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On the merits; however, we see no reason for appointing the respondent guardian of the person of the minors Govind and Gopal: we think the appellant should be so appointed, and the order appointing the respondent guardian of the person should be varied accordingly. There should also be reserved liberty to any of the wards on attaining majority to apply for the removal of the guardian of the property, or otherwise as he may be advised.

Order varied.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

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August 30.

KESHAVRAM DELAVRAM (ORIGINAL PLAINTIFF); APPELLANT, v. RAN-
CHHOD FAKIRA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Mortgage—Two mortgages on the same property executed by the same person—
Suit under the second mortgage for sale of the property subject to the first
mortgage—Civil Procedure Code (Act XIV of 1882), section 43.*

Where a mortgagee holds two mortgages on the same property executed by the same person, he cannot maintain a suit to recover the sum due on the later mortgage only, by sale of the property subject to the prior mortgage.

SECOND appeal from the decision of J. C. Gloster, District Judge of Broach, varying the decree passed by P. J. Talyarkhan, Subordinate Judge of Ankleshwar.

On the 29th September 1895, Mithia mortgaged his house to the plaintiff for Rs. 599. The mortgage was without possession. Vanmali (a brother of Mithia) joined in this mortgage apparently as a surety.

On the 13th June 1898 Mithia alone (Vanmali having died in the meanwhile) executed a second mortgage in favour of the plaintiff in respect of the same house for Rs. 399. The material portions of the deed are set out in the judgment of Russell, J.

Under the second bond the plaintiff received Rs. 130, and to recover the balance Rs. 269, the plaintiff filed on the 27th

* Second appeal No. 214 of 1905.

October 1903, a suit against the heirs of Mithia, praying that the amount may be realized by sale of the mortgaged property subject to the prior mortgage of Rs. 599.

The defendants contended *inter alia* that the plaintiff was not entitled to bring the house to sale subject to the prior mortgage.

The Subordinate Judge upheld the defendants' contention and dismissed the plaintiff's suit.

The District Judge on appeal varied this decree "by directing that plaintiff do recover from the separate estate of Mithia in the hands of defendants, if any, the sum claimed."

The plaintiff then appealed to the High Court.

G. K. Parekh, for the appellant:—There is nothing in law to prohibit a mortgagee from bringing a suit on any one of the mortgages reserving his rights under the other mortgage. There is no provision in the Transfer of Property Act (IV of 1882) in restriction of this right of the mortgagee.

The cases of *Sundar Singh v. Bholu*⁽¹⁾ and *Kanti Ram v. Kutubuddin Mahomed*⁽²⁾ establish that when the same property is mortgaged to two different persons the puisne mortgagee can bring it to sale subject to the prior mortgage. If this is good law, then it makes no difference if the two mortgages are passed to one and the same persons. The case of *Dorasami v. Venkateshayaar*⁽³⁾ is not quite to the point.

What was mortgaged in 1898 was but the equity of redemption and not an unascertained balance. Such mortgage deeds are very common in this part of the country.

The objection as to non-joinder of parties under section 85 of the Transfer of Property Act (IV of 1882) is only technical, as the parties under both the mortgages being the same, all the necessary parties under the first mortgage were as a matter of fact before the Court in the suit brought upon the second mortgage.

The Court erred in not ordering the sale of the property free of all charges under the first mortgage.

(1) (1898) 20 All. 322.

(2) (1894) 22 Cal. 33.

(3) (1901) 25 Mad. 108.

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[At this point the Court allowed to the appellant's pleader an option to amend his claim; but he contended that it was not necessary to do so.]

M. N. Mehta, for the respondents:—We contend that the suit as brought is unmaintainable. This contention is based upon the following considerations.

Under the terms of the mortgage deed (Exhibit 28) the mortgagee cannot sue on the second mortgage unless his rights under the first mortgage are determined and the surplus or balance ascertained.

The suit is bad under section 85 of the Transfer of Property Act (IV of 1882) which provides that all parties should be on the record. The plaintiff has brought this suit on the second mortgage, so he is not on record *qua* mortgagee under the first mortgage. See *Dorasami v. Venkataseshayyar*⁽¹⁾.

If the property be sold subject to the first charge it would fetch no price and the defendants would be materially prejudiced.

It is again a recognized principle of law that when two mortgages are executed in favour of the same person relating to the same property the mortgagor must redeem both the mortgages. This principle tends to prevent multiplicity of suits and should be recognized here. See *Mata Din Kasodhan v. Kazim Husain*⁽²⁾.

Lastly, the plaintiff cannot get the decree according to the relief prayed for as it would contravene the provisions of section 99 of the Transfer of Property Act (IV of 1882). See also *Bapu Ravji v. Ramji Svarupji*⁽³⁾.

The following cases also were referred to:—*Sri Gopal v. Pirthi Singh*⁽⁴⁾; *Govind Hari v. Parashram*⁽⁵⁾; and *Balmakund v. Sangari*⁽⁶⁾.

