

1885  
March 12.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

SIRBADH RAI AND OTHERS (DEFENDANTS) v. BAGHUNATHIPRASAD  
(PLAINTIFF).\*

*Mortgage—First and second mortgage—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.*

The purchasers of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage.

Held that the prior mortgage was not extinguished, and that the purchaser of the equity of redemption had, by paying off that mortgage, acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas v. Parannal Prensukhdas* (1) followed.

Per OLDFIELD, J., (MAHMOOD J. dissenting), that the prior mortgage afforded a defence against the claim of the second mortgagee seeking to bring the property to sale. *Gokaldas Gopaldas v. Parannal Prensukhdas* (1) followed.

Per MAHMOOD, J., that the ruling of the Privy Council in *Gokaldas Gopaldas v. Parannal Prensukhdas* (1) did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes, but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession.

Also per MAHMOOD, J., that although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security, and, as persons entitled to the benefits of the prior mortgage, they were at best in the position of assignees of that mortgage; that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage, so long as such enforcement does not clash with the rights secured by the prior mortgage; and that therefore the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing, though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgagee whose rights they had acquired by subrogation. *Gangy Prasad v. Salik Prasad* (2), *Ramu Naikan v. Subbaraya Mudali* (3), and *Mulchand Kuber v. Lallu Trikum* (4) referred to.

\* Second Appeal No. 1460 of 1883, from a decree of Bahu Mrittonjoy Munsif Subordinate Judge of Ghazipur, dated the 28th August, 1883, modifying a decree of Babu Rajnath Prasad, Munsif of Balia, dated the 27th March, 1883.

(1) I. L. R., 10 Cal. 1035; L. R., (3) 7 Mad. H. C. Rep. 229.

11 Ind. Ap. 126.

(2) I. L. R., 3 All. 682.

(4) I. L. R., 3 Bom. 404.

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

Munshi *Sukh Ram*, for the appellants (defendants).

Lala *Lalta Prasad*, for the respondent (plaintiff).

OLDFIELD, J.—It appears that Jarawan Singh and Daulat Kuar mortgaged three bighas of land, in May, 1866, for Rs. 401 to one Lachman Rai, and subsequently, in June, 1874, mortgaged their four annas share, which included the said land, to plaintiff.

In June, 1878, the appellant bought the equity of redemption and paid off the prior mortgage out of the purchase-money. The plaintiff-respondent seeks in this suit to bring the said land to sale in satisfaction of his subsequent mortgage. The first Court disallowed this portion of the claim, but it was decreed by the Subordinate Judge, and the appeal, which takes exception to the decree on this point, must prevail. It has been established by rulings of this Court that, where a purchaser of the equity of redemption has a prior mortgage of his own, or gets in a prior mortgage, the prior mortgage is not necessarily extinguished, but will be presumed to exist for his benefit against subsequent mortgagees: and the law to that effect has now been settled by the recent decision of the Privy Council in *Gokuldas Gopaldas v. Puranmal Preamsukhdas* (1), a case somewhat similar to the one before us, where one purchasing the equity of redemption had paid off a prior mortgage on certain house property, and it was held that the prior mortgage had not become extinguished, and he had a good defence to the suit for possession of the property brought by a subsequent mortgagee.

Their Lordships remark that in these cases “the obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it, and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention shall be ascribed to him? The ordinary rule is, that a man having the right to act in either of two ways, shall be assumed to have acted according to his interest.”

So in the case before us, I hold that the prior mortgage was not extinguished, and that it affords a defence against the claim

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

1885

SIRBAMI RAI  
v.  
RAGHUNATH  
PRASAD.

seeking to bring the property to sale. I would modify the decree of the lower appellate Court, and restore that of the first Court with costs.

MAHMOOD, J.—The facts of the case necessary for the disposal of this appeal seem to be these :—

The land in dispute in this appeal, namely, plot No 111, was originally mortgaged, in 1866, to one Lachman. Subsequently, on the 9th June, 1874, the mortgagors executed another mortgage of a four annas share in the village, including plot No. 111, to the present plaintiff, and, on the 29th June, 1878, the mortgagors executed a deed of sale in respect of plot No. 111 in favour of the defendants-appellants for the purpose of raising money to pay off Lachman's mortgage of 1866 and other debts due by them to various creditors.

