APPELLATE CIVIL.

Before Mookerjee and Richardson JJ.

HAR SHYAM CHOWDHURI

v.

SHYAM LAL SAHU.*

1915

March 25.

Subrogation—Prior mortgage—Fraudulent suppression of, by vendor.

If A purchases a property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase money in his hands with a view to satisfy the mortgages Y and Z, but subsequently discharges the security Z, he cannot on satisfaction of the mortgage X use it as a shield against the mortgage Y.

Biseswar Prosad v. *Lala Sarnam Singh* (1) and *Hiam* v. *Vogel* (2) followed.

But where the purchaser found on enquiry that there were only two subsisting charges Y and Z to be satisfied, but discovered after his purchase that there was a prior charge X which was falsely described as satisfied in the mortgage instrument of Y, (in a suit upon bond X):

Held, that from whatever point of view the case may be considered, the purchaser was entitled to priority in respect of the payment made by him to satisfy the first mortgage X.

Mohesh Lal v. *Mohant Bawan Das* (3) followed.

Held, also, that the purchaser was not entitled to priority on the basis of the payment made by him to satisfy the second mortgage Y.

SECOND APPEAL by Har Shyam Chowdhuri, the defendant No. 5.

This is an appeal in a suit on a mortgage bond executed by the father of defendants Nos. 1 to 3 in favour

* Appeal from Appellate Decree, No. 2757 of 1912, against the decree of A. Melior, District Judge of Darbhanga, dated Feb. 2, 1912, modifying the decree of Charu Chandra Mukherjee, Subordinate Judge of Darbhanga, dated April 28, 1911.

(1) (1907) 6 C. L. J. 134. (2) (1879) 69 Missouri 529.
(3) (1883) I. L. R. 9 Calc. 961; L. R. 10 I. A. 62.

1915

HAR SHYAM CHOWDHURI v. SHYAM LAL SAHU.

of Gobardhan Lal defendant No. 4, on the 27th December 1897 for Rs. 700. The mortgagee sold the bond to the plaintiff on the 12th September, 1906, and the mortgagor sold the equity of redemption to Har Shyam Chowdhuri on the 15th October 1901 for Rs. 2,238. The property in dispute had been the subject of three mortgage transactions. The first mortgage was created on the 29th March 1888 for a sum of Rs. 700 which carried interest at the rate of 24 per cent. per annum, the second was on the 22nd July 1895 to secure a loan of Rs. 500 on interest at 18 per cent. per annum; the third mortgage, now sought to be enforced, was created on the 27th December 1897, to secure a loan of Rs. 700 which bore interest at 18 per cent. per annum. Defendant No. 5's conveyance recited that there were only two mortgages on the property, namely, those of 1895 and 1897. The purchaser, who was allowed to retain in his hands the entire consideration, agreed to apply the money in satisfaction of the dues on these two mortgages. He subsequently discovered that there was the prior mortgage of 1888 on the property purchased by him. He accordingly satisfied the mortgage of 1888 and 1895. On the 21st June 1910 the mortgagee of 1897 then commenced this action in the Court of the Subordinate Judge of Darbhanga to recover his dues. The purchaser under the conveyance of 1901 contested the suit and urged that he was entitled to priority to the extent of the mortgages of 1888 and 1895.

Both the learned Subordinate Judge and, on appeal, the learned District Judge of Darbhanga decided against the defendant No. 5, who in consequence preferred this second appeal to the High Court.

Babu Narendra Kumar Bose, for the appellant

Babu Lakshmi Narayan Singh, for the respondent.

1915

HAR SHYAM CHOWDHURI v. SHYAM LAL SAHU.

MOOKERJEE AND RICHARDSON JJ. This is an appeal by the fifth defendant in a suit to enforce a mortgage-security. The property in dispute has been the subject of three mortgage transactions. The first mortgage was created on the 29th March 1888 for a sum of Rs. 700 which carried interest at the rate of 24 per cent. per annum; the second was on the 22nd July 1895 to secure a loan of Rs. 500 on interest, at 18 per cent. per annum; the third mortgage, now sought to be enforced, was created on the 27th December 1897, to secure a loan of Rs. 700 which bore interest at 18 per cent. per annum. On the 15th October 1901, the mortgagors transferred the equity of redemption to the appellant for a sum of Rs. 2,238. The conveyance recited that there were only two mortgages on the property, namely, those of 1895 and 1897. The purchaser, who was allowed to retain in his hands the entire consideration, agreed to apply the money in satisfaction of the dues on these two mortgages. He subsequently discovered that there was a prior mortgage on the property purchased by him, namely, the mortgage of 1888. He accordingly satisfied the mortgages of 1888 and 1895. The mortgagee of 1897 then commenced this action on the 21st June 1910 to recover his dues. The suit has been contested by the appellant, the purchaser under the conveyance of 1901, who argues that he is entitled to priority to the extent of the mortgages of 1888 and 1895. The District Judge has overruled this contention and has made the asual mortgage decree in favour of the plaintiff. On the present appeal by the purchaser of the equity of redemption, it has been urged that as he has satisfied the mortgages of 1888 and 1895, he is entitled to use them as shields against the mortgagee of 1897.

