APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

1895. Feb. 25, 26, March 13.

UNNI AND OTHERS (DEFENDANTS NOS. 3 to 5), APPELLANTS,

v.

NAGAMMAL AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2 AND SECOND DEFENDANT'S REPRESENTATIVE), RESPONDENTS.*

Mortgage—Subsequent agreement— Covenant to pay an additional sum—Charge—Tacking.

In a suit on a mortgage, dated 1878, it appeared that the premises had been mortgaged in 1874, but the mortgagor had been left in possession under a lease; and that a suit brought by the mortgagee (on the rent reserved by the lease falling into arrears) was compromised in 1877 on the terms that Rs. 3,680 should be paid together with the amount secured by the mortgage of 1874. The instrument of compromise was not registered and the amount was not paid:

Held, that the plaintiff's mortgage was subject to the mortgage of 1874 only and not to the arrangement comprised in the compromise.

Quære: whether the compromise would, if registered, have charged the land with Rs. 3,680, or whether its effect was merely to make the equity of redemption conditional on payment of that amount, in such a manner as not to affect the rights of the subsequent mortgagee.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 7 of 1893.

Suit to recover principal and interest due on a mortgage, dated the 16th March 1878, and executed by the deceased father and uncle of defendants Nos. 1 and 2 in favour of the plaintiff No. 1 to secure the repayment with interest of the sum of Rs. 4,000. Defendants Nos. 3 to 5 were the assignees of one Varadan Patter to whom the lands had previously been mortgaged on the 6th April 1874 for Rs. 20,000 and on the 7th April 1874 for Rs. 1,000. It appeared that Varadan Patter after the execution of his mortgages demised the mortgage premises on lease to the mortgagor, and subsequently in 1877 instituted a suit against him to recover possession of the property with arrears of rent. That suit was compromised and a document was executed in the following terms:—

"Razi presented under section 375 of the Civil Procedure "Code by Vakil Ramanatha Ayyar for Varadan Patter, plaintiff in

* Appeal No. 97 of 1894.

"original suit No. 24 of 1877, and by Vakil Sankara Menon for "first defendant Govinda Mannati.

"The subject-matter of the above suit has been talked before "and adjusted by mediators as follows:—first defendant shall, on "the third Makarom next, pay plaintiff 675 parahs of paddy out "of rent accruing due up to 1053, and the sum of Rs. 3,680 being "value of paddy due on account of balance pattam and the costs "of the suit shall be paid by the first defendant, together with the "sum of Rs. 21,000 which the plaintiff has to get from the proper-"ties mentioned in the plaint; till payment the first defendant "shall pay 4,319 parahs of paddy and 50 cocoanuts inclusive "of interest of 644 parahs at the rate of 5½ parahs of paddy per "10 fanams due on the said sum in Kanni (September-October) "and Makarom (January-February) commencing from 1054 "(1878-79)."

The following decree was passed on the presentation of the razinamah:—"The Court doth order and decree in the terms of the "said razinamah that on account of the rent for 1053 (1877-78) "the first defendant do pay plaintiff 675 parahs of paddy or their "value according to the market rate at execution, and that the suit "be in all other respects dismissed assessing first defendant with "his costs."

The question in the present suit was whether the plaintiffs' mortgage was subject to the mortgages of 1874 only, or whether his rights were affected by the transaction of 1877 also. The Subordinate Judge decided this matter in favour of the plaintiff and passed a decree accordingly.

Defendants Nos. 3 to 5 preferred this appeal.

Sankaran Nayar for appellants.

Sundara Ayyar for respondents Nos. 1 and 2.

SUBRAMANIA AYYAR, J.—This is a suit for the recovery of the amount due under a mortgage executed to the first plaintiff on the 16th March 1878 by the father of the defendants Nos. 1 and 2. The defendants Nos. 3 to 5 are the assignees of the rights of one Varadan Patter to whom the father of defendants Nos. 1 and 2 had executed two prior mortgages, one for Rs. 20,000 and the other for Rs. 1,000 on the 6th and 7th April 1874, respectively.

Varadan Patter, having been entitled to the possession of the property as mortgagee, leased the same to the mortgagor. The

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mortgagor-lessee failed to pay the rents and Varadan Patter brought a suit against him in 1877 for the recovery of arrears of rent and the possession of land. The disputes were amicably adjusted and a razi petition was put in on the 30th October 1877. The portions of the compromise material for our present purpose are as follows:—"The first defendant (father of the defendants Nos. 1 "and 2) shall, on the third Makarom next, pay plaintiff (Varadan "Patter) 675 parahs of paddy out of rent accruing due up to 1053 "and the sum of Rs. 3,680 being value of paddy due on account of "balance pattam shall be paid by the first defendant, together with "the sum of Rs. 21,000 which the plaintiff has to get from the pro- "perties mentioned in the plaint; till payment the first defendant "shall pay 4,319 parahs of paddy and 50 cocoanuts inclusively "of interest of 644 parahs at the rate of $5\frac{1}{2}$ parahs of paddy per "10 fanams due on the said sum in Kanni (September-October) "and Makarom (January-February) commencing from 1054 "(1878–79)." These terms were not embodied in the decree which was passed on the compromise. The only question, we have to determine in this appeal, is whether the plaintiffs (respondents) are entitled to redeem the property under mortgage to the third, fourth and fifth defendants (appellants) without paying them Rs. 3,680 in addition to the Rs. 21,000 admittedly due under the mortgages of 1874. The Subordinate Judge decided in favour of the respondents. On behalf of the appellants it is argued that the Subordinate Judge was wrong and that he should have held that the respondents were bound to pay Rs. 3,680 as well as the Rs. 21,000; the razi having created a charge upon the land for the former amount also. In my opinion the razi does not create a charge for the amount in question as the appellants contend. I see no words in it which either expressly or by implication create any lien on the land. The language of the document appears to be more consistent with the construction suggested for the respondents, viz., that the razi only imposes an obligation on the mortgagor to pay the said sum along with the Rs. 21,000 before he claims redemption. If the parties intended to create a charge for the Rs. 3,680, it was quite easy to use apt words to give effect to such intention. But, on the contrary, the language employed falls, in my view, far short of what the parties would have said, had the idea of creating a charge been clearly in their minds. The only circumstance relied upon on behalf of the appellants in

support of their contention is that the total sum payable at the time of redemption is Rs. 24,680 which includes Rs. 3,680 in question. This is not, however, inconsistent with the argument for the respondents who concede that so far as the mortgagor is concerned he must pay both the sums before he can ask for the surrender of the lands, he having contracted to do so. On the other hand, the manner in which reference is made in the document to Rs. 3,680, coupled with the provision therein made about the payment of interest on the sum, rather points to the view that the amount was looked upon by the parties as constituting a debt distinct from the Rs. 21,000 and standing on quite a different footing from the latter which carried no interest. This construction is in accordance with *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare*(1) and *Yashvant Shenvi* v. *Vithoba Sheti*(2). In the first case the mortgagor of an estate gave to the mortgagee subsequently to the date of the mortgage two successive money bonds, in each of which it was stipulated that if the amounts were not paid on the due date they should take priority of the amount due under the mortgage, and that redemption of the mortgage should not be claimed until the bonds had been satisfied. The assignee of the equity of redemption sued for possession of the estate on payment merely of the mortgage money. His claim was upheld by Sargent, C.J., and Mr. Justice Kemball, who ruled that the two subsequent bonds did not create a further charge on the mortgaged premises, although they would prevent the original mortgagor from redeeming without paying their amounts. In the second case the learned Chief Justice observed :—"We think "that the Subordinate Judge was right in his construction of the "mortgage deed (exhibit 29). There are no words in that instru- "ment which expressly make the old debt of Rs. 100 a charge on "the property. The mortgagor undertakes to pay it together "with the Rs. 64 when he takes back the land and also agrees to "the mortgagee's continuing in the enjoyment of the land till "he pays off both the debts; but these provisions are satisfied "by construing them as intended to make the equity of redemption "conditional on the payment of both the debts. This construction, "moreover, receives corroboration from the allusion to the old "debt as a distinct and separate transaction which would have

(1) I.L.R., 9 Bom., 233. (2) I.L.R., 12 Bom., 231.

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"no significance if the intention was to make the Rs. 100 a charge "equally with the Rs. 64."

Following these decisions I hold that the razi did not create a charge for Rs. 3,680, but only makes the equity of redemption conditional on the payment of that amount also.

It was next urged on behalf of the appellants that even if no charge was created in their favour, the obligation to pay Rs. 3,680, undertaken by the mortgagor, is equally binding on the respondents claiming from him under a subsequent mortgage, and in support of this, reference was made to the principle embodied in section 40 of the Transfer of Property Act. At first I was inclined to think that there was some force in this argument: but further consideration convinces me that that contention is not sound. For the obligation respecting the payment of Rs. 3,680, arising out of the contract between the mortgagor and Varadan Patter, cannot properly be said to be one annexed to the ownership of the land under mortgage as laid down in section 40. And the cases in which the principle relied on has been applied will be found to be such as involved obligations directly connected with the ownership of immovable property, though they do not amount to interests therein or easements thereon. But the obligation in question here is quite unlike the class of obligations dealt with in those cases and a typical instance of which is furnished by *Tulk* v. *Moxhay*(1) where it was held that a covenant between vendor and purchaser on the sale of land that the purchaser and his assignees shall use or abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice. In other words, the obligation so to be enforced must amount to an equity attached by the owner to the property itself. I hold that is not the case here and I am of opinion that the obligation to pay Rs. 3,680, though, of course, binding upon the mortgagor, is not binding upon parties who have subsequently acquired from him for value an interest in the mortgaged property. This view is supported by the decision in *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare*(2) already quoted, in which Sargent, C.J., and Kemball, J., held that the assignee of the equity of redemption was entitled to redeem without paying the unsecured debt which the original mortgagor had contracted to pay along

(1) 2 Phill., 774, 778. (2) I.L.R., 9 Bom., 233,

with the mortgage amount notwithstanding that the assignor himself had he been the plaintiff would have been prevented from redeeming without paying the two amounts. A different view was however taken in *Allukhan* v. *Roshan Khan*(1), but the authorities quoted in the judgment from the Roman and the French Laws do not go to the length to which Duthoit, J., proceeded in that case. They only allow tacking of the description contended for in the present case against the mortgagor. They do not lay down that a similar consolidation of unsecured and secured debts is allowable against subsequent purchasers for value. It is true that such consolidation or tacking has been permitted under special circumstances against a beneficial donee of the debtor in *Ragho Govind Parajpe* v. *Balvant Amrit Gole*(2). But the rule followed there is not founded on any principle of equity. It is merely to avoid circuity of action, so that the creditor may not be driven to enforce by separate proceedings the claims to which the operation of law or the act of the mortgagor has rendered the same person liable; but the tacking of the debts on the principle of avoiding circuity is inapplicable to the case of persons in the position of the respondents against whom the creditor has no equity. (See Fisher on mortgages, 4th edition, pages 573-4). It is therefore difficult to see on what principle the obligation of the mortgagor in the present case is to be saddled on the respondents who are subsequent mortgagees.

In the view I have taken, it is unnecessary to consider the other points raised. I would dismiss the appeal with costs.

BEST, J.—I am of opinion that it was the intention of the parties to make the additional Rs. 3,680, a charge on the property originally mortgaged for Rs. 21,000 to Varadan Patter whose assignees the appellants are, and that if the razinamah exhibit I had been registered the plaintiffs' subsequent mortgage under exhibit A would have been subject to the appellants' prior mortgage for Rs. 24,680. But, as the razinamah was not registered, no valid charge was created thereby and the Subordinate Judge's decree is correct.

I concur, therefore, in dismissing this appeal with costs.

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(1) I.L.R., 4 All., 85. (2) I.L.R., 7 Bom., 101.