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Court : Allahabad

Decided On : Apr-30-1918

Reported in : AIR1918All81(1); 46Ind.Cas.559

Judge : P.C. Banerji and ;A. Raoof, JJ.

Appellant : Gobardhan

Respondent : Manna Lal

Judgement :

1. This appeal arises out of a suit brought under the following circumstances. Sohan Lal and Shiam Lal, defendants executed two mortgages in favour of Misri Lal and Murli on the 20th of October 1906 and the 8th of April 1908 respectively. In both mortgages the same property, namely, 4 3/4 biswas of Mauza Behta, Mahal Munna Lal was mortgaged. Subsequently to these mortgages, the mortgagors mortgaged a one-biswa share out of the aforesaid 4 3/4 biswas in favour of Munna Lal. The mortgagees brought two separate suits on the basis of the two mortgages but impleaded as defendants to each suit not only the mortgagors but Munna Lal also. Munna Lal was made a party to each of these suits as subsequent mortgagee of a one-biswa share. The first suit was decreed on the 25th of January 1913 and the second on the 26th of March 1914. In the first suit Munna Lal did not appear but the mortgagors raised the plea that they were the owners of a one biswa share only and were not competent to mortgage the remaining 3 3/4 biswas which they alleged belonged to Munna Lal. The Court framed an issue as to the

extent of the mortgagor's rights and the validity of the mortgage as regard 3 3/4 biswas and decided that the mortgagors were estopped from asserting that the whole of the property which they professed to mortgage, did not belong to them. In the course of the judgment the Court made some remarks as to Munna Lal's rights and in the end made a decree for the sale of the whole of the mortgaged property, namely, the 4 3/4 biswas share in Mauza Behta. In the second, suit brought upon the second mortgage, Munna Lal did appear and he put forward the contention that the 3 3/4 biswas belonged to him and that the mortgagors had no right to mortgage that share. The Court held that as Munna Lal set up a paramount title as regards the 3 3/4 biswas share, the question of his title could not be tried in the suit, and refused to try it, but it made a decree for the sale of the 4 3/4 biswas. In that suit the Court distinctly said that Munna Lal's remedy was to bring a suit of his own to try the question of his title. The present suit was thereupon instituted by Munna Lal and he asked for a declaration that the mortgagors were the owners of only a one-biswa share and that the mortgagees had no right to put to auction sale in execution of the two decrees obtained by them, any portion of the remaining 3 3/4 biswas share which he alleged belonged exclusively to him and not to the mortgagors: Both the Court of first instance and the lower Appellate Court found that the 3 3/4 biswas claimed by the plaintiff belonged to the plaintiff and that the mortgagors Sohan Lal and Shiam Lal were owners of one biswa only. It was contended in the Courts below that the previous decrees obtained by the mortgagees operated as res judicata and the question of the plaintiff's alleged title could not be re-opened and litigated in a separate suit brought by the plaintiff. This plea was overruled by the Courts below. It has been repeated in the appeal before us. Mr. Hamilton who appears for the appellants has conceded that as in the second suit brought on the basis of the second mortgage decided by the Subordinate Judge on the 26th of March 1914 the Court distinctly refused to try the issue as to the title of Munna Lal in respect of 3 3/4 biswas, the decision -in that case cannot be held to be res judicata; but he contends that the decision in the earlier suit has the effect of res judicata. As we have said above, both the Courts below have found that the property claimed by the plaintiff Munna Lal belongs to him. We have, therefore, to consider whether Munna Lal is precluded by any provisions of law from putting forward the title which has been found to

exist in him and in respect of which we are bound to accept the finding of the Court below. In order to determine whether the question of Munna Lal's title is res judicata, we have to see whether in the previous suit this question was directly and substantially in issue. We must take it as settled law that in a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. We may refer to the decision of this Court in *Joti prasad v. Aziz Khan* 1 Ind. Cas. 53 : 31 A. 11; A.W.N. (1908) 263 : 6 A.L.J. 5 : 5 M.L.T. 47. That case followed a ruling of the Calcutta High Court in *Jaggaswar Dutt v. Bhuban Mohan Mitra* 33 C. 425 : 3 C.L.J. 205. It is true that in the present instance Munna Lal was made a party to the suit brought by the mortgagees on the basis of the first mortgage, but he was made a party not as a person claiming a paramount title but as subsequent mortgagee of a one biswa share and thus representing the mortgagors as regards that share. As such representative, he could not raise the question of his paramount title; That apparently was the reason why he did not appear in the suit. He filled two capacities in that litigation; viz., first, that of a subsequent mortgagee and as such representing the mortgagor as regards a part of the mortgaged property; and secondly, as a person setting up a paramount title in respect of 3 3/4 biswas. The question of his paramount title could not be litigated in that suit. Therefore, no issue could be framed in regard to that question and no such issue could be determined as an issue which arose directly and substantially, as between him and the mortgagee. The mortgagors, it is true, asserted that Munna Lal owned a 3 3/4 biswa share and that they, the mortgagors, were not competent to mortgage that share and to the extent of that share, the mortgage was invalid. It is in reference to this plea that an issue was framed as to the right of the mortgagors to mortgage the whole of the 4 3/4 biswas. The Court decided that the mortgagors who had made the mortgage, were estopped from questioning the validity of the mortgage and asserting that they were not the owners of the property which they mortgaged on the representation that they were the owners thereof. In the course of the judgment, the learned Subordinate Judge made some observation in respect to Manna Lal but these observations were nothing more than obiter dicta and could not as between the mortgagees and Munna Lal be treated as a decision

on the question of the paramount title of Munna Lal. In this view, it, cannot be said that the question of Manna Lal's title has become res-judicata by reason of the decision in the previous suit. It may be, as observed in Jaggeswar Dutt v. Bhuban Mohan Mitra 33 C. 425 : 3 C.L.J. 205, that if Munna Lal had allowed the question of his paramount title to be determined in the suit, he might not be permitted in appeal to contend that the decree of the Court below was vitiated by reason of the determination of that question, but that was not the case here. In the present suit Munna Lal did not appear and he did not put into issue the question of his title in respect of the 3 3/4 biswa share. That question, therefore, remained an open question as between him and the mortgagee and he is entitled in a subsequent suit to raise the same question. It is true that the decree in the previous suit was a decree for the sale of the whole of the 4 3/4 biswas, but that is the only decree which could be made in the previous suit and so far as the 3 3/4 biswa share is concerned, Munna Lal must be treated as if he was not a party to the previous suit. The principle of the decision of the Calcutta High Court in Girija Kanta Chakrabatty Mohim Chandra Acharjya 35 Ind. Cas. 294 : 20 C.W.N. 675 is applicable to the present case. There in a suit by a mortgagee the legal representative of one of the mortgagors who had died, was made a party as representing the mortgagor. A decree was obtained against him and the property was sold. The auction-purchaser having been resisted in obtaining possession of a portion of the property sold, brought a suit for possession. In that suit the representative of the mortgagor, who had been a party to the previous suit, set up an independent title to the property claimed. It was held that he was not precluded from raising the question of his title by reason of the previous decree passed against him. In this case Munna Lal was a party to the suit as representing the mortgagor in respect of a one-biswa share. He could not be made a party as claiming paramount title to the remaining 3 3/4 biswas. The fact of a decree having, been passed against him as representative of the mortgagors, could not, upon the principle of the ruling to which we have referred and on general principles, preclude him from bringing a suit of his own to try the question of his title, and the Court from granting a decree to him in respect of the title which it has found to exist. In this view we are of opinion that the appeal must fail. We accordingly dismiss it with costs.

