APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

NEELAMANI PATNAIK MUSSADI (PLAINTIFF), APPELLANT,

v.

SUKADUVU BEHARU AND FIFTEEN OTHERS (DEFENDANTS NOS. 1 TO 3, 5 TO 11 AND 15 TO 20), RESPONDENTS.*

1919, October, 2, 1920, March, 24.

Mortgage bond—Transfer—Absence of notice to mortgagor—Payment to mortgagee by mortgagor, after transfer, without notice thereof—Payment in full settlement of debt—Effect of payment—Receipt by mortgagee, necessity for registration—Registration Act (XVI of 1908), s. 17 (b)—Civil Procedure Code, O. XLI, r. 33—Memorandum of objections, whether necessary—Transfer of Property Act (IV of 1882), s. 130, principle of.

Payment by the mortgagor to the mortgagee after, but without notice of, a transfer of the mortgage, must, in the absence of collusion, be allowed to the mortgagor as against the transferee.

Where such payment was accepted by the mortgagee in full settlement of the debt due, the mortgagor is entitled to get credit, as against the transferee, not only for what he actually paid but for the whole mortgage-debt.

Where a receipt by the mortgagee, in terms, only discharges a mortgage-debt, it does not fall under section 17 (*b*) of the Registration Act, and is admissible in evidence, though it was not registered.

Where, in a suit for sale instituted by the transferee of a mortgage bond against the mortgagee and mortgagor, a decree was passed against the latter, but on appeal by him, the decree against him was reversed, the Appellate Court had power, under Order XLI, rule 33, Civil Procedure Code, to pass a decree against the mortgagee, who was a respondent in the appeal, even though the plaintiff had not filed an appeal or memorandum of objections.

SECOND APPEAL against the decree of B. C. SMITH, District Judge of Ganjām at Berhampur, in Appeal Suit No. 358 of 1916, preferred against the decree of M. V. HAYAGREEVA RAO, Additional District Munsif of Berhampur, in Original Suit No. 209 of 1916.

The defendants Nos. 1 to 3 and the father of defendants Nos. 8 and 9 had executed the suit mortgag ebond to the twelfth defendant on 26th July 1908.

The latter transferred the bond on 18th October 1911 to the plaintiff, who instituted this suit, on 11th March 1915, against the original mortgagors and the mortgagee as twelfth

* Second Appeal No. 597 of 1918.

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defendant. The mortgagors pleaded that they had paid off the mortgage to the twelfth defendant and produced a receipt from him (Exhibit I, dated 30th November 1911), that they had no notice of the assignment to the plaintiff, that their payment was in full discharge of the amount due on the bond, a portion of the interest being given up by the mortgagee, who accepted the payment in full settlement of his claim under the bond, and that the said payment was binding on the plaintiff.

The receipt, which was not registered, was in these terms:—

Payment receipt given on the 30th day of November 1911 to, etc. . . . I have this day received payment from you of Rs. 350 on account of the principal and interest due under the registered mortgage bond executed by you in my favour on 26th July 1908. I have excused payment of balance of interest. Nothing remains due under the said document.

(Sd.) B.P.

The District Munsif disbelieved the discharge set up, and passed a decree in favour of the plaintiff. On appeal by defendants Nos. 1 to 11, the lower Appellate Court held that the payment alleged by the mortgagors was true and binding on the transferee as it was made without notice of the transfer, and reversed the decree and dismissed the suit. The plaintiff who, was a respondent in the appeal had not preferred a memorandum of objections in the lower Appellate Court against the twelfth defendant's legal representatives, who were defendants Nos. 15 to 19, and respondents Nos. 3 to 7 in the Appeal, and had been exonerated in the first Court. The plaintiff preferred this Second Appeal.

C. S. Venkata Achariyar for the appellant.

P. Nagabhushanam and *B. Jagannatha Doss* for respondents.

The JUDGMENT of the Court was delivered by

SPENCER, J.

