

1885
June 1.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

GURDIAL MAL (PLAINTIFF) v. JAUHRI MAL AND OTHERS (DEFENDANTS)*.

Mortgage—Agreement, for fresh consideration, between mortgagee and third person for release of property from mortgage—Release not required to be in writing and registered.

The mortgagee of immoveable property under a hypothecation bond, entered into an agreement with one who was not a party to his mortgage, to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property.

Held that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered.

Held also that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein. *Nash v. Armstrong* (1), referred to.

THE plaintiff in this case, Gurdial Mal, sued for the recovery of a sum of money, principal and interest, due on a hypothecation bond executed in his favour by defendants Nos. 1 to 6, by enforcement of lien against the mortgaged property. This property comprised, among other things, a ten biswas share in a village called Etawa, an eight biswas share in a village called Muzaffarpur Kaisho, and a mango grove in the town of Bijnour. The plaintiff alleged that, subsequent to the execution of his bond, the shares and the grove before-mentioned were mortgaged to the defendants Nos. 7 and 8; that in 1873 these defendants paid him the sum of Rs. 700 on account of his bond; that, without his knowledge, they made an indorsement in Persian upon the bond, to the effect that Rs. 700 had been paid in consideration of the release of the share in Muzaffarpur Kaisho and of the grove from the charge held by him thereon; that, in consequence of his ignorance of Persian, he did not, till 1883, become aware of the real character of the indorsement; and that he had made no release of the property as alleged. The allegations of defendants Nos. 1 to 6 are not material to the purposes of this report. The defendant No. 7, Jauhari Mal, alleged that he had purchased the share in Etawa in satisfaction of a lien which was prior to that of the plaintiff; that the share

* First Appeal No. 47 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 26th January, 1884.

(1) 30 L. J., C. P. 286.

in Muzaffarpur Kaisho and the grove in Bijnor were mortgaged to him in 1873, on the condition that he should pay Rs. 700 to the plaintiff in order to exempt such property from the plaintiff's mortgage; that, in consideration of such payment, the said property had been released by the plaintiff; and that the indorsement by which this release had been effected was genuine, and was made by the plaintiff himself. The indorsement was in the following terms:—"Received on account of the release of an eight biswa share in Muzaffarpur Kaisho in pargana Bijnor, and a mango grove in the town of Bijnor, (the amount) through Jauhri Mal, purchaser of the aforesaid property." The defendant No. 8, Per-tab Singh, alleged that he had purchased a share in Muzaffarpur Kaisho at a date prior to that of the plaintiff's bond, and that this share was therefore not subject to the plaintiff's lien.

The Court of first instance (Subordinate Judge of Moradabad) found that the truth of the allegations of the defendant Jauhri Mal was established by the evidence; and accordingly, while decreeing the claim as against the defendants Nos. 1 to 6, exempted from the decree the shares in Etawa and Muzaffarpur Kaisho and the grove in Bijnor.

The plaintiff appealed to the High Court, contending, *inter alia*, that "under the provisions of the Stamp and Registration Acts, the indorsement on the back of the bond, which is the basis of the suit, is invalid, and cannot operate to release any property from the lien created by the bond."

Pandits *Ajudhia Nath* and *Bishambar Nath*, for the appellant.

Babus *Dwarka Nath Banarji* and *Ratan Chandra Banarji*, for the respondents.

STRAIGHT and TYRRELL, JJ.—In this appeal there are only two questions before us. The first of these relates to the village of Etawa. With regard to this village, we concur with the findings of the Subordinate Judge, and approve the views expressed by him. Upon the remaining question, we are first of all of opinion that the evidence satisfactorily proves that Jauhri Mal paid the Rs. 700 to the plaintiff on the 6th March, 1883, upon the faith of the plaintiff's promise that he would release the share of Muzaffarpur Kaisho from the mortgage held by him, and we entirely disbelieve the

1885

GURDIAL
MAL
v.
JAUHRI MAL.

1885

GURDIAL
MAL

v.

JAUHRI MAL.

plaintiff's assertion that, though the deed was all along in his possession, he never discovered the indorsement on it till the 8th February, 1883, a period of about ten years. The case, therefore, so far as the defendants Jauhri Mal and Pertab Singh are concerned, comes to this—that in consideration of the plaintiff's promise to release a particular property from a charge he already held on it, Jauhri Mal paid Rs. 700 to the plaintiff. This was a new contract for a fresh consideration between persons who were not parties to the mortgage, and was not, as between the parties to the mortgage, a release which the law required to be in writing and registered. In short, it was a fresh oral agreement for a distinct and separate consideration *dehors* the original contract. We think that Jauhri Mal might have come into Court as a plaintiff to enforce that agreement, and that it is equally competent for him to plead it in avoidance of the plaintiff's claim to bring Muzaffarpur Kaisho to sale. The principle enunciated in *Nash v. Armstrong* (1) is applicable *a fortiori* to the present case, in which a stranger to the original contract is setting up, as a consideration for money paid by him, a promise of one of the parties not to enforce a particular covenant of such contract.

In this view of the case, it is not necessary for us to decide the objection taken by the learned counsel for Pertab Singh.

The appeal fails, and we dismiss it with costs.

Appeal dismissed.

FULL BENCH.

Before Sir *James Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Field, Mr. Justice Brodhurst, and Mr. Justice Mahmood.*

JAFRI BEGUM (DEFENDANT) v. AMIR MUHAMMAD KHAN (PLAINTIFF).*

Muhammadan Law—Inheritance—Devolution not suspended till payment of deceased ancestor's debts—Decree in respect of deceased Muhammadan's debts passed against him in possession of estate—Decree not binding on other heirs not parties thereto and not in possession, so as to convey their interests to auction-purchaser in execution—Recovery of possession by other heirs contingent on payment of proportionate shares of debt for which decree was passed.

Upon the death of a Muhammadan intestate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such

* First Appeal No. 70 of 1883, from a decree of Pandit Rai Jagat Narain, Subordinate Judge of Farakhabad, dated the 19th March, 1883.

(1) 30 L. J., C. P. 286.

1885
February 10.