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case to that court with directions to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants must have their costs of this appeal. Other costs will abide the result.

*Appeal allowed, cause remanded.*

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January, 22.

*Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.*

GULZARI LAL (PLAINTIFF) v. AZIZ FATIMA AND OTHERS  
(RESPONDENTS)\*.

*Mortgage—Suit for recovery of mortgage money—Payment of prior mortgage debts—Subrogation—Circumstances in which intention to keep prior mortgage alive is to be inferred.*

On the 22nd of March, 1911, one A. A. executed two *zar-i-peshgi* leases in favour of G. L. comprising a zamindari share in the village of Kura Mai and a house in the town of Marchra. Upon this, A. F. brought a suit against A. A. and G. L. for specific performance of an agreement entered into by A. A. to mortgage to her the zamindari in Kura Mai, and for a declaration that the *zar-i-peshgi* leases entered into with G. L. were ineffective as against her. The plaintiff obtained a decree, which was upheld in appeal by the High Court, and as the result a *zar-i-peshgi* lease was executed by A. A. in favour of A. F., under the order of the Court, and G. L.'s leases were declared to be void as against A. F.

Immediately after the execution of the *zar-i-peshgi* leases of the 22nd of March, 1911, G. L. paid off two prior mortgages of 1907 and 1908. No reference, however, was made to these in the deeds of 1911, nor was there any contract between the parties to these deeds that the mortgagee was to be subrogated to the benefits of the earlier securities which were to be paid off. Moreover, the mortgages of 1907 and 1908 comprised other property besides that included in the deeds of 1911.

*Held* that it was not competent to G. L., in a suit on his *zar-i-peshgi* leases of 1911, to set up a title under the mortgages of 1907 and 1908 and claim to recover from A. F. the money which he had expended in their redemption.

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

Pandit *Radha Kant Malaviya*, for the appellant.

Mr. *Ishag Khan*, Babu *Jogindro Nath Mukerji* and Maulvi *Iqbal Ahmad*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—The appellant here, Babu Gulzari Lal, was the plaintiff in the court below in a suit brought for the recovery of mortgage money alleged to be due to him in respect of two mortgages executed in his favour on the

\* First Appeal No. 14 of 1917, from a decree of Piare Lal Chaturvedi, Subordinate Judge of Aligarh, dated the 29th of September, 1916.

22nd of March, 1911, by one Sayid Ali Ahsan. The mortgage transaction was cast in the form of *zar-i-peshgi* leases and the mortgage money was Rs. 6,000. The property comprised in the mortgage consisted of a certain zamindari share of the mortgagor, situate in a village called Kura Mai and also a house situate in the town of Marchra. The first defendant in the suit was the mortgagor, Ali Ahsan, and in addition to him there were 18 other defendants who were represented to have interests of one kind or another in the property mortgaged. The suit, as we have said, was a suit for sale, but the claim was not merely for sale of the property mortgaged under these documents of the 22nd of March, 1911. There was in addition a claim to bring to sale certain other property which had been mortgaged under two documents, dated respectively the 29th of July, 1907, and the 1st of September, 1908. The plaintiff alleged that these two latter mortgages had been paid off by him: that he was entitled accordingly to the benefit of these mortgage securities, and could, therefore, call upon the court to bring the properties affected by them to sale.

Before proceeding to discuss the matters which arose for decision in the court below, it is necessary to say a few words regarding a suit which was brought in the court of the Assistant Judge of Aligarh in the year 1911 just after the mortgages now in the suit had been executed in the plaintiff's favour. The second defendant, namely, Musammât Aziz Fatima, brought a suit against Babu Gulzari Lal and his mortgagor, Ali Ahsan, for specific performance of a contract of mortgage. In this suit Aziz Fatima alleged that Ali Ahsan had, on the 17th of March, 1911, contracted to give her a *zar-i-peshgi* lease of mauza Kura Mai. She alleged that the agreement had been completed by the tender and acceptance of earnest money, and she went on to say that on the 22nd of March, 1911, the mortgagor, Ali Ahsan, had fraudulently executed two documents of mortgage (*zar-i-peshgi* leases) in favour of Gulzari Lal. Her allegation was that this was a collusive transaction which Ali Ahsan and Gulzari Lal had entered into for the purpose of defeating her rights. She claimed that at the time Gulzari Lal took these transfers from Ali Ahsan, he was well aware of the previous

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agreement of Ali Ahsan to execute a mortgage in her favour. Accordingly she claimed specific performance of the agreement of the 17th of March, 1911, and also a declaration that the transfers which had been made in favour of Gulzari Lal on the 22nd of March, 1911, were void and not binding upon her.

