

proves that he has for a period of twenty years before the commencement of a suit paid as rent the same proportion of the produce of his holding, is not entitled to the presumption which s. 4 declares.

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HANUMAN
PARSHAD
v.
KAILASH
PANDEY.

APPELLATE CIVIL.

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August 16.

(*Mr. Justice Turner and Mr. Justice Spankie.*)

SALAMAT ALI AND OTHERS (PLAINTIFFS) v. BUDH SINGH AND OTHERS
(DEFENDANTS).*

Mortgagor and Mortgagee—Constructive Fraud.

Mere silence on the part of a prior mortgagee on hearing that the mortgagor is mortgaging the property a second time is not such conduct as will amount to constructive fraud, and deprive him of his right to priority as against the second mortgagee.

Neither does the mere fact that, being aware of the second mortgage, he attests the execution of the mortgage-deed, amount to such conduct, where his knowledge of the contents of the deed is not shown.

Where a prior mortgagee, however, attested the execution of the deed mortgaging the property a second time, and, being aware of the contents of the deed, kept silence, and thus led the second mortgagee to think that the property was not encumbered, and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was held to be conduct which amounted to constructive fraud on the part of the prior mortgagee and deprived him of his right to priority (1).

THIS was a suit for money charged on immoveable property. The facts of the case and the arguments in special appeal sufficiently appear from the order of the High Court remanding the case under s. 354, Act VIII of 1859.

* Special Appeal, No. 1062 of 1875, against a decree of the Subordinate Judge of Agra, dated the 30th August, 1875, modifying a decree of the Munsif of Jalesar, dated the 29th June, 1875.

(1) See also *Rai Seeta Ram v. Kishun Dass*, H. C. R., N.-W. P., 1868, p. 412, in which case it was held, where a prior mortgagee stood by and allowed the mortgagor to deal with the property as if it were unencumbered, while the second mortgagee, acting in the belief that he was taking a security free from encumbrance, advanced his money upon it at the solicitation of the prior mortgagee, that the prior mortgagee had lost his right to priority by reason of his conduct. See also *MacConnell v. Mayer*, H. C. R., N.-W. P., 1870,

p. 315, in which case it was held, where a decree-holder brought to sale in execution of his decree property on which he held a mortgage without notifying his encumbrance on it, and on being asked by an intending bidder at the time of the sale whether there was any encumbrance on the property, gave an evasive answer which misled the bidder and induced him to purchase the property as unencumbered, that such decree-holder could not subsequently claim as against such bidder to enforce his mortgage.

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Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the appellants.

Mr. *Mahmood*, for the respondents.

The order of the High Court was as follows :

The appellants allege that their brother Mansab Ali having incurred debts, borrowed Rs. 400 from them wherewith to discharge the debts, and to secure the repayment of the loan executed a mortgage of the property which the appellants now claim to bring to sale for its satisfaction. The mortgage-deed in favour of the appellants was duly registered. On the 3rd August, 1870, Mansab Ali having become still more involved in debt, borrowed Rs. 2,000 from Pirthi Singh, and again hypothecated the property. One of the appellants, Intizam Ali, was a witness to the execution of the mortgage. On the 16th February, 1871, Mansab Ali took Rs. 2,600 from Budh Singh to pay off the mortgage due to Pirthi Singh and for other purposes, and hypothecated the property to Budh Singh. The debt due to Pirthi Singh was discharged out of the loan taken from Budh Singh. The appellant Salamat Ali witnessed the execution of the mortgage-deed in favour of Budh Singh. This deed does not contain any statement to the effect that no mortgage subsisted on the property, nor is there any allegation that the mortgagee inquired of any of the appellants whether or not there were any charges on the property. Budh Singh brought a suit on his mortgage-deed and obtained an order for sale. The appellants were not parties to this suit, but they caused the lien they now claim to enforce to be notified at the time of the sale. The property was purchased by the respondents for a sum of Rs. 5,000. It therefore is apparent that, at the time the mortgage was executed in favour of Budh Singh, its value was more than sufficient to discharge that debt as well as the debt due to the appellants.

