LETTERS PATENT APPEAL.

Before Mitter and McNair JJ.

1934

March 19, 20; *April* 17.

PRANBALLABH SHAHA

v.

BHAGABANCHANDRA SEAL.*

Mortgage—Transferee of a portion of the equity of redemption, when can redeem his portion—Notice of the transfer, if necessary—Transfer of Property Act (IV of 1882), s. 60.

The transferee of a portion of the equity of redemption is not entitled to redeem his portion only, although subsequent to his purchase the mortgagee released from the mortgage some other of the mortgaged properties, unless it is proved that before such partial release the mortgagee had knowledge of the transfer.

It is only the notice or knowledge of the transfer before partial release by the mortgagee that gives the right to the transferee to redeem his portion under section 60 of the Transfer of Property Act as it stood before the amendment of 1929.

Hari Kissen Bhagat v. *Veliat Hossein* (1) and *Muktakeshi Pal* v. *Ramani Mohan Bhattacharya* (2) distinguished.

Imam Ali v. *Baij Nath Ram Sahu* (3), *Hakim Lal* v. *Ram Lal* (4), *Eusuff Ali Haji* v. *Panchanan Chatterjee* (5) and *Dalip Narayan Singh* v. *Chait Narayan Singh* (6) referred to.

Perumal Pillai v. *Raman Chettiar* (7) and *Surjiram Marwari* v. *Barhamdeo Persad* (8) referred to.

Kettlewell v. *Watson* (9) and *Brooks* v. *Benham* (10) followed.

LETTERS PATENT APPEAL by the plaintiff.

The facts of the case are fully stated in the judgment of Mukerji J. in the Second Appeal, dated 6th January, 1933, which is as follows :—

In 1323, the predecessors of the defendants Nos. 1 to 4 executed a mortgage in plaintiffs' favour in respect of certain properties on taking a loan of

*Letters Patent Appeal, No. 12 of 1933, in Appeal from Appellate Decree, No. 2938 of 1930.

(1) (1903) I. L. R. 30 Calc. 755.
(2) [1927] A. I. R. (Calc.) 195; 98 Ind. Cas. 504.
(3) (1906) I. L. R. 33 Calc. 613.
(4) (1907) 6 C. L. J. 46.
(5) (1910) 15 C. W. N. 800.
(6) (1912) 16 C. L. J. 394.
(7) (1917) I. L. R. 40 Mad. 968.
(8) (1905) 1 C. L. J. 337.
(9) (1882) 21 Ch. D. 685; on app. (1884) 26 Ch. D. 501.
(10) 66 Am. St. Rep. 87.

1934

Pranballabh Shaha v. *Bhagabanchandra Seal.*

Rs. 895. In 1334, the plaintiffs released some of the properties on receiving Rs. 1,000 from the mortgagors and made an endorsement to that effect on the back of the mortgage bond. The defendant No. 8 had, in the meantime, purchased one of the properties, not one amongst the properties subsequently released.

The plaintiffs instituted the suit for enforcing the mortgage security for the principal and interest due after deducting the amount received by them and against all the mortgaged properties. In the plaint, however, he averred that he had released some of the properties as aforesaid. The suit was contested by the defendant No. 8 alone, who was impleaded on the allegation that the plaintiffs had come to know of his purchase only a few months before the suit.

The Munsif made a decree for sale in respect of all the mortgaged properties on the basis of the mortgage as it originally was. It is obvious that such a decree in respect of all the mortgaged properties was wrong, because the mortgagee himself had previously released some of the properties on receipt of Rs. 1,000.

From the decree made as above the defendant No. 8 preferred an appeal. Before the Subordinate Judge the plaintiffs conceded that the decree for sale of all the properties could not stand and prayed for an amendment of the plaint by asking for a sale of the properties not released. The Subordinate Judge allowed the prayer.

In dealing with the contentions of the defendant No. 8, the appellant in the appeal before him, the Subordinate Judge held that the endorsement by which the release was made required registration and not having been registered was not admissible in evidence. He held that, therefore, the release was to be treated as made on the date on which the plaint, which contained the admission about the release, was filed. He held also that, as the plaintiff admittedly had knowledge of the purchase of the defendant No. 8 on the date of the suit, and so before the date of the release as he found it, the case attracted the principle that if a mortgagee releases one or more of the mortgaged properties with the knowledge that there has been change of ownership as to some or all of the properties, then the properties which remain liable are only liable for such part of the mortgage debt as is proportionate to their value at the date of the mortgage. He held, therefore, that the defendant No. 8 would be entitled to redeem his own property only and on payment of the proportionate mortgage debt. On this basis the Subordinate Judge has made a decree for sale of the properties which are unreleased.