The lady's claim was decreed in the court of first instance. The defendant, Ali Ahsan, was directed to execute a *zar-i-peshgi* lease in favour of the lady according to the terms of the draft which was filed, and it was further declared that the documents executed in favour of Gulzari Lal on the 22nd of March, 1911, were void as against Aziz Fatima. This decree was upheld in appeal by a Bench of this Court in a judgment dated the 28th of July, 1913. The result of this litigation, therefore, was that the document of mortgage which Ali Ahsan had contracted to execute in favour of Aziz Fatima was executed under the order of the court in her favour. Now we have the present suit brought by Gulzari Lal on the strength of the documents of the 22nd of March, 1911. Various defences were put forward by the various defendants who were impleaded, but it will not be necessary for us to refer to all the pleas taken in defence but only to such of them as are necessary to be mentioned for the purpose of disposing of the single point which has to be decided in this appeal.

We note that in the court below it was found that the total consideration for the bond in suit which passed was Rs. 5,120 only and we also note that a decree was given to the plaintiff for this sum together with interest according to the terms of the documents. The total sum for which sale was ordered was Rs. 6,868, and the lower court directed the property situate in mauza Kura Mai and the house situate in Marehra to be sold subject to the prior rights of the defendants Nos. 2 to 9. The lower court refused to order the sale of other properties mentioned in the schedule attached to the plaint, in other words, the properties which though not mortgaged to the plaintiff by the deeds of the 22nd of March, 1911, had been mortgaged under the two documents, dated the 29th of July, 1907, and the 1st of September, 1908, in favour of other persons. These mortgages, as we have said, the plaintiff claimed to have redeemed and it was for this reason that he sought to have them sold in satisfaction of his

claim. The learned Judge of the court below held that the plaintiff was not entitled to the benefit of subrogation in respect of these two which he had redeemed, and it was for this reason that the claim to have these properties brought to sale was dismissed.

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The plaintiff comes here in appeal, and it is argued that by reason of his having satisfied the debts due on the two bonds mentioned above, namely, those of the 29th of July, 1907, and the 1st of September, 1908, he was entitled to priority against Aziz Fatima in respect of the mortgage which was executed in her favour under the order of the court and also against the other defendants, who are lessees and transferees of portions of the mortgaged property.

In dealing with this question of the right of the plaintiff to be subrogated to the rights of the prior creditors whom he had paid off, the learned Judge of the court below referred to a decision of this Court reported in the case of *Umrai Lal v. Rukmin Kuar* (1), and in particular, to certain remarks which are to be found at page 960 of the report. It was there laid down that "the mere fact that money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit just mentioned depends upon the existence of an agreement between the borrower and the lender, an agreement which in certain cases may be presumed having regard to the circumstances of the transaction and this agreement must be one by which it is provided that the subsequent lender shall be substituted for the earlier creditors."

It is not shown in the present case that the documents which were executed in the plaintiff's favour on the 22nd of March, 1911, contained any express contract between the borrower and the lender by which the latter was to be subrogated to the benefits of the earlier securities which were to be paid off. The question, therefore, which the court below had to determine was whether in the circumstances of the transactions which took place on the date above mentioned between Ali Ahsan and Gulzari Lal, there was anything from which an agreement entitling Gulzari Lal

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to the benefit of the earlier securities might be implied. The Subordinate Judge points out the very facts which to his way of thinking tend to the conclusion that there was no such agreement between the parties. One fact, it may be mentioned, is of special importance and that is that certain items of property which were hypothecated in the earlier deeds were not included in the mortgage executed in favour of Gulzari Lal. Thus in the deed of July, 1907, we find that, in addition to the property situate in village Kura Mai, other items of property situate in the villages of Ratanpur, Umarpur and Kasimpur had been mortgaged. These properties were not included in the bonds executed in Gulzari Lal's favour. Further, it is evident from the result of the litigation between Aziz Fatima and Gulzari Lal that as against the former these documents upon which the plaintiff is now suing were declared to be totally void, and, this point being settled, it seems to us impossible for the plaintiff in the present suit to argue that by reason of having discharged these prior bonds he is entitled to any priority against the lady. He can only justify or seek to justify the discharge of these prior encumbrances on the ground that a mortgage was executed in his favour on the 22nd of March, 1911; but if that mortgage has been declared to be void and of no effect against Aziz Fatima, it is obvious that Gulzari Lal cannot, as against the lady, claim any benefit in the way of priority. We think, therefore, that the court below was right. As regards the other defendants against whom it is argued here that priority should have been allowed, namely defendants 3 to 9 and defendants 13, 14, 15, 16 and 19, we are satisfied that the decision of the court below is also correct. There can be no doubt that the transaction which took place between Ali Ahsan and the plaintiff Gulzari Lal on the 22nd of March, 1911, was in substance a fraudulent transaction and entered into for the purpose of defeating the rights of Aziz Fatima. The existence of the previous agreement between Ali Ahsan and Aziz Fatima was well-known to Gulzari Lal at the time, and the fact that payments in discharