BENSON AND SUNDARA AYYAR, JJ.

SUBRAMANIAN CHETTY v. MUTHIA CHETTY.

(5th edition). We reverse the District Judge's decision with respect to this item.

The two other items of the plaintiff's claim are based on exhibits B and C executed by the defendant in the plaintiff's favour on settlements of the accounts between the parties on their respective dates. These documents have been held by the lower Courts to be promissory-notes and to be inadmissible in evidence as they are not stamped. The appellant does not dispute this finding but contends that he is entitled to recover the amount in the circumstances of the case on the settlements themselves, but we agree with the lower Courts that the obligation created by the settlements was intended to be evidenced only by exhibits B and C and that there was no completed obligation created by way of settlements except by those documents. The result is that the decree of the lower Appellate Court in so far as it modified the decree of the Subordinate Judge must be set aside and the latter decree restored. The parties will pay and receive proportionate costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

1911 April 25.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Munro.

MAHALAKSHMAMMAL (FOURTH DEFENDANT), APPELLANT,

v.

SRIMAN MADHWA SIDDHANTA OONNAHINI NIDHI, LIMITED, AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1—3), RESPONDENTS.*

Mortgage, discharge of—Whether security kept alive for benefit of person making payment.

The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. If it is to the advantage of the person paying that the security should be kept alive, the law will presume that he intended to keep it alive.

Bhawani Kuer v. *Mathura Prasad*, [(1908) 7 Calc. L.J., 1 at p. 31], referred to.

* Original Side Appeal No. 23 of 1910.

APPEAL from the judgment of SANKARAN NAIR, J. in Civil Suit No. 49 of 1909.

K. Srinivasa Aiyangar, *E. Venkaturama Sarma* and *C. P. Ramaswami Aiyar* for appellant.

C. Balarama Rao for first respondent.

The facts are fully stated in the judgment of SANKARAN NAIR, J. :—

"Suit to recover the amount due under a mortgage bond, dated 4th August, 1903. The fourth defendant claims that he has a prior charge on items Nos. 1 and 2 under his document of 1899.

"The second and third issues raise the question whether item No. 2 is intended in the plaintiff's and fourth defendant's instruments of mortgage respectively. These issues were not argued before me. I find that item No. 2 was mortgaged to the plaintiff and also to the fourth defendant.

"The plaintiff was a mortgagee by deposit of title-deeds in 1895. He obtained a mortgage-decree in Civil Suit No. 261 of 1899 on the 13th February, 1900 (H). On the 11th August he took the plaint mortgage (O) for Rs. 2,700, of which Rs. 1,086-0-8 was the amount found due under the decree and the balance money then paid to the mortgagor. The fourth defendant took a mortgage of the equity of redemption in June, 1899 stated in terms to be subject to the plaintiff's mortgage. He obtained a decree for sale (B) in Calendar Case No. 210 of 1900 on the 28th September, 1900. The sale was to be subject to the claim of the plaintiff as mortgaged and in his application for execution the plaintiff's rights were reserved (C). But in the proclamation of sale it was stated that the plaintiff's claim was extinguished by the subsequent mortgage, though the plaintiff contends otherwise. The property was sold and purchased by the fourth defendant himself, On these facts the question raised by the first issue. 'Is the plaintiff entitled to priority in respect of his mortgage over the fourth defendant' has to be determined. As to the amount paid to the mortgagor at the time of the execution of (O) in 1903, I fail to see how the plaintiff can claim the rights of a prior mortgagee.

"The next question is whether the new mortgage (O) operated to extinguish the plaintiff's rights under his prior mortgage and decree against the fourth defendant. In many decided cases, it is said that this depends upon the intention of the parties to the contract.

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"The law imputes to a person an intention to act according to his interest. That presumption is made even when the mortgagee as in this case may not have been aware of the circumstances indicating what course of conduct would be for his interest. If so the statement in (O) made without the knowledge of the fourth defendant's encumbrance that the charge and the decree debt is extinguished is not material and has no greater effect than the provision in section 89 of the Transfer of Property Act that the security becomes extinguished on the passing of an order absolute for sale. In the later case it is quite clear that even after such order the security subsists as against a subsequent encumbrancer. An intention to give up his charge against a puisne encumbrancer cannot be imputed in the absence of any knowledge on his part of that encumbrance.

"The true principle is that stated in section 101 of the Transfer of Property Act though that section does not apply to this case. Where the continuance of a charge is for a person's benefit, then it is not extinguished in such cases; but it subsists. I am therefore of opinion that for the sum of Rs. 1,086-0-8 and interest thereon and proportionate costs the plaintiff has a first charge. The fourth defendant's mortgage comes next in order of priority. The plaintiff's claim for the balance under (O) with interest and proportionate costs comes next. I do not see why the amount of Rs. 400 should be deducted out of the sum of Rs. 1,086-0-8. The plaintiff is therefore entitled to the usual decree for sale as first mortgagee and if the property is sold, the sale-proceeds will be distributed in the above order.

"If the property is not sold, but the fourth defendant pays the first charge to the plaintiff, then the fourth defendant will be declared to have a charge for the amount he has paid in addition to his own mortgage debt and it will be open to the plaintiff as mortgagee for the balance under (O) to redeem him. Against the representatives of the mortgagor as such there will be a decree for the recovery of the amount with interest at 6 per cent. and costs out of the assets of the deceased. As between the plaintiff and the fourth defendant each party will pay and receive proportionate costs."

Fourth defendant appealed under clause (15) of the Letters Patent.

(The CHIEF JUSTICE)—The facts are stated in the Judgment of SANKARAN NAIR, J. The learned Judge held that the plaintiff (I refer to the plaintiff Company as the plaintiff) could not claim priority as regards the sum of Rs. 1,600 odd, the amount of the further advance made by the plaintiff at the time of the execution of the mortgage of August 1903 (Exhibit O). This finding was not contested by the plaintiff (the respondent). The question for us is was the learned Judge right in holding that as regards the sum of Rs. 1,080 odd, the amount remaining due from the mortgagor to the plaintiff at the time of the mortgage of August, 1903, the plaintiff had priority over the fourth defendant; in other words, did the mortgage of August, 1903 operate so as to extinguish the plaintiff's mortgage rights under the decree obtained by him in February, 1900 (Exhibit H) in the suit brought on his equitable mortgage of 1895? In September, 1900, *i.e.*, after the plaintiff had got his decree on his equitable mortgage of 1895, the fourth defendant obtained a decree for sale (exhibit B) on a mortgage of the equity of redemption of the property in question which had been executed in June, 1899. This decree was executed by the fourth defendant who brought the property in execution. The sale was subject to the plaintiff's rights as mortgagee and in the fourth defendant's application for execution the plaintiff's rights were reserved.

There can be no question that before Exhibit O was executed the plaintiff had priority over the fourth defendant as regards any balance remaining due to him under his equitable mortgage of 1895. Is Exhibit O to be construed as a surrender of his mortgage rights as against the puisne encumbrancer (the fourth defendant) so as to convert the fourth defendant into a first mortgagee by virtue of his mortgage of June, 1899, and relegate the plaintiff to the position of second mortgagee?

A document, dated March 11, 1902 (exhibit I), is in evidence which is a notice given to the plaintiff on behalf of the fourth defendant of the decree obtained by the fourth defendant in September, 1900 (Exhibit B). The case or the plaintiff was that no notice which was legally binding on the plaintiff had been received. It does not seem to me to be very material whether the notice was received or not. If the plaintiff had no knowledge of an encumbrance it is difficult to say that he intended to give that encumbrance priority over an earlier subsisting encumbrance in

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his favour. On the other hand, the fact that notice had been received (if it was received) would render it unlikely that the plaintiff should have been content to surrender his mortgage rights as against the fourth defendant without consideration, or for a consideration which seems inadequate. The terms of the mortgage of 1903 may have been, as between the mortgagor and the plaintiff, more advantageous than those of the equitable mortgage of 1895. But this would not have compensated the plaintiff for the loss of his mortgage rights as against the fourth defendant. What the plaintiff purports to give up (by Exhibit O) as against his mortgagor is all his rights under his mortgage decree of February, 1900 (Exhibit H) and under an agreement. The agreement is recited in the instruement as an agreement, which had been sanctioned by the Court under which the sale under the plaintiff's decree was postponed on certain terms. The instrument contains a covenant by the mortgagor that he has power to convey free from encumbrances. With regard to this question of intention I think the view taken by SANKARAN NAIR, J., was right. The plaintiff gave up his rights to sue on his mortgage of 1895 but he did not give up his rights as a secured creditor in respect of the unpaid balance which would of course include the right to set up his security as against his puisne encumbrancer. I do not think we ought to hold, as we were asked by the appellant to hold that the rights of the parties were the same as if the mortgagor had paid off the plaintiff. It may be that, as suggested on behalf of the respondent the form in which Exhibit O was drawn was intended to meet the decision in *Venkata Subramania Ayyar* v. *Koran Kanan Ahmod* (1). However this may be, the effect of Exhibit O was unquestionably to put an end to the plaintiff's subsisting judgment debt against his mortgagor, but the fact that the debt was extinguished leaves open the question whether the security was put an end to. The law is thus stated in *Bhawani Koer* v. *Mathura Prasad* (2), "As laid down by their Lordships of the Judicial Committee in *Gokuldoss Gopaldoss* v. *Rambux Seochand* (3), *Mohesh Lal* v. *Mohunt Bawan Das* (4), *Dinobhundhu Shaw Chowdhry* v. *Jogmaya Dasi* (5) and by the House of Lords in *Thorne* v. *Cann* (6) and *Liquidation Estates*

