

## ORIGINAL CIVIL.

Before Roy J.

SURENDRANATH GHOSH

v.

HARIDAS BISWAS.\*

1932

June 8, 9, 10.

*Mortgage—Priority—“Gross neglect”—Delay in registration, if amounts to “gross neglect”—Indian Registration Act (XVI of 1908), ss. 23, 47—Transfer of Property Act (IV of 1882), s. 78.*

Where a prior mortgagee has done nothing towards inducing a subsequent mortgagee to advance money, but has simply availed himself of the time given to him by the law for registering his mortgage, he cannot be said to be guilty of “gross neglect” within the meaning of section 78 of the Transfer of Property Act. A mortgage, which is prior in date and has been validly registered within the time allowed by the law, cannot be postponed to a subsequent mortgage merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage.

*Llyods Bank, Ltd. v. P. E. Guzdar & Co.* (1) and *Jadunandan Prosad Singh v. Deo Narain Singh* (2) relied on.

## ORIGINAL SUIT.

Relevant facts of the case appear from the judgment.

*P. C. Ghosh* for the defendant, Durgacharan Mitra. In transactions regarding immoveable properties, a prior transferee has a duty to take reasonable care to protect the interest of subsequent transferees: *Dearle v. Hall* (3). This equitable principle has been recognised by the legislature in the Transfer of Property Act, sections 41 and 78.

The object of the Registration Act is to ensure the genuineness of documents. It has nothing to do with the amount of diligence which ought to be

\*Original Civil Suit No. 1125 of 1930.

(1) (1929) I. L. R. 56 Calc. 868. (2) (1911) 16 C. W. N. 612.  
(3) (1823) 3 Russ. 1 (10, 21); 38 E. R. 475 (478, 483).

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shown by prior transferees, as is prescribed in section 109 of the Indian Companies Act. The prior mortgagee ought to register his mortgage within a reasonable time. If he fails to do so, he holds out to the world that the property is free from encumbrances and so induces later mortgagees to advance money and enables the mortgagor to commit fraud. In such circumstances the prior mortgage should be postponed: *Dixon v. Muckleston* (1), *Alexander Mitchell v. Mathura Das* (2), *Baij Nath Tewari v. Sheo Sahoy Bhagut* (3), *Tilakdhari Lal v. Khedan Lal* (4). The position of the prior mortgagee in this case is similar to that of an equitable mortgagee in England, who parts with the title deeds and sleeps over it for three months.

*B. C. Ghose* (with him *J. K. Ghose*) for the plaintiff. Under section 47 of the Registration Act the document operates from the date of execution. It requires something more than mere failure to register to take away the priority of a mortgagee. In the absence of collusion, mere carelessness or want of prudence will not postpone a prior mortgage: *Northern Counties of England Fire Insurance Company v. Whipp* (5). "Gross "neglect" is doing something which enables the mortgagor to perpetrate the fraud. Mere omission to do something, that is not a duty, is not negligence. Delay in registration is not negligence. Especially, in this case the mortgage was presented for registration within the four months allowed by the Act. Four months is an absolute standard of diligence: *The Madras Hindu Union Bank v. C. Venkatrangiah* (6), *Rangasami Naiken v. Annamalai Mudali* (7), *Nabadwip Chandra Das v. Loke Nath Roy* (8), *Mutha v. Sàmi* (9).

(1) (1872) L. R. 8 Ch. 155, 160.

(5) (1884) 26 Ch. D. 482, 494.

(2) (1885) I. L. R. 8 All. 6 (12);

(6) (1889) I. L. R. 12 Mad. 424, 428.

L. R. 12 I. A. 150 (156).

(7) (1907) I. L. R. 31 Mad. 7, 11.

(3) (1891) I. L. R. 18 Calc. 556, 570.

(8) (1932) 36 C. W. N. 733, 736.

(4) (1920) I. L. R. 48 Calc. 1 (18);

(9) (1884) I. L. R. 8 Mad. 200, 202.

L. R. 47 I. A. 239 (252).

*P. C. Basu* for the defendant *Kunjatal Datta*. In the old Registration Act documents took effect from the date of registration. It has now been changed deliberately, therefore failure to register cannot affect priority. The reasoning of *Dearle v. Hall* (1) has been held to be wrong: Ghose on Mortgage, 5th Edition, pages 408 *et seq.*

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There is no duty on a prior mortgage.

Since registration is not notice, there cannot be a duty to register: *Tilakdhari Lal v. Khedan Lal* (2), *Lloyds Bank, Ltd. v. P. E. Guzdar & Co.* (3).

