

securities. There is nothing in section 81, or, as far as we know, elsewhere, to destroy the right of marshalling by a notice given subsequent to the mortgage.

It is said that, if we affirm this right of marshalling, we should be causing injustice to the plaintiff, as the property which is not mortgaged to the second defendant is claimed by others as *wakf* property, and that therefore the plaintiff would probably have to stand a suit before he could acquire the property, even if he were successful in such suit. This consideration we think should not be acted upon by us. We must assume that the plaintiff took a mortgage of property, which, so far as he was aware, was free from claim, and the risk of the application of section 81 of the Transfer of Property Act is one which every mortgagee must take. The mere fact that somebody has claimed, or is likely to claim, this property cannot get rid of the second defendant's right to insist upon the plaintiff marshalling his securities. We cannot find that this suggestion of *wakf* was argued in the first Court, and there is nothing in the evidence to satisfy us that the properties are unsaleable. In our opinion this second contention of the defendants must prevail, and the plaintiff must by the decree be required, before selling the properties which are the subject of the second defendant's mortgage, to sell the other properties mortgaged to him. In other respects the appeal fails, and we therefore make no order as to the costs.

S. C. C.

Appeal allowed in part.

Before Mr. Justice Ghose and Mr. Justice Gordon.

BENI MADHUB MOHAPATRA (PLAINTIFF) *v.* SOURENDRA MOHUN TAGORE AND OTHERS (DEFENDANTS.) *

1896
May 22.

Mortgage—Suit for sale of mortgaged property without redeeming prior mortgage—Form of decree—Transfer of Property Act (IV of 1882), section 98.

In a suit on a mortgage by a subsequent mortgagee who made prior mortgagees parties thereto, and in which the plaintiff prayed that the amount due to him might be realized by a sale of the mortgaged property, the lower Court decreed the suit, but required the plaintiff, before bringing the property to sale, to redeem certain prior mortgages.

* Appeal from Original Decree No. 189 of 1894 against the decree of Babu Aghore Nath Ghosh, Subordinate Judge of Bancoora, dated the 30th March 1894.

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Held, on appeal, that although, on the authority of the case of *Kantiram v. Kutubuddin Mahomed* (1), the plaintiff would be entitled to a decree giving him leave to sell the property subject to the prior incumbrances, yet having regard to the difficulty and complication that would arise under such decree by reason of the fact that one of the defendants, who had purchased the equity of redemption and certain prior mortgages, had obtained upon two of them decrees against the plaintiff, the decree passed by the lower Court was equitable and proper.

THIS was a suit on a mortgage executed by the defendant No. 1 in favour of the plaintiff on the 24th Bysack 1293 B.S., corresponding with the 6th May 1886. A number of other mortgages were also made defendants to the suit. The first mortgage of the property in suit was a usufructuary mortgage by the defendant No. 1 in favour of the defendant No. 4. The defendant No. 2 purchased the equity of redemption at a sale in execution of a decree; and he also took assignments of five other mortgages prior to the mortgage in favour of the plaintiff. In this suit he contended that the plaintiff, who prayed that the amount due to him might be realized by sale of the mortgaged property, subject to the prior incumbrances, could not bring the property to sale without redeeming the prior mortgages.

The Subordinate Judge made a decree in favour of the plaintiff, but required him to redeem the prior mortgages before putting up for sale the mortgaged property. The plaintiff appealed, on the ground that a decree should have been made giving him leave to sell the mortgaged property subject to prior incumbrances.

Babu *Taril Mohan Dass* for the appellant contended that the plaintiff was entitled to the decree he asked for. He relied on the case of *Kantiram v. Kutubuddin Mahomed* (1).

Babu *Durga Mohan Dass* and Babu *Gopal Chandra Ghosal* for the respondent No. 2.—The case of *Kantiram v. Kutubuddin Mahomed* (1) is really in our favour, for the Court expressly says that in the state of facts that exists here, the second mortgagee is not entitled to bring to sale the mortgagor's interest. The defendant No. 2 has acquired both the equity of redemption and certain

(1) I. L. R., 22 Cal., 33.

mortgages prior to the plaintiff's, and therefore he is entitled to have his mortgages redeemed before sale of the property. *Ramu Naikan v. Subaraya Mudali* (1); *Gaya Prasad v. Salik Prasad* (2); *Har Prasad v. Bhagwan Das* (3); *Mulchand Kuber v. Lalla Trikam* (4). The contrary doctrine does not apply in India,—*Gokuldoss Gopaldoss v. Rambux Seochand* (5).

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The judgment of the Court (GHOSH and GORDON, JJ.) was as follows:—

This was a suit to enforce a mortgage security bearing date the 24th Bysack 1293 corresponding with 6th May 1886.

