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opinion that section 16 does not authorise any reference to an Assistant Judge to decide a suit under the Divorce Act, we must decline to confirm the decree.

Under section 115 of the Civil Procedure Code we set aside the decree which has been passed and remand the case to the District Judge for trial.

Decree set aside and case remanded.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

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DHONDO RAMCHANDRA KULKARNI (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHIKAJI WALAD GOPAL (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), section 11, Explanation IV, Order II, Rule 2—Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 12 and 13—Prior and subsequent mortgages upon the same property by the same mortgagor to co-parcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Separate causes of action—Subsequent suit barred—Res judicata—*Finding as a matter of fact that the two mortgages had been transactions "out of which the suit has arisen."*

A mortgagee, who has two mortgages of different dates upon the same property, having sued upon a mortgage of the later date and having had the property sold without reference to the prior mortgage, cannot afterwards bring a suit on the prior mortgage though the causes of action for the two suits are distinct. This rule is not the result of Order II, Rule 2 of the Civil Procedure Code (Act V of 1908) but it depends upon the principle of *res judicata*.

Per Hayward J. :—If the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen," the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of Order II, Rule 2 of the Code and the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

* Civil Reference No. 5 of 1914.

REFERENCE made by C. Fawcett, District Judge of Poona, under section 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) in Revision Application No. 54 of 1913.

The reference was made in the following terms :—

I have the honour to refer the following question of law for the determination of their Lordships, *viz.*, whether a mortgagee who has several mortgages on the same property can treat them, with respect to the provisions of Order II, Rule 2 of the Civil Procedure Code, as separate causes of action, or whether they constitute one cause of action, so that if he sues in respect of one of the mortgages, he cannot afterwards sue in respect of an earlier one on the same property ?

The facts out of which the question arises are as follows. In 1903 defendant's grandfather mortgaged his house to the plaintiff, Dhondo. In 1908 he mortgaged the same house and the yard (*bakhal*) attached to it to plaintiff's brother Sadashiv. In 1911 when Dhondo and Sadashiv admittedly formed a joint family, of which Dhondo was the manager, Sadashiv brought a suit in respect of the mortgage of 1908 with the cognizance and consent of his brother Dhondo. Sadashiv obtained a decree for recovery of Rs. 116-8-0 by sale of the mortgaged property, which decree plaintiff states has not been satisfied. Plaintiff now sues on the prior mortgage of 1903, the cause of action on which arose in 1904. The Sub-Judge of Junnar raised the issue.... "Is the present suit barred under the Order II, Rule 2 of the Civil Procedure Code, in view of the fact that the cause of action on the footing of plaint bond had already arisen in 1911 ?" This issue he answers in the affirmative, relying on the ruling in *Keshavram* v. *Ranchhod*, I. L. R. 30 Bom. 156, and the First Class Subordinate Judge, who has reported on the case under section 53 of the Dekkhan Agriculturists' Relief Act, agrees with him.

Assuming that the morgagee in the case of both bonds was virtually the same in consequence of the plaintiff being joint with his brother Sadashiv in 1911 (and I do not see any sufficient ground to differ from the Sub-Judge on this point), the question still remains whether the claim in respect of the prior mortgage of 1903 was in respect of the same cause of action as the claim in respect of the later bond of 1908, within the meaning of the Order II, Rule 2. This is a point which was left open by the Privy Council in *Sri Gopal* v. *Prithi Singh*, I. L. R. 24 All. 429 at p. 439, and which I do not understand to have been expressly decided in *Keshavram* v. *Ranchhod*, where (at page 163) reference is expressly made to the querry raised in the former case. Also, as I read *Keshavram's* case, the determination of this particular question was not necessary for the exact point raised in that case, *viz.*,

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Whether plaintiff in that suit could maintain a suit to recover the sum due on a later mortgage by sale of the property subject to a prior mortgage (*cf.* the remarks as to this in *Gobind Pershad* v. *Harihar Charan*, I. L. R. 38 Calcutta 60 at p. 63). I do not, therefore, think that *Keshavram's* case can be taken as a binding ruling that Order II, Rule 2 applies even though the causes of action are different in regard to the two mortgages. It seems to me that the cause of action can only be considered to be the same if the prior mortgage became merged in the later mortgage ; but the law is that a mortgage is not merged by the taking of a new mortgage on the same property to cover the original debt and further advances (*see* Halsburys' Laws of England, Vol. 21, p. 326). I may also refer to Mulla's Code of Civil Procedure, 5th edition, p. 333 and Ghose's law of mortgage, 4th edition, p. 594, in support of the doubt I feel as to the correctness of the view taken by the two Subordinate Judges. As the point is an important one and it is not, in the view I take, clearly covered by the ruling in *Keshavram's* case, I submit I am justified in making this reference in spite of what was said in *Bhanaji* v. *DeBrito*, I. L. R. 30 Bom. 226.

