintiffs are now seeking to enforce. He should have prayed either that he should be paid off or that the property should be sold subject to his prior mortgage lien. As he did not do so, his mortgage lien must be held to have been extinguished. The case of *Sri Gopal v. Partu Singh* (1), in which it has been held that an earlier mortgagee, who in a redemption suit by a later mortgagee fails to set up one of his incumbrances as a charge to be redeemed, is barred by section 13 of the Civil Procedure Code from bringing a fresh suit to enforce the same, would seem to be sufficient authority for this view.

The learned pleader for the respondents urges that the present appellant, who was the plaintiff in the previous suit is shown by the evidence adduced in this case to have been aware of the execution of the prior bond in favour of the father of the present plaintiffs, that in his suit he made no mention of it, that accordingly the father of the plaintiffs was not attacked in respect of that bond and that it was, therefore, unnecessary for him to disclose the existence of his prior bond. We are unable to see that these facts are in any way material. The present appellant in the [432] previous suit prayed to be allowed to sell the mortgaged property free of incumbrance and he obtained a decree. The father of the present plaintiffs had then a prior incumbrance. If he did not wish the property to be sold free of incumbrance, he should have resisted the present appellant's prayer on the ground that he had a prior incumbrance and should, as we have said, have asked either that he should be paid off or that the property should be sold subject to his mortgage. His silence was calculated to mislead purchasers and to defeat the object of section 85 of the Transfer of Property Act, which is to prevent the multiplicity of mortgage suits. In these circumstances we consider that the plaintiffs cannot now sue on the bond they are seeking to enforce and consequently the appeal must be decreed and the suit dismissed.

It is unnecessary to discuss the other pleas of the appellant.

We decree the appeal and dismiss the suit with costs.

Appeal decreed.