Before Mr. Justice Loch and Mr. Justice Glover.

1868
July 14.

ROY MOHANLAL MITTRA *v.* BISHNU CHANDRA CHATTERJEE.*

Benami Mortgage—Disclosure of beneficial owner—Non-Verification of Plaint.

In a suit for possession after foreclosure, defendants urged that C, (and not A. and B. the plaintiffs) was the actual mortgagee. This was denied by A. and B, who obtained a decree. In a subsequent suit, brought by the representatives of A. and B. for mesne profits, they, in conjunction with C., alleged that C. was the real mortgagee, and C. was made a co-plaintiff but he did not verify the plaint. A decree was given for mesne profits in favor of C. the plaintiff. *Held*, the fact that C. had not verified the plaint was no sufficient ground for dismissing the suit. Decree affirmed.

Roy Mohan Lal Mittra and another mortgaged a property to Mahesh Chandra and Gopinath. On the suit of the mortgagees for possession after foreclosure, Mohan Lal contended, that Mahesh Chandra and Gopinath were not beneficially interested in the mortgage, but that the real mortgagee was Bishnu Chandra Chatterjee, or his father. This was denied by Mahesh and Gopinath, and they obtained a decree for possession.

The present suit was brought by Bhava Sundari Devi, as guardian of Behari Lal, son of Gopinath above-mentioned, and by the widow of Mahesh Chandra, for mesne profits of the mortgaged property, which had accrued since the date of the decree for possession. Plaintiffs got a decree, but on appeal to the High Court the case was, on 30th January 1866, remanded for a local enquiry.

During the pendency of these second proceedings in the lower Court, Behari Lal, who had now come of age, applied in conjunction with the widow of Mahesh to the Court to have the name of Bishnu Chandra inserted as joint plaintiff, on the ground that he was the person beneficially interested and now in possession. On Bishnu Chandra applying to the

* Regular Appeal, No. 309 of 1867, from a decree of the Principal Sudder Ameen of Gya.

same effect, the Principal Sudder Ameen made him co-plaintiff, and gave the plaintiffs a decree for mesne profits.

Defendants, on appeal to the High Court, urged that if Bishnu Chandra was the real plaintiff, he had never verified the plaint, and that after the statement made by the ostensible mortgagees in the suit for foreclosure, they ought not, in the present suit, to have been listened to, when alleging the direct opposite.

Baboo *Srinath Das* for appellants.

Mr. *Money* (with him Baboo *Anukul Chandra Mookerjee*) for respoudents.

LOCH, J.—This is a suit to recover mesne profits. It appears that the property in question was mortgaged by the defendants in the names of Mahesh Chandra and Gopinath to the father of Bishnu Chandra Chatterjee.

A suit for possession after notice of foreclosure was brought against the defendants, in the names of the parties who appeared as mortgagees in the mortgage deed, and a decree for possession was given in their favor. In that suit, it was hotly contended, that the ostensible plaintiffs were not really interested, and that the real mortgagee was the father of Bishnu Chandra. This was denied by the plaintiffs, and the Court rejected this objection to the hearing of the suit.

The present action is brought to recover the mesne profits of the land decreed in the suit referred to above. The Principal Sudder Ameen gave a decree for the plaintiff, but on appeal the case was remanded that the lower Court might take more reliable evidence than was then on the record, and that an Ameen might be deputed to ascertain the amount of wasilat, in the usual manner.

While the case was before the Principal Sudder Ameen, under the order of remand, Behari Lal, whose guardian, Bhava Sundari Devi, had brought this action, filed a petition in Court, on 29th April 1867, stating that he had nothing to do with the property, that the real owner was Bishnu Chandra Chatterjee; that he was the party beneficially interested; that the former litigation

1868

ROY MOHAN LAL MITTRA v. BISHNU CHANDRA CHATTERJEE.

had been carried on at his expense, and for his benefit; that he was in possession, and that he, the petitioner, now that he had come of age, had given an ikrarnama to that effect to Bishnu Chandra. A petition to the same purport was filed by Bishnu Chandra, who filed the ikrarnama; and on 4th May 1867, the Principal Sudder Ameen directed that his name should be entered as a joint plaintiff with the original plaintiffs to the suit. Two petitions of objection on the part of the defendants, dated respectively the 7th May and 10th July, were presented, but the Principal Sudder Ameen appears to have passed no orders upon them.

The appeal before us may be divided into two heads: *1st*, as regards the admission of Bishnu Chandra as a co-plaintiff; and, *2nd*, as to the mode of determining the amount of mesne profits. These two heads embrace every thing that was argued before us.

We think both the grounds taken by the appellants must be given against them. The mortgage, for some reason best known to the parties, was drawn up in the names of Mahesh Chandra and Gopinath, from whom the defendants had professed to take the loan. It was necessary, therefore, that both the suit for possession after foreclosure, and the present suit, should be brought in the names of the persons in whom the legal title was vested. For some reason also best known to the parties, it appeared advisable, in the course of this suit, to drop the *nom de guerre*, and to disclose the real mortgagee; and, accordingly, petitions by Behari Lal and Bishnu Chandra were presented, acknowledging that the former was only ostensibly the mortgagee, he representing his father, Mahesh Chandra, and that the latter was the person beneficially interested. It is urged, that on such a disclosure being made, the suit should have been dismissed, for Bishnu Chandra had not verified the plaint, which by law he was required to do; and the present statement was directly at variance with the statement made in the former case, in which the plaintiffs, who then represented Behari Lal, had successfully contended that Mahesh and Gopinath were the real mortgagees.

