

I would allow this appeal, set aside the order of the Court below and make an order of adjudication under section 16 of the Insolvency Act against both the appellants. I would give the appellants their costs in this Court.

KARAMAT HUSAIN J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the Court below is set aside with costs and the appellants are adjudicated insolvents under section 16 of the Insolvency Act.

Appeal allowed. Order set aside.

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

BRUJ LAL SINGH AND ANOTHER (PLAINTIFFS) v. BHAWANI SINGH
AND OTHERS (DEFENDANTS).*

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June 6.

Mortgage—Redemption—Clog on the equity of redemption—Two mortgages—Covenant to pay the second mortgage before the first—Consolidation.

Under a covenant contained in a mortgage of the year 1867 the mortgagees took possession of the mortgaged property. Subsequently the mortgagors took a further advance from the mortgagees and gave them a second mortgage on the same property in which they covenanted that they would pay off the amount due on the second mortgage before redeeming the first. *Held*, on suit by the mortgagors to redeem the mortgage of 1867, that this was an admissible covenant and not a clog on the equity of redemption. *Bhartu* *vs.* *Dalip* (1) distinguished. *Muhammad Abdul Hamid* *v.* *Jairaj Mal* (2) referred to.

In second appeal the plaintiffs mortgagors were allowed to amend their plaint so as to include a prayer for redemption of both the mortgages.

THE facts of this case were as follows :—

Under a simple mortgage executed on August 2nd, 1867, the mortgagee was competent to take possession if the mortgage money was not paid within a certain time. A subsequent simple mortgage was executed by the same mortgagors in favour of the same mortgagees with the stipulation attached that money due on the second bond was to be paid before the prior mortgage could be redeemed. The money was not paid under the first mortgage bond within the time specified and the mortgagees took possession of the property. The representatives of the mortgagors brought this suit for redemption

* Second Appeal No. 1041 of 1909 from a decree of Jagat Narayan, second Additional Judge of Aligarh, dated the 8th of June, 1909, reversing a decree of Muhammad Husain, Munsif of Etah, dated the 19th of January, 1909.

(1) Weekly Notes, 1906, p. 278. (2) Weekly Notes, 1906, p. 267.

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of the earlier mortgage without offering to redeem the subsequent mortgage. The court of first instance decreed the plaintiffs' suit for redemption without requiring them to redeem the subsequent mortgage. The lower appellate court reversed the decree. The plaintiffs appealed to the High Court.

Dr. *Tej Bahadur Sapru* (with him The Hon'ble Pandit *Moti Lal Nehru*), for the appellants, argued that the stipulation in the subsequent mortgage-deed amounted to a clog on the equity of redemption. He cited *Sheo Shankar v. Parma Makton* (1), *Ranjit Khan v. Ramdhan Singh* (2), *Muhammad Abdul Hamid v. Jivraj Mal* (3) and *Bhartu v. Dalip* (4).

The two transactions were quite independent and there was no consolidation.

Dr. *Satish Chandra Banerji* (with him Babu *Girdhari Lal Agarwala*), for the respondents, contended that when the property was mortgaged in 1867, the mortgage was simple; but the mortgagees could take possession in default of payment, and when they did so, the mortgage became usufructuary. The same mortgagees made another advance in 1874. The law governing such transactions was laid down in Coote, *Law of Mortgages*, ed. 7, vol. 2, p. 1168; Ghose, *Law of Mortgage*, ed. 5, p. 271, and *Ram Das v. Smirkha* (5). It had been consistently held in the Allahabad High Court that there would be no clog where the covenant was for the redemption of both the mortgage simultaneously. The argument in favour of consolidation would be stronger were the covenant was that the second mortgage should be redeemed first. The case in I. L. R., 31 All., collects all the earlier cases. Section 61 of the Transfer of Property Act did not apply to cases where the property comprised in the second mortgage was the same as in the first mortgage; *Dorasami v. Venkata Seshayyar* (6). Cases where the second bond was a money bond were to be distinguished from cases where the second bond was a mortgage bond. The case in I. L. R., 26 All., was of the former kind.