The plaintiff has then preferred this Second Appeal.

A number of decisions of the different Courts, not wholly consistent with each other, have been cited before me on behalf of the appellant on the meaning of section 17, sub-section (2), clause (*xi*) of the Registration Act. I do not propose to discuss them here as none of them has directly decided a case in which the receipt of the money which is the subject-matter of the endorsement purported to extinguish a mortgage entirely in respect of a part of the mortgaged properties. But, giving the question the best consideration I could, I have come to the conclusion that the expression "when the receipt does not purport to extinguish the mortgage" should be read as they are and that no words such as "in whole or in part" or "in respect of some or all of the mortgaged properties in their entirety" can be read as qualifying that expression. I am inclined to take the view that, as only some of the mortgaged properties purported to have been released by the endorsement, the mortgage itself was not extinguished and so the endorsement falls within sub-section (2), clause (*xi*) of section 17 and required no registration.

1934

Pranballabh Shaha v. *Bhagabanchandra Seal.*

In the view that I have taken as above the position has been simplified and the only question that I have to consider is whether the defendant is entitled to redeem his property only, when subsequent to his purchase the plaintiffs granted the release in respect of some other of the mortgaged properties. It has been strenuously contended that it is only when the mortgagee grants a partial release with knowledge of the change of ownership of a part or the whole of the mortgaged properties that a partial redemption is to be allowed, and that where he does so without any such knowledge the transferee has no equities in his favour on which he can rely for claiming such partial redemption. I have not been able to discover any authority directly bearing on this question. Of course there is abundant authority for the proposition that where the mortgagee has granted the release with such knowledge the release should have the same effect as a purchase of the released properties by the mortgagee himself and so a partial redemption must be allowed. In my opinion, the argument that in no case, where knowledge is not proved, the transferee must redeem the mortgage in its entirety as it stands after the release cannot be accepted as sound on principle. Redemption of the whole, in my opinion, can only be insisted on where the transferee acquires his interest with knowledge of the release: when he has such knowledge or at all events when he ought to have had such knowledge, he can have no higher rights than what his vendor, the mortgagor himself has. But in cases where the transferee could never have knowledge of the release, as in the present case, where the release took place after the transfer, he is in a different position. A mortgage is not to be regarded as a prohibition against transfer. An innocent transferee of a part of the equity of redemption too has his rights protected on equitable considerations. In my judgment, such a transferee is entitled to urge on equitable grounds that when he took the transfer there was one indivisible mortgage, and when after he acquired an interest in the equity of redemption, the integrity of the mortgage was broken by the mortgagee and the mortgagor behind his back, he is entitled to claim a partial redemption, the mortgagee himself being no longer competent to rely on the integrity of the mortgage. It should not be overlooked that the mortgage security, as a whole, is no longer enforceable by reason of the release itself, and it is only a deformity of it that is being sought to be enforced as a whole by the mortgagee. The mortgagee having, by his own act in granting the release, made it impossible for the transferee to redeem the original mortgage as a whole on the basis of which the equity of redemption which he purchased has to be judged, he is, in my judgment, entitled to claim a partial redemption.

On all these considerations, I am of opinion that the decision of the learned Judge as to partial redemption is right.

I, accordingly, dismiss this appeal with costs.

Leave to prefer an appeal under the Letters Patent is granted.

Debendranath Bagchi (Jr.) and *Harekrishna Pramanik* for the appellants.

Kalipada Chakrabarti for the respondent.

Cur. adv. vult.

MITTER J. This appeal has been preferred by the plaintiffs under section 15 of the Letters Patent from

1934

Pranballabh Shaha v. *Bhagabanchandra Seal.*

Mitter J.

a decision of my learned brother Mr. Justice Mukerji and arises in an action commenced by the appellants for enforcing a mortgage security.

It is not necessary to restate the facts as they have been stated with sufficient fullness by my learned brother Mukerji J.

The question of law which falls for determination in this appeal is whether the defendant No. 8, who is a purchaser of a portion of the equity of redemption, is entitled to redeem his property only, when, subsequent to his purchase, the plaintiffs, without the knowledge of the said purchase, released from the mortgage some other of the mortgaged properties The contention of the plaintiffs appellants before us is that it is only when the mortgagee grants a partial release with the knowledge of change of ownership of a part or the whole of the mortgaged properties that a partial redemption is to be allowed and that where he does so without any such knowledge, the transferee has no equities in his favour on which he can rely for claiming such partial redemption. The learned Judge points out that he has not been able to discover any authority bearing on the question and he has come to the conclusion that where the transferee could never have the knowledge of release as in the present case where a release took place after the transfer partial redemption can be insisted on. In coming to this conclusion, Mr. Justice Mukerji has relied on certain equitable grounds and it is best to reproduce what he has said in this connection.

