

judgment-debtors, their counsel, in the exercise of his discretion, stated that he could not properly urge before us anything beyond those topics with which I have dealt, and it is on these alone that he has relied.

The result is that the appeal must be allowed, the order of the Court below reversed, and the application to set aside the sale dismissed with costs throughout.

This judgment will govern the other appeal (No. 449), in which the application is accordingly dismissed with costs throughout.

Doss J. concurred.

S. M.

Appeals allowed.

ORIGINAL CIVIL.

Before Mr. Justice Pugh.

SARAT CHANDRA ROY CHOWDHRY

v.

M. M. NAHAPIET.*

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June 20.

Mortgage—Practice—First mortgagee's suit for sale—Surplus of sale proceeds—Second mortgagee's claim for sale in first mortgagee's suit of other property on which he has a mortgage—Civil Procedure Code (Act V of 1908) order XXXIV—Costs.

B mortgaged property in Calcutta to *A* and afterwards mortgaged the same property and a further property in the mofussil to *C*. *A* brought an ordinary mortgage suit against *B* for sale, making *C* a party-defendant. *A* obtained a decree. *C* thereupon claimed to be entitled to a decree for sale of the property mortgaged to *A* including the mofussil property not included in *A*'s mortgage:—

Held, that in *A*'s suit *C* could only obtain the surplus of the sale proceeds of the property in that suit and could not get any relief against the other property in the mofussil.

Kissory Mohun Roy v. Kally Churn' Ghose (1), *Kissory Mohun Roy v. Kali Churn Ghose* (2), *In re Kissory Mohan Roy v. Kali Charan Ghose* (3), and *Platt v. Mendel* (4) distinguished.

* Original Civil Suit No. 1151 of 1909.

(1) (1894) I. L. R. 22 Calc. 100.

(3) (1896) I C. W. N. 106.

(2) (1897) I. L. R. 24 Calc. 190.

(4) (1884) 27 Ch. D. 246.

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Mackintosh v. Watkins (1) followed.

The effect of the incorporation of the sections in the Transfer of Property Act into order XXXIV of the new Code of Civil Procedure is to put an end to any independent practice on the Original Side of the High Court based on the old procedure, and the Original Side should now follow the provisions of order XXXIV of the Code.

Costs will be on Scale No. 2, not Scale No. 1, against the mortgagor who does not appear.

THIS was a mortgage suit brought by the plaintiffs, Sarat Chunder Roy Chowdhry and others, as first mortgagees, against the mortgagor, M. M. Nahapiet; and one J. C. Galstaun, a second mortgagee, was made a party defendant.

The mortgage to the plaintiffs was dated the 30th September 1908, and the security for the principal sum of Rs. 67,000 was the property situate at No. 8-1, Loudon Street in the town of Calcutta. The mortgage to J. C. Galstaun was dated the 26th April 1909, the property mortgaged being No. 8-1, Loudon Street in the town of Calcutta, and also a piece of leasehold land situate in Baikanthanathpur in zilla Darjeeling. The defendant, M. M. Nahapiet, did not defend the suit, but the 2nd defendant, J. C. Galstaun, entered appearance and filed a written statement praying for a decree for sale on his mortgage as well as the leasehold property not included in the mortgage to the plaintiffs.

Mr. C. Bagram, for the 2nd defendant, J. C. Galstaun, submitted that he was entitled to a decree for sale on his mortgage, including the leasehold property not included in the mortgage to the plaintiffs, and in support of his argument cited the following cases: *Auhindro Bhoosun Chatterjee v. Channooololl Johurry* (2), *Kissory Mohan Roy v. Kali Churn Ghose* (3), *In re Kissory Mohan Roy v. Kally Charan Ghose* (4) and *Platt v. Mendel* (5). The form of the decree set out in Schedule I, Appendix D, Form No. 7 of the Code shows that such relief to the second mortgagee is contemplated.

Mr. D. N. Bose, appeared for the plaintiffs.

(1) (1904) 1 C. L. J. 31.

(3) (1897) L. L. R. 24 Calc. 190.

(2) (1879) I. L. R. 5 Calc. 101.

