

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
June 25.

BONOMALEE NAG (DEFENDANT) *v.* KOYLASH CHUNDER DEY
(PLAINTIFF).*

Estoppel—Mortgage—Right of Way.

A brought a suit against *B*, to have it declared that *B* possessed no right of way over his lands. This suit was dismissed, and *B* obtained a decree establishing his right. Previous to the institution of this suit, *A* had mortgaged the same lands to *C*, who, after the suit, caused the lands to be sold under his mortgage, and became the purchaser at the auction-sale. In a suit by *C* against *B*, to have it declared that no such right of way existed over the lands, *held*, that *C* was not estopped by the previous decision against *A*, his mortgagor, from again raising the question of the validity of the right of way over the said lands.

THIS was a suit brought to contest the validity of the right of way claimed by the defendant over the plaintiff's lands. On the 21st August 1874, one Dhonomonee Dossee mortgaged—under a Bengali deed of mortgage, which contained no conveyance of the lands, but simply a declaration that the lands were liable to be sold in default—certain lands to the present plaintiff, Koylash Chunder Dey; and, on the 31st August of the same year, instituted a suit against the present defendant, Bonomalee Nag, to have it declared that the said defendant had no right of way over the lands already mortgaged to Koylash Chunder Dey; the latter was not made a party to this suit, and there was nothing to show that he was cognizant of the proceedings. On the 8th March 1875 this suit was dismissed, and the right of way over the said lands was decreed in favour of Bonomalee Nag. On the 9th March 1875, the present plaintiff, Koylash Chunder Dey, obtained a decree against his mortgagor, Dhonomonee Dossee, for the sale of the said lands, and, on the 5th May 1875, Koylash himself purchased them at the auction-sale.

* Special Appeal, No. 2778 of 1876, against the decree of Baboo Brojendro Coomar Seal, Second Subordinate Judge of Zilla 24-Pargannas, dated the 15th of September 1876, reversing the decree of Baboo Juggobundhoo Gangooly, Munsif of Sealdah, dated the 31st of March 1876.

On the 21st September 1875, Koylash Chunder Dey filed his present suit against Bonomalee Nag to contest his right of way over the said lands. On behalf of the defendant it was objected that the plaintiff was estopped from contesting the defendant's right by the decree of the 8th March 1875.

1878
 BONOMALEE
 NAG
 v.
 KOYLASH
 CHUNDER
 DEY.

The Court of first instance was of opinion, that the plaintiff, not having been made a party to the previous suit decreed on the 8th of March 1875 in favor of the present defendant, was not estopped from bringing his present suit by s. 2 of Act VIII of 1859. The Court, however, on the facts found, that the defendant had acquired a right of way over the disputed lands, and thereupon dismissed the plaintiff's suit. The lower Appellate Court concurred with the Court of first instance in its opinion that the suit was not barred, but on the facts found that the defendant had not acquired a right of way over the lands, and gave the plaintiff a decree.

The defendant appealed to the High Court.

Baboo *Rash Behary Ghose* and Baboo *Doorga Mohun Doss* for the appellant.

Baboo *Anand Churn Ghosal* for the respondent.

Baboo *Rash Behary Ghose* for the appellant contended that the mortgagee was bound by the decree in the previous suit. The Subordinate Judge was mistaken in supposing that none but the representative of the previous owner can be bound by the results of litigation and adverse decrees against such owner—*Outram v. Morewood* (1); Coke upon Littleton, p. 352. In this country a purchaser at a revenue-sale is bound by an adverse decree against the previous owner—*Boykuntnath Chatterjee v. Ameeroonissa Khatoon* (2). So is a reversioner by a decree against a widow in possession—*Katama Natchier v. Srimut Rajah Mootoo Vijaya Raganudha* (3). In both these instances neither the purchaser nor the reversioner is a representative of the previous owner. The test in all these cases is, Did the person against whom the judgment was obtained

(1) 3 East, 346. (2) 2 W. R., 191. (3) 5 Moore's L. A., 539.

1878
 BONOMALEE
 NAG
 v.
 KOYLASH
 CHUNDER
 DEY.

sufficiently represent the estate? If he did, in the absence of fraud and collusion, the decree would be binding upon every successive owner; see *Katama Natchier v. Srimut Rajah Mootoo Vijaya Ragunadha* (1). In this country the mortgagor has always been understood to be the person entitled to represent the estate. Limitation which bars him bars also the mortgagee—*Ram Coomar Sein v. Prosunno Coomar Sein* (2). A large portion of lauded property in this country is on mortgage, and the consequence of holding that a mortgagee would not be bound by a decree obtained against the mortgagor, would be to deprive all litigation in respect of land of finality.

Baboo *Anand Chunder Ghosal* for the respondent relied on *Dooma Sahoo v. Joonarain Loll* (3).