There were several defendants in the Court below, but most of them did not appear to defend the suit. It is only necessary to refer to the defendant No. 1, who is the mortgagor, and to the defendant No. 2, who has, since the plaintiff's mortgage, purchased the equity of redemption of the mortgagor at a sale in execution of a certain decree, and has also obtained an assignment of five different mortgages of dates anterior to the plaintiff's mortgage. And, having apparently kept alive these earlier mortgages, he (the defendant No. 2) contended in the Court below that the plaintiff was not entitled to sell the mortgaged property without redeeming the earlier mortgages now in his hands. It appears that since the assignment to him of those mortgages, the defendant No. 2 has, upon two of them, obtained decrees against various parties, amongst whom the plaintiff is one. These decrees are binding upon the plaintiff, and in execution thereof the defendant No. 2 is entitled to sell the mortgaged properties at any time he pleases.

We might also mention two other defendants, Chintamoni Dutt and Brojonath Dutt. These persons, though they appeared in the suit, did not produce, nor support, their alleged mortgage.

The only other person to whom reference need be made is defendant No. 4, who has an usufructuary mortgage of a date even anterior to the dates of the five mortgages which have been assigned over to defendant No. 2.

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

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

(3) I. L. R., 4 All., 196.

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

(5) L. R., 11 I. A., 126.

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Under these circumstances, the Subordinate Judge, while making a decree in favour of the plaintiff, held that the plaintiff was not entitled to cause the sale of the mortgaged property without redeeming in the first instance the five prior mortgages of the defendant No. 2, but that when such redemption has been made, he would be entitled to sell the property mortgaged to him subject to the usufructuary mortgage of the defendant No. 4.

In making the decree in this form, the Subordinate Judge was guided by a decision of the Allahabad High Court in the case of *Mata Din Kasodhan v. Kazim Hossein* (1) where it was held that a second mortgagee was not entitled to bring to sale the property mortgaged to him without first redeeming all the prior mortgages. This case was considered, but was dissented from by this Court in the case of *Kantiram v. Kutubuddin Mahomed* (2), where it was held by us, having regard to the various provisions of the Transfer of Property Act, that a second mortgagee is entitled to sell the property mortgaged, subject to any prior mortgage. In that view of the matter, the declaration that has been made in this case by the Subordinate Judge as to the necessity of redemption of the earlier mortgages would seem to be wrong; but having regard to the circumstances already noticed, viz., that the defendant No. 2 has, upon two of his anterior mortgages, obtained decrees against the plaintiff binding these very properties, we think it would be introducing an unnecessary difficulty and complication if we were to make a decree directing that the plaintiff should be entitled to sell the property mortgaged to him, subject to the earlier mortgages, the two mortgages, in respect of which the defendant No. 2 has already obtained decrees inclusive.

As already mentioned, it is open to the defendant No. 2, at any time he pleases, to put his decrees already obtained against the plaintiff into force, and sell these very properties in satisfaction of his two mortgages; and in that event the decree that we are asked to make, and which we might have made if it had not been for the circumstance already stated, would be wholly infructuous. It seems to us that, although ordinarily, having in view the provisions of the Transfer of Property Act, and the case in

(1) I. L. R., 13 All., 432.

(2) I. L. R., 22 Cal., 83.

I. L. R., 22 Calcutta, already referred to, the plaintiff would be entitled to a decree to sell the property subject to the prior incumbrances, still, under the circumstances of this particular case, we think we are not called upon to make a decree to that effect; rather we are of opinion that the decree passed by the Court below, giving the plaintiff liberty to redeem the earlier mortgages and then to sell the property subject to the usufructuary mortgage, is equitable and proper.

In this view of the matter we dismiss the appeal, but under the circumstances we think that each party should bear his own costs.

H. W.

Appeal dismissed.

Before Mr. Justice Ghose and Mr. Justice Gordon.

ROBERT WATSON & CO., LD. (DEFENDANTS) *v.* RAM CHAND DUTT
AND OTHERS (PLAINTIFFS).*

1896
April 8.

Joint Tenancy—Exclusive occupation of the joint lands by some of the co-owners—Suit by the other joint tenants for compensation—Limitation—Limitation Act (XV of 1877), Schedule II, Article 120.

Some of the joint tenants of certain lands took the use and occupation of part of the joint lands, to the exclusion of the other joint tenants, who afterwards brought a suit for compensation for such use and occupation.

Held, that the period of limitation for such a suit was governed by Article 120 of the Limitation Act; and that, therefore, the plaintiffs were entitled to recover compensation for six years.

THE plaintiffs and the defendants jointly owned certain lands. The plaintiffs, four in number, were jointly entitled to a 1 anna 6 gundas 2 couries and 2 krants share; and the plaintiffs 2, 3 and 4 were exclusively entitled to an 8 annas share. The defendants took possession of 4,128 bighas of the joint-lands and cultivated them exclusively. The plaintiffs then instituted a suit against them for the recovery of joint possession, together with mesne profits for the years 1291 to 1293 and for an injunction. This suit was eventually appealed to the Privy Council (see I. L. R., 18 Calc., 10); and the Judicial Committee, on the 25th April 1890, held that, although the plaintiffs were not entitled to either of the remedies they claimed, they were entitled to compensation from

* Appeals from Original Decrees Nos. 329 and 349 of 1894, against the decree of Babu Rabi Chandra Ganguly, Subordinate Judge of Midnapur, dated the 28th of June 1894.