

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SANAGAPALLY LAKSHMAYYA (MINOR) BY HIS MOTHER AND
GUARDIAN VENKAMMA (SECOND DEFENDANT), APPELLANT,

v.

INTOORY BOLLA REDDY AND OTHERS (PLAINTIFF AND FIRST
DEFENDANT), RESPONDENTS.*

1902.
March, 19, 20.
September
15.

Transfer of Property Act— IV of 1882, s. 65 (c)—Duty of mortgagor to pay public revenue on mortgaged land—Default in payment—Sale for arrears of revenue—Subsequent sale by purchaser at revenue sale to original mortgagor—Right of mortgagee under original mortgage.

It is the duty of a mortgagor, under section 65 (c) of the Transfer of Property Act, to pay the public revenue accruing due on the mortgaged property when it continues in his possession. If he fails to perform that duty, and the land is sold for arrears of revenue and the purchaser at the revenue sale sells the land to the original mortgagor, the mortgage is not extinguished.

A man cannot be allowed to take advantage of his own wrong, and notwithstanding that the land might have vested in the purchaser at the revenue sale free of the mortgage, the original mortgagor (or his son), on his purchase from the auction purchaser, cannot plead, for his own benefit, that by reason of such wrong there has been a statutory extinction of the original mortgage.

Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan, (10 M.I.A., 540 at p. 557), followed.

ON 1st June 1886, first defendant's father gave one Mala Ramaswami a simple mortgage over a certain piece of land. In August 1888, the mortgaged land was sold by the revenue authorities for arrears of revenue, Linga Reddi being the purchaser. In December 1894, Linga Reddi sold the land to first defendant, and on the same day, first defendant's guardian mortgaged it to plaintiff. In 1895, the original mortgagee Mala Ramaswami transferred his mortgage to second defendant's father, and in the same year second defendant brought Original Suit No. 386 of 1895, in the Court of the District Munsif of Guntur, on the mortgage bond and obtained a decree. Plaintiff also sued, in the same year, in

* Second Appeal No. 837 of 1900, presented against the decree of W. C. Holmes, District Judge of Kistna at Masulipatam, in Appeal Suit No. 634 of 1899, presented against the decree of C. Bapayya, District Munsif of Guntur, in Original Suit No. 686 of 1895.

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Original Suit No. 686 of 1895, to recover his money by sale of the mortgaged land free from first defendant's mortgage. The plaintiff asked for a declaration that the second defendant's decree in Original Suit No. 386 of 1895 was null and void, and claimed from first defendant the mortgage amount, and, in default of payment, asked for sale of the mortgaged land. First defendant remained *ex parte*, and the District Munsif decreed in plaintiff's favour for the mortgage amount, and, on default of payment, ordered the land to be sold and the proceeds paid in the first instance to plaintiff. Second defendant appealed to the District Judge, contending that when the first defendant purchased the land (from Linga Reddi) the liability to second defendant's mortgage re-attached to the land. The District Judge refused to adopt this view, holding that on the sale to Linga Reddi, for arrears of revenue, the land was sold free of all incumbrances. He considered that the mortgage by first defendant's guardian to plaintiff was not a bogus transaction and that the doctrine of estoppel did not apply. He dismissed the appeal.

Second defendant preferred this second appeal contending, *inter alia*, that inasmuch as first defendant himself purchased the land from the auction purchaser (Linga Reddi), it was not open to first defendant to dispute the second defendant's prior mortgage.

C. Ramachandra Rau Sahib for appellant.

K. Jayannadhayyar for third to sixth respondents.

JUDGMENT.—We do not think that the decrees of the Courts below can be supported. Inasmuch as the land was sold during first defendant's minority for arrears of revenue, we must take it, having regard to Regulation X of 1831, that it was sold for arrears which became due during the life-time of first defendant's father. It was a duty which the first defendant's father, as mortgagor, owed to his mortgagee (under whom second defendant claims as assignee) to pay the public revenue accruing due on the mortgaged property which continued to be in his possession [section 65 (c), Transfer of Property Act, 1882]. This duty the father failed to perform, and the arrears not having been paid by the first defendant before the day fixed for sale, the land was sold under Act II of 1864 to realize the revenue. Linga Reddi purchased the land, and under Act II of 1864 the land vested in him free of the mortgage. A few years afterwards the property was purchased by first defendant from Linga Reddi and on the same day was mortgaged by first

defendant to plaintiff and this suit is now brought to enforce that mortgage by sale of the land. The Courts below have held that the second defendant's prior mortgage was extinguished by the revenue sale, and have given plaintiff a decree for sale of the land on the footing that second defendant had no mortgage thereon.