> An innocent transferee of a part of the equity of redemption too has his rights protected on equitable considerations. In my judgment, such a transferee is entitled to urge on equitable grounds that when he took the transfer there was one indivisible mortgage, and when after he acquired an interest in the equity of redemption, the integrity of the mortgage was broken by the mortgagee and the mortgagor behind his back, he is entitled to claim a partial redemption, the mortgagee himself being no longer competent to rely on the integrity of the mortgage.

In considering this question, we must first turn to the legislative provision for partial redemption in the Transfer of Property Act. This is contained in section 60 of the Act as it stood before its amendment

1934

Pranballabh Shaha v. *Bhagabanchandra Seal.*

Mitter J.

by the Transfer of Property Amendment Act of 1929, the suit having been commenced in 1928. Section 60, so far as is material, ran as follow :—

> Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

This section would seem to suggest that a part of the mortgaged property is not to be redeemed except on the payment of the mortgage money, the only exception to the rule being the case of the mortgagee having himself acquired part of the mortgaged property. On a strict construction of this section, it has been held recently by a Full Bench of the Madras High Court in the case of *Perumal Pillai* v. *Raman Chettiar* (1) in which the judgment was delivered by Sir John Wallis, Chief Justice, as he then was, that a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property. This view is clearly opposed to the view of this Court in the case of *Surjiram Marwari* v. *Barhamdeo Persad* (2). The general rule deducible from the authorities of this Court is stated in Sir Rash Behary Ghose's classic book on the Law of Mortgages in the following words :—

> The general rule on the subject is that the rights of persons, who have acquired an interest in the mortgaged estate since the making of the mortgage, of which the mortgagee has notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If, therefore, a mortgagee with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser. In other words, a mortgagee cannot release a part of the mortgaged land, and then seek to enforce his entire claim upon another portion in which third parties have become to his knowledge interested as assignees of the equity of redemption.

See Ghose's Law of Mortgages, 5th edition, 336. This general rule is supported by the following

(1) (1917) I. L. R. 40 Mad. 968. (2) (1905) 1 C. L. J. 337, 354.

decisions of the Calcutta High Court. *Hari Kissen Bhagat* v. *Veliat Hossein* (1), *Imam Ali* v. *Baijnath Ram Sahu* (2), *Hakim Lal* v. *Ram Lal* (3), *Eusuff Ali Haji* v. *Panchanan Chatterjee* (4), *Dalip Narayan Singh* v. *Chait Narayan Singh* (5).

Although it is pointed out by Sir Dinshaw Mulla in his recent commentary on the Transfer of Property Act that the Calcutta decisions regarding the interpretation of section 60 to the effect that the principle of the section affects the case of a release by the mortgagee are erroneous, we are bound to follow the course of decisions of this Court. The learned commentator in his note under section 60, under the heading "Release of a share by the mortgagee" says this :—

> Even prior to the amendment it was recognized that the cases which held that a release by the mortgagee of a share was equivalent to a purchase by the mortgage of that share were incorrect for the effect of the release is only to diminish the mortgagee's security and the rest of the property remains subject to the mortgage for full amount.

Under the recent amendment in 1929, it is to be noticed the insertion of the word "only" after the word "except" in the last paragraph of the section makes it clear that there can be proportionate abatement only where the mortgagee has acquired an interest in the equity of redemption. But the amendment does not govern the present case.

The question, however, whether notice of the transfer of the equity of redemption is essential, has never been directly raised in this country, though such notice is necessary both in the English as well as in the Amercian law. In the case of *Kettlewell* v. *Watson* (6), Lord Justice Fry formulates the legal position thus :—

> The argument put forward was this, that there had been a release of the plaintiffs' lien by their giving it up in certain cases. I can conceive that if a person who was entitled to a lien upon properties, which he knew to belong to A, B, C and D, released the lien to A, he could not afterwards

(1) (1903) I. L. R. 30 Calc. 755.
(2) (1906) I. L. R. 33 Calc. 613.
(3) (1907) 6 C. L. J. 46.
(4) (1910) 15 C. W. N. 800.
(5) (1912) 16 C. L. J. 394.
(6) (1882) 21 Ch. D. 685 (714); on app. (1884) 26 Ch. D. 501.