(1) (1904) I. L. R., 26 All., 559.

(2) (1909) I. L. R., 31 All., 482.

(3) Weekly Notes, 1906, 267.

(4) Weekly Notes, 1906, p. 278.

(5) (Unreported) S. A. 142 of 1903, referred to in I. L. R., 31 All., 493.

(6) (1901) I. L. R., 25 Mad., 108, 115.

Dr. *Tej Bahadur Sapru*, in reply :—

The question was one mainly of intention. The case in *I. L. R.*, 25 *Mad.*, 108, did not apply. Consolidation could only be a matter of agreement, unless there was a definite provision of law to that effect. In any case there was a conflict of decisions in this Court, the two rulings in the *Weekly Notes* for 1906 not being in harmony.

STANLEY, C. J.—This second appeal arises out of a suit for redemption of a mortgage of the 2nd of August, 1867, and the circumstances under which it was brought are as follows:—The predecessors in title of the plaintiffs borrowed money from one Kharagjit deceased, and as security therefor, hypothecated their share in the village of Badhaulta. The mortgage provided that if the mortgagors failed to repay the money borrowed in Jeth 1275 Fasli, the mortgagee should be at liberty to take possession of the mortgaged property. Default was made in payment of the mortgage debt, and the mortgagee took possession of the mortgaged property. Later on, namely, on the 3rd of July, 1874, a further mortgage to secure a small sum was executed by the mortgagors in favour of Kharagjit. In that document it is recited that the sum of Rs. 98 was due by the mortgagors to Kharagjit and the executants thereby agreed to pay interest on that amount at the rate of Rs. 2 per cent. on demand. In order to secure the amount the mortgagors hypothecated their share in the village in question in favour of the mortgagees, and then follows the covenant upon which the arguments in this case are mainly based. The covenant is as follows:—“We shall repay the amount due under this bond, before payment of the mortgage money and redemption of the mortgage” (i.e., the earlier mortgage). The suit out of which this appeal has arisen was brought for redemption of the mortgage of the 2nd of August, 1867, alone, and the defence set up was that the mortgagors were bound to pay the amount due on foot of the subsequent mortgage of the 3rd of July, 1874, along with or before payment of the money due on foot of the earlier mortgage of the 2nd of August, 1867.

The court of first instance decreed the plaintiff's claim, but upon appeal the learned Additional District Judge reversed its

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decision, holding that upon the language of the document of the 3rd of July, 1874, the mortgagors were bound to satisfy the amount of that mortgage before they could insist upon redemption of the earlier mortgage.

The case before us has been argued at considerable length and ably, and numerous authorities have been cited to us. I do not think it necessary to review these authorities at length. I think that the learned Additional District Judge rightly decided the appeal before him. It is contended by Dr. *Tej Bahadur Sapru* on behalf of the appellant that the case is governed by the decision of a Bench of this Court in the case of *Bhartu v. Dalip* (1). That case at first sight appears to have a close bearing upon the case before us, but it will be observed on closer scrutiny that in the judgement of myself and my brother KNOX, care was taken to distinguish it from a case such as that with which we are now dealing. It was held in that case that upon the true construction of two documents, one being a usufructuary mortgage and the other a simple mortgage, there was no consolidation of the two mortgages and that the mortgagor was therefore competent to redeem the first mortgage without redeeming the second. In our judgement we observed:—"It may be that if the parties to mortgage transactions determine and agree so to consolidate mortgage securities as to preclude the mortgagor from redeeming one without redeeming the other their contract in that regard would be enforced. But in this case we are unable to discover that there was any such clear and distinct contract entered into between the parties as obliged the mortgagor to redeem both mortgages at the same time." And later on:—"There is an express provision in the later deed that the mortgaged land should not be redeemed unless the mortgagor paid the amounts which had been ear-marked in the earlier passage as being the two sums, namely, one of Rs. 1,000, secured by a bond of the 17th of May, 1881, and the other the further advance of Rs. 500" (which was secured by a second mortgage of the 17th of June, 1881). "From this we gather that the parties contemplated that the mortgagor should be at liberty to redeem the later mortgage on payment of the two sums secured by it,