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If the first defendant himself, instead of Linga Reddi, had been the purchaser at the revenue sale, it is clear that the second defendant's mortgage would not have been extinguished and that he could enforce his mortgage against first defendant just as if there had been no revenue sale (*Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*(1)), and the plaintiff, who claims as mortgagee under the first defendant, cannot be in a better position than first defendant himself. The principle of law on which that decision was based was mainly that a man cannot be allowed to take advantage of his own wrong; and that therefore the mortgagor in that case had a title by estoppel to redeem the mortgage as against the mortgagee who failed to pay the arrears of revenue and himself became the purchaser at the revenue sale brought about by his own default. This principle is, in our opinion, applicable to the present case notwithstanding that the property vested free of mortgage in Linga Reddi, and the fact that the first defendant did not purchase the property himself at the revenue sale, but from Linga Reddi who was the purchaser at the revenue sale, makes no difference as between himself and his mortgagee. He cannot be allowed to take advantage of his father's wrong and plead for his own benefit that by reason of such wrong there has been a statutory extinction of second defendant's mortgage security. [See note (at p. 242, Vol. XV; second edition) to "Market Overt" A1 in Viner's Abr. cited and followed in *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*(1).] We may observe that the same principle underlies section 65 of the Indian Trusts Act in the case of trust property.

We shall therefore have to set aside the decrees of the Courts below and give plaintiff a decree as a puisne mortgagee only, the second defendant having the rights of a prior mortgagee.

Before passing the decree we must call for a finding as to the amount due under second defendant's mortgage, and the amount

(1) 10 M.I.A., 540 at p. 557.

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due under the plaintiff's mortgage up to the date on which the finding may be recorded by the lower Appellate Court.

In compliance with the order contained in the above judgment, the District Judge submitted the following

FINDING.—“ This suit has been remanded by the High Court for a finding on the following issue :—

“ What are the amounts due under the plaintiff's mortgage and the second defendant's mortgage up to the date of this finding ? ”

“ 2. No evidence has been adduced by either side and it is admitted that the amount due up to 15—12—1895 is Rs. 553-15-9 according to the terms of exhibit II. For the appellant it is contended that interest at 6 per cent. per annum is due on that amount from 15—12—1895 up to the date of this finding. For respondents it is urged that the appellant is not entitled to such interest.

“ 3. I consider that the respondents' contention should prevail. The mortgage bond is not before me and there is no means of ascertaining the interest due under it. The bond has to all intents and purposes been merged in exhibit II and under that exhibit appellant is not entitled to any further interest.

“ 4. My finding therefore is that the amount due under the plaintiff's mortgage and the second defendant's mortgage is Rs. 553-15-9.”

The case coming on for final hearing after the return of the finding of the lower Appellate Court, the Court delivered the following

JUDGMENT.—We accept the finding, which it is agreed, is that the amount due to the second defendant under his mortgage is Rs. 553-15-9, and the second defendant's vakil says that he does not insist on interest as the mortgage bond is not produced to fix the rate of interest. The plaintiff, as subsequent mortgagee, will be entitled to redeem the second defendant's mortgage on payment of the said amount into Court on or before the 15th February 1903, the said sum to carry interest at 6 per cent. from the date of such payment till realization. A decree will be drawn up reversing the decrees of the Courts below with an additional direction that the amount due to the plaintiff by the first defendant under the plain-

tiffs' mortgage be also declared in Court by the District Munsif on or before the 15th January 1903. The decree will also give further necessary directions for the first defendant redeeming, on or before the 15th April 1903, the plaintiffs, on the latter redeeming the second defendant and also for the first defendant redeeming both by payment into Court, in default of plaintiffs redeeming the second defendant, with additional provisions for sale in default of redemption. The plaintiff must pay the second defendant's costs throughout and the first defendant must pay the plaintiff's costs throughout, excluding the costs which the plaintiff will have to pay to the second defendant.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), APPELLANT,

1902.
November 18,
19.

v.

ROBERT FISCHER (PLAINTIFF), RESPONDENT.*

Assessment of Land Revenue Act—(Madras) Act I of 1876, s. 7—Appeal to Board of Revenue from assessment fixed by Collector—Limitation—Revenue Recovery Act—(Madras) Act II of 1864, s. 45—Regulation II of 1803, s. 18—Effect of Act I of 1876 on the procedure prescribed by s. 18 of Regulation II of 1803.

The period of ninety days prescribed by section 7 of Act I of 1876, during which an appeal may be preferred to the Board of Revenue from an order by a Collector apportioning the assessment on land, runs from the date when the Collector declares the apportionment of assessment, after the apportionment proposed by him to the Board of Revenue has been sanctioned. It does not commence to run, under the Act of 1876, from the date when the Collector himself fixes the amount and submits his proposal to the Board of Revenue for sanction.

Under section 18 of Regulation II of 1803, the Collector was bound, when transmitting for the consideration of the Board a statement of the assessment to be apportioned on the sub-division, to furnish a copy of such statement to the proprietor of the estate, who was directed to appeal if he objected to the assessment. Under that Regulation the appeal was against the proposal for

* Appeal No. 70 of 1901 presented against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Original Suit No. 63 of 1899.