

1906
July 10.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Knox.

SHYAM LAL (PLAINTIFF) v. BASHIR-UD-DIN AND OTHERS
(DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 89—Civil Procedure Code, section 310A—Mortgage—Order for sale—Discharge by third party.

Where a mortgage debt, for the payment of which a sale has been ordered, is satisfied by a third party, who obtains a security for the advance made by him, such security is not extinguished by section 89 of the Transfer of Property Act, and the incumbrance in respect of which the sale was ordered enures for the benefit of the party making the payment.

Quarre, whether section 310A is applicable to a sale carried out under the provisions of section 89 of the Transfer of Property Act, *Bibijan Bibi v. Sachi Bewah* (1), *Vanmikalinga Mudali v. Chidambara Chetty* (2) and *Tufail Fatma v. Bitola* (3) referred to.

THE facts are fully stated in the judgment of the Court.

Babu *Sital Prasad Ghosh* and Maulvi *Muhammad Zahur*,
for the appellants.

Messrs. *Karamat Husain* and *Muhammad Ishaq Khan*,
for the respondents.

STANLEY, C.J., and KNOX, J.—The facts of this case, so far as they are material for the purposes of our judgment, are as follows:—On the 28th of February, 1893, the defendants Bashir-ud-din and Wazir-ud-din executed a mortgage of two houses in Budaun in favour of one Piare Lal, subject to redemption on payment of a sum of Rs. 298-14-0, and interest. Later, on the 23rd of January 1895, the same defendants mortgaged one of the two houses in favour of one Chimman Lal, now deceased, who is represented by his son, the defendant No. 3. On the 16th of March 1899, Piare Lal instituted a suit and obtained a decree for sale of the mortgaged property, but did not in that suit implead Chimman Lal. On the 12th of February, 1900, the two houses were sold, but before the sale was confirmed the plaintiff advanced to the defendants 1 and 2 sufficient money to satisfy

* Second Appeal No. 243 of 1905, from a decree of Bibu Nihala Chandra, Subordinate Judge of Shahjahanpur, dated the 23rd of January, 1905, confirming the decree of Maulvi Syed Hidayat Ali, Munsif of East Budaun, dated the 29th of August, 1904.

(1) (1904) I. L. R., 31 Cal., 868. (2) (1905) I. L. R., 29 Mad., 37.
(3) (1904) I. L. R., 27 All., 400.

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the debt of Piare Lal and that debt was paid and the sale was set aside by the Court. On the 7th of March, 1900, the plaintiff obtained a mortgage for the amount so advanced together with interest. In setting aside the sale, the Court appears to have acted under the provisions of section 310(A) of the Code of Civil Procedure. The plaintiff instituted the suit out of which this appeal has arisen on the 27th of July, 1904, for the recovery of the moneys so advanced by him by sale of the mortgaged property. The defendant, Ram Charan Lal, who is the son of Chimman Lal, set up the defence that the mortgage of the 23rd of January 1895, to the benefit of which he is now entitled, has priority over the mortgage executed in favour of the plaintiff, and that the plaintiff is not entitled to have the house, which is comprised in his mortgage, sold without payment of the amount due under it. So far as this appeal is concerned, these are the only facts which it is necessary to state.

Both the lower Courts dismissed the plaintiff's claim holding that under section 89 of the Transfer of Property Act, when the order absolute for sale was passed, the right of redemption of the mortgagor is lost and the security is extinguished. From these decisions this appeal has been preferred.

Mr. *Ishaq Khan*, on behalf of the respondents, relies upon the words in section 89 of the Transfer of Property Act, which declare that if the payment directed by the Court is not made and an order for sale is passed then "the defendant's right to redeem and the security shall both be extinguished." His argument is that the order absolute for sale extinguished the security and that the decree-holder and the judgment-debtors thereafter occupied the position merely of parties to a simple money decree, and consequently the payment made by the plaintiff could not operate to revive the mortgage, or give any right of lien in respect of it to the plaintiff. On the part of the plaintiff it was contended that the order for sale passed under section 89 of itself did not extinguish the security and that the sale having been set aside the mortgage continued in full force.