The object of this suit was to bring the four annas share to sale by enforcement of the lien created by the mortgage deed of the 9th June, 1874. The Court of first instance decreed the claim, but exempted the plot No. 111, on the ground that it had been purchased by the defendants-appellants by payment of consideration-money, which paid off Lachman's mortgage of 1866, which had priority over the plaintiff's mortgage of 1874.

The plaintiff appealed to the lower appellate Court, so far as the exemption of plot No. 111 was concerned, and that Court, without going into the merits of the case, modified the decree of the lower Court, by decreeing enforcement of lien against plot No. 111 also, on the ground that, even if the mortgage of 1866 had been satisfied by the purchasers of the plot, they could not claim the benefit of the priority of the mortgage, because the mortgage must be taken to have been extinguished for all purposes, and could not therefore be pleaded in defence of the plaintiff's suit, which was based upon the mortgage of the 9th June, 1874. In other words, the lower appellate Court held that the defendants-appellants purchased the land (on the 29th June, 1878) subject to the plaintiff's mortgage, and the land was therefore liable to be sold in enforcement of the plaintiff's lien, regardless of the fact that they had paid off Lachman's mortgage of 1866. The present appeal has been preferred by the defendants, pur-

1885

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 SIRBADH RAT  
 v.  
 RAGHUNATH  
 PRASAD.

chasers of plot No. 111, under the sale-deed of the 29th June, 1878. The facts of the case thus stated seem to me to raise two distinct questions of law. *First*, whether the discharge by the appellants of Lachman's mortgage of 1866 entitles them to the benefits of that mortgage, notwithstanding the purchase by them of land No. 111, to which that mortgage related; and *secondly*, whether the appellants can resist the plaintiff-respondent's claim to enforce his mortgage of June, 1874, by bringing the land to sale.

So far as the first question is concerned, I entirely concur with my brother Oldfield in the view that the appellants, as purchasers of the equity of redemption, have, by paying off Lachman's prior mortgage, acquired an equitable right to the benefits of that mortgage, which they can use against the plaintiff's mortgage. That in such cases the prior mortgage is not extinguished, but subsists in favour of the person paying off the mortgage, has been explained by Mr. Justice Story in s. 1035*c* of his celebrated work on Equity Jurisprudence (ed. 1877).

The rule was first enunciated in India by Mr. Justice Holloway in *Ramu Naikan v. Subbaraya Mudali* (1) in which that learned Judge disapproved the doctrine laid down by the English Courts in *Toulmin v. Steere* (2) which had some time been followed by the Bombay Courts—*Itcharam Dayaram v. Raiji Jaga* (3),—till a Full Bench of that Court in *Mulchand Kuber v. Lallu Trikam* (4) adopted the view of the Madras High Court. The rule was again followed in *Shantapa v. Balapa* (5) by a Division Bench of the same Court, and by this Court in *Gaya Prasad v. Salik Prasad* (6) and in *Ali Hasan v. Dhirja* (7). The doctrine has now been settled by the recent ruling of the Privy Council in *Gokaldas Gopaldas v. Puranmul Rremsukhdas* (8) in which the English cases on the subject were considered. The rule there laid down fully supports the view taken by my brother Oldfield, and indeed s 101 of the Transfer of Property Act (IV of 1882) and some other sections of that enactment appear to me to be based

(1) 7 Mad. H. C. Rep. 229.

(2) 3 Mer 210.

(3) 11 Bom. H. C. Rep. 41.

(4) 1. L. R., 6 Bom. 404.

(5) 1. L. R., 6 Bom. 561.

(6) 1. L. R., 3 All. 682.

(7) 1. L. R., 4 All. 518.

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

1885

SIRBADII RAI  
v.  
RAGHUNATH  
PRASAD.

upon the same principle of equity; I have therefore no doubt that the appellants in this case are entitled to the benefits of the priority of Lachman's mortgage of 1866, which they have paid off.