Baboo *Rash Behary Ghose* in reply.

The following judgments were delivered:—

MARKBY, J.—This is a suit brought by one Koylash Chunder Dey, alleging that one Dhonomonee Dossee, by mortgage deed of 21st August 1874, mortgaged to him a certain piece of land; and that, on the strength of that mortgage, he obtained a decree for the debt, put up the property to sale, and purchased the property himself on the 5th May 1875. The plaintiff further alleges that the defendant, in collusion with Dhonomonee Dossee, obtained a decree in his favor, declaring that he (the defendant) had a right of way over the property in question; and the plaintiff in effect prays that it may be declared that no such right of way exists.

The previous suit, to which the plaintiff refers, was brought by Dhonomonee against the present defendant, Bonomalee Nag, and the object of that suit was the same as the object of this suit,—namely, to have it declared that no right of way existed. I understand that that suit was disposed of on its merits, and that it was decided then that the right of way now claimed by the present defendant existed.

(1) 9 Moore's I. A., 539. (2) W. R. (1864), 375. (3) 12 W. R., 362.

There is nothing to show whether the present plaintiff had notice of the former suit; nor is there anything to show whether the defendant was aware of the existence of the mortgage when the former suit was instituted. The mortgage is an ordinary Bengalee mortgage, in which there is no conveyance of the property, but only a declaration that the property is liable to be sold on default in payment of the debt. No collusion in bringing or conducting the former suit has been shown, but the lower Courts did not consider the decree made in that suit as binding on the mortgagee, and the lower Appellate Court, trying the present case, has held, that the defendant has no right of way such as he claims, and has given the plaintiff a decree. The question which has been argued in the present special appeal is, whether as against the present plaintiff the former decree was conclusive—that the right of way exists.

No decision bearing upon this question has been cited to us, except one of *Dooma Sahoo v. Joonarain Loll* (1). In that case it was held that a decree given in a suit brought against the mortgagor, by which it was held that the property pledged was subject to a mokurari lease in favor of a third party, was not in any way binding upon the mortgagee. No reasons are given for the decision, and the matter seems to have been taken pretty well for granted. I am not aware of any other authority in this country or in England upon the subject.

I am by no means able to look upon the question as one free from doubt. Indeed, it is one which though not, as far as I know, discussed in England, has been frequently discussed elsewhere, and the difficulty of determining it has been very generally acknowledged. Nor has the discussion served to remove the difficulty. Considerable difference of opinion upon the subject still prevails, and it would be easy to bring authority of foreign lawyers and text-writers both for and against the opinion expressed in *Dooma Sahoo v. Joonarain Loll* (1). Probably, however, these authorities would be considered to have little weight here, and as there is an express decision upon

1878

BONOMALEE
NAG
v.
KOYLASH
CHUNDER
DEY,

(1) 12 W. R., 362.

1878
 BONOMALEE
 NAG
 v.
 KOYLASH
 CHUNDER
 DEY.

the point in this Court, I think that I ought to follow it, and not to give effect to any doubts of my own.

I do not think this case distinguishable from that of *Dooma Sahoo v. Joonarain Loll* (1), and, therefore, upon the authority of that decision, and without expressing any opinion of my own, I hold that the decision in the suit brought by Dhonomonee, against the present defendant, is not binding upon the present plaintiff.

The only objection, therefore, taken to the decision of the Court below fails, and this appeal must be dismissed with costs.

PRINSEP, J.—On the authority of the case of *Dooma Sahoo v. Jonarain Loll* (1) I concur in holding that a mortgagee not in possession is not barred by a decision, affirming a right of way in a suit between a third party and the mortgagor, from suing to declare that there is no such right of way, he having no knowledge of that suit, which was, however, decided without any collusion between the parties to it. The point is, I admit, by no means free from doubt, but we cannot, I think, hold, that a mortgagor in possession so far represents the entire estate as to affect the right of a mortgagee.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice White.

IN RE EMPRESS v. MANNOO TAMOOLEE.*

1879.
 Feb. 19.

Evidence—Admissibility of Secondary Evidence of Confession—Confession not taken in accordance with s. 346 of Criminal Procedure Code (X of 1872).

When the confession of a prisoner under s. 122 of the Criminal Procedure Code was not taken in the manner provided by s. 346, and was, therefore, defective,—*held*, that the evidence of the Recording Officer, that such confession was actually made, was inadmissible to remedy the defect.

Reg. v. Bai Batan (2) followed.

* Criminal Reference, No. 53 of 1879, from an order made by J. F. Browne, Esq., Officiating Sessions Judge of Patna, dated 28th January 1879.

(1) 12 W. R., 362.

(2) 10 Bom. H. C. Rep., 166.