1894

SHAM CHAND GIRI v. BHAYARAM PANDAY.

Sir *Griffith Evans* objects. This is a Chamber application. All that the Court can do is to certify for Counsel.

Mr. *Mitter*.—The application has been adjourned into Court and it must be taken as a Court application. Even that will cover only a portion of our costs.

SALE, J.—There is no precedent for dealing with the costs of an application of this nature as costs of a hearing. The costs will be dealt with as the costs of an ordinary Court application.

Application refused.

Attorney for the applicant Koshub Chunder Giri : Mr. *U. L. Bose*.

Attorneys for the defendant : Messrs. *Sen & Co.*

J. V. W.

Before Mr. Justice Sale.

1894

July 26.

KISSORY MOHUN ROY *v.* KALLY CHURN GHOSE.*

Practice—Mortgage—Suit on mortgage for an account and for sale of mortgaged property—Form of decree—Decree where puisne mortgagee is a party defendant and asks for an account on the footing of his mortgage—Application to vary decree.

In a suit on a mortgage, for an account, and for sale of the mortgaged property, where a puisne mortgagee who is made a defendant appears and proves his mortgage and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount found due to him out of the sale proceeds, the practice of the Court is, where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgage, to make a decree directing an account on the footing of each of the mortgages, and fixing one period of redemption for all the defendants. *Auhindro Bhoosun Chatterjee* v. *Chunnoo Lall Johurry* (1) referred to.

An application made by the purchaser of the equity of redemption, who had been made a defendant in such a suit, and had been served with a summons but had failed to appear, that the decree, which had been made in accordance with the above practice, should be varied by limiting it to a decree in favour of the plaintiff alone on the ground that the Court had no jurisdiction in such a suit to make a decree between co-defendants, was dismissed.

THIS was the hearing of a rule to show cause why a decree which had been made in a mortgage suit should not be varied.

* Application in Original Civil Suit No. 595 of 1893.

(1) I. L. R., 5 Calc., 101.

1894

KISSORY MOHUN ROY v. KALLY CHURN GHOSE.

The suit was brought by Kissory Mohun Roy, and the defendants were Kally Churn Ghose, Panch Cowrie Ghose, Pran Gobind Shaha, and Tin Cowrie Ghose.

The plaint stated that a mortgage was executed in favour of the plaintiff on the 4th Bhadur 1295 (19th August 1888) by the first defendant Kally Churn Ghose of certain house property in Calcutta, to secure repayment of the sum of Rs. 14,856, being principal and interest due from that defendant on a *hathchitta* account, and that subsequently to the execution of that mortgage, *viz.*, on the 30th Aughran 1295 (14th December 1888), another mortgage of the same and other properties was executed by the first and second defendants, Kally Churn Ghose and Panch Cowrie Ghose, in favour of the plaintiff, to secure repayment of Rs. 30,918 principal and interest, also due by those defendants on a *hathchitta* account; and the plaintiff prayed for an account of what was due on each of the mortgages, and, if necessary, for a sale of the properties.

The third defendant, Pran Gobind Shaha, was a subsequent mortgagee of (amongst others) the properties mortgaged to the plaintiff on the 19th August and 14th December 1888, respectively. The fourth defendant, Tin Cowrie Ghose, had, on 6th January 1892, purchased the properties subject to the mortgage of the plaintiff and the third defendant.

The third defendant, Pran Gobind Shaha, alone appeared in the suit and put in a written statement, in which he stated that the properties mortgaged to the plaintiff had (with others) been mortgaged to him by the first defendant on 28th September 1891, and he asked that, subject to the plaintiff's claim, the mortgaged properties might be declared liable to satisfy his mortgage debt. The decree was for an account of what was due to the plaintiff on the mortgage of 19th August 1888; for an account of what was due to the plaintiff on the mortgage of 14th December 1888; for an account of what was due to the third defendant, Pran Gobind Shaha, on the mortgage dated 28th September 1891; for payment by the defendant Tin Cowrie Ghose of the sums so found due on the mortgages within six months and release of the mortgaged properties on such payment; and in default of pay-

1894

KISSORY MOHUN ROY v. KALLY CHURN GHOSE.

ment it was directed that the mortgaged properties should be sold and the proceeds paid into Court to satisfy the mortgage debts, and if the proceeds were not sufficient to satisfy the debts that the balance should be paid by the respective mortgagors.