In regard to the second question, however, I confess, with regret, that I have difficulty in understanding the Privy Council ruling in the extensive sense in which my brother Oldfield has interpreted it. The ruling does not seem to me to go beyond laying the proposition in which I have already expressed my concurrence, namely, that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes; but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession. The rule appears to me to be a necessary consequence of the doctrine of subrogation, and it is obvious that to allow the possession of a prior usufructuary mortgagee to be ousted by a person holding a subsequent usufructuary mortgage, would be to violate the fundamental principle of the priorities of lien. In the case before the Privy Council, the purchaser of the equity of redemption had paid off a prior usufructuary mortgage, which essentially carried with it the right to possession of the mortgaged property as the means of liquidating the mortgage-debt, and the object of the puisne usufructuary mortgagee's suit was to oust such possession by virtue of his mortgage. The suit, if decreed, would have operated in defeasance of an essential incident of the prior mortgage. It is clear that when the essential incidents of a prior incumbrance clash with the incidents of a subsequent incumbrance, the latter must give way, and the former must prevail. The principle is well expressed in the language of s. 48 of the Transfer of Property Act, which lays down that "where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created." This seems to me to be the essence of the rule of priority upon

.1885

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 SIRBADH RAI  
 v.  
 RAGHUNATH  
 PRASAD.

which the Lords of the Privy Council seem to have acted by applying the doctrine of subrogation to the case, the effect of which I am considering, and I do not understand their Lordships' judgment to have laid down any rule which goes beyond the limits of this proposition.

Such being my interpretation of the ruling of the Privy Council in the case of *Gokaldas Gopaldas* (1), I cannot help feeling that the present case has a different aspect. The appellants, by paying off Lachman's prior mortgage of 1866, are no doubt entitled to claim the benefits of that mortgage, but they cannot, in my opinion, be understood to have acquired rights greater than those which Lachman himself possessed. It seems to me that the appellants possess two distinct capacities, *first* as holders of the equity of redemption, and, *secondly*, as persons entitled to the benefits of Lachman's mortgage of 1866. It is clear that in the former capacity they could not resist the suit which aims at enforcing a valid security, and in the latter capacity, the payment of the mortgage of 1866 can at best place them in the position of assignees of that mortgage (*vide* last sentence in *Story's Equity Jurisprudence*, s. 1035 c.)

But such position will not, as I understand the law, enable them to prevent sale of the property in enforcement of the plaintiff's mortgage of 1874, because such sale would not disturb or clash with the rights under the mortgage of 1866, which they have acquired by subrogation, and in their capacity, as *such*, the exercise of the plaintiff's rights cannot affect them. Nor can I hold that the union of the latter capacity with the former can in itself confer upon them rights higher than those which the mortgage they have paid off created. To hold the contrary view seems to me to amount to the proposition that the purchaser of the equity of redemption and the first mortgagee could, by a transaction entered into in *the absence of the intermediate incumbrancer* and irrespective of his interests, place him in a worse position than before. Such a doctrine would be analogous in principle to the rule of tacking, which the law of mortgage in this country, so far as I am aware, never recognized, and which has now been expressly negatived by s. 80 of the Transfer of Property Act.

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

1885

SIRBADI RAI  
v.  
RAGHUNATH  
PRASAD.

The matter, therefore, resolves itself into the question, whether the holders of the rights of mortgage of 1866 could prohibit the enforcement of the mortgage of 1874 ; in other words, can a prior mortgagee prevent the sale of the equity of redemption in enforcement of a subsequent security ?

It seems to me that, notwithstanding the mortgage, the mortgagor or the holder of the equity of redemption can alienate his rights by private sale, and it follows that he can do so by hypothecation. Such sale or hypothecation would, of course, be subject to the prior mortgage, and could in no manner disturb the priority of lien possessed by the prior incumbrancer or militate against his interests. So long as there can be no conflict between the rights created by the prior and the puisne incumbrances, it appears to me that property subject to two or more incumbrances can be sold in enforcement of any one of them, and the purchaser in such sale would acquire such right as the position of the incumbrance with reference to the rule of priority could convey. Such seems to me to be the effect of the unreported ruling of this Court (S. A. No. 159 of 1876), to which my brother Oldfield was a party. I think I may safely say that such was the law, and the uniform course of decision, before the passing of the Transfer of Property Act ; and I have not been able to find any provision in that Act which lays down the contrary rule. S. 74 of the Act enunciates the rule that a subsequent mortgagee possesses the right to pay off a prior mortgage ; but such provision cannot be understood to confer upon the prior incumbrancer the power of prohibiting either the mortgagor from dealing with the equity of redemption, or the puisne incumbrancer from enforcing his security, subject, of course, to the rights created by the prior incumbrance. Indeed, s 96 of the Act distinctly contemplates enforcement of puisne incumbrance without paying off the prior incumbrances, for it speaks of the sale of property subject to prior mortgage. Such a sale in enforcement of a puisne incumbrance cannot affect the prior mortgage, and no such conflict of rights can take place as in the case before the Privy Council, where both the contending mortgages included the right of possession, which of course could not be simultaneously enjoyed by both the mortgagees. It seems to me that any other view of the law would necessarily involve

