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APPELLATE CIVIL.

1907
April 6.

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

BALDEO PRASAD (DEFENDANT) v. UMAN SHANKAR (PLAINTIFF)

AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 101—Prior and subsequent mortgagees—Purchase of mortgaged property by prior mortgagee—Suit for sale by subsequent mortgagee.

Held that a prior mortgagee who had in the exercise of a right of pre-emption purchased the property mortgaged to him had a right to be repaid the money due in respect of his mortgage before a subsequent mortgagee could bring such property to sale in execution of a decree on the mortgage held by the latter.

IN this case one Baldeo Prasad, the holder of a usufructuary mortgage of the year 1891, in the exercise of a right of pre-emption purchased the mortgaged property, which had been sold by the mortgagor in 1902. In 1905 one Uman Shankar the holder of a subsequent simple mortgage of the 11th August 1902 brought a suit for sale on his mortgage. Baldeo Prasad set up the defence that Uman Shankar was bound to pay to him the amount secured by his prior mortgage of 1891 before he could obtain a decree for sale. This defence was accepted by the court of first instance (Subordinate Judge of Farrukhabad), which gave the plaintiff a decree subject to his repaying to Baldeo Prasad the amount of the mortgage of 1891. On appeal, however, the District Judge modified the decree by removing this condition. Baldeo Prasad appealed to the High Court.

Babu Jogindro Nath Chaudhri and Munshi Gulzari Lal,
for the appellants.

* Second Appeal No. 1069 of 1905, from a decree of H. W. Lyle, District Judge of Farrukhabad, dated the 8th August, 1905, modifying a decree of Raj Nath Prasad, Subordinate Judge of Farrukhabad, dated the 13th May, 1905.

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BALDEO
PRASAD
v.
UMAN
SHANKAR.

Babu Durga Charan Banerji and Dr. Satish Chandra Banerji, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal arises out of a suit for sale on a mortgage of the 11th of August 1902 executed by the defendant Debi Din to secure a sum of Rs. 1,400. There was a previous usufructuary mortgage of the year 1891 in existence at the date of this mortgage, by which a principal sum of Rs. 1,000 was secured in favour of the defendant Baldeo Prasad. On the 20th of October, 1902, the mortgagor Debi Din sold his equity of redemption to one Girdhari Lal for a sum of Rs. 1,800, of which amount Rs. 800 was paid in cash, and Rs. 1,000 was left in the hands of Girdhari Lal to satisfy the mortgage debt of Baldeo Prasad. Baldeo Prasad was a co-sharer in the village, and as such was entitled to pre-empt this sale, and he sued for pre-emption and obtained a pre-emption decree. Upon pre-emption he paid Rs. 800 to the vendor and retained Rs. 1,000, portion of the purchase money, in satisfaction of his own prior mortgage of 1891. The plaintiff in the present litigation is the holder of the second mortgage, and as such instituted the suit out of which this appeal has arisen on the 3rd of January 1905 to recover his debt by sale of the mortgaged property. The defendant Baldeo Prasad set up the case that he is entitled to hold up the mortgage of 1891 as a shield against the plaintiff's claim and that the plaintiff cannot have a sale without paying the amount of the earlier mortgage-debt. The court of first instance in a carefully written judgment decided in favour of the defendant Baldeo Prasad and held that he was entitled to rely on the prior incumbrance. On appeal, however, the learned District Judge has taken a different view of the rights of the parties and held that the puisne incumbrancer is entitled to a sale of the property discharged from the prior mortgage. We are at a loss to understand the reasoning by which he arrived at this conclusion. Section 101 of the Transfer of Property Act, which only embodies the law as it existed previously upon this subject, protects a purchaser, as the purchaser here, against the claims of puisne incumbrancers, where, holding a prior mortgage, he has purchased the mortgaged property. It provides that where the owner of a charge, or other incumbrance on immovable property, becomes absolutely entitled

to that property, the charge or incumbrance shall be extinguished unless he declares by express words or necessary implication that it shall continue to subsist, or, as is the case before us, such continuance would be for his benefit. It was clearly for the benefit of Baldeo Prasad when he became the absolute owner of the property that his prior charge should be kept alive, and how the lower appellate court came to hold that the property which he purchased could be sold at the instance of a puisne incumbrancer without any regard to the earlier incumbrance we are at a loss to understand. We think that the decision arrived at by the learned Subordinate Judge upon this question is entirely correct. We therefore allow the appeal, set aside the decree of the District Judge, and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

Before Mr. Justice Banerji and Mr. Justice Tudball.

ARDESHIRJI FRAMJI AND ANOTHER (JUDGMENT-DEBTORS) v. KALYAN DAS (DECREE-HOLDER).*

Civil Procedure Code, (1908), sections 47, 96, 104 (b), 135 (2)—Execution of decree—Arrest—Privilege of exemption from arrest under civil process—Appeal.

Certain judgment-debtors, who had come from Bombay to Benares to look after an application which they had made for the rehearing of a case decided against them *ex parte*, were arrested under a warrant taken out by the decree-holder in execution of his decree. At the time of their arrest the judgment-debtors were seated in the train at the Benares railway station and had taken tickets for Allahabad. *Held* that the judgment-debtors were not exempted from arrest under section 135 of the Code of Civil Procedure, 1908; also that the order for their arrest was appealable as a decree under section 96 of the Code. *In the matter of Siva Bux Savantkaram* (1) not approved. *Wooma Churn Dhole v. Teil* (2) referred to.

IN this case an *ex parte* decree was passed against the appellants, who were residents of Bombay, by the Subordinate Judge of Benares on the 8th of January, 1909. They applied to have it set aside, and the application was heard on the 22nd of March 1909. They came up to Benares from Bombay for the purpose of this application, and having arrived on the evening of the 21st

* Execution First Appeal No. 96 of 1909, from a decree of Maula Bakhsh, Subordinate Judge of Benares, dated the 29th of March 1909.

(1) (1881) I. L. R., 4 Mad., 817.

(2) (1875) 14 B. L. R., App., 13.

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