On the application of the fourth defendant, Tin Cowrie Ghose, the purchaser of the equity of redemption in the mortgaged properties, a rule was granted calling on the plaintiff and the defendant Pran Gobind Shaha to show cause why the decree should not be varied so as to limit it to a decree in favour of the plaintiff.

Mr. *O'Kinealy* for the defendant Tin Cowrie Ghose, in support of the rule.

Mr. *T. A. Apcar* for the plaintiff Kissory Mohun Roy.

Mr. *Phillips* for the defendant Pran Gobind Shaha.

The following cases were cited: *Kevan* v. *Crawford* (1), *Smithett* v. *Hesketh* (2). *Doble* v. *Manley* (3), *Bartlett* v. *Rees* (4), and *Platt* v. *Mendel* (5).

SALE, J.—The plaintiff in the present case is the first mortgagee of certain properties and the second mortgagee of the same and other properties. The third defendant is mortgagee of the properties comprised in the second mortgage. The first defendant is the original mortgagor. The fourth defendant is the purchaser of the equity of redemption. The suit is for an account on the footing of the plaintiff's mortgage and for sale of the properties. At the hearing the third defendant appeared and proved his mortgage and asked that the payment of his claim should be provided for. The original mortgagor also appeared. The other defendant, the purchaser of the equity of redemption, did not appear. As between the parties appearing no question was raised as to the mortgages, and a decree was made for an account of what was due on each of the mortgages. Six months time was allowed for payment of what should be found due on the several mortgages, and it was directed that in default of payment the properties comprised

(1) L. R., 6 Ch. D., 29.
(2) L. R., 44 Ch. D., 161.
(3) L. R., 28 Ch. D., 664.
(4) L. R., 12 Eq., 395.
(5) L. R., 27 Ch. D., 246.

1894

KISSORY MOHUN ROY v. KALLY CHURN GHOSE.

in the several mortgages should be sold, and the sale proceeds marshalled and applied in payment of the several mortgage debts. The decree further directed the payment by the original mortgagor of any balance remaining due after the sale proceeds had been exhausted. The purchaser of the equity of redemption has now obtained a rule calling on the other parties to show cause why the decree should not be varied and restricted so as to affect the plaintiff's mortgage only; and it was said on the part of the applicant that in making a decree in the present form the Court had in effect made a decree as between co-defendants which in a suit of this kind it has no jurisdiction to do. A number of English authorities were cited; but it seems to me that they do not support the contention which is now put forward. The cases are all foreclosure actions, in which the point considered and determined was whether as between the plaintiff, the first mortgagee, and the defendants who were puisne incumbrancers and the mortgagor there should be only one period of redemption fixed for all the defendants, or whether there should be successive periods of redemption so as to give each incumbrancer the opportunity in turn of redeeming the plaintiff and foreclosing all subsequent incumbrances.

The rule to be deduced from these authorities I think is that where the puisne incumbrancers do not appear, or where, if they do appear, any question as to priority arises, there will only be one period of redemption allowed without prejudice to questions arising as between the defendants, but that, on the other hand, where a puisne incumbrancer does appear and sets up and proves his mortgage, and no question as to priority arises, the Court will allow him to have the benefit of the action and make a decree in his favour, assigning him a separate period of redemption.

The right of puisne incumbrancers to appear and ask for judgment as between themselves and other defendants, under the circumstances specified, seems to be clearly recognised and laid down by Chitty, J., in the case of *Platt* v. *Mendel* (1).

