

subrogation, which prevents extinguishment of the prior mortgage.

If the case had been decided on the merits by the lower appellate Court, the result of my opinion would be to uphold the decree of the lower appellate Court, directing sale in enforcement of the plaintiff's mortgage of 1874, but to render such sale subject to the mortgage of 1866, to the benefits of which the appellants are entitled. I do not think the case can be decided finally here, because the Subordinate Judge had before him a contention as to the genuineness of the mortgage of 1866, and other pleas touching the merits, which he declined to consider, on account of the erroneous view he took relative to the extinguishment of the mortgage of 1866. Those were pleas which can be disposed of only by the Court of first appeal, and I would therefore, with reference to the observations which I have made, decree this appeal, and, setting aside the decree of the lower appellate Court, remanded the case to that Court for disposal. Costs to abide the result.

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SIRBADH RAI
v.
RAGHUNATH
PRASAD.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

JANKI PRASAD (DEFENDANT) v. SRI MATRA MAUTANGUI DEBIA
(PLAINTIFF) *

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March 19.

Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of purchaser to benefits of first mortgage—Right of second mortgagee to bring to sale mortgaged property—Registered and unregistered instruments—Optional and compulsory registration—Act. III of 1877 (Registration Act), s. 50.

At a sale in execution of a decree, *J* purchased certain property which was at that time subject to two mortgages, the first under an unregistered deed in favour of *M* and dated in 1872, and the second under a registered deed in favour of *L* and dated in 1880. The registration of the latter both deeds was optional, the former under Act VIII of 1871, and the latter under Act III of 1877. *J* subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. *M* then brought a suit to recover the money due to him under the mortgage-deed of 1872 by sale of the mortgaged property.

Held by OLDFIELD, J., that applying the rule laid down by the Privy Council in *Gokuldas Gopaldas v. Puranmal Premsukhdas* (1), *J*, having paid off the mortgage under the registered deed of 1880, should have the benefits of that mortgage,

* Second Appeal No. 1665 of 1893, from a decree of Maulvi Muhammad Samiullah Khan, Subordinate Judge of Aligarh, dated the 14th August, 1883, modifying a decree of Lala Mata Prasad, Munsif of Aligarh, dated the 7th April, 1883.

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and was entitled to set up the deed which he held against the unregistered deed of 1872, against which, under s. 50 of the Registration Act (III of 1877) it would take effect, as regards the property comprised in it. *Lachman Das v. Dip Chand* (1) referred to.

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Per MAHMOOD, J., that the word "unregistered" in s. 50 of the Registration Act, must, in reference to the circumstances of the present case, be read as "not registered under Act VIII of 1871", and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage deed of 1872. *Lachman Das v. Dip Chand* (1) and *Sri Ram v. Bhagirath Lal* (2) distinguished.

Also *per MAHMOOD, J.*, that the position of *J.*, by reason of his having paid off the registered mortgage of 1880, could at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff was suing; that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which *J.* had acquired by reason of his having paid off the registered mortgage of 1880. *Sirbadh Rai v. Raghunath Prasad* (3) and *Gokaldas Gopaldas v. Puranmal Premsukhdas* (4) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi *Sukh Ram* and Babu *Harkishen Das*, for the appellant (defendant).

Babu *Jogindro Nath Chaudhri*, for the respondent (plaintiff).

OLDFIELD, J.—The plaintiff-respondent holds a deed of mortgage, unregistered, dated the 15th February, 1872, executed in his favour by Ungan and others, mortgaging the property in suit.

The mortgagors executed another deed of mortgage, dated the 18th December, 1880, which was registered, in respect of the same property, in favour of Sundar Lal; and they also executed a third unregistered deed of mortgage in respect of the same property, on the 26th July, 1881, in favour of Sundar Lal. Sundar Lal obtained a decree on the 6th February, 1882, upon the last deed, for sale of the property mortgaged, had it attached, and sold in execution, and it was purchased by the defendant Janki Prasad, appellant, before us. Janki Prasad subsequently satisfied

(1) I. L. R., 2 All. 851.
(2) I. L. R., 4 All. 227.
(3) *Supra*. p. 568.