In so far as the mortgage of 1895 is concerned, it is plain that this contention cannot prevail. It was

1915

HAR SHYAM CHOWDHURI v. SHYAM LAL SAHU.

ruled by this Court in the case of *Surjiram Marwari* v. *Barhamdeo Persad* (1) that the doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. If a person purchases a property, subject to two mortgages, retains a portion of the purchase-money for payment to the mortgagees, but pays the first incumbrancer alone and not the second, he cannot treat the first mortgage as kept alive for use as a shield against the second; he cannot claim to be subrogated to the position of the mortgagee whose debt he has satisfied. The same principle was applied in the cases of *Bissweswar Prosad* v. *Lala Sarnam Singh* (2) and *Satnarain Tewari* v. *Choudhuri Sheobaran Singh* (3). The cases of *Tara Sundari Debi* v. *Khedan Lal Sahu* (4) and *Prayag Narain* v. *Chedi Rai* (5) are not in principle opposed to this view; they merely furnish illustrations of cases which, the Court thought, (whether rightly or wrongly it is needless to discuss for our present purpose), fall outside the scope of the rule enunciated in *Surjiram Marwari* v. *Barhamdeo Persad* (1). In respect of the mortgage of 1895, it is clear that the appellant discharged an obligation which he had undertaken to fulfil, namely, to satisfy the mortgage, not with his own money, but with money which belonged to his vendors, and had been placed at his disposal for that specific purpose. If his vendor had satisfied the mortgage of 1895, as he might well have done, it is plain that he, as mortgagor, could not have treated the mortgage satisfied by him, as available by way of defence against the mortgagee of 1897. It follows consequently that the appellant is not entitled

(1) (1905) 2 C. L. J. 288.
(2) (1907) 6 C. L. J. 134.
(3) (1911) 14 C. L. J. 500.
(4) (1910) 14 C. W. N. 1089.
(5) (1910) 14 C. W. N. 1093.

to priority, on the basis of the payment made by him to satisfy the mortgage of 1895.

A question of some nicety, however, arises in respect of the mortgage of 1888. The appellant had undertaken to satisfy the mortgage of 1897; he did not fulfil his obligation, but chose to satisfy the mortgage of 1888. Is he then entitled to use the mortgage of 1888 as a protection against the mortgage of 1897? There can be no room for doubt that if A purchases a property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase-money in his hands with a view to satisfy the mortgages Y and Z, but, subsequently, discharges the security Z, he cannot, on satisfaction of the mortgage X, use it as a shield against the mortgage Y. This follows from the case of *Bissweswar Prosad* v. *Lala Sarnam Singh* (1) where reference is made to the decision in *Hiam* v. *Vogel* (2). In that case A obtained title to a property subject to two prior charges, and at the same time undertook to satisfy the second charge. He did not fulfil his obligation, but, subsequently, when he had acquired rights under the first charge, took his stand thereon as protection against the second charge. His contention was overruled on the ground that he was bound to satisfy the second charge with the money at his disposal, and so long as that money was retained by him, he could not be allowed to prejudice the position of the second encumbrancer by means of title acquired under the first charge. If, consequently, nothing else was known in this case except that there were the three successive charges of 1888, 1895 and 1897 and that the appellant had undertaken to pay the charges of 1895 and 1897 with money placed at his disposal by the mortgagor, the mere fact that he had

(1) (1907) 6 C. L. J. 134. (2) (1879) 69 Missouri 529.

1915

HAR SHYAM CHOWDHURI v. SHYAM LAL SAHU.

satisfied the prior charge of 1888 would not entitle him to use it as a shield against the mortgagee of 1897. The latter would *prima facie* be entitled to contend that as the appellant had in his hands money placed at his disposal by the mortgagor for the satisfaction of his dues, he could not be prejudiced by reason of the payment made by the appellant to satisfy the debt of 1888. There are, however, special circumstances in this case which, as we shall presently see, take it out of the general rule already explained.