No doubt, the party beneficially interested has put himself into difficulty by the contrary statements made by him in the

1868

ROY MOHAN LAL MITTRA v. BISHNU CHANDRA CHATTERJEE.

two suits. As the mortgage bond was in the name of Mahesh Chandra and Gopinath, the suits were, as is customary, brought in their names, and it would have been prudent for Bishnu Chandra to have kept quiet and abstained from declaring himself till the present suit was determined, and we have now to consider whether, in consequence of his having made this disclosure, the suit should be dismissed. It is clear that the defendants are in no wise prejudiced by the disclosure. They cannot pretend that they were ignorant of the real party with whom they were dealing. The money claimed in this suit is justly due by them to the party who has foreclosed the mortgage and taken possession of the property, and it is not denied that this person is Bishnu Chandra. It is true that he has not complied with the requisition of the law, which requires the party instituting a suit to verify the plaint; but there is no allegation that the claim is false or unfounded, and it would be a denial of justice, were the suit to be dismissed on the technical ground now taken by the pleader for the appellant. The parties in whose names the suit was brought may be considered in the light of trustees for the person beneficially interested. There is no doubt an evasion of the law by the party really interested in the suit, for he has failed to verify the plaint as required by the law, and it is open to question whether suits brought in such a form should not be dismissed as defeating the object of the law, which is to enable a Court to have before it, and to deal with, the parties actually concerned in the matter brought before it for trial. In the present case, however, there can be no doubt that the defendants, appellants, have not been injured by the course taken by the respondents; and that they knew with whom they were dealing, and, therefore, I reject this ground of appeal.

On the second objection taken to the judgment of the lower Court, it appears to me that the estimate of mesne profits has been formed on the best evidence before the Court, and though in the remand order the High Court was not satisfied with the mode in which the account had been prepared, under the impression that other and better evidence could be procured, yet as it is clear that nothing better has been brought forward by the

1868

ROY MOHAN LAL MITTRA v. BISHNU CHANDRA CHATTERJEE.

appellants, who could have proved the real assets of the estate, and there is on the record sufficient, though meagre *data* upon which the Court can come to a conclusion, and upon which it has based its decree, we think there are no grounds for disturbing that judgment; and I dismiss the appeal with costs.

GLOVER, J.—I think, on the whole, that this appeal should be decided on its merits. I admit fully that the policy of the law is against secret trusts; and that parties beneficially interested should be made to disclose themselves. But in the present case no one has been deceived, nor has any injury been done to the defendant. Mesne profits have been adjudged to be due from him, and so far as he is concerned, it matters nothing whether or not the name of the beneficial owner is joined to that of the legal owner as co-plaintiff.

There would be, undoubtedly, a want of verification on the plaint as amended. The new co-plaintiff not having been called upon to verify, and in ordinary cases this would, I conceive, be a fatal objection to the alteration, but here there is really no second verification required, for the facts are undisputed; and the only question for decision was the amount of mesne profits collected. That mesne profits were collected by the defendants, and that those mesne profits were rightly payable to the party beneficially interested in the foreclosure decree, there is no doubt. In this country, when transactions are so commonly "benami," it would, I think, be hard measure to visit a case like the present, when there is no suspicion of fraud, with dismissal. The defendant knew of the "benami," from the first; indeed, he tried to prove it in the foreclosure suit, but failed, and cannot, therefore, say, that he was, or is, any way damaged by the fact, that the ostensible mortgagees were not the real plaintiffs. In fact, he does not say so, but seeks to escape the consequences of a claim put in itself, on a technical objection which has nothing to do with the merits of the case.

This being so, I do not think that the defect in the judgment of the Principal Sudder Ameen, that is to say, his not adjudicating on the effect of the disclosure by the beneficial owner, is one which affects the merits of the case; and, therefore, under

section 350 Act VIII. of 1859, the appeal on this point should be disallowed.

1868

ROY MOHAN LAL MITTRA
v.
BISHNU CHANDRA CHATTERJEE.

As to the amount of mesne profits, it appears to me that the Lower Court's order proceeded on sufficient evidence, and that no ground is shown for an interference.

I would dismiss the appeal with costs.

Before Mr. Justice Loch and Mr. Justice Mitter.

ABDUL JABEL *v.* KHELATCHANDRA GHOSE.*

1868
July 15.

*Act I. of 1841—Act XXIII. of 1861, s. 14—Pre-emption.**

Section 14 af Act XXIII of 1861 is not applicable to permanently settled estates in Sylhet, nor to estates in any district of Bengal, unless extended thereto.

When property is sold by public auction at a sale in execution of a decree, and the neighbour or partner has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply.

THIS was a suit to enforce the right of pre-emption, and to recover possession of 133 bigas of land, being 5 annas, 4 pies share of talook Maniram, appertaining to Pergunna Chowallish, by setting aside a deed of sale executed in favor of the defendant. The plaintiff alleged that he was a co-sharer of the aforesaid talook; that in execution of a decree held against another co-sharer, the disputed mehal was put up to sale and purchased by the defendant, Kalikumar, who was quite a stranger to the estate, on behalf of the other defendant, Khelat-Chandra; the plaintiff then claimed the right of pre-emption under the provisions of section 14 of Act XXIII. of 1861, his claim was allowed by the Principal Sudder Ameen; but on appeal, this order was eventually set aside on the 10th February 1866, on an application for review of judgment.

On special appeal, the plaintiff was referred by the High Court (L. S. Jackson and Glover, JJ.) to a civil suit (1). Accordingly the present suit was instituted by the plaintiff, for the establishment of his right.

Kalikumar, in his written statement, set up that the mehal in question was not a puttidari estate within the meaning of

*** Special Appeal, No. 2317 of 2857, from a decree of the Judge of Sylhet, affirming a decree of the Principal Sudder Ameen of that district.**

(1) 2 Wyman's Reporter, p. 17, 11th June 1866.