My own opinion for the reasons already given is that the suit is not barred by Order II, Rule 2 ; but at the same time as the defendant is an agriculturist, it is doubtful whether (in view of the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act, under which an account between the parties has to be taken *from the commencement of the transactions* between them) there was not an implied obligation on Dhondo and Sadashiv to have joined in one suit against the defendant in respect of the two mortgages as is allowed by Order II, Rule 2, and whether as they have not done so, the present suit is not barred. This also is a point of law on which I feel a reasonable doubt and which I would venture to refer for the decision of the High Court, should they agree with my opinion on the other point. I am inclined to think it should be answered in the affirmative, *i. e.*, that the suit is barred.

B. V. Desai (*amicus curiæ*) for the appellant (plaintiff) :—The question is whether Order II, Rule 2 of the Civil Procedure Code is a bar to the present suit. It refers to more reliefs than one in respect of the same cause of action. If there are different causes of action, then the Rule does not apply. Here there are two separate mortgages, one of 1903 and the other of 1908. Before the mortgage of 1908 the plaintiff could have brought a suit on the mortgage of 1903. Therefore in the present case it cannot be said that there is only one cause of action in respect of the two mortgages and if

there are two causes of action, then clearly the Rule is not a bar to the present suit.

In the case of *Sri Gopal* v. *Pirthi Singh*[1] their Lordships of the Privy Council left open the question in connection with section 43 of the Code of 1882. The cases which apparently lay down that section 43 is a bar are cases under a mortgage and their Lordships of the Privy Council in deciding whether section 43 is a bar have not interpreted the section by itself but have read it along with section 85 of the Transfer of Property Act. That section requires that all persons interested in the mortgage should be parties to the suit. The ruling in *Keshavram* v. *Ranchhod*[2] is to the same effect. In that case what was mortgaged a second time was the surplus of the previous debt and the first mortgage was clearly mentioned in the second. All the cases prior to 1908 have lost their binding authority because section 85 of the Transfer of Property Act, which was applicable to such transactions, has been repealed and it is re-enacted in Order XXXIV, Rule 1 of the Civil Procedure Code of 1908 with the addition of an explanation which distinguishes all the previous cases. The explanation clearly shows that in a suit by a puisne mortgagee, the prior mortgagee need not be joined. Therefore section 85 of the Transfer of Property Act being no longer a bar to a suit like the present, section 43 of the old Code can also be no longer a bar. The decision in *Gobind Pershad* v. *Harihar Charan*[3] shows that a person holding several mortgages can bring a suit on a prior mortgage without joining the claims on later mortgages.

V. V. Bhadkamkar (*amicus curiæ*) for the respondent (defendant) :—The present suit is clearly barred by

(1) (1902) 24 All. 429 at p. 439. (2) (1905) 30 Bom. 156.
(3) (1910) 38 Cal. 60.

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Order II, Rule 2 corresponding with section 43 of the Code of 1882. Here the same person holds different mortgages on one and the same property. He may bring a suit on a subsequent mortgage and may sell the property in execution of his decree with the result that the property may fetch less than its actual value because there is a subsisting prior mortgage. The object of section 85 of the Transfer of Property Act was to protect the interests of *bonâ fide* purchasers: *Hari Narain Banerjee* v. *Kusum Kumari Dasi*[1]. In *Gobind Pershad* v. *Harihar Charan*[2] it was held that such a suit can lie but it was held at the same time that the plaintiff cannot ask for a decree subject to the subsequent mortgage, meaning thereby that if he brings a suit on the other mortgage, the suit would be barred.

The decision in *Nattu Krishnama Chariar* v. *Annangara Chariar*[3] also shows that if a mortgagee omits to mention his second mortgage, he cannot afterwards sue on his second mortgage.

Desai in reply:—The ruling in *Nathu Krishnama Chariar* v. *Annangara Chariar*[3] was arrived at before section 85 of the Transfer of Property Act was repealed and incorporated in the explanation to Rule 1, Order XXXIV of the Civil Procedure Code. Moreover, in the present case the property is not ordered to be sold but the decretal amount is made payable by instalments.