The mortgage of 1897 recited that Rs. 400 out of the Rs. 700 secured thereby had been applied by the mortgagor to satisfy the mortgage of 1888, that the mortgagor had redeemed the mortgage and had obtained the mortgage instrument which he had made over to the new mortgagee as evidence of his title. This was, it is now conceded, an entirely false recital. The sum of Rs. 400 had not been applied to discharge the mortgage of 1888; the mortgage instrument had not been taken back from the mortgagee but was still in his custody. The appellant contends that he was misled by this recital, and purchased the property from the mortgagor in the belief that it was subject to two charges only, namely, those of 1895 and 1897. It is indisputable that the acceptance of this instrument, with an untrue recital, by the mortgagee of 1897 enabled the mortgagor to commit a fraud on the appellant. He intended to acquire a clear title to the property free of all prior charges thereon; he found on enquiry that there were only two subsisting charges to be satisfied, namely, those of 1895 and 1897. He discovered after his purchase that there was a prior charge of 1888, which was falsely described as satisfied in the mortgage instrument of 1897 held by the respondent. Consequently, if we apply the

test of intention of the person who satisfies the prior charge, as ruled in the cases of *Mohesh Lal* v. *Mohant Bawan Das* (1). *Gokul Das* v. *Ram Bux* (2), *Dinobundhu* v. *Jogmaya* (3), *Mahomed Ibrahim* v. *Ambika* (4), *The Liquidation Assets* v. *Willoughby* (5), *Thorne* v. *Cawn* (6), *Whiteley* v. *Delaney* (7) and *Shib Narain* v. *Gobinda* (8), the answer must be in favour of the appellant; for there is no shadow of a doubt that when he satisfied the mortgage of 1888, he intended to keep the security alive for use as a protection against the mortgage of 1897. On the other hand, if, as explained in *Gurdeo* v. *Chandrikah* (9), we treat the doctrine of subrogation as based on equitable grounds to be applied only where needed to accomplish the ends of justice, it is equally plain that the plaintiff has no claim to consideration as against the appellant; for it was the conduct of the plaintiff which enabled his mortgagor to commit a fraud on the appellant. The plaintiff has also no claim as against the appellant on any contractual basis; he is in no sense privy to the agreement between the appellant and his vendor; and, although it has recently been held that a stranger to a contract may sometimes [as explained in *Jahandar Baksh* v. *Ram Lal* (10)] be entitled to claim the benefit of the performance thereof, as in *Khwaja Muhammad Khan* v. *Nawab Husaini Begam* (11) and *Debnarayan Dutt* v. *Chunilal Ghosh* (12), that

(1) (1883) I. L. R. 9 Calc. 961; L. R. 10 I. A. 62.
(2) (1884) I. L. R. 10 Calc. 1035; L. R. 11 I. A. 126.
(3) (1901) I. L. R. 29 Calc. 154; L. R. 29 I. A. 9.
(4) (1911) I. L. R. 39 Calc. 527; L. R. 39 I. A. 68.
(5) [1898] A. C. 321.
(6) [1895] A. C. 11.
(7) [1914] A. C. 132.
(8) (1913) 19 C. L. J. 200.
(9) (1907) I. L. R. 36 Calc. 193
(10) (1910) 11 C. L. J. 364, 368.
(11) (1910) I. L. R. 32 All. 410; L. R. 37 I. A. 152.
(12) (1913) I. L. R. 41 Calc. 137.

1915

HAR SHYAM CHOWDHURI v. SHYAM LAL SAHU.

doctrine cannot be allowed to be invoked to defeat the ends of justice. From whatever point of view the case may be considered, it is consequently plain that the appellant is entitled to priority in respect of the payment made by him to satisfy the mortgage of 1888.

The result is that this appeal is allowed in part, and the decree of the District Judge modified. The appellant is entitled to priority in respect of a sum of Rs. 344, proportionate to the share of the property now in suit. We direct that the property covered by the mortgage of 1897 be sold in execution of the decree made by the District Judge free of the charges of 1888, 1895 and 1897. Out of the sale proceeds, the appellant will be first entitled to Rs. 344 and the costs of this suit; from the balance left, the plaintiff-decree-holder will be entitled to his dues; the surplus, if any, will belong to the appellant. The appellant is entitled to his costs as against the plaintiff throughout this litigation.

G. S. *Appeal allowed in part.*