

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Srinivasa Ayyangar.*

THANMUL SOWCAR (SECOND DEFENDANT), APPELLANT,

1927,
December 19.

v.

NATTU RAMADOSS REDDIAR AND ANOTHER
(PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 81 and 56—Prior mortgagee of two plots—Subsequent mortgagee of one of them—Sale of the plot not mortgaged to the latter for payment of interest due to the first mortgagee—Suit by prior mortgagee for sale of the plot mortgaged to the puisne mortgagee, impleading only the mortgagor and puisne mortgagee—Non-joinder of vendee of other plot—Right of puisne mortgagee to insist on joinder of vendee, so as to enable him to marshal securities.

Where two plots of land were mortgaged to the plaintiff and only one of them to the second defendant, the other plot was sold by the mortgagor to pay off interest due on the first mortgage, and the plaintiff thereafter sued to recover his debt by the sale of the plot mortgaged to the second defendant and impleaded in the suit only the mortgagor and the subsequent mortgagee, and the latter applied that the vendee of the other plot should be joined in the suit so as to enable him to exercise his right to marshalling of securities,

Held, that the subsequent mortgagee of one of the properties has no right, under section 81 of the Transfer of Property Act, to compel the prior mortgagee to proceed in the first instance against the property not mortgaged to the former, as the obligation laid under the section is only on the mortgagor and not on the prior mortgagee, as it is on the vendor under section 56 of the Act; consequently the subsequent mortgagee is not entitled to have the purchaser impleaded in this suit, so as to enable him to exercise his alleged right of marshalling of securities.

* Second Appeal No. 260 of 1926.

SECOND APPEAL against the decree of the District Court of Chingleput in A.S. No. 144 of 1923 preferred against the decree of the Court of the Subordinate Judge of Chingleput in O.S. No. 27 of 1922.

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The material facts appear from the Judgment.

Mahammad Ibrahim and *G. Ramakrishna Ayyar* for appellant.

C. Narasimha Achariyar for respondents.

JUDGMENT.

WALLACE, J.—The plaintiff is a first mortgagee and WALLACE, J. is suing to enforce his mortgage which runs over A and B schedule properties. In the suit he gave up his right over B schedule property on the ground that his mortgagor, the first defendant, had sold it to one Narasimhulu Chetty and had credited the sale price to the interest on the mortgage. The second defendant, the appellant, has been joined in the suit as the purchaser of the equity of redemption in A schedule property. He also appears to be the second mortgagee of A schedule property. He claims that in this suit he is entitled as second mortgagee so to marshal the burdens on A and B schedule properties as to compel the plaintiff to bring the B schedule property to sale and recover from it as much of his mortgage debt as he can before he proceeds against A schedule property and for that end the appellant maintains that his petition to bring the purchaser of the B schedule property Narasimhulu Chetty, on the record in order that this claim might be fought out in the suit, was improperly rejected by the lower Court.

The validity of his claim turns on the correct interpretation of section 81 of the Transfer of Property Act. That section lays down in terms that the result of marshalling shall not prejudice the rights of the

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first mortgagee. Now one of the rights of the mortgagee undoubtedly is to choose against which of several properties mortgaged to him he may proceed and he therefore cannot be hampered in such election by any consideration of obligation undertaken to others by his mortgagor subsequent to the contract with himself. It might be argued that he is not prejudiced in being compelled to proceed against the properties in any particular order so long as he recovers his money which is all he is concerned with. But that is not the way in which the law on the subject of marshalling has been interpreted. The English law on the subject has usually been held to spring from a case decided by the Lord Chancellor, Lord HARDWICKE, in *Lanoy v. The Duke of Athol*(1), where the proposition is stated in broad terms:—

“suppose a person, who has two real estates mortgages both to one person and afterwards only one estate to a second mortgagee who had no notice of the first, the Courts in order to relieve the second mortgagee have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee.”

In *Flint v. Howard* (2), KAY, L.J., quotes Lord Chancellor HARDWICKE'S dictum as being that

“if a person having two estates mortgaged both to A and then one only to B who had no notice of A'S mortgage, B might, as against the mortgagor, compel the payment of the first mortgage out of the estate on which he had no charge.”

And later on in the same judgment he says,

“The right of a subsequent mortgagee of one of the estates to marshal is an equity which is not enforced against third parties, that is against anyone except the mortgagor and his legal representatives.”

This is subject to one reservation that if both estates are subject to separate second mortgages the Court will

(1) (1742) 2 Atk., 444.

(2) [1893] 2 Oh., 54 at 72.

apportion the first mortgage between them. This latter principle however is based rather on the doctrine of contribution than on the doctrine of marshalling and will be governed in India by section 82 of the Transfer of Property Act. In *Manks v. Whitely*(1), PARKER, J., lays down that the equitable right of marshalling has never been held to prevent a prior mortgagee from realizing his security in such a manner and order as he thinks fit. In equity jurisdiction the general principle which will govern the action of the Court when it is possible is that

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“ a person having two funds shall not by his election disappoint a party having only one fund ; and equity, to satisfy both, will throw him, who has two funds upon that which can be affected by him only, to the intent that the only fund, to which the other has access, may remain clear to him.”