The case of *Payana Reena Saminathan* v. *Pana Lana Palaniappa*[4] gives the meaning of the words "causes of action". Section 34 of the Ceylon Civil Procedure Code is the same as Order II, Rule 2 of the Indian Civil Procedure Code of 1908. We submit that the present suit is not barred by Order II, Rule 2.

(1) (1910) 37 Cal. 589.
(2) (1910) 38 Cal. 60.
(3) (1907) 30 Mad. 353.
(4) [1914] A. C. 618.

BEAMAN, J. :—This is a Reference by the District Judge of Poona under section 54 of the Dekkhan Agriculturists' Relief Act. The principal question referred to us, put in the simplest language, is whether a mortgagee having two mortgages of different dates upon the same property may sue upon the mortgage of later date first, and having had the property sold without reference to the prior mortgage can thereafter bring a separate suit on the prior mortgage. We think that he cannot do so. In our opinion the question is not to be answered under Order II, Rule 2. The causes of action certainly are distinct. It could hardly be seriously contended, we think, that in such circumstances if the mortgagee allowed the prior mortgage to be time-barred, he could not sue upon the puisne mortgage, or again, that by doing so he could revive the prior mortgage which had become time-barred. Thus, it is clear, that the causes of action are not the same. The answer then will have to be sought by reference, we think, to the general principles of the law of mortgage and *res judicata*. The rule is that where there are several mortgages upon the same property, any mortgagee suing upon his mortgage must make all the other mortgagees, as well as the mortgagor, parties to the suit. To this rule there are exceptions. Until the alteration of section 85 of the Transfer of Property Act by Order XXXIV, Rule 1, the Courts appear to have put a very strict interpretation upon the words of old section 85 of the Transfer of Property Act. But there can be no doubt that under the general law of mortgage as administered in England a puisne mortgagee might sue his mortgagor, if he chose to do so, for foreclosure and sale, without making a prior mortgagee a party to the suit, and the result of such a suit between a puisne mortgagee and his mortgagor would be to have the property sold, as it is said, subject to the prior mortgage.

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Accurately stated in all cases of that kind what is really sold is not the property at all but the right to redeem the prior mortgage upon it.

Similarly when a puisne mortgagee sues the mortgagor and joins a prior mortgagee, the effect of the suit between the puisne mortgagee and the mortgagor is exactly the same as though the prior mortgagee had not been a party to it, assuming (1) that the mortgagee has insisted upon his rights ; (2) that neither the puisne mortgagee nor the mortgagor has redeemed him in the suit. Then the result would be that the property would be sold subject to that prior mortgage as between the puisne mortgagee and the mortgagor. In other words again, what would be sold would not be the property but the right to redeem the prior mortgagee. It is equally clear, we think, that in a suit so framed if the prior mortgagee did not choose to assert his rights, although a party to the suit, the result would be that the property would be sold free of that mortgage, and that the prior mortgagee would be disentitled to assert any rights he might otherwise have had under his prior mortgage against a purchaser at any such sale. That rule depends upon the principle of *res judicata*. This is very clearly apparent from the dicta of their Lordships of the Privy Council in *Sri Gopal* v. *Prithi Singh*[1].

In our opinion, precisely the same result is worked out where the puisne mortgagee suing on his puisne mortgage is himself a prior mortgagee. By no stretch of fictional forms or fictional ideas can it be said, we think, that in such circumstances he is not a party to the suit. He is just as much a party as though he had been impleaded by a puisne mortgagee other than himself. So that where a mortgagee holds two mort-

[1] (1902) 24 All. 429.

gages of different dates upon the same property, and sues upon the later mortgage, he must be deemed to be a party to the suit in a position to assert any rights he might have under his prior mortgage. There might be no objection in such circumstances to his reserving those rights, as though he and the prior mortgagee were different persons, and so have the property put to sale subject to the prior mortgage. But if he makes no mention of his rights as prior mortgagee, then he is in the same position, we conceive, as a prior mortgagee would be, if being duly impleaded, he did not attempt to assert his rights. In such cases the decision in *Sri Gopal* v. *Prithi Singh*[1] is conclusive, establishing that such a prior mortgagee would be precluded from bringing another suit upon his prior mortgage against the purchaser at the sale; that is to say, the matter would be *res judicata* against the prior mortgagee.

This being our view, it follows that we must answer the question asked us by the learned District-Judge in the negative. He has referred to us a subsidiary question under the special provisions of section 13 (*b*) of the Dekkhan Agriculturists' Relief Act upon which, I believe, my brother Hayward will express our opinion, though in the view we take, it is not essential to the decision of the suit upon which the first question has been referred to us.