The respondents pleaded that the appellants are estopped from enforcing their lien because they fraudulently concealed their charge, and they further pleaded that the charge created in the appellants' favour was a merely nominal transaction for the purpose of protecting Mansab Ali's property from his creditors, or that, if *bonâ fide*, the debt had been discharged.

The Court of first instance held the mortgage-deed executed in favour of the appellants to have been a *bond fide* transaction, and disbelieved the witnesses called to prove that the money had been refunded. As to the plea of estoppel the Court found that, regard being had to the value, there could have been no intention on the part of the appellants to deceive the second encumbrancers, inasmuch as it was ample to satisfy both charges, and that the mere attestation of the subsequent encumbrance was not sufficient to create estoppel. It therefore decreed the claim. On appeal the same pleas were urged by the respondents, the then appellants, as they had pleaded in the Court of first instance. The lower appellate Court held that the appellants had purposely and intentionally concealed their prior demands, and that, had they mentioned them, the subsequent creditors would either have abstained from lending their money or would have considered their advantages and disadvantages. The lower appellate Court, without determining the other pleas, reversed the decree of the Court below and dismissed the suit.

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It is contended that there was no sufficient evidence to justify the lower appellate Court in finding that the appellants fraudulently concealed their mortgage, and the mortgagees had been deceived by them, and that at least a distinction should have been made between such of the appellants as did not attest the deed under which the property had been sold and the appellant who attested it.

It is conceded that all that is proved against the appellants Muntaz Ali and Akbar Ali is that, being brothers of the mortgagor and cognisant of his dealings with his property, they remained silent and did not give the mortgagees notice of their lien. In addition it is proved against Intizam Ali that he attested the deed executed in favour of Pirthi Singh, and it is proved against Salammat Ali that he attested the deed under which the property was sold. Are these circumstances sufficient to deprive all or any and which of the appellants of the right to enforce their lien?

Although the plea has not been taken in special appeal, we may express our opinion that the respondents, who now hold the property in virtue of their purchase at auction, are entitled to put forward the same pleas as might have been urged by the mort-

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gagees had the question of priority arisen before the sale. *Although they purchased with a knowledge of the appellants' claim, they also knew that the claim was contested, and the notification of the claim at the sale could not restore to the appellants priority if they had already lost it. Had they or have any of them lost it?*

It is a rule of equity that where a man by his conduct or language wilfully causes another to conceive an erroneous impression and to act upon the impression he has so formed and to alter his position, he cannot afterwards be allowed to claim any benefit for himself by asserting that the facts were contrary to the impression he had produced, and it may be added that a man must be presumed to intend the natural consequences of his conduct or language. If a man stands by and sees another sell property which belongs to him, he is bound to proclaim his title. If he fails to do so and a stranger is induced by his silence to believe he has no title, and under that impression expends his money on the purchase of the property, equity holds the man so standing by, if he fails to explain his silence, guilty of constructive fraud and postpones his title to that of the purchaser. The cases on this point are noted in Story's Equity Jurisprudence, s. 393, and in Fisher on Mortgages, s. 1541. It is, however, of the essence of constructive fraud that the person sought to be charged therewith should be proved to have concurred or co-operated in some deceit or to have been guilty of gross negligence. It is not therefore enough to show merely that a man, knowing that persons are dealing with his property out of his presence, keeps silence—Story's Equity Jurisprudence, s. 394. "A mortgagee need not go out of his way to give notice of his security upon hearing that the mortgagor is dealing with the estate"—Fisher on Mortgages, s. 1541. But if a person who proposes to make an advance on a property informs a mortgagee of his intention in such a manner as to show that he intended to be guided by what he might hear from the mortgagee and the mortgagee remains silent, still more if a direct inquiry is made of the mortgagee and he remains silent, then in either of these cases the mortgagee will be held guilty of constructive fraud. Again, although the mere attestation of the execution of a mortgage-deed by a prior mortgagee is not, as it was at one time held to be, sufficient to create estoppel, because it does not necessarily follow that a witness is aware of the contents of the

deed of which he attests the execution, yet where that knowledge is brought home to him, and there are circumstances to show that he acted dishonestly and disingenuously to the mortgagee, and the mortgagee was in consequence deceived, the prior mortgagee will be deprived of his priority.

