

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

HANUMANTHAIYAN NINTH (DEFENDANT), APPELLANT,

v.

MEENATCHI NAIDU AND OTHERS (PLAINTIFF) AND SECOND TO
EIGHTH AND TENTH DEFENDANTS), RESPONDENTS.*

1910.
September,
15.
—
1911.
September,
11

Mortgage, right of person paying off prior—Cannot claim rights of prior mortgage unless prior debt is completely satisfied.

Where there are two mortgages on a single property and a person advances money for the payment of the first mortgage, the claim of such person to priority over the second mortgage cannot be sustained unless the first mortgage is entirely discharged.

SECOND APPEAL against the decree of J. G. Burn, Additional Subordinate Judge of Madura, in Appeal Suit No. 401 of 1908, presented against the decree of T. N. Lakshmana Row, District Munsif of Madura, in Original Suit No. 549 of 1906.

The facts are fully stated in the judgment of the lower Appellate Court, the material portion of which is as follows:—

The plaintiff (appellant) sued to recover money due to him under a mortgage deed exhibit A of which he is the assignee. He obtained a decree for sale of the hypothecated property subject to a prior mortgage under exhibit I.

Exhibit A is dated 30th April 1894 and exhibit I is 20th April 1888. The latter mortgage has been discharged, but the District Munsif has found that the discharge was effected by payments made by certain of the defendants, and that they or their representatives are entitled to stand in the place of the mortgagee under exhibit I.

It appears from the findings of the lower Court that the first defendant who is the mortgagor raised money by sale of a portion of the hypothecated property under exhibit V and by mortgages of portions of the property under exhibits IX and II. The findings are that the whole of the sale price under exhibit V, the whole of the mortgage money under exhibit IX and portion of the mortgage money under exhibit II were applied by the first

* Second Appeal No. 625 of 1909.

ABDUL
RAHIM AND
SHERCER JJ.

HANEMAN-
THAYAN-
v.
MEENATCHI
NAIDU.

defendant towards paying off the principal and interest due under exhibit I.

The dates of the documents exhibits IX, V and II are 4th November 1895, 11th January 1899 and 17th December 1903. Assuming the findings as to the discharge to be correct (they are disputed) I am unable to see how the persons in whose favour these documents were executed and those claiming under them are entitled to any priority over the suit document exhibit A merely because first defendant chose to apply sums received by him from them in partial discharge of the earlier debt. It is not the case of any of the claimants that the whole mortgage was discharged through monies received from him. It seems to me that no one of them would have been entitled to stand in the place of the mortgagee under exhibit I, and that it is not competent for the Court to say that because the mortgagee has discharged the prior encumbrance by means of sums received by him at different times from different persons with no common interest, that therefore all these persons taken together are entitled to represent the prior mortgagee.

For the above reasons I would disallow the priorities claimed for defendants. The appeal is allowed with costs throughout.

The ninth defendant appealed.

K. N. Aiyar for appellant.

C. V. Anantakrishnayya for first respondent.

ORDER.—Before deciding the appeal we must ask the District Judge to find on the evidence on record how much of the money borrowed under exhibits VIII and IX went towards the discharge of the mortgage under exhibit I.

The finding should be submitted within six weeks and seven days will be allowed for filing objections.

In compliance with the above order the District Judge of Madura submitted the following

FINDING—My finding is that Rs. 100 advanced under exhibit IX went towards the discharge of exhibit I.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT—In this case there are two questions raised before us: (1) Where there are two mortgages on a property and a

person advances money for the payment of the first mortgage and that debt is satisfied would the lender be entitled to stand in the shoes of the first mortgagee and to claim priority if he had no interest in the mortgaged property either as purchaser of the equity of redemption or as mortgagee at the time of the advance, and (2) whether it is necessary that the first mortgage should be entirely discharged before the claim to priority over the second mortgagee can be sustained. In this case only a portion of the mortgage money due under the first mortgage was paid and the first mortgage was not entirely discharged. We think there can be no doubt on principle that before a person advancing money for the purpose of discharging the debt due under the first mortgage can establish his claim to the rights of the first mortgagee it must be shown that the first mortgage had been extinguished. Otherwise the result would be that a number of persons would be entitled to rank as first incumbrancers with reference to different sums of money advanced by them, and it would be impossible to work out the rights of the parties. This is very clearly pointed out in *Gurdeo Singh v. Chandrikah Singh* and *Chandrikah Singh v. Rashbehary Singh* (1) and in Jones on 'Mortgages', para. 885b. The learned vakil for the appellant has relied on several rulings of this Court for the contrary position. The cases relied on are *Rupabai v. Audimulam*(2), *Gangadhara v. Sivarama*(3) and *Seetharama v. Venkatakrishna*(4). In *Rupabai v. Audimulam*(2) the learned Judges state at page 354 that the whole of the prior charge was released and the same appears to have been the case in *Gangadhara v. Sivarama*(3). The facts of *Seetharama v. Venkatakrishna*(4) so far as they appear from the report, are not very clear but supposing that the case is authority for the proposition contended for by the appellant it would seem that the question was not properly discussed before the learned Judges and they give no reasons in support of their view. On this point therefore the appeal fails even if the other proposition advanced on behalf of the appellant be held to be sound, as to which we do not express any decided opinion. The appeal is dismissed with costs.

ABDUR
RAHIM AND
SPENCER, J.J.
—
HANUMAN-
THAYAN
v.
MEENATCHI
NAIDU.

(1) (1907) 5 Cal. L.J., 611 at p. 633.

(3) (1885) I.L.R., 8 Mad., 246.

(2) (1888) I.L.R., 11 Mad., 345.

(4) (1893) I.L.R., 16 Mad., 94.