APPELLATE CIVIL.

Before Suhrawardy and Jack JJ.

SONAULLA KARIKAR

v.

ABU SAYAD MAHAMMAD ISMAIL.*

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April 30.

Merger—Extinction of encumbrance or charge on acquisition of absolute interest, when takes place—Fraud, effect of—Transfer of Property Act (IV of 1882), s. 101.

The interest in which the encumbrance should merge under section 101 of the Transfer of Property Act must be the absolute interest and not a limited one and the encumbrancer must become entitled to the absolute interest.

When the transaction is vitiated by fraud, it affects not only the right of the party to the fraud but even an innocent party who was apparently not a party to the fraud.

Jugal Kishore v. *Ram Narain* (1) distinguished.

Bai Rewa v. *Vali Mahomed Miya Mahomed* (2) dissented from.

The proviso to section 101 of the Transfer of Property Act provides two circumstances which make the earlier part of the section inapplicable: (*a*) the encumbrancer declares by express words or necessary implication that his encumbrance shall continue to subsist; (*b*) that such continuance would be for his benefit. In either of these cases, the two clauses in the proviso being disjunctive, the section says there will be no extinction of the charge.

Gokaldas Gopaldas v. *Puranmal Premsukhdas* (3) referred to.

Ramu Naikan v. *Subbaraya Mudali* (4) followed.

SECOND APPEAL by the plaintiff, Sonaulla Karikar.

The appeal arose out of a suit for enforcement of a mortgage bond executed by Bishai Karikar and Naimuddin Karikar in favour of the plaintiff in January, 1915. Subsequently to the mortgage, Naimuddin died and Bishai, the predecessor-in-interest of defendants Nos. 1 to 4, became the sole owner by inheritance of the mortgaged properties. Bishai sold the mortgaged properties to *pro forma* defendant No. 5 in November, 1916, but the conveyance was not registered till many months after. In the meantime, Bishai sold the same properties to the plaintiff, in December, 1916, who paid Rs. 123 in cash and the balance was set off against the principal and

*Appeal from Appellate Decree, No. 1190 of 1927, against the decree of Gopaldas Ghosh, Subordinate Judge of Faridpur, dated March 7, 1927, modifying the decree of Manmathanath Roy, Munsif of Bhanga, dated July 15, 1926.

(1) (1912) I. L. R. 34 All. 268.
(2) (1922) I. L. R. 46 Bom. 1009.
(3) (1884) I. L. R. 10 Calc. 1035; L. R. 11 I. A. 126.
(4) (1873) 7 Mad. H. C. R. 229.

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interest due on the mortgage bond, and the plaintiff was put in possession of the properties. The *pro forma* defendant No. 5 then brought a suit to enforce his purchase of the disputed lands and, in execution of the decree obtained by him, the plaintiff was dispossessed from the lands. The plaintiff then brought this suit on the mortgage bond of 1915. The defence *inter alia* was that the mortgage bond was satisfied or at least extinguished and no suit on it was maintainable. The Munsif held that the mortgage still subsisted and the suit on it was maintainable and passed a decree in favour of the plaintiff, only reducing the amount of the interest claimed. On appeal by the defendant against the decree and by the plaintiff against the reduction of the interest, the Subordinate Judge held that, in the circumstances of the case, under section 101 of the Transfer of Property Act, plaintiff's mortgage was extinguished by his purchsae of the property in December, 1916, as he himself had declared it as satisfied at the time of his purchase and as there was no intention at the time to keep it subsisting. He, therefore, decreed, the defendant's appeal and dismissed the plaintiff's appeal with costs.

The plaintiff, thereupon, appealed to the High Court.

Syed Nasim Ali, for the appellant.

Mr. Rupendrakumar Mitter, for the respondent.