That is the dictum of Lord Chancellor ELDON in *Aldrich v. Cooper*(2). But it is one thing to say that in an administration suit where all the assets are in Court the Court will in equity so marshal the assets that one creditor shall not prejudice the rights of another, and a different thing for a Court in an ordinary action on a mortgage to compel the mortgagee to forego rights which the law itself gives him. In the above case the judgment of the Lord Chancellor concludes :

“ If it is necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those, who are thereby disappointed, must stand in his place as to the copyhold estate.”

Therefore, if the mortgagee does as a matter of fact exercise his undoubted right to satisfy himself out of one estate, the second mortgagee whose security is thereby taken away or impaired will be entitled

(1) [1911] Ch., 448.

(2) (1808) 8 Ves, Jun., 382 at 395.

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to stand in his shoes as regards the other estate; and that is really the principle which governs the present case. *Aldrich v. Cooper*(1), is no authority for the contention that the Court will in an action like the present compel the mortgagee to forego his undoubted right of satisfying his debts out of any portion of his security. Second defendant is therefore not entitled in this case to compel the first defendant to satisfy his debt first out of B schedule property. But in a properly framed suit with the proper parties on record he may claim to hold B schedule property liable for his own debt *pro tanto*.

It may be pointed out that in the analogous section 56 of the Transfer of Property Act it is also made clear by the wording of that section that a charge-holder is not to be prejudiced by a sale of the property over which he holds that charge and that the buyer's claim is against the seller and not against the charge-holder also. In *Perumal Pillai v. Raman Chettiyar*(2), a Full Bench of this Court has held that the purchaser of the equity of redemption in one of several items mortgaged under one mortgage cannot prevent the mortgagee from satisfying his debt out of the properties sold to him since the mortgagee's undoubted right is to recover the whole of his mortgage debt from any portion of the mortgage property. The principle here is the same, that the mortgagee's original rights cannot be prejudiced by any action taken by third parties after his mortgage.

The question whether the appellant had notice of the first mortgage therefore does not arise in this suit, which is entirely in order to settle the claim of the first mortgagee over the mortgaged property. I agree therefore with the lower appellate Court that the mortgagee's rights to recover from A schedule property cannot be

(1) (1803) 8 Ves. Jun. 382 at 395.

(2) (1917) I.L.R., 40 Mad., 968.

interfered with in this suit by any second mortgage claim of the appellant over that property, and that the suit was rightly decided. I would therefore dismiss this appeal with costs.

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. SRINIVASA AYYANGAR, J.—I agree with my learned brother that the appeal is not sustainable and must be dismissed with costs. In his judgment he has dealt with all the cases to which reference has been made in the course of the discussion of the point. I shall therefore merely content myself with referring to the terms of section 81 of the Transfer of Property Act which alone in my judgment should be regarded, because in and by that section the legislature has undoubtedly sought to embody the rule of equity relating to marshalling. It is no doubt true that on a superficial reading of the section the contention put forward by Mr. Ramakrishna Ayyar, the learned vakil for the appellant, would almost seem to be insuperable. A close examination however of the language seems to my mind to leave no doubt in the matter. If it be conceded that a mortgagee has the right of proceeding against any or any part of the securities under his mortgage and in any order he pleases, then it must be conceded that the recognition of any right on the part of the subsequent mortgagee of one of the items of the security, to require the mortgagee to proceed in the first instance against the item not mortgaged to him would undoubtedly be interfering with such rights and therefore prejudicing the same. But apart from that altogether, the language used with regard to the right of the second mortgagee is that he is entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee. The obligation corresponding to his right could, having regard to the language, be

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regarded as being only on the mortgagor and not against the first mortgagee.

If it was the intention of the legislature that in such cases the first mortgagee should first proceed against the property not mortgaged to the second mortgagee, the legislature would have had no difficulty in giving clear and direct expression to the same. When the right is stated "to have the debt of the first mortgagee satisfied" the persons liable to satisfy the same being only the mortgagor, the implication is clear and conclusive that the right declared in this section is only as between the second mortgagee and the mortgagor, and is intended for the purpose, by such declaration of right, of adjusting the equities as between them.

In the present case it is perfectly clear that where the other item of security with reference to which alone the question can possibly arise is not the subject-matter of the suit, the subsequent mortgagee has no right whatever to require both the things to be done for his benefit, namely, that the other property should, by some amendment be brought in as the subject-matter of the suit and that for that purpose the alienee of such property should also be made a party to the litigation.

It is impossible to accede to any such contention, because a Court has only to decide the matters and points that arise as between the parties actually before it for the purpose of according the proper relief to the plaintiff.

K.B.