Once a document is registered, it does not matter when it has been registered, for section 47 of the Registration Act gives the transferee a statutory right. No equitable principle can take away that right: *Ariff v. Jadunath Majumdar* (4), *Jadunandan Prosad Singh v. Deo Narain Singh* (5), *Rajani Nath Das v. Ofajuddi Molla* (6).

*P. C. Ghosh*, in reply. In England, mere inaction to take possession of title deeds is gross neglect. In this country, that analogy should be applied where there is failure to register.

There is nothing in *Rangasami Naiken v. Annamalai Mudali* (7) to show that the document was not presented for registration immediately. If that was done any delay was not due to any fault of the transferee. The other cases cited by my learned friends are clearly inapplicable.

*P. N. Sen*, *B. C. Datta* and *S. N. Bose* for other defendants.

*Cur. adv. vult.*

Roy J. This is a suit to realise mortgage securities. There are altogether five mortgages and two further charges involved in the suit. The mortgagor was one *Haridas Biswas*,

(1) (1823) 3 Russ. 1;  
 38 E. R. 475.

(2) (1920) I. L. R. 48 Calc. 1;  
 L. R. 47 I. A. 239.

(3) (1929) I. L. R. 56 Calc. 868.

(4) (1931) I. L. R. 58 Calc. 1235  
 (1245); L. R. 58 I. A. 91 (101).

(5) (1911) 16 C. W. N. 612, 617.

(6) (1916) 22 C. W. N. 318.

(7) (1907) I. L. R. 31 Mad. 7.

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who was originally the first defendant. He died on the 5th January, 1932. On his death, his infant sons were brought on the record and are now the first three defendants. The mortgage in favour of the plaintiff is dated 20th March, 1927. All the other mortgages and further charges are subsequent in date to the mortgage of the plaintiff. The defendants Nos. 4 to 8 are the subsequent mortgagees. The mortgages have all been duly proved and in the normal course a mortgage decree in the usual form would follow.

A question of priority has, however, been raised by the defendant Durgacharan Mitra. This has led to some further evidence being given and considerable argument being advanced, in the course of which various cases have been cited. The mortgage in favour of the defendant Durgacharan Mitra was executed on the 7th June, 1927, and registered on the following day. There was a further charge in favour of the defendant Durgacharan Mitra on the 6th August, 1927, which was registered on the 8th August, 1927. The defendant Durgacharan Mitra has claimed that, though his mortgage and further charge are subsequent to the plaintiff's mortgage and the mortgage in favour of the defendant Kunjalal Datta, which was executed on the 21st May, 1927, Durgacharan Mitra should have priority over the mortgages of the plaintiff and the defendant Kunjalal Datta. The way this claim has been formulated is to be found in paragraphs 3 and 4 of Durgacharan Mitra's written statement. Though there was a suggestion of fraud made in paragraph 3 of the written statement, learned counsel appearing on behalf of the defendant Durgacharan Mitra stated that he did not rely on any case of fraud. In paragraph 3 it has been alleged that, through the "gross neglect" of the plaintiff and the defendant Kunjalal Datta in not getting their respective mortgages registered until after the mortgage and further charge in favour of the defendant Durgacharan Mitra, he was prevented from having any

notice or knowledge of the prior mortgages and was induced *bona fide* to advance money to the mortgagor Haridas Biswas on the security of the mortgage and further charge. In paragraph 4, the claim has been put forward that the plaintiff and the defendant Kunjalal Datta are estopped from claiming priority in respect of their mortgages. In support of his case, the defendant Durgacharan Mitra has relied on the evidence of his solicitor, Babu Rajkumar Basu. The defendant Kunjalal Datta gave evidence on his own behalf. The plaintiff has not called any evidence.

Now, it is clear that the case of "gross neglect" made by the defendant Durgacharan Mitra is based simply on the fact that the mortgages in favour of the plaintiff and the defendant Kunjalal Datta had not been registered prior to the mortgage and further charge in his favour. The mortgage in favour of the plaintiff was presented for registration on the 22nd June, 1927, and was registered on the 12th August, 1927. The mortgage in favour of the defendant Kunjalal Datta was presented for registration on the 21st September, 1927, and was registered on the 20th January, 1928. The delay in registration in both cases was undoubtedly due, to a great extent, to the default of the mortgagor, who in both cases had to be compelled to register the documents. Mr. P. C. Ghosh on behalf of the defendant Durgacharan Mitra has argued that there was a duty on the part of the prior mortgagees to register their mortgages within a reasonable time and he submitted that, by neglecting to register their mortgages prior to the date of his client's mortgage and further charge, they had held out that the properties were free from encumbrances, and so induced his client to advance the money. He contended that, on general equitable principles and under section 78 of the Transfer of Property Act, his client was entitled to priority. The sole question, therefore, for determination by me, as has been admitted by Mr. P. C. Ghosh, is whether the plaintiff and the defendant Kunjalal Datta, by not