SUHRAWARDY J. The predecessor of the defendants Nos. 1 to 4 borrowed a sum of Rs. 55 from the plaintiff in January, 1915, and executed the mortgage bond in suit. In November, 1916, the mortgagors sold the mortgaged property to the defendant No. 5. In December, 1916, they sold the same property to the plaintiff mortgagee for Rs. 300, out of which Rs. 123 was paid in cash to the mortgagor and Rs. 177 was credited towards the mortgage of 1915. The mortgagors put the plaintiff in possession of the property. Thereafter, the defendant No. 5 brought a suit in 1923 against the plaintiff for

recovery of possession of the property and succeeded in obtaining a decree, in execution of which the plaintiff lost possession of the property. That litigation ended on the 27th June, 1925, and, on the 29th August, 1925, the plaintiff instituted the present suit on the bond of January, 1915, for recovery of the amount due under it. The defendant No. 5 entered appearance and contested the suit and the only defence with which we are now concerned is his contention that the plaintiff's mortgage bond of 1915 is no longer operative and the mortgage lien has been extinguished by the plaintiff's purchase of the property in December, 1916. The trial court overruled this objection and also other objections taken on behalf of the defendants and allowed the plaintiff a partial decree. The plaintiff and the defendant No. 5 both appealed and the learned Subordinate Judge gave effect to the objection taken by defendant No. 5 on the ground stated above and as a result allowed the defendant's appeal and dismissed the paintiff's appeal without discussing the other questions raised in this case which in view of his judgment were not considered necessary. The plaintiff is the appellant in this case and it is argued on his behalf that the view of law taken by the lower appellate court is erroneous.

The learned Subordinate Judge has relied on section 101 of the Transfer of Property Act and held that the plaintiff, having purchased the mortgaged property in December, 1916, the mortgage charge was extinguished, and hence the plaintiff is not entitled to maintain the suit on the mortgage bond of 1915. In my judgment, this view of the law, in the circumstances of the case, cannot be supported. According to the facts as stated above, in December, 1916, when the mortgagors sold the property to the plaintiff, they had no subsisting title to it, and, therefore, they could pass no title to the plaintiff. Section 101 of the Transfer of Property Act says that, where the owner of an incumbrance on immoveable property becomes absolutely entitled to that property, the encumbrance

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shall be extinguished. The principle underlying this section is an application of the well known doctrine of merger. Where the full interest and the limited interest coalesce, the limited interest is extinguished. But in the present case, there was no combination of the two interests. The word "absolutely" is used in the section to indicate that the interest in which the encumbrance should merge must be the absolute interest and not a limited one. And the incumbrancer must become entitled to the absolute interest. The property in this case had already been purchased by the defendant No. 5 and so the plaintiff did not become entitled to the property. Hence section 101 of the Transfer of Property Act has no application to the present case.

Another point of view is that the sale by the mortgagors to the plaintiff, in December, 1916, was a fraudulent transaction. The mortgagors had, a few days before the sale, already parted with their interest in the property by sale to defendant No. 5. Fraud perpetrated by a party to the transaction will not give it validity except in the case of a subsequent holder of the property in good faith and for valuable consideration. Where the transaction is vitiated by fraud, it affects not only the right of the party to the fraud, but even an innocent party who was apparently not a party to the fraud. The law is thus stated in Ghose's Mortgage, 5th Edition, Volume I, Page 487; "where a release has been obtained by "fraud or misrepresentation, it will, of course, be "inoperative as between the parties, and the mortgagee "would be restored to his original position on dis-"covery of such fraud or misrepresentation. And "this right may be exercised even against a person "who is innocent of the fraud, provided he has not "given any valuable consideration" that is subsequent to the fraud and in the honest belief of the genuineness of the transaction. But it is difficult to hold that the defendant No. 5, though not a party to the fraud, was not privy to it or did not help the mortgagor in practising the fraud on the plaintiff. He

purchased the property before the plaintiff, but did not take possesion of it. His document was registered many months after it was executed. So that, on the date when the plaintiff purchased the property and obtained possession of it, he had no reason to believe that the mortgagors had lost their interest in it and were not, therefore, in a position to pass it. This the mortgagors could only do because of the negligence or intentional omission by the defendant No. 5 to take possession of the property when he purchased it. On this ground also, the defendant No. 5 is not entitled to succeed. Then again, when the defendant No. 5 purchased the property, he took it subject to the plaintiff's mortgage. He cannot get rid of it by the fraudulent act of the mortgagors.