RUSSELL, J.—The two points in the suit are:—

(1) Whether, having regard to the plaint as framed and the terms of the mortgage-deed sued on, the plaintiff is entitled to maintain this suit.

(1) (1901) 25 Mad. 108.

(2) (1891) 13 All. 432, at pp. 465, 530.

(3) (1886) 11 Bom. 112.

(4) (1897) 20 All. 110, on appeal to P. C.

(1902) 24 All. 429.

(5) (1900) 25 Bom. 161.

(6) (1897) 19 All. 379.

(2) Can a holder of two mortgages on the same property maintain a suit on the latter one only for sale of the property subject to the prior mortgage?

It is necessary to set out the facts shortly as follows :—

There were three brothers, Mithia, Fakira and Vanmali, who owned two ancestral houses. Vanmali separated from his brothers many years ago, and was allotted one of the said two houses as his share. The other house is the house in question herein.

Fakira, who was the father of the defendant herein, died in 1894, and in 1895, 29th September, Mithia and Vanmali executed a mortgage for Rs. 599 to the plaintiff of the house in question. Vanmali apparently joined in this mortgage as a surety only. Vanmali died in 1898 and shortly afterwards, *viz.*, on the 13th June 1898, the bond now in suit (Exhibit 28) was passed by Mithia alone to the plaintiff. The material portions of which are as follows :—

After reciting how the Rs. 399 (the amount of the debt for which the mortgage was given) are made up, the mortgagor agrees to pay that sum by the instalments therein mentioned. Then it goes on "In consideration whereof I write over to you any surplus that may remain after deducting the principal amount with interest due on the hypothecation bond passed in respect of the under-mentioned property by me and my brother Vanmali on the 29th September 1895 for Rs. 599." After describing the house in detail it goes on—

"The surplus in the above property is hypothecated, that can only be redeemed after the principal with interest is recovered. I agree to pay the same on demand after the expiration of the fixed date. If I fail to pay, you are at liberty to recover from the surplus and from me personally and from my other property. If per chance there be no surplus left in the property, you are at liberty to recover from me personally and from my other property."

In his plaint the plaintiff says that "there was an amount due to him by Mithia and Vanmali and accounts were made up on the 13th June 1898 when Mithia passed a bond above referred to for Rs. 399 whereby he gave me in writing a san

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mortgage of the excess (*sic*) that may be left of the property after satisfaction. The san mortgage passed to me by Mithia and Vanmali for Rs. 599 on the 29th September 1895."

The plaint goes on :—

"Mithia who passed the bond is dead. Defendant and his nephews are his heirs. Please pass a decree for my recovering 269 Rupees" (it appears 130 Rupees had been recovered) "and the costs of the suit by the sale of the above-mentioned property after reserving the charge in respect of the amount due on the aforesaid san document on the 29th September 1895."

Both the lower Courts held that Mithia was not competent to charge the whole of the property and on this point there has been no appeal to this Court.

(1) As to the first point: Looking at the portion of the mortgage-deed and the plaint above set out, it appears clear, that what was mortgaged was the excess or surplus of the property which might be left after "satisfaction of his first mortgage" (as in the plaint stated) or "the surplus that might remain after deducting the principal amount with interest due after first mortgage" (as in the mortgage-bond stated). It is not necessary to decide whether such surplus or excess was such "a possibility coupled with an interest" as comes within the meaning of "*property*" in the Transfer of Property Act, section 3: for we are of opinion that until the amount due on the first mortgage is ascertained it is impossible to say what passed under the second mortgage, and consequently it is impossible to pass a decree for the plaintiff in this suit for any specific sum. The case is exactly analogous to the well known case of *Scott v Avery*⁽¹⁾ where the insurer was to be entitled to sue only for such sum as the arbitrator should award: and the decision of the arbitrator was held to be a condition precedent to the maintaining of the action. Here the ascertainment of the sum due on the first mortgage is a condition precedent to any obligation or liability arising on the second mortgage—nay more—if there should be no surplus on the first mortgage the liability of the mortgagor

(1) (1855) 5 H. L. C. 811.

is to be a personal liability only. See further *Spurrier v. La Cloche*⁽¹⁾.

2. As to the second point: Having regard to sections 32 and 43 of the Civil Procedure Code (which we read so far as material) it would certainly seem that the plaintiff herein should have sought relief in respect of his first mortgage as well as his second in this suit. For as is well put in Pomeroy on Remedies, section 330 "necessary parties defendants are those without whom no decree at all can be rendered: proper parties defendants are those whose presence renders the decree more effectual: and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy."

On this point, therefore, we are in agreement with the High Court of Madras in *Dorasami v. Venkateshazayar*⁽²⁾ where they discuss the *dictum* of the Allahabad High Court in *Mata Din Kasodhan v. Kazim Husain*⁽³⁾, viz. "that there is nothing in the Civil Procedure Code or in the Transfer of Property Act, which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant, in either of them, from obtaining a decree for sale on each of them in a separate suit."