(4) (1896) 1 C. W. N. 106.

(5) (1884) 27 Ch. D. 246.

PUGH J. This is a suit filed by a first mortgagee against his mortgagor and also against the second mortgagee. The second-mortgagee's security consists of a second mortgage on the Calcutta property subject to the plaintiffs' first mortgage, and also what is said to be a first mortgage on certain property in the mofussil, and he asks for a decree in his favour for the amount of his claim and for a direction that, in the event of the Calcutta property proving insufficient to pay the first mortgage and also his own, the mofussil property may be sold by this Court. It has become necessary to consider this position because of the Civil Procedure Code of 1908. There was a recognised practice on the Original Side of this Court which, as stated by Mr. Justice Sale in *Kissory Mohun Roy v. Kally Churn Ghose* (1), was to treat the preliminary decree as being in favour not only of the first mortgagee, but also in favour of the second mortgagee, one of the defendants. A further extension of this principle appears in the report of an application in the same suit (2) also under the name of *In the matter of Kissory Mohan Roy v. Kali Charan Ghose* (3), where Mr. Justice Sale allowed a second mortgagee, who was a defendant, under the liberty retained to him by the preliminary decree, to come in and obtain an order for sale of the property outside Calcutta, which was subject only to the second mortgage, not to the first. This practice of treating the suit as one for the benefit of the second mortgagee is based on, or at any rate is in accordance with, the English practice as it appears from the case of *Platt v. Mendel* (4). It will be observed that this procedure being based upon the old practice of the Original Side, does not profess to be in agreement with the terms of the Transfer of Property Act. In *Mackintosh v. Watkins* (5), Brett and Mookerjee JJ., sitting on the Appellate Side and dealing with a mortgage of Darjeeling property, held, that under the Transfer of Property Act, the proper procedure was different, and they held in effect that the second mortgagee was merely made a

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party to the suit in order that he might have an opportunity of redeeming if he wished, and in order that he might receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the first mortgage, but that the decree was not really a decree in his favour, and that he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before or by means of the sale.

This deals only with the simple case of a first and second mortgagee: the matter here is complicated by the fact that part of the security of the second mortgagee and that which he wishes to have sold is outside the jurisdiction. In my view, the effect of the incorporation of these sections of the Transfer of Property Act as order XXXIV of the Civil Procedure Code is to put an end to any independent practice on this side of the Court based on the old procedure, and that the Original Side of the Court should now follow the provisions of the Transfer of Property Act which have been imported into the Civil Procedure Code as order XXXIV, and with them are imported the Forms 4 to 11 of Appendix D in the first Schedule which are part of the Act. Referring to Form No. 7, it will be observed that it provides for an account to be taken of what is due to the plaintiff and describes that amount as Rs. X. It then provides for an account of what is due to the first defendant and describes that sum as Rs. Y, and it then provides what is to happen on payment or non-payment of Rs. X, and it provides that if there is a surplus on sale, that is to go in discharge of the sum referred to as Rs. Y. There is no trace of any provision to enable the first defendant, the second mortgagee, that is the person entitled to Rs. Y, to proceed by way of sale or to get any relief at all if the other defendant, *i.e.*, the mortgagor, satisfies the first mortgagee's claim referred to as Rs. X.

In my view, therefore, under the Code, the second mortgagee is there simply for the purpose as indicated by Brett and Mukerjee JJ. of receiving any surplus sale-proceeds or of redeeming, and that he cannot take any independent action and treat the decree as in other respects in his favour. It

follows, therefore, that if he has, as he has here, a claim to other property as well, that matter can only be dealt with by a separate suit, and of course he will be able to bring that suit notwithstanding he is a party to this one. There is one matter that I might mention in favour of this view, and that is that there might very well be a prior or a subsequent mortgagee or an assignee of that other property which is also included in the second mortgagee's security. Such persons would not be proper parties in a suit by the first mortgagee. In fact, if the first mortgagee made them parties, I take it they would be entitled to be dismissed from the suit, and on the other hand it is clear that the property, the subject of the second mortgage, could not be sold except in their presence, and after decree had been made with respect to their interests. There is no doubt the decision of Mr. Justice Sale, to which I have referred, which says that such a sale can take place under a decree of the Original Side of this Court, but the *ratio decidendi* there was that the old practice and not the Transfer of Property Act was to be followed.