SPENCER, J.—We must accept in Second Appeal the findings of fact of the learned District Judge that the mortgagors made the payment they pleaded to the mortgagee and that they did so without notice of the prior assignment of the mortgage to the plaintiff. We think the learned Judge is right in holding that on the above findings plaintiff was bound by the payment so made,

The English Law on the point is quite clear. In Halsbury's Laws of England, Volume 21, page 179, paragraph 334, it is stated :

"That the mortgagor is entitled to make payments to the mortgagee, whether of principal or interest, and to have credit for them as against the transferee after the transfer until he has received notice of it."

And several English cases, including *Bickerton* v. *Walker*(1) and *Dixon* v. *Winch*(2), are quoted.

There does not seem to be any good reason why that rule, which is founded on principles of equity, should not be followed in this country. It is true that after the amendment of the definition of the term "actionable claim" by Act II of 1900, so as to exclude mortgage debts, section 130 of the Transfer of Property Act (IV of 1882) does not apply to mortgage debts, and the statutory provision in it that the payment to a transferor will be valid against a transferee save when the debtor is a party to the transfer or has received notice thereof does not apply *ex proprio vigore*. But this rule itself is based on the equitable principle referred to and recognized in the English cases, and it subsists apart from the section itself. We think therefore the principle is applicable to payments by mortgagors though the section does not apply.

It is true that notice is not necessary for the validity of the assignment of a mortgage—see *Govindrao* v. *Ravji*(3). But that is not the question before us. No doubt "where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between mortgagor and mortgagee at the date of the transfer" as observed by COZENS-HARDY, J., in *Dixon* v. *Winch*(2) above referred to. See *Turner* v. *Smith*(4). But that observation also has no reference to the present question.

No Indian case has been cited to us on the exact question before us, but Dr. Ghose in his book on the Law of Mortgages in India, Volume I, page 330, observes :

"It is also well settled that payment made by the mortgagor to the mortgagee after, but without notice of, a transfer must in the absence of collusion be allowed to the mortgagor as against the transferee."

(1) (1886) 31 Ch.D., 151.
(2) [1900] 1 Ch., 736.
(3) (1888) I.L.R., 12 Bom., 33.
(4) [1901] 1 Ch., 213 at 219.

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We accept this as a correct statement of the law so far as it goes.

It was then argued that the mortgagors were guilty of negligence, as they did not make proper inquiries of the transferor about the absence of the mortgage deed from his possession. The learned Judge, however, finds that the mortgagors did make inquiries and they were given an explanation which they believed. We see no reason to suppose that the mortgagors acted negligently in these circumstances and no inference of constructive notice of plaintiff's assignment can be drawn against them.

The next question raised is that the mortgagors can get credit for only what they actually paid, though that payment was accepted by the mortgagee in full settlement of the debt due, and not for the whole mortgage debt. As the mortgagors were entitled to deal with their mortgagee as if no assignment took place when they had no notice of the transfer, we think the arrangement set up must be held to be binding on the transferee.

It is next argued that Exhibit I, which evidences the payment pleaded by the mortgagors, is inadmissible in evidence, as it is unregistered and as it purports, according to the plaintiff's vakil, to extinguish the mortgage. On a reference to Exhibit I we find it to be merely a receipt for money actually paid, which was taken in full discharge of the mortgage debt, the payment of the balance of interest due being excused. There is nothing in the document to show that the mortgage interest was expressly extinguished by it; it is only a discharge of the mortgage debt. We think there is a clear distinction between a discharge of a debt and the extinguishment of a mortgage interest, though one may be the result of the other. Where a receipt, in terms, only discharges the debt, it cannot be brought under section 17 (*b*) of the Registration Act (XVI of 1908). In this particular this case is distinguishable from *Namagiri Lakshmi Ammal* v. *Srinivasa Aiyangar*(1) where there was an agreement to cancel and return the mortgage deed. In *Mallappa* v. *Matum Nagu Chetty*(2), also cited, there was only an oral agreement to take a smaller sum for the mortgage amount and the question