However this may be, it would appear from section 85 of the Transfer of Property Act that the plaintiff is not entitled to sue in the manner in which he has done herein. That section (which is under the heading "Suits for foreclosure, sale or redemption") is as follows "Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter relating to such mortgage: provided that the plaintiff has notice of such interest."

As Banerji J., in *Balmakund v. Musammat Sangar*⁽⁴⁾, says "as a prior mortgagee is a person who has an interest in the mortgaged property, he is a necessary party to the suit for sale brought by a puisne mortgagee, provided that the latter has notice of the

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(1) [1902] A. C. 446.

(3) (1891) 13 All. 432.

(2) (1901) 25 Mad. 103 at p. 116.

(4) (1897) 19 All. 379 at p. 384.

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prior mortgage. The omission to join such a prior mortgagee in the subsequent mortgagee's suit entails, according to the ruling of the Full Bench in *Matadin's case*⁽¹⁾, the dismissal of the suit."

The abuses which section 85 of the Transfer of Property Act was directed at will be found set out in *Sri Gopal v. Pirthi Singh*⁽²⁾ which was confirmed by the Privy Council⁽³⁾.

In the present case, no doubt the plaintiff is already a party to this suit. But looking at the wording and object of section 32 of the Civil Procedure Code the correct reading of it would seem to be that "all parties having an interest, etc., must be joined *in respect of such interest as parties, etc.*"

There are numerous cases which support the view we take. We need only refer to some of them. In England, in *Palmer v. The Earl of Carlisle*⁽⁴⁾ it was held that a person entitled to part only of a sum of money due on mortgage could not file a bill for a foreclosure of the same part of the mortgaged estate. Here the plaintiff is really in the present suit filing his plaint in respect of a part only of the monies due to him in respect of the property in question.

In India (*Dorasami v. Venkateshayyar*⁽⁵⁾), it was held that a mortgagee holding two mortgages on the same land could not sue on the earlier one for sale subject to the later one—a converse case to the present. The whole of the judgment in that case is pertinent to the present case. There the Court says at p. 115 "But a party suing upon one of his mortgages, can have no excuse for his not including in the suit his rights under his other mortgages, for he must necessarily have notice of the same."

Again it is difficult to see any answer to the argument derived from the form of a decree for sale in No. 128, schedule 4, to Civil Procedure Code at p. 115 of that judgment. Further, in *Mata Din Kasodhan v. Kazim Husain*⁽⁶⁾ the Allahabad High Court says "One thing is quite clear, that the plaintiffs cannot sell the property twice over, and they cannot sell under the second decree subject to the first."

(1) (1891) 13 All. 432.

(2) (1897) 20 All. 110 at p. 114.

(3) (1902) 29 I. A. 118; 24 All. 429.

(4) (1823) 1 S. & S. 423.

(5) (1901) 25 Mad. 108.

(6) (1891) 13 All. 432.

Again, as pointed out by the Madras High Court, in *Dorasami v. Venkateshayaar*⁽¹⁾, the principle of section 61 of the Transfer of Property Act which prevents the mortgagor who has mortgaged the same property twice over to the same person from redeeming one mortgage without redeeming the other also applies equally to a mortgagee who, having several mortgages over the same property, seeks to obtain an order for sale on one mortgage only.

It will be observed that section 43 of the Civil Procedure Code is imperative. Suppose a decree was passed for the plaintiff herein and he afterwards sued on the first mortgage, it seems to us that that would be a "splitting of his claims" within the meaning of Sir Lawrence Jenkins' judgment in *Govind v. Parashram*⁽²⁾ which section 43 was intended to prevent. Regard however must be had to the query in *Sri Gopal v. Pirthi Singh*⁽³⁾.

In the present suit every opportunity was given both in the lower appellate Court and in this Court to the plaintiff to amend his claim. He, however, rejected all such offers and, in spite of the risks which this Court pointed out to his pleader he was running, he determined to go on. For the reasons we have given above he was wrong in so doing, and the only decree we now pass is to dismiss the suit in so far as it seeks for sale of the mortgaged property. The plaintiff will, however, be at liberty to recover from the separate estate of Mithia (if any) in the hands of the defendants the sum claimed. The plaintiff must bear all costs throughout provided nevertheless that if the estate of Mithia in the hands of the defendants is sufficient to pay the claim and costs, then the costs of this suit shall be borne by that estate. This amounts to a confirmation of the decree of the lower appellate Court which is accordingly confirmed.

R. R.

Decree confirmed.

(1) (1901) 25 Mad. 108 at p. 115. (2) (1906) 25 Bom. 161; 2 Bom. L. R. 864.

(3) (1902) 29 I. A. 118 at p. 126; 4 Bom. L. R. 827; 24 All. 429.

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