

APPELLATE CIVIL.

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

1907.
September
26.
October 23.
November
20.
1908.
March 3.

THENAPPA CHETTIAR AND ANOTHER (PLAINTIFFS),

APPELLANTS,

v.

MARIMUTHU NADAN AND OTHERS (DEFENDANTS, AND FOURTH
DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

*Mortgage, interest on—Rate fixed by Court in suit by prior mortgagee
not binding in a subsequent suit by puisne mortgagee to redeem.*

When in a suit by a prior mortgagee a decree for sale is passed which fixes the rate of interest after the date for redemption, the rate so fixed is not binding as between the prior mortgagee and a puisne mortgagee, who was not made a party to the suit. In a suit by such puisne mortgagee for redemption against the prior mortgagee, the mortgage will be considered as subsisting and interest will be awarded on the footing of the mortgage without reference to the decree in the prior suit.

Umes Chunder Sircar v. Zakur Fatima, (I.L.R., 18 Calc., 164), followed.

Gangadas Bhutter v. Jogendra Nath Mitter, (11 C.W.N. 403), dissented.

SUIT by the plaintiffs to recover the amount due on two promissory notes executed by first defendant, and to enforce payment by the sale of the plaint properties under the terms of a security bond, dated 25th July 1898. The defendants Nos. 3 to 5 were made parties as they had prior mortgages on some of the plaint properties. The plaintiffs prayed that the properties be sold subject to the prior mortgages.

The third defendant had previously brought a suit to enforce his mortgage but he did not make the plaintiffs parties therein. The third defendant obtained a decree for sale, in execution of which, he purchased certain items of the plaint properties, while the fourth defendant purchased other items.

Defendants Nos. 3 and 4 objected *inter alia* that they had made certain improvements in the property and that the plaintiffs were only entitled to redeem and not to sell subject to the prior mortgages.

* Second Appeal No. 177 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 938 of 1902, presented against the decree of M. R. Ry. P. Narayana Chariar, District Munsif of Kumbakonam, in Original Suit No. 23 of 1901.

The District Munsif passed a decree for sale of all the plaint properties subject, in the case of these purchased by defendants Nos. 3 and 4 to the prior mortgages on them.

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On appeal, the District Judge modified the decree by completely exonerating the items purchased by defendants Nos. 3 and 4.

The plaintiffs appealed.

B. Sitarama Rau for *K. Srinivasa Ayyangar* for appellants.

K. Ramachandra Ayyar for third and seventh to ninth respondents.

After remanding the case for findings, the Court passed the following

JUDGMENT.—The plaintiffs are mortgagees of certain property including items Nos. 2 and 4. The third and fourth defendants are prior mortgagees of those two items. The third defendant sued on his mortgage in Original Suit No. 2 of 1900, making the fourth defendant a party but not the plaintiffs. The third defendant himself purchased item No. 2 at the sale held under the decree obtained by him in his suit, and the fourth defendant purchased item No. 4 at the same sale. The plaintiffs have now to redeem the prior mortgages and the present question is as to the conditions of redemption. The plaintiffs claim to proceed on the footing that the mortgages were enforced by the decree in Original Suit No. 2 of 1900 and to take the account on that footing; the prior mortgagees claim payment on the footing that their mortgages are still existing. The practical question is one of the rate of interest to be paid on the mortgage money. In our opinion the decision of the Privy Council in *Umes Chunder Sircar v. Zahur Fatima* (1) concludes the question of the terms of redemption, and we cannot therefore follow the case of *Gangadas Bhutler v. Jogenra Nath Mitter* (2). The learned Judges do in that case, no doubt, find themselves able to hold that their decision is not inconsistent with that of the Privy Council. But we find ourselves unable to reconcile the two cases. It is true that the Privy Council allow interest at the contract rate only up to the date on which Zahur, the prior mortgagee, took possession under the sale held in execution of her own decree, but the reason for that is clearly explained by their Lordships at the top of page 180 of the report in the Calcutta series, and there is nothing to indicate that the interest after possession which they held might fairly be taken to be

(1) I. L. R., 18 Calc., 164.

(2) 11 C. W. N., 403.

THENAPPA equivalent to the profits, was interest at the *post diem* rate awarded
 CHETTIAR by the Court, and not interest at the rate provided by the contract
 v. On the other hand, their Lordships' observations show clearly,
 MAIMUTHU we think, that the decree in the prior mortgagee's suit is to be
 NADAN. disregarded in considering the terms of redemption as between the
 prior and puisne mortgagees.

After pointing out wherein lies the Court's power to regulate interest after decree their Lordships continue "the decree can only operate as between the parties to the suit, and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is that, as to him, Zahur is still but a mortgagee, and if so, she should be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to; and the Court would have had no jurisdiction to cut it down, and that is the position in which the parties are placed by the decree in this suit."

This passage from their Lordships' judgment leaves no room for the contention urged before us that the puisne mortgagee ought to be allowed to choose whether to adopt or to disregard the account directed by the decree. To allow him to do so would be to allow him to do what their Lordships say it would be *unjust* to allow him to do. The fact is that, the puisne mortgagee not being a party, the suit ought not to affect either his rights or his liabilities. It is contended that the prior mortgagee by excluding him from the suit can obtain an advantage for himself, but that advantage is entirely dependent on the will of the puisne mortgagee; he can redeem when he pleases, before, pending, or after the suit. If he has no notice of the prior encumbrance or of the suit he is no worse off after the decree than before the suit. Either way he is bound by the prior mortgage.

The equitable considerations which appear to have prevailed with the learned Judges in *Gangadas Bhattar v. Jogendra Nath Mitter* (1) seem to be applicable only to a case in which the prior

mortgagee has notice of the subsequent encumbrance and the subsequent encumbrancer has no notice of the prior mortgage; in such a case it may be just to penalize the prior mortgagee for his disregard of the provisions of section 85 of the Transfer of Property Act. The present case is not such a case, and is we think covered by the Privy Council decision.

The District Judge has taken an account of the profits received by the prior mortgagee after entering into possession and has set them off against the interest. That being so we do not think we can take the profits as the equivalent of the interest as was done in the Privy Council case. The rule there adopted is not laid down as a rule of law but as a rule "just and convenient and not objected to by either party."

We, therefore, accept the District Judge's finding and adopt his account for the final decree. If the plaintiffs do not redeem the third and fourth defendants, the plaintiffs will have no costs from the third and fourth defendants and will pay their costs. Six months will be allowed for redemption.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

PERIA KARUPPAN (THIRD DEFENDANT), APPELLANT,

v.

SUBRAMANIAN CHETTI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 4), RESPONDENTS.*

Landlord and Tenant—Notice determining tenancy—Denial of landlord's title after suit does not render previous notice unnecessary.

A tenant is entitled to reasonable notice before ejectment, and fifteen days' notice to a cultivating tenant in the middle of the cultivating season is not sufficient notice.

A landlord in a suit for ejectment against a tenant is bound to prove a complete cause of action when the suit was instituted, and the tenant, who for the first time denies the landlord's title in his written statement, is not

* Second Appeal No. 181 of 1905, presented against the decree of M. R. Ry. W. Gopalachariar, Subordinate Judge of Madura (East), in Appeal Suit No. 252 of 1904, presented against the decree of M. R. Ry. V. R. Kuppusami Iyer, District Munsif of Sivaganga, in Original Suit No. 200 of 1901.

1908.
February 13.