(1) (1903) I. L. R., 26 Mad., 19.
(2) (1908) 7 Calc. L.J., 1 at p. 31.
(3) (1884) L. R., 11 I. A., 126.
(4) (1883) L. R., 10 I. A., 62.
(5) (1902) L. R., 29 I. A., 9.
(6) (1895) A. C., 11.

Purchase Company v. *Willoughby* (1), the question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. The principle upon which this doctrine is founded, is that, although ordinarily when the interests of the mortgagor and the mortgagee are united in the same person, it is not necessary for him to keep them distinct, equity will keep them distinct, where from the intentions of the party, either express or implied, it is for his benefit that they should be so kept; it depends upon the intention, actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage. Consequently where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption." This principle was recognised *In re Jenning's Estate* (2) where it was held that where an equitable mortgagee by deposit of title-deeds took a bond to secure the same debt and entered up judgment thereon he did not thereby forfeit his security or defeat its priority. I may also refer to the judgment of this Court in *Purnamal Chund* v. *Venkata Subbaryalu* (3) and the judgment of the Calcutta High Court in *Gopal Chunder Sreemany* v. *Herembo Chunder Holdar* (4). See too Ghose on 'Mortgages,' vol. I, p. 475, edition 4.

The decision in *Ramakrishna Sadashiv* v. *Chothmal* (5) is no doubt in point and is an authority in the appellant's favour. But in the case before us I am not prepared to hold that it was the intention of the plaintiff to give up his mortgage rights as against the fourth defendant. The judgment in *Commercial Bank of Tasmania* v. *Jones* (6) no doubt lays down the general principle that a party may be entitled to the benefit of a contract which operates as a novation though he was no party to the contract. This however does not affect the rule that the

(1) (1898) A. C., 321.
(2) (1885) 15 Irish Reports, 277.
(3) (1897) I. L. R., 20 Mad., 486.
(4) (1889) I. L. R., 16 Calc., 523.
(5) (1899) I. L. R., 13 Bom., 348.
(6) (1893) A. C., 313.

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law imputes to a person the intention to act according to his interest.

I think the learned Judge was wrong in holding that the plaintiff was entitled to redeem the fourth defendant in respect of the fresh advance made under Exhibit O since this advance was made after the fourth defendant had obtained his decree for sale. Except as regards this the appeal is dismissed. Plaintiff and fourth defendant will pay and receive proportionate costs. Three months from this date will be allowed for redemption.

MUNRO, J.—I concur.

APPELLATE CIVIL.

1911 September 20.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

K. P. KALLIANI AMMA (SECOND DEFENDANT), APPELLANT,

v.

K. P. GOVINDA MENON AND TWENTY-TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 3 TO 23), RESPONDENTS.*

K. P. KARUNAKARA MENON (FIRST DEFENDANT), APPELLANT,

v.

K. P. GOVINDA MENON AND TWENTY-TWO OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2—23), RESPONDENTS.*

Marumakkattayam law—Gift to a woman and her children enures for their benefit with the incidents of tarwad property—Members subsequently born acquire an interest by birth—Karnavan, power of to alienate—Right of one member of tarwad to erect buildings in tarwad property—Compensation, claim to, for demolition of building—Malabar Tenants' Improvement Act I of (1900), *s.* 5.

A gift to a woman governed by the Marumakkattyam Law and her children enures in favour of the donee and her children with the incidents of tarwad property. As members of a tarwad acquire an interest in the tarwad property by birth, children born subsequent to the gift will acquire an interest in such property.

A karnavan cannot make an alienation for such a long period as sixty years in the absence of special necessity or special benefit. Such an alienation cannot be held good for a portion of the term, *i.e.*, the usual period of twelve years, as it will have the effect of creating a new contract between the parties.

Although in the case of ordinary co-parceneries, the courts will not order the demolition of buildings erected by one co-parcener in joint property, unless some substantial injury is shown, the case will be different in the case of tarwad property. The members of the tarwad have not, like the members of

* Second Appeals Nos. 525 and 526 of 1910.