The learned Subordinate Judge has relied upon the decision in *Jugal Kishore* v. *Ram Narain* (1) in support of his view. Without admitting the correctness of that decision, in view of the recent decisions in England as well as in India, I am of opinion that the facts of that case distinguish it from the present case. In that case, the mortgagee had purchased the property and at the date of the purchase had become absolutely entitled to it. His right to retain it was subsequently defeated by the pre-emptor. It does not appear from the report, but it may be presumed that the mortgagee was paid back by the pre-emptor the amount of the consideration paid by him for the purchase of the property. That was a case in which the mortgagee had become absolutely entitled to the property, though for a short time and, therefore, the principle of section 101 might be said to apply. Reliance has also been placed on behalf of the respondent on the case of *Bai Rewa* v. *Vali Mahomed Miya Mahomed* (2), which follow the Allahabad decision. In that case, the mortgagee had purchased a *wakf* property and subsequently lost title to it. Thereafter, the mortgagee wanted to enforce his previous mortgage. The learned Judges held that there were circumstances indicating that, at the time

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of the purchase, the mortgagee had the intention of not enforcing the mortgage and, therefore, lost his right under the mortgage by the sale. The question, as to whether the mortgagee became absolutely entitled by his purchase, was not discussed. I am not quite sure that the decision on the facts of that case can be supported in view of the law which I will presently discuss.

Section 101, Transfer of Property Act, contains a proviso or exception in the light of which cases of this nature have to be considered. It says "Unless "he declares, by express words or necessary implica- "tion, that it shall continue to subsist, or such con- "tinuance would be for his benefit." As I read the section, it seems to me, having regard to its punctuation, that the exception provides two circumstances which make the earlier part of the section inapplicable. The first is that the encumbrancer declares, by express words or necessary implication, that his encumbrance shall continue to subsist; secondly, that such continuance would be for his benefit. In either of these cases, the section says that there will be no extinction of the charge. The cases, which have held that the non-application of the section depends upon the presence of the intention at the date of the combination of the two interests, have overlooked the last clause of the section, which is in the disjunctive. Omitting the words with which we are not concerned, the section will stand thus:—Where the owner of a charge or other encumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or encumbrance shall be extinguished, unless such continuance (continuance to subsist) would be for his benefit. This construction has been accepted by the learned author in Ghose on the Law of Mortgage at page 524. This view is in accordance with the present law in England and the law which was laid down in India many years ago. A contrary rule was dogmatically enuncitaed in the case of *Toulmin* v. *Steere* (1). This case has been severely criticised

(1) (1817) 3 Mer. 210; 36 E. R. 81.

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in England and has been held to be inapplicable in India by the Judicial Committee in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1) in which their Lordships though on a different set of facts say "The "ordinary rule is that a man having a right to act in "either of two ways should be assumed to have acted "according to his interest". The present enunciation of the law will be found in Fisher on Mortgage, 6th edition, paragraph 1528. After discussing the subject, the learned author remarks: "It is sub-"mitted that in all such cases the *prima facie* "inference now is that the charge is kept alive because "it is obviously for the benefit of the purchaser of the "equity of redemption that it should be, which is "always a strong ground in equity for rebutting the "inference of merger." The law in India was laid down in 1873 by two learned judges of the Madras High Court in *Ramu Naikan* v. *Subbaraya Mudali* (2), approvingly noticed by the Judicial Committee in *Gokaldas' case.* The facts there are not very dissimilar to those of the present case. In that case, the mortgagee had subsequently purchased, in execution under a money claim of his the mortgage property, and it was held that he could still use his mortgage as a shield against the claims of the mortgagees subsequent to his original mortgage. In any view of the case, I am of opinion that the decision of the court below that the plaintiff's right as mortgagee has become extinguished by his purchase of the property in 1916 is erroneous and should be reversed.

The result is that this appeal is allowed, the decrees of the court below in both the appeals before it are set aside and the case remanded to that court for consideration of other points which were left undetermined by the learned Judge because of the view of the law he took on the first point urged before him. Costs will abide the result.

JACK J. I agree.

A. A. *Case remanded.*

(1) (1884) I. L. R. 10 Calc. 1035; L. R. 11 I. A. 126.

(2) (1873) 7 Mad. H. C. R. 229.