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Applying these principles to the case before us we are unable to hold there was any sufficient evidence to justify the lower appellate Court in finding the appellants Mumtaz Ali and Akbar Ali guilty of constructive fraud, and therefore debarred from insisting on their claim. Looking to the value of the property, it may well be doubted whether there was a design on the part of any of the appellants to deceive the mortgagee. However this may be, Mumtaz Ali and Akbar Ali simply remained silent, although cognisant of the fact that their brother was dealing with the mortgaged property elsewhere. Nor does the case seem stronger against Intizam Ali. He, it is true, attested the deed executed in favour of Pirthi Singh, but the sale was not made under that deed, nor was the mortgage executed in favour of Pirthi Singh kept alive and assigned to the subsequent mortgagee. So far as concerns Budh Singh, Intizam Ali simply remained silent. We hold that the facts proved did not justify the lower appellate Court in holding Intizam Ali had concurred or co-operated in any fraud practised on Budh Singh.

Against Salamat Ali there is the circumstance that he attested the execution of the deed of mortgage in favour of Budh Singh, that he was the brother of the mortgagor and in constant intercourse with him, whence it may be inferred he was aware of the contents of the deed he witnessed, and lastly, that possessing this knowledge he kept silent as to the existence of a prior lien in favour of himself and his brothers. Under these circumstances, if Budh Singh was deceived, it would be competent to the Court to find that Salamat Ali wilfully misled Budh Singh and so co-operated and concurred in that deceit, and to hold that, in consequence, his interest in the alleged prior encumbrance must be postponed to that of Budh Singh and those who purchased under Budh Singh's mortgage. (Being of opinion that there had been no sufficient investigation of the issue whether Budh Singh was deceived by Salamat

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Ali's silence, and to enable it to pass final orders in this appeal, the Court remanded the case for the trial of the following issues: (i) Was the mortgage on which the appellants rely executed *bonâ fide* and for good consideration? (ii) If it was so executed, has the debt so created been discharged? (iii) Was Budh Singh ignorant of the mortgage on which the appellants rely, and if he had known of its existence, would he have declined to advance his money on the security of the property?)

The lower appellate Court determined the two first of the issues above mentioned in favour of the appellants, and the third issue in favour of the respondents.

The judgment of the Court (after accepting the findings of the lower appellate Court on the two first issues) was as follows:

We accept the finding that Budh Singh would not have agreed to take a second mortgage of the property had he been aware of the existence of the prior mortgage in favour of the appellants. He was about to advance a large sum on the property of which the bulk was as he knew, and as Salamat Ali must have known, to be applied to extinguish existing encumbrances, and had he been aware of the lien held by the appellants it may reasonably be inferred he would have insisted on its satisfaction out of the monies he had advanced. Each case must of course be governed by its own circumstances, but on the facts found in this case we must hold that Salamat Ali has by his silence lost his right to priority so far as his interest in the mortgage is concerned.

It must also be presumed that the shares of the four brothers in the mortgage-debt were equal. The decree of the lower appellate Court so far as it dismisses the claim in respect of three-fourths of the mortgage-debt and interest is reversed, being the shares of Mumtaz Ali, Intizam Ali, and Akbar Ali, and the decree of the Court of first instance to this extent restored, but the decree of the lower appellate Court so far as it dismisses the claim to one-fourth of the mortgage debt, being the share of Salamat Ali, is affirmed. The appellants will recover three-fourths of their own costs in all Courts from the respondents and pay one-fourth of the respondents' costs. The respondents or either of them are of course at liberty to pay off the three-fourths of the mortgage-debt, interest, and costs, and to prevent a sale.