There have been such orders made, and it is not necessary for me to express any opinion as to whether they were properly made or not, because in my view the matter has now to be dealt with on a different basis. But I only add, with regard to that decision, that I have some doubt as to the foundation for it under the Charter of this Court. The Charter gives leave to a plaintiff to proceed against immoveable property partly within and partly without the jurisdiction of this Court, provided he gets leave of Court, otherwise he can only proceed against the property within the jurisdiction. Mr. Justice Sale treats that as a restriction which does not apply to the case of a defendant, and he concludes that that being so, a defendant is not under such a restriction and can bring to sale property outside the jurisdiction.

To me the provision seems one of extension and not of restriction, and as it does not apply to the defendant, it seems to me that a defendant could not have those extended privileges which are given only to a plaintiff who gets the leave of the

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Court. It is not necessary for me to decide that point, because I have come to the conclusion that we have to follow the Civil Procedure Code, and that under the terms of that Code, once the first mortgagee has either got his money or sold the property, the subject of his security, his suit is finished, and the second mortgagee defendant cannot treat that suit as a suit of his own for the purpose of actively enforcing his second mortgage, whether the property, the subject of it, be within or outside the jurisdiction. It was stated by Mr. Mitter at the Bar that in some cases he had been called upon to argue in favour of the proposition that this Court can sell property outside Calcutta, and that it had been decided that the Court could sell property outside the jurisdiction, provided some part of the property was within the jurisdiction and leave had been obtained. I certainly have always been under the impression that there was no doubt whatever as to that. It seems to me obvious on the Letters Patent and too clear to require either argument or decision. It would be most unfortunate if any doubt was thrown on the correctness of the practice of selling properties in that way. For many years, ever since the Charter, persons who have lent money on mofussil property have frequently declined to do so unless and until a certain portion of Calcutta property was included in the mortgage, so as to give the Original Side jurisdiction over the mofussil property, and no doubt at the present time there are enormous sums in the aggregate lent out on the faith of what is considered settled law.

There will be a decree in this case in Form No. 7 in the Appendix. The only matter in regard to that Form is that it seems rather waste of time and expense to take an account of what is due on the second mortgage, unless there be a surplus from the sale-proceeds of the property.

It might be considered, with regard to this Form, whether it would not be better that the direction should be to take the account of the second mortgage in the event of there being any surplus, but in the meantime, till there is some alteration in the Form by a rule of the Court or otherwise, the Form in the Code had better be followed.

The question of the scale of costs to be allowed in this case has also been discussed. The first mortgagee is compelled by law to make the second mortgagee a party. He, therefore, has no option but to bring him in as a defendant and to incur expense as on the basis of scale No. 2. The second mortgagee is also brought here. He has to incur expense on the basis of scale No. 2. He is entitled to add such costs to his claim. The first mortgagee is entitled to costs on scale No. 2 as against the mortgagor who does not appear, although a decree is as a rule on scale No. 1 as against a defendant who does not appear, for three reasons: *first*, that they are part of the necessary expenses of enforcing his mortgage, he cannot avoid incurring them; *secondly*, in this country the common form of Calcutta mortgage used in this case contains a covenant by which the mortgagor expressly covenants to pay the costs of and incidental to realizing the security, and he therefore is liable to pay the costs on scale No. 2 under his covenant irrespective of what the ordinary practice of this Court is as regards scale No. 1; *thirdly*, he is responsible for executing a second mortgage and rendering it necessary to bring in another defendant. The plaintiff is entitled to his costs on scale No. 2, and can add them to his claim or his personal decree for the balance against the mortgagor. The second mortgagee is entitled to have his costs taxed on scale No. 2 and he can add them to his claim.

Attorneys for the plaintiff: *B. N. Bose & Co.*

Attorneys for the defendant: *Gregory & Jones.*

R. G. M.

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