namely, Rs. 1,500. If he was so at liberty to redeem that mortgage at any time, there is no reason why he should be precluded from redeeming the earlier mortgage by payment of the amount secured by it."

Unlike this case, the covenant which we have before us is specific and clear. The mortgagors in it undertook to repay the amount due under the second bond before payment and redemption of the earlier mortgage. In view of this specific covenant on the part of the mortgagors it would be, I think, inequitable to hold that the mortgagors, despite their covenant, can redeem the earlier mortgage alone, leaving the second incumbrance unsatisfied. The case is similar to the case of *Mubammad Abdul Hamid v. Jairaj Mal* (1). In that case the mortgagors having taken a further advance on the security of a second mortgage of the same property covenanted that they would not be at liberty to redeem it without at the same time redeeming the first. It was held by Mr. Justice RUSTOMJEE and myself that this was a valid covenant and did not amount to a clog or fetter on the right of redemption, and that both mortgages must be redeemed at the same time.

The same question came before my brothers BANERJI and TUDBALL in Second Appeal No. 142 of 1908, decided on the 28th of April, 1909 (as yet unreported). In that case there was a first mortgage of property, and then a second mortgage deed of Asarh Badi 15th, 1949, was executed which provided as follows:—"Whenever I am paying off the mortgage debt (i.e., the debt due under the first mortgage) I shall first pay the principal sum due under this document with compound interest and then the amount of the mortgage." Another mortgage deed of Magh Badi 10th, 1952, contained this provision:—"Whenever I, the said debtor, shall pay off the mortgage debt in the month of Jeth of any year, I shall first pay the principal sum with interest due under this bond in a lump sum and then the mortgage money. I shall then take back the fields and the documents." The property comprised in the first mortgage was made in that case security for the amounts secured by the two mortgages, extracts from which I have given. It was held, upon a true construction

(1) Weekly Notes, 1906, p. 267.

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of these documents, that the mortgagor contemplated simultaneous payment of the amounts of the three documents and that the two later documents placed a further charge on the property which was the subject of all the three mortgages, and there was thus a consolidation of the three mortgages, and the mortgagors were not entitled to recover possession of the mortgaged property unless the amount secured by the three mortgages were paid. I concur in that decision. The covenant in the present case is a covenant in effect not to pay off the earlier mortgage without first paying of the puisne incumbrances. Despite this covenant the plaintiffs appellants seek with the aid of the court to redeem the earlier mortgage without paying the subsequent debt. This, it appears to me, would be inequitable. I am of opinion that the decision of the lower court is correct and would dismiss the appeal.

We are asked, however, to allow the plaintiffs appellants to redeem both mortgages and amend their claim for that purpose and thereby save the expenses of a fresh suit. This is not unreasonable and is not objected to by Dr. *Satish Chandra Banerji*, the learned advocate for the respondents. With the view of saving the parties costs we accede to this application. It is necessary, therefore, to refer, to the lower appellate court for determination of the following issue :—

What sum, if any, is due by the plaintiffs to the defendants on foot of the mortgage of the year 1874?

We accordingly refer this issue under the provisions of order XLI, rule 25 of the Code of Civil Procedure, with directions that such relevant evidence as may be required be taken. On return of the finding the usual ten days will be allowed for filing objections.

GRIFFIN, J.—I agree with the learned Chief Justice in the order proposed.

BY THE COURT.—The order will be as stated above.

Issue remitted.