1885

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 SIRBADI RAI  
 v.  
 RAGHUNATH  
 PRASAD.

the proposition that the only manner in which a puisne incumbrancer by hypothecation can enforce his security, is to pay off the prior mortgage first, and then to bring the property to sale. It is easily conceivable that such a rule would operate as a great hardship in cases where the value of the prior security is enormously larger than the amount of the puisne incumbrance; whilst in cases where the amount due on the prior mortgage does not become payable till long after the due date of the subsequent mortgage, the puisne incumbrancer would be obliged to wait for his money till the prior mortgage became redeemable. I find much difficulty in holding that the law contemplates such contingencies, and I am of opinion that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security, so long as such enforcement does not clash with the rights secured by the prior mortgage.

Under this view, the appellants as purchasers of the equity of redemption, hold that right, subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the mortgage of 1866 does not place *the equity of redemption* on a better footing, though it entitles them to the benefits of that mortgage, secured to them in the same manner as to the original mortgagee Lachman, whose rights they have acquired by subrogation. In arriving at this view, I have had to consider whether the case of *Gaya Prasad v. Salik Prasad* (1) is an authority which binds me to adopt a contrary opinion. Having carefully examined the case, I find that it was not a Full Bench ruling of this Court, but only a reference under s. 575 of the Civil Procedure Code, arising out of a difference of opinion between the learned Judges of the Division Bench (Pearson and Oldfield, JJ.). The case was then heard by Stuart, C. J., and Straight, J., in the absence of the learned Judges who had referred the case,—a procedure which, according to the view expressed by a Bench of three Judges of this Court in the case of *The Rohilkhand and Kumaon Bank v. Row* (2), was erroneous. But putting aside this consideration, I find that out of the four judgments that are reported in that case, the judgments of my brothers Oldfield and Straight bear upon the question which I am now considering, whilst the judgment of

(1) I. L. R., 3 All. 682, (2) I. L. R., 6 All. 463.



1885

SIRBADI RAY  
v.  
RAGHUNATH  
PRASAD.

Pearson, J., proceeds upon a totally different ground, and the judgment of Stuart, C. J., is silent upon the point. Under these circumstances, I do not feel myself bound by that ruling upon the point immediately before me, namely, whether the purchaser of equity of redemption, who pays off a prior mortgage, can, by reason of acquiring the benefits of that mortgage, prevent the property from being brought to sale in enforcement of a mortgage which is anterior to the purchase, but subsequent to the mortgage paid off. Before leaving this question, however, I must refer again to some of the cases which I have already cited. The report of the case of *Ram & Naikan* (1) is not very clear upon this point, but I may take it, that it laid down the rule "that a subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the first mortgage." This is the *dictum* of Deruburg, cited and adopted by Mr. Justice Holloway in that case; and the effect of the last part of Mr. Justice West's judgment in the case of *Mulchand Kuber* (2) seems to be the same. With nearly the whole of that judgment I fully concur, and I would not willingly dissent from the conclusion of such eminent Judges, even upon the point now under consideration, were it possible for me to hold that the right of a prior incumbrancer enables him to suspend the enforcement of the puisne incumbrance by hypothecation, and that redemption of the former is a condition precedent to the enforcement of the latter; and so long as I cannot hold this, I find myself unable to hold that the doctrine of subrogation can enable the party who benefits by it to hold rights which the prior incumbrancer to whom he is subrogated himself never held. I have carefully studied, and, I may say with great advantage, the judgments of Mr. Justice Holloway and Mr. Justice West, both of whom I esteem as eminent Judges and great jurists, but (I say this with profound respect) neither of those judgments contain any exposition of the law upon the exact point on which I have ventured to differ from them, and no other authorities have been cited which sufficiently satisfy me to arrive at any conclusion other than that at which I have arrived. In all the cases to which I have been referred, the exact point seems to have been assumed or taken for granted as a necessary corollary to the doctrine of

(1) 7 Mad. II. C. Rep., 229. (2) 11 Bom. H. C. Rep., 41.

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.

1885

SIRBADH RAI  
v.  
RAGHUNATH  
PRASAD.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

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

1885

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.

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