

APPELLATE CIVIL.

1896
April 23.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

INDERDAWAN PERSIAD, MINOR, THROUGH MUSSUMMAT MAN KOER
(DEFENDANT No. 2) v. GOBIND LALL CHOWDHRY (PLAINTIFF),
NAJMUDDIN HOSSEIN AND MUSSUMMAT BIBI
ULFAT (DEFENDANTS No. 1 AND No. 3). *

Transfer of Property Act (IV of 1882), section 81—Marshalling of securities—Notice—Registration.

Mere registration is not "notice" within the meaning of section 81 of the Transfer of Property Act (IV of 1882).

Shan Maun Mull v. Madras Building Company (1) approved. Lakshman Das Sarupchand v. Dasrat (2) dissented from.

It is a notice at or before the time of mortgage, which under the terms of section 81 alone negatives the right conferred by that section.

A purchaser at an execution sale under the second mortgage, whether he be the original mortgagee or not, purchases not only the right of the mortgagor, but all the rights of the mortgagee acquired up to the sale, including the right to insist upon the plaintiff marshalling his securities, and there is nothing in section 81 or elsewhere to destroy the right of marshalling by a notice given subsequent to the mortgage.

NAJMUDDIN HOSSEIN, the defendant No. 1 in this suit, executed a mortgage bond in favor of the plaintiff in June 1886, under which three properties were mortgaged, namely, one *pucca* house, a second house, and 2 annas 8 gundas 2 dunts share in Mouza Chapra Harchand. In August of the same year he executed another mortgage bond in favor of the father of defendant No. 2, now deceased, in which the *pucca* house mentioned above was mortgaged. Both the bonds were registered. The second mortgagee brought a suit upon his bond and obtained a decree. Upon his death, his son, the defendant No. 2, caused the *pucca* house to be sold in execution and purchased it himself. But before this sale the first mortgagee, now plaintiff, applied to the Court to give notice of his claim under the mortgage of June 1886, and

* Appeal from Original Decree No. 130 of 1894, against the decree of Babu Jada Nath Dass, Subordinate Judge of Tirhoot, dated the 10th of January 1894.

(1) I. L. R., 15 Mad., 268.

(2) I. L. R., 6 Bom., 168.

such notice was ordered to be given. In the present suit brought to enforce the first mortgage bond, one of the objections raised by the second mortgagee (defendant No. 2) was that, under section 81 of the Transfer of Property Act, the plaintiff should be compelled to proceed in the first instance against the two properties not mortgaged with him (the defendant No. 2), and against the *pucca* house only if the two other properties prove insufficient to satisfy the decree. On this objection the Subordinate Judge's decision was as follows :—

"I am of opinion that section 81 of the Transfer of Property Act does not apply to the present case, because, as required by that section, the defendant No. 2 in this case is not a 'person who has not notice of the former mortgage.' It is explained in section 3 of the Act that 'a person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. In the present case Gouesh Persad, karpardaz of defendant No. 2, says in his evidence that no inquiry was made in the Registration Office whether the house mortgaged to the defendant No. 2 under the bond (A) had been mortgaged with any other person. This was a wilful abstention from an inquiry which the defendant No. 2 ought to have made, and which, if made, would have resulted in disclosing to him the plaintiff's prior mortgage, and his case therefore does not come under section 81 of the Act."

The defendant No. 2 appealed to the High Court, and the right to the marshalling of securities was urged in appeal among other grounds not material to this report.

Babu Sarada Charan Mitra (Babu Manindra Nath Bhattacharjea with him) for the appellant.—The view taken by the lower Court on the question of marshalling in substance is that there was notice because there was registration. That is a wrong view of the law. *Shan Maun Mull v. Madras Building Company* (1); Dr. Ras Behari Ghose on Mortgage, second edition, p. 136. There are also earlier cases of the Madras Court.—*Gangadhara v. Swarama* (2), *Madras Building Co. v. Rowlandson* (3). Shephard, J., referring to the opinion of the Bombay High Court in *Lakshman Das Sarupchand v. Dasrat* (4), says that the doctrine obtains

(1) I. L. R., 15 Mad., 268.
 (3) I. L. R., 13 Mad. 383.

(2) I. L. R., 8 Mad., 246.
 (4) I. L. R., 6 Bom., 168.

1896
 INDERDAWAN
 PERSHAD
 v.
 GOBIND
 LALL
 CHOWDHURY.

1896
 INOERDAWAN
 PERSHAD
 v.
 GOBIND
 LALL
 GHOWDHRY.

in America only. The case in this Court on the question of constructive notice is *Doorganarain Sen v. Baney Madhub Mozoomdar* (1). I contend that there should be marshalling in this case. The notice at the time of the sale does not affect the question.

M. *Mahomed Yusuf* (with him *M. Serajul Islam* and *Babu Nalininath Sen*) for the respondent.—As to the question raised under section 81 of the Transfer of Property Act, that section does not apply. The defendant No. 2 is a purchaser, and the question does not arise. Even if it does, the cases of the Bombay and Allahabad Courts ought to be followed. *Narayan Lakshman v. Bapu Valad Haibatrav* (2), *Jankiprasad v. Kishen Dat* (3). [*Babu Sarada Charan Mitra* drew attention to page 482]. If it is held otherwise the consequences would be serious.

Babu Sarada Charan Mitra in reply.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

The facts which it is necessary to narrate for the purpose of determining the questions which we have to decide in this appeal are as follows : On the 21st June 1886 the first defendant mortgaged to the plaintiff, for the purpose of securing the sum of two thousand rupees with interest at 24 per cent. per annum, one *pucca* house and a second house, partly *pucca* and partly *cutcha*, and the land upon which those houses stand, and a 2 annas and 8 gundas 2 dunts share in Mouza Chapra Harchand. On the 17th August 1886 the first defendant mortgaged to the father of the second defendant the *pucca* house above mentioned. It is admitted that when this second mortgage was executed the mortgagee had no notice of the first mortgage, except so far as the fact that the first mortgage was registered can be said to have given him notice of it. On the 30th July 1887, the second defendant's father obtained a mortgage decree against the first defendant. On the 21st June 1889 the first defendant executed another bond for Rs. 1,440, the interest then due under the bond of 21st June 1886, and for a further loan of Rs. 800, and gave to the plaintiff another mortgage of the properties covered by the first mortgage in order to secure those

(1) I. L. R., 7 Calc., 199.

(2) I. L. R., 17 Bom., 741.

(3) I. L. R., 16 All., 478.

two sums and interest thereon at 24 per cent. per annum. On the 15th April 1891, the property, the subject of the second mortgage, was sold in pursuance of the decree to which we have referred and was purchased by the second defendant. At that sale notice was given of the plaintiff's claim under the first mortgage. This suit was brought on the 4th April 1893 for the purpose of enforcing payment of the money due to the plaintiff on the first mortgage of 21st June 1886, the plaintiff giving up his claim under the second bond on the 21st June 1889.

1896
 INDERDAWAN
 PERSHAD
 v.
 GOBIND
 LALL
 CHOWDHRY.

The second defendant contended that the effect of the subsequent mortgage to the plaintiff was to satisfy the claims for interest under the first mortgage which had accrued due at the time of the execution of the subsequent mortgage; and he also contended that he was entitled under the terms of section 81 of the Transfer of Property Act to require the plaintiff in execution of this decree to sell first those of the mortgaged properties which were not covered by mortgage to the second defendant. These two contentions were negatived by the learned Subordinate Judge, and the question which we have to decide is whether that decision is right.

With regard to the first question, we think we must hold that the interest due under the first mortgage was not satisfied by the subsequent mortgage. The learned Subordinate Judge has rightly acted on the authority of the case of *Gopal Chandra Sreemany v. Herembo Chandra Haldar* (1). The question is, as was shown in that case, one of intention; and it is not shown here that it was the intention of the parties to get rid of the earlier security. On the contrary, although the second bond of 1889 was given partly to secure the three years' interest then due upon the amount of the bond of 1886, it is clear that the real object was to secure compound interest upon that amount, and that the intention of the parties was that the bond of 1886 should be kept alive, not only as regards the principal and future interest, but also as regards the interest for those three years. The same property is mortgaged; the interest payable is the same; and there is no acquittance of any debt under the bond of 1886.

(1) I. L. R., 16 Calc., 523.

1896

INDERDAWAN
PERSHAD
v.
GOBIND
LALL
CHOWDHRY.

We do not, however, agree with the view which the learned Subordinate Judge has taken of the second question. This question in the main depends upon whether mere registration is notice within the meaning of section 81 of the Transfer of Property Act. Section 3 of that Act says: "A person is said to have notice of a fact, when he actually knows that fact, or when but for wilful abstention from an enquiry or search, which he ought to have made, or gross negligence, he would have known it." Although in Bombay the High Court, adopting the American law as laid down in Story's Equity Jurisprudence, has held that registration amounts to constructive notice [*Lakshman Das Sarup Chand v. Dasrat* (1)], that view has been dissented from by the Madras High Court [*Shan Maun Mull v. Malras Building Company* (2)]; and we are not aware that it has ever been adopted in this Court. We cannot say that search in the Registration Office is one which in law an intending mortgagee is bound to make, and that his abstention from such enquiry amounts to gross negligence within the meaning of the definition. It is true that a careful mortgagee would ordinarily hold his mortgagor at arm's length, and would take every precaution to prevent the loss of his money, but it is quite another thing to say that in law he ought to make such enquiry, or that the absence of such enquiry amounts to gross negligence. This Court has never, so far as we are informed, gone to the extent of holding that registration is notice, and, whether it be for some purposes notice or not, we think it quite clear it is not notice within the meaning of section 81 of the Transfer of Property Act. It follows that the second mortgagee was entitled to insist upon the plaintiff marshalling his securities.

There remains this question, whether that right has been lost to the second mortgagee, because at the time of the sale he received notice of the earlier mortgage. It is a notice at or before the time of the mortgage which under the terms of the section alone negatives the right, and the purchaser, whether he be the original mortgagee or not, purchases, not only the rights of the mortgagor, but all the rights of the mortgagee acquired up to the sale, including the right to insist on the plaintiff marshalling his

(1) I. L. R., 6 Bom., 168.

(2) I. L. R., 15 Mad., 268.

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.