We wish to express our thanks to the learned gentlemen who afforded us much assistance as *amici curiæ* during the argument.

HAYWARD, J.:—I entirely concur with regard to the first question that prior and subsequent mortgages in favour of one mortgagee cannot be considered one cause of action so as to bar separate suits under Order II, Rule 2. They must, in my opinion, ordinarily

[1] (1902) 24 All. 429.

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constitute two different causes of action, as causes of action are said to comprise all facts material to prove the particular suits, and, clearly in the case of separate mortgages, there would be different facts which would have to be proved to establish the separate suits. So that there could be no bar to separate suits under Order II, Rule 2.

I also concur with regard to the further question which thereon arises, that the prior mortgage must be considered as necessarily brought in by way of defence in a suit on the subsequent mortgage in favour of the same mortgagee under Order XXXIV, Rule 1, and that failure to plead the prior mortgage in the suit on the subsequent mortgage would give rise to *res judicata* under section 11, Explanation IV, of the Civil Procedure Code. The several decisions quoted before us in support of this proposition, namely, *Dorasami* v. *Venkatasesha-yyar*[1]; *Keshavram* v. *Ranchhod*[2]; and *Hari Nara-in Banerjee* v. *Kusum Kumari Dasi*,[3] all proceeded on the assumption that prior mortgagees were in all cases necessary defendants in suits brought by subsequent mortgagees under section 85 of the Transfer of Property Act. But it has since been made clear that they are not necessary defendants and that it is a matter of the choice of the subsequent mortgagees by the Explanation to Order XXXIV, Rule 1 of the Civil Procedure Code. So the further question which has arisen must be thus stated: whether the prior mortgagee can practically be left out of the suit by the subsequent mortgagee where the two mortgages are vested in the same mortgagee, so as to avoid the penalty of *res judicata* which would otherwise result under the decision of the Privy Council in *Sri Gopal* v. *Prithi Singh*[4].

(1) (1901) 25 Mad. 108.
(2) (1905) 30 Bom. 156.
(3) (1910) 37 Cal. 589.
(4) (1902) 24 All. 429.

The matter is in my opinion not free from difficulty, but after consideration it does not seem to me practicable to hold the prior mortgagee in such a case not to be a party, when he is himself actually represented in the case, with full knowledge of the prior mortgage as subsequent mortgagee. Nor would there be any prejudice to him in so holding because he would be able, if he so desired, to keep his prior mortgage alive by requiring that the sale of the property should be subject to the prior mortgage, or in the alternative he might allow the sale free of the prior mortgage and recover the amount due on the prior mortgage out of the proceeds of the sale on the subsequent mortgage. This is clear from the provisions of Rules 12 and 13 of Order XXXIV. On the other hand, if the prior mortgagee were held in such a case not to be a party and not bound to disclose his prior mortgage though himself the subsequent mortgagee, the ruling would, in my opinion, open the door to possible fraud in the subsequent dealings with the property and would tend to defeat the general policy of finally settling all questions regarding mortgaged property in one suit, and of limiting litigation, underlying the various provisions of the Transfer of Property Act and the Civil Procedure Code.

With regard to the subsidiary question whether in any case the prior mortgage and the subsequent mortgage must not be held to be one cause of action in view of the special provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, it is not strictly necessary, in view of our decision on the preceding questions, to come to any definite decision; nor does it appear to me that the materials before us are sufficient to enable us to arrive at such a decision. It will be sufficient, therefore, merely to indicate that it would depend on the question of fact, as pointed out in the

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decisions in *Mahadu* v. *Rajaram*[1] and *Gopal Purushotam* v. *Yashwantrav*[2] whether the two mortgages can be said to be independent transaction or transactions "out of which the suit has arisen" within the meaning of section 13 of the Dekkhan Agriculturists' Relief Act. If it had been found as a matter of fact that the transactions were transactions "out of which the suit has arisen", then they would have constituted the same cause of action, and the subsequent suit would have been barred under Order II, Rule 2, by reason of the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act.

So that the reply to the questions put to us must, in my opinion, be that the subsequent suit on the prior mortgage was barred by reason of the decree in the previous suit on the subsequent mortgage as *res judicata* under section 11, Explanation IV, of the Civil Procedure Code, and that in any case, if the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen", the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provision of Order II, Rule 2, and the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act.

Order accordingly.

G. B. R.

(1) (1887) P. J. 216.

(2) (1887) P. J. 273.