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having their mortgages registered prior to the date of the mortgage and further charge of Mr. P. C. Ghosh's client, could be said to have been guilty of such "gross neglect" as would entitle the defendant Durgacharan Mitra to claim that his mortgage should have priority over theirs. In the course of his argument, I asked Mr. P. C. Ghosh if he could tell me as to what would be reasonable time within which a mortgage should be registered or presented for registration. Mr. P. C. Ghosh said that the answer to the question would depend on the facts of each particular case, and he suggested that, in the circumstances of this case, the prior mortgagees should have presented their mortgages for registration within a week from the date of execution. I am not prepared to accept that suggestion. Moreover, I cannot see how the presenting of the mortgages for registration could have improved the position so far as Mr. P. C. Ghosh's client was concerned. If a mortgagor has to be compelled to register the mortgages, as happened in the case of the mortgages in favour of the plaintiff and Kunjalal Datta, considerable time might elapse between the date of the presentation and the date of the actual registration of the deeds and until the actual registration, the subsequent mortgagee would not have known of the prior mortgages. On the facts of this case, I am unable to hold that there has been any such "gross neglect" on the part of the plaintiff and the defendant Kunjalal Datta as would entitle the defendant Durgacharan Mitra to claim priority over them. For the meaning of "gross neglect" within section 78 of the Transfer of Property Act, I adopt the observations of Page J. in the case of *Lloyds Bank, Ltd. v. P. E. Guzdar & Co.* (1). Each case, however, must turn upon its own facts. Here the only suggestion of "gross neglect" is that there was unreasonable delay in registration. In my judgment, there has been no unreasonable delay. The mortgage in favour of Durgacharan

(1) (1929) I. L. R. 56 Calc. 868, 884.

Mitra was executed about 16 days after the mortgage in favour of the defendant Kunjalal Datta and a little over 2½ months after the mortgage in favour of the plaintiff. The defendant Kunjalal Datta has given an explanation as to why his mortgage could not be registered earlier and, though the plaintiff gave no evidence, on the materials before me, I do not think I would be wrong in holding that whatever delay there has been in the presenting of the mortgages for registration and in their actual registration was due largely to the default of the mortgagor. I am not prepared to hold that the mere fact that the prior mortgagees in this case had not registered their mortgages prior to the date of the mortgage and further charge in favour of the defendant Durgacharan Mitra is sufficient by itself to postpone their mortgages.

In my view, when a mortgage is registered within the period of four months allowed by section 23 of the Registration Act, it is *prima facie* registered within a reasonable time. Where a prior mortgage has done nothing towards inducing a subsequent mortgagee to advance money, but has simply availed himself of the time given to him by the law for registering his mortgage, he cannot be said to be guilty of "gross neglect" within the meaning of section 78 of the Transfer of Property Act. Section 47 of the Registration Act lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration and, in my view, where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage.

"There is no special hardship on the subsequent encumbrancer, because, as in this country documents do not take effect from the date of registration,

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“every person who acquires property takes it subject to the risk that there may be a prior title created within the preceding four months or in some instances even eight months. (Sections 23 and 24 of the Registration Act)”. See *Jadunandan Prosad Singh v. Deo Narain Singh* (1).

In my judgment, the defendant Durgacharan Mitra has failed to make out his case and cannot, therefore, claim any priority. There will be the usual mortgage decree. The costs will be as usual in a mortgage suit like the present one, except that the defendant Durgacharan Mitra must pay the costs of the second day's hearing of the suit to the plaintiff and the defendant Kunjalal Datta. The guardian-*ad-litem's* costs will be paid in the first instance by the plaintiff and will be added to the plaintiff's claim.

Attorney for plaintiffs: *M. K. Singha.*

Attorneys for defendants: *R. K. Basu, S. D. Sett, G. N. Dutt & Co., Pal Chowdhury & Sen, R. C. Bose.*

*Suit decreed.*

S. M.

(1) (1911) 16 C. W. N. 612, 617.