1934

Pranballabh Shaha v. *Bhagabanchandra Seal.*

Mitter J.

insist upon it as against B, C and D, because he would, without their privity and consent, be increasing the burden on them. But it appears to me that, in order to raise such an equity, you must shew that he knew that the estate, which had originally been in one person, had got into the hands of various persons. No such evidence has been adduced in the present case.

Fisher in his Law on Mortgages, in paragraph 1522, states the law as indicated in the decision of Lord Justice Fry in the following words :—

If part of an estate be released from a lien, the release will prevent the lien from being enforced against any part of the property which at the time of the release had got into the hands of other persons, with the knowledge of the owner of the lien.

The American law is stated in Jones on Mortgage, paragraph 723, as follows :—

The mortgagee who has actual or constructive notice of the equity of such purchaser must regard it and therefore if he releases a part of the mortgaged debt he must abate a proportionate part of the mortgaged debt as against such purchaser.

The principle on which this rule is based is explained in one of the American cases, *Brooks* v. *Benham* (1), cited in the decision of Mr. Justice Asutosh Mookerjee in *Eusuff Ali Haji* v. *Panchanan Chatterjee* (2), in the following words :—

While the whole of the debt is secured by the whole of the land, each parcel of the land, as between the different properties is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land ; and, if its owner should be compelled to redeem the mortgage, he can resort to the others for a rateable contribution, and for that purpose, is entitled to the benefit of subrogation to the mortgage-title. To release any particular parcel from the mortgage incumbrance, is to make, as respects that any such subrogation impossible. The mortgagee, therefore, releases at his peril, if he had notice of the conveyance out of which the equities in question arise ; and if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the residue of that share in favour of the owners of the remaining parcels.

We are, therefore, of opinion that, in the absence of any authority directly covering the question in issue, we should be prepared to follow the English and American authorities on the point, and, with great respect, we differ in view of these authorities from the conclusion arrived at by our learned brother Mukerji J. in this behalf.

(1) 66 Am. St. Rep. 87. (2) (1910) 15 C. W. N. 800, 805.

It remains to notice two cases to which reference was made by the learned advocate for the respondent. In the case of *Hari Kissen Bhagat* v. *Veliat Hossein* (1), it was no doubt held that, where the mortgagee released one of the mortgaged properties, the mortgage would be treated as having been split up and the release should be held to have the same effect as if the mortgagee had himself bought the property released and the mortgaged debt should be apportioned between that property and the mortgaged property. In this case, suit upon the mortgage was brought without making the purchaser of one of the mortgaged properties from the mortgagor which had been released by the mortgagee a party to the suit, it was held that the suit could not be dismissed on that ground as the property cannot strictly speaking be considered property comprised in the mortgage. The precise question now raised before us did not arise in that case. The next case is that of *Muktakeshi Pal* v. *Ramani Mohan Bhattacharya* (2). In this case, the mortgagee after relinquishing his claim on a portion of the mortgaged property was held not entitled to throw the whole burden of the mortgaged debt on the remainder of the properties. What happened in this case was that the mortgagee did not desire to proceed against certain portions of the mortgaged properties which were purchased by her husband and her husband's brother at sales by which only the equity of redemption passed to them. The learned Judges followed the decision in *Surjiram's* case (3), and refused to follow the Full Bench of the Madras High Court in *Perumal's* case (4). In these two cases the precise question now before us did not arise for determination.

The result is that the judgment of my learned brother Mr. Justice Mukerji, as well as of the courts below, must be set aside and the following decree will be made. There will be a preliminary decree for sale

(1) (1903) I. L. R. 30 Calc. 755.
(2) [1927] A. I. R. (Calc.) 195; 98 Ind. Cas. 504.
(3) (1905) 1 C. L. J. 337.
(4) (1917) I. L. R. 40 Mad. 968.

1934

Pranballabh Shaha v. *Bhagabanchandra Seal.*

Mitter J.

of all the mortgaged properties except the property released. A decree is passed for the sum claimed which represents the principal amount of the mortgage with interest up to the date of the suit and interest at the bond rate on the principal amount from the date of suit till the date fixed by the decree of the first court as the period of grace and thereafter at the rate of six per cent. per annum till the date of payment. If this sum is not paid within three months from this date the mortgaged properties as in the amended plaint would be sold. The plaintiff is entitled to his costs in all the courts against the defendant No. 8 and the cost of the first court against the other defendants. The costs are to be added to the mortgage money.

McNAIR J. I agree.

Appeal allowed; suit decreed.

A. A.