Whether section 310A of the Code is applicable to a sale carried out under the Transfer of Property Act, it is not necessary to determine. The sale was, as a matter of fact, set aside by the

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Court, whether rightly or wrongly, without objection by any party. All the proceedings including the order for sale upon payment of the mortgage debt became abortive. It is not easy to say what was in the contemplation of the framers of the Transfer of Property Act in introducing at the end of section 89 the words to which we have referred, but we are not disposed to hold that these words have the meaning attributed to them by the learned counsel for the respondents. We think that the view expressed by a Full Bench of the Calcutta High Court in the case of *Bibijan Bibi v. Sachi Bewah* (1) in regard to this question is correct. In that case the learned Chief Justice, Sir Francis Maclean, and Brett, Mitra, Geidt and Woodroffe, JJ., held that the concluding words of section 89 relate to the actual sale and distribution of the proceeds and not merely to the passing of the order absolute for sale, and that a mortgagor, judgment-debtor, is entitled to stop the sale of mortgaged property in execution of the mortgage decree by payment of the debt before the sale actually takes place, although an order absolute for sale may have already been passed. The same view was taken by a Bench of the Madras High Court in the case of *Vanmikalinga Mudali v. Chidambara Chetty* (2). The facts of that case are on all fours with those of the case before us. It was held by Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Boddam, J., that when money is advanced by a third party on the security of property which had been actually sold under an order absolute for sale to enable the judgment-debtor to set aside the sale under section 310A of the Code, the incumbrance in respect of which the sale was ordered enured to the benefit of the party making the payment.

We agree in this ruling. Where a mortgage debt, for the payment of which a sale has been ordered, has been satisfied by a third party, on obtaining a security for the advance made by him, we see no good ground for holding that the order for sale, passed at the instance of the creditor whose debt has been satisfied, which has become abortive, should be regarded as extinguishing the security. The proceedings for a sale having come to nothing, the order for sale also seems to us to fall to the ground and may

(1) (1904) I. L. R., 31 Cal., 863. (2) (1905) I. L. R., 29 Mad., 37.

be treated as if it had never been passed. For these reasons the decisions of the Courts below are, in our opinion, erroneous.

We may mention that in the case of *Tufail Fatma v. Bitola* (1) it was held by our brothers Burkitt and Aikman that where a decree for sale and an order absolute for sale had been passed against a mortgagor and the mortgagor then borrowed money on a mortgage of several villages, including villages previously mortgaged and applied a portion of the money so obtained in satisfying the previous decree for sale, the subsequent mortgagee was entitled to bring a suit for sale of the villages which were the subject of the previous mortgage and decree. It remains then to consider to what decree the plaintiff is entitled. The proper form of decree we think in this case is to direct that in default of payment within three months from this date by the defendants respondents of the amount due to the plaintiff on foot of the mortgage of the 28th of February, 1893, and costs, so much of the property mortgaged to him as is not comprised in the mortgage of the 23rd of January, 1895, shall be sold and the proceeds applied in payment of what is due to the plaintiff on foot of the mortgage of the 28th of February, 1893. If the amount so due to the plaintiff is not fully discharged thereby, the remainder of the mortgaged property shall be sold and the proceeds applied in the first instance towards the discharge of the mortgage of the 28th of February, 1893, and the surplus, if any, in discharge of the mortgage of the 23rd of January, 1895, as also the costs of the defendant Ram Charan Lal throughout, and if any surplus remain it shall be applied, so far as may be necessary, in paying off the remainder of the plaintiff's claim under his mortgage of the 7th March, 1900. The decrees of the lower Courts are modified accordingly. The respondents must pay the appellant's costs of this appeal.

Decree modified.

(1) (1904) I. L. R., 27 All., 400.

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