(1) (1915) 21 I.C., 269. (2) (1919) I.L.R., 42 Mad., 41.

raised was quite different from the one before us. In *Lakshmana Setti* v. *Chenchuramayya*(1) also, the agreement was not merely to receive the Rs. 3,000 in full settlement but also to return the documents, that is, the mortgage deed and the title-deeds. There was, therefore, in it a proposal to extinguish the mortgage interest.

All the points raised against the mortgagors, respondents Nos. 1 to 10, thus fail. It is finally urged that a decree for money should be given to the plaintiff against the representatives of the original mortgagee, who is found to have received the mortgage money from the mortgagors after the transfer to the plaintiff, as money had and received for his use. In view of the findings come to by the learned District Judge, we think the question whether any relief, and if so what relief, should be given to the plaintiff against those representatives should have been considered. The fact that they were exonerated in the first Court, and that the plaintiff filed no appeal or Memorandum of Objections against such exoneration in the appellate Court, will not stand in the way of plaintiff being given relief now, under Order XLI, rule 33, Civil Procedure Code. As there is no finding by the lower Appellate Court on the point, we must call for a finding on it and allow fresh evidence, as the point, though in a manner raised in issue V, does not seem to have been properly tried. Finding in two months, objections seven days.

[In compliance with the order contained in the above judgment, the District Judge of Ganjām at Berhampur submitted a finding to the effect that the nineteenth defendant, who was the son of the deceased twelfth defendant, the original mortgagee, would only be liable for Rs. 350 received by his father under Exhibit I, and that the other defendants were not liable. This Second Appeal coming on for final hearing the Court delivered the following :—]

JUDGMENT

As against the nineteenth defendant, the son of twelfth defendant, the deceased assignor of the plaintiff, the plaintiff's suit for money had and received is barred under article 62, Limitation Act [*Sriramulu* v. *Chinna Venkatasami*(2)]. We

(1) (1918) 34 M.L.J., 70. (2) (1902) I.L.R., 25 Mad., 396.

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do not pronounce on any other cause of action that the plaintiff may have against this defendant. The Second Appeal is dismissed with costs of respondents Nos. 1 to 10.

K.R.

SPENCER, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1920, March 15.

PUJARI BHIMAJI, MINOR BY NEXT FRIEND PUJARI NAGAPPA, PLAINTIFF (APPELLANT),

v.

RAJABHAI HUSSAIN SAHEB AND ANOTHER, DEFENDANTS (RESPONDENTS).*

Civil Procedure Code (V of 1908), Order XXXII, rule 4 (2)—Existence of a guardian appointed for a minor by a competent authority—Suit and decree against such minor represented by another guardian, validity of.

If a minor has a guardian appointed for him by a competent authority he alone can represent the minor in any litigation; hence a decree obtained against such a minor represented not by such guardian, but by another, though the Court acted in ignorance of the existence of such appointed guardian is not binding on the minor.

Rashid-un-nisa v. *Muhammad Ismail Khan*, (1909) I.L.R., 31 All., 572 (P.C.), followed; *Dammar Singh* v. *Pirbhu Singh*, (1907) I.L.R., 29 All., 290, not followed.

SECOND APPEAL from the decree of A. J. CURGENVEN, Temporary Subordinate Judge of Bellary, in Appeal No. 136 of 1918, filed against the decree of P. NARAYANA MENON, District Munsif of Hospet, in Original Suit No. 484 of 1917.

The facts are given in the Judgment of SADASIVA AYYAR, J.

P. R. Ganapati Ayyar for appellant.

K. Rajah Ayyar for first respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff represented by his certificated guardian (appointed by the District Court) is the

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* Second Appeal No. 967 of 1919.