That is the practice which has been adopted in foreclosure actions as to subsequent incumbrancers who appear and prove

(1) L. R., 27 Ch. D., 248, 249.

1894

KISSORY MOHUN ROY v. KALLY CHURN GHOSE.

their mortgages. In this Court, where suits on mortgages are usually not for foreclosure but for sale of the property, the analogous position is that of a puisne mortgagee who is made a defendant, and who appears and proves his mortgage, and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount due to him out of the sale proceeds. In these cases it has been the practice of this Court for a long series of years—certainly since the decision of Pontifex, J., in 1879 in the case of *Auhindro Bhoosun Chatterjee* v. *Chunnoo Lall Johurry* and others (1) that where no issue is raised as between the defendants, and no question of priority arises, on proof of the subsequent mortgages, to make a decree directing an account on the footing of each of the mortgages and fixing one period of redemption for all the defendants. The decree in the present case was made strictly in accordance with that practice, which is now too well settled to be disturbed. I think, therefore, the decree ought not to be set aside or varied on the ground that it was made without jurisdiction.

The next point is whether the applicant has made a sufficient case to have the decree set aside under section 108 of the Code.

He admits he was duly served with the summons in the suit, but he says he was prevented by sufficient cause from appearing when the suit was called on for hearing within the meaning of the section, inasmuch as he had no notice, either in the summons to appear and answer or otherwise, that a decree as between the co-defendants would be asked for or made, and that he was advised that he need not appear in the suit.

He wishes now to intervene and raise an issue as to the consideration alleged for the second mortgage, which he says he would have raised at the hearing had he known that this could have been done.

Having regard to the practice followed by this Court for the past seventeen years, I do not think the applicant can be heard to say that he was unaware that it was open to the Court to make a decree on the footing of the second mortgage, if asked to do so by the second mortgagee, and if no issue were raised as to its validity. It is

(1) I. L. R., 5 Calc., 101.

1894

KISSORY MOHUN ROY v. KALLY CHURN GHOSE.

moreover admitted that the applicant was in actual attendance at the Court on the day of hearing under a subpœna issued in this case. He says, however, that he went away having been informed that his presence was not required. I must hold that his non-appearance at the hearing was voluntary, and that in no sense was he prevented from appearing. The result is that the rule must be discharged with costs.

Mr. *Apear* applies on behalf of the plaintiff for his costs of the application.

SALE, J.—You may add your costs to your claim.

Rule discharged.

Attorney for the applicant, the defendant Tin Cowrie Ghose: Mr. *N. C. Bose.*

Attorney for the plaintiff: Mr. *Rutter.*

Attorney for the defendant Pran Gobind Shaha: Babu *Norendro Nath Sen.*

J. V. W.

Before Mr. Justice Sale.

UMBICA CHURN SEN AND OTHERS *v.* BENGAL SPINNING & WEAVING COMPANY, LIMITED.*

1894 *July* 26.

Inspection of documents—Affidavit of documents, Sufficiency of—Practice—Right to put in further affidavit in support of claim of privilege where original affidavit is not sufficient—Documents referred to in pleadings, as stating facts on which party setting them up relies.

Where an affidavit of documents stated, with regard to certain documents of which the plaintiffs asked for inspection, that the defendants objected to produce them for inspection "because such documents were obtained after dispute arose, and for purposes of litigation that might arise between them and the plaintiffs," *Held*, in an application for their production and inspection, that the affidavit was not sufficient to support the defendant's claim to privilege.

Held also, in such an application the party claiming privilege is entitled to put in and use a further affidavit in support of the claim of privilege, and is not confined to the grounds made in the affidavit in which the claim is first set up. *M'Corquodale* v. *Bell* (1) referred to. Where, however, the party comes into Court relying on the original affidavit as

* Original Civil Suit No. 48 of 1894.

(1) L. R., 1 C. P. D., 471.