(4) I. L. R., 10 Calc. 1035; L. R.,
11 Ind. Ap. 126.

the mortgage under the registered deed of the 18th December, 1880, which was delivered to him. The plaintiff-respondent has brought this suit to recover the money due to him on the mortgage-deed, dated the 15th February, 1872, by sale of the mortgaged property. He made Ungau the mortgagor, and Janki Prasad the purchaser of the property, defendants in the suit. We are only concerned in this appeal with the claim against Janki Prasad. The material plea that Janki Prasad set up was, that he had satisfied the mortgage-debt under the registered deed dated the 18th December, 1880, and he contended that this document, being registered, will take effect as regards the property comprised in it against the unregistered deed of the plaintiff, and in consequence the latter cannot bring the property to sale in satisfaction of his claim under his deed of mortgage.

The Court of first instance allowed the plea and dismissed the suit. The Subordinate Judge has disallowed the plea, and given a decree for the sale of the property. Janki Prasad, defendant, has appealed, and the grounds of appeal are, in my opinion, valid. It is now settled law by the decision of the Privy Council in *Gokaldas, Gopaldas v. Puranmal Preamsukhdas* (1), that when a person purchases the equity of redemption and holds a prior mortgage of his own, or pays off a mortgage on the property, there is in neither case of necessity an extinguishment of the mortgage, and, if he so intends, it will be kept alive for his benefit, and in the absence of express evidence, such intention will be assumed if it be for his interest to keep it alive. Applying the rule to the case before us, the appellant will have the benefit of the mortgage under the registered deed dated the 18th December, 1880, and he is entitled to set up the deed which he holds against the unregistered deed of the plaintiff, and it will, under the provisions of s. 50, Registration Act, take effect against the plaintiff's deed as regards the property comprised in it—*Lachman Das v. Dip Chand* (2)—and the plaintiff's claim to bring such property to sale to satisfy his mortgage-debt must be disallowed. I would modify the decree of the Subordinate Judge and affirm that of the Court of first instance, which dismissed the suit, with all costs.

(1) I. L. R., 10 Calc. 1035 ; L. R., 11 Ind. Ap. 126.

(2) I. L. R., 2 All. 851.

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MAHMOOD, J.—The facts of the case, so far as they are necessary for the disposal of this appeal, are, that the property to which the suit relates was hypothecated to the plaintiff under an unregistered deed dated the 15th February, 1872. The same property was, for the second time, hypothecated to one Sundar Lal, under a registered deed dated the 18th December, 1880, and it was hypothecated for the third time to the said Sundar Lal under an unregistered deed of the 26th July, 1881.

It appears that Sundar Lal sued on the bond of the 26th July, 1881, and obtained a decree on the 6th February, 1882, and, in execution of that decree, the defendant purchased that property at the auction-sale, at which Sundar Lal's mortgage of the 18th December, 1880, was duly notified. The defendant subsequently paid off that mortgage and is now in possession. The present suit was instituted by the plaintiff for recovery of the money due on the bond of the 15th February, 1872, by enforcement of lien against the hypothecated property. The Munsif dismissed the suit on the ground that the defendant-purchaser, having paid off the registered mortgage of 1880, was entitled to the benefits of that mortgage, and that the deed, being registered, took (under s. 50 of Act III of 1877) priority over the plaintiff's deed of the 15th February, 1872, and the property could not therefore be sold in enforcement of the plaintiff's incumbrance. On appeal by the plaintiff, the lower appellate Court held that the defendant, having purchased the property in enforcement of the unregistered mortgage of the 26th July, 1881, purchased it subject to the plaintiff's unregistered prior incumbrance of the 15th February, 1872, and that the fact of his having paid off Sundar Lal's registered mortgage of the 18th December, 1880, could not save the property from being sold in enforcement of the plaintiff's lien. The present second appeal has been preferred by the defendant, and the argument addressed to us on his behalf raises two questions for determination.

First.—Did Sundar Lal's registered mortgage of the 18th December, 1880, possess priority over the plaintiff's unregistered mortgage of the 15th February, 1872, on which it is based?

Secondly.—What is the effect of the defendant's paying off Sundar Lal's mortgage upon the relief prayed for in the suit?

In considering the first question, it is important to notice that the plaintiff's unregistered mortgage of 1872 was executed when the registration law was regulated by Act VIII of 1871, under which the registration of the deed was optional, the amount of the mortgage being less than Rs. 100. For similar reasons Sundar Lal's registered mortgage of the 18th December, 1880, did not compulsorily require registration under the present Registration Act (III of 1877). The registration of both deeds being thus optional, and one of them being registered, the question arises, whether the registered deed has priority notwithstanding the fact that the plaintiff's mortgage is anterior in date. In connection with this question, we have been referred to two Full Bench rulings of this Court—*Lachman Das v. Dip Chand* (1) and *Sri Ram v. Bhagirath Lal* (2)—neither of which appears to me to be on all fours with the present case. In the case of *Lachman Das* the contention was between a document *optionally* registered under Act VIII of 1871 and a document *compulsorily* registered under Act III of 1877 ; whilst in the case of *Sri Ram* both the contending documents were executed before the passing of the present Registration Act III of 1877. Here the contention lies between two *optionally* registrable documents, one of which was optionally registrable under Act VIII of 1871, which was then in force, and the other was registered under Act III of 1877, and the question therefore rests upon the interpretation of s. 50 of the latter enactment. Reading that section with the last part of the *Explanation* attached to it, it is obvious that the word "*unregistered*," which occurs in the body of the section, must, with reference to the exigencies of the present case, be read as "*not registered under Act VIII of 1871*;" and reading the section in this manner, I have no doubt that Sundar Lal's registered mortgage-deed of the 18th December, 1880, will take effect in preference to the plaintiff's unregistered mortgage of the 15th February, 1872, that is, will have priority.

Upon the second question in the case, I am of opinion that the defendant, as purchaser of the equity of redemption, who has paid off the registered mortgage of 1880, is entitled to the benefits of that mortgage, and can use them as a shield against any

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such claim by the plaintiff as would militate against the rights secured by that mortgage. But whether those benefits are such as go beyond the terms and incidents of the mortgage itself, and entitle the defendant to resist the plaintiff's suit to bring the property to sale in enforcement of his mortgage, is another question. The fact of the mortgage of 1880 being registered can only give it priority over the plaintiff's mortgage, and the benefits of priority are available to the defendant who has satisfied that mortgage. But does such priority place the defendant's rights *qua* purchaser of the equity of redemption on a higher footing than they would otherwise have been? In other words, is the defendant entitled to prevent the property from being sold in enforcement of the plaintiff's mortgage? A similar question arose in the case of *Sirbadh Rai v. Raghunath Prasad* (1) in which I have explained my reasons for dissenting from the affirmative answer, and have endeavoured to show that the ruling of the Privy Council in the case of *Gokaldas Gopaldas* (2) does not go the length of supplying such an answer.

Taking the same view in the present case, I hold that the position of the defendant, by reason of his having paid off the registered mortgage of 1880, can at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff is suing, that such priority cannot enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage, and that, as a consequence, the sale of the property in enforcement of the plaintiff's incumbrance of 1872 should be allowed to take place, but subject to the rights of priority which the defendant-appellant has acquired by reason of his paying off the registered mortgage of 1880. I would therefore partially decree the appeal, and modify the decree of the lower appellate Court to the extent above indicated, and under the circumstances would make no order as to costs.

(1) *Supra*, p.

(2) I. L. R., 10 Calc. 1035; L. R., 11 Ind. Ap. 126.