

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

CANGAYAM VENKATARAMANA IYER (PLAINTIFF), APPELLANT,

v.

HENRY JAMES COLLEY GOMPERTZ AND OTHERS (DEFENDANTS
NOS. 8, 9 AND 11), RESPONDENTS.*

1908.
March 19, •
20.
April 7.

Mortgagor and mortgagee—Puisne mortgagee, right of, to sell subject to prior mortgage—Decree in suit by puisne mortgagee—Transfer of Property Act, ss. 51, 75, 85, 96—Right of purchaser from first mortgagee to improvements on redemption by puisne mortgagee.

In a suit brought on a mortgage, where all the parties interested are before the Court, it is the duty of the Court, if it can, to make a decree which will deal finally with all the questions raised in the suit and preclude further litigation to enforce rights arising out of the mortgage or mortgages in question in the suit. This is the obvious intention of section 85 of the Transfer of Property Act.

Under section 75 of the Transfer of Property Act the prior mortgagee has the right to require the second mortgagee to redeem him or submit to a sale of whatever interest he has in the property.

In a suit brought by the puisne mortgagee, to which the prior mortgagee who has also become the owner of the equity of redemption is made a party, the decree must direct the redemption by the second mortgagee and then for sale, if the prior mortgagee as owner of the equity of redemption does not redeem the second mortgage. The second mortgagee must show sufficient reason for departing from this rule and is not entitled to a decree for sale subject to the first mortgage, in the absence of special circumstances. The second mortgagee on redeeming is bound to pay the full amount due on the first mortgage, though the first mortgagee had sold his right for a smaller sum.

Section 96 of the Transfer of Property Act does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. Where the prior mortgagee sues for and obtains a decree for sale without making the second mortgagee a party and himself purchases the property in execution, a purchaser of the property from him cannot claim the value of improvements from the second mortgagee under section 51 of the Transfer of Property Act in a suit by the second mortgagee to enforce the rights under his mortgage.

A mortgagee of property has the right to bring to sale all buildings on such property, whether erected before or subsequent to the mortgage.

Rangayya Chettiar v. Parthasarathi Naicker (I.L.R., 20 Mad., 120), followed.

* Appeal No. 99 of 1905, presented against the decree of M. R. Ry. M. Visvanatha Aiyar, Subordinate Judge of Madura (West), in Original Suit No. 16 of 1903.

VENKATA-
RAMANA
IYER
GOMPERTZ.

Suit to recover money on a mortgage bond. *Y*, the father of the defendants Nos. 1-7, mortgaged item I of the plaint schedule to one *R*, and subsequently mortgaged items 1-3 to the plaintiff. After the date of the mortgage to plaintiff, *Y* mortgaged items I and II to the eighth defendant to pay off the amount due to *R*. The eighth defendant sued on his mortgage without making the plaintiff a party to the suit and obtained a decree for the sale of items I and II. Items 1 and 2 were bought at the sale by the eighth defendant himself. He subsequently sold item I to the ninth defendant, and item II to the tenth defendant. The eleventh defendant claims as a mortgagee of item I from the ninth defendant.

The plaintiff claimed priority over the eighth defendant on the ground that the mortgage to *R* was extinguished and was not kept alive in favour of the eighth defendant.

Buildings were admittedly erected on item I after it was sold to the ninth defendant.

The plaintiff prayed for a decree on the footing of a first mortgage, and in the event of the eighth defendant being found entitled to priority, for a decree for sale subject to the mortgage right of eighth defendant offered, in the alternative, to redeem the eighth defendant.

The Subordinate Judge found that the plaintiff was entitled to a mortgage decree against item I only; that the mortgage right of the eighth defendant had priority over the plaintiff's mortgage and that the proportion of the eighth defendant's mortgage amount chargeable on item I was Rs. 3,833-10-8.

He accordingly decreed as follows:—

“Judgment for the plaintiff for Rs. 7,898-6-0 and interest on Rs. 3,181 at one per cent. per mensem from the date of the plaint up to six months from this date and at 6 per cent. per annum from the latter date to the date of realization and for costs and interests thereon at 6 per cent. per annum from to-day to the date of realization, on condition of the plaintiff's paying into Court Rs. 3,833-10-8 on account of the prior mortgage within the aforesaid six months. If the plaintiff should fail to pay the said amount within the aforesaid time he be absolutely debarred of all right to redeem the said mortgage. If the plaintiff should pay the said amount within the aforesaid period, the defendants Nos. 9 and 11 be at liberty to pay into Court within nine months from this date,

for payment to the plaintiff, the amount adjudged to him as also the amount paid by him into the Court with interest on the latter amount at 6 per cent. per annum from the date of the plaintiff's paying it into the Court to the date of payment by the defendants Nos. 9 and 11 and if they fail to pay these amounts within the aforesaid time, item I as described in the schedule annexed to the plaint, be sold at the plaintiff's instance excluding the new buildings thereon not included in the said schedule for the realization of the amounts adjudged to the plaintiff, and the amount paid by him into the Court, and of interest on the latter amount at 6 per cent. per annum from the date of the deposit into Court to the date of realization."

VENKATA-
RAMANA
IYER
v.
GOMPERTZ

The plaintiff appealed to the High Court.

T. Subramania Ayyar and *T. M. Krishnaswami Ayyar* for appellant.

J. L. Rosario for third respondent.

T. Rangachariar for first and second respondents.

JUDGMENT.—The principal question in this appeal may be stated as follows:—

Can the second of two successive mortgagees, both of whom hold simple mortgagees, insist in a suit to which the prior mortgagee is a party, on obtaining from the Court a decree for sale subject to the prior mortgage?

It is unnecessary in considering this question to decide whether or not the prior mortgagee is a necessary party to the suit in all cases, or whether in this country the second mortgagee can make him a party simply to enable the Court to determine what is due to him. In this case the plaintiff has not stated that this was the only purpose for which the prior mortgagee was made a party; he has in fact offered as an alternative to his first prayer, to accept a decree for redemption of the prior mortgagee. It is of course the case that the plaintiff could not here avoid making the prior mortgagee a party, for as purchaser in the sale on his mortgage he unites in himself the interests of the mortgagor and mortgagee in the property. That however does not affect the question. All the interested parties being before the Court, it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the question between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question

VENKATA.
RAMANA
IYER
v.
GOMPERTZ.

in the suit. This is the obvious intent of section 85 of the Transfer of Property Act, and is clearly a desirable and proper intent. It may be that there will be found cases in which the Court will be unable finally to close the matter without doing injustice to the prior or puisne mortgagee (see remarks in 'Ghose on Mortgages,' 3rd edition, at page 738), but those cases must be treated as exceptional and will no doubt, having regard to the fact that the second mortgagee before advancing his money knows of the existence and the nature of the burden on the property which must be removed before he can be paid, be very few in comparison with those in which justice can best be done by requiring redemption by the second mortgagee, or directing a sale free of encumbrances.

Moreover it is the right of the prior mortgagee to require the second mortgagee to redeem him or submit to a sale of whatever interest he holds in the property (section 75, Transfer of Property Act), and the decree must give effect to this right, unless by doing so it unnecessarily deprives the second mortgagee of any right of his own.

It is the rule in England that when the prior mortgagee is made a party, the plaintiff must be ready to redeem him (Daniell's 'Chancery Practice,' 7th edition, page 217), and on the Original Side of this Court it appears to be the ordinary practice to require redemption in such suits (*vide* Form No. 52, Original Side Rules).

In America too, the decree in a suit like that before us will ordinarily be for redemption by the second mortgagee and then for sale if the prior mortgagee as purchaser of the equity of redemption does not redeem the second mortgage (Jones on 'Mortgages,' section 1075), and the rule there seems to be that when the prior mortgage is not due at the date of the second mortgagee's suit he can obtain a decree for sale subject to the prior mortgage, but when the prior mortgage is due he may redeem and sell the estate to obtain the redemption money as well as his own claim (Jones on 'Mortgages,' section 1580). This practice not only gives effect to the policy of the law and the rights of the different parties, but also secures for the mortgagor the best chance of obtaining a good price for the property at the sale, and prevents the necessity of further proceedings against the mortgagee; and, if it is not in any particular case to be adopted, it is for the second mortgagee to show sufficient reason for making

an exception to it. In this case the second mortgagee prefers a sale subject to the prior mortgage, but that is not a sufficient reason.

VENKATA-
RAMANA
IYER
v.
GOMPHERTZ.

Section 96 of the Transfer of Property Act does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. The prior mortgagee may no doubt consent to a sale free of encumbrances, but it is not impossible that the section was intended to cover cases in which the prior mortgagee is not a party to the suit but intervenes after the decree, and it does not seem to answer the present question even indirectly.

Mr. Subramanya Ayyar relied on *Debendra Narain Roy v. Ramtaran Banerjee*(1), but the point decided in that case was that the right of a puisne mortgagee was not affected by the proceedings taken in a suit to which he was not a party. It was not contended that in the absence of a sale in the prior mortgagee's suit the second mortgagee would be entitled to a sale subject to the prior mortgage. Nor does *Ram Shankar Lal v. Ganesh Prasad*(2) cover the present case, for it is not there decided what form the decree should take when the prior mortgagee is made a party to the suit.

The decree made by the Subordinate Judge is, we think, substantially correct, but the form of the opening direction "that defendants Nos. 9 and 11 do pay to the plaintiff, etc., etc.," is open to the objection that it may be construed as a decree against those defendants personally. It is better to follow the form sketched in section 86 of the Transfer of Property Act, and commence by declaring the amount due; and the decree in that respect must be altered.

The plaintiff contends next, if we understand Mr. Subramanya Ayyar aright, that the amount payable by him for redemption of the prior mortgage should be calculated not on the mortgage money, but on the amount paid by the eighth defendant to the original first mortgagee for his rights. No authority was cited for this proposition, and we think it is unsound. The eighth defendant bought the rights of the original mortgagee, and the price which he paid for them is no concern of the plaintiff's. This is not a case in which the plaintiff has to compensate the eighth

(1) I.L.R., 30 Calc., 599.

(2) I.L.R., 29 All., 385.

VENKATA-
RAMANA
IYER
v.
GOMPERTZ.

defendant for a payment made to redeem a mortgage which otherwise the plaintiff would have had to redeem. The mortgage remains and the plaintiff must redeem it.

The next contention is that all the buildings on the land ought to be included in the decree for sale, and this is in our opinion a sound contention. It is clear, we think, that the plaintiff intended to describe all the buildings in the schedule to his plaint, and that the ninth and eleventh defendants understood that he had done so and framed their defence accordingly. There is no doubt that the plaintiff is entitled as a matter of law to sell all the buildings and the decree must be modified so as to make it clear that he is at liberty to do so.

For the ninth and eleventh defendants, it is contended that if the plaintiff sells the new building they should be compensated under section 51, Transfer of Property Act, as for improvements made by them in the belief that they were the owners of the land, but section 51 does not apply to the facts, and *Rangayya Chettiar v. Parthasarathi Naicker* (1) by which we are bound seems to be on all fours with the present case.

The decree subject to the modifications we have stated, ought to be confirmed.

The parties will bear their own costs of the appeal.

Time for redemption will be extended by six (6) months from this date.

(1) I.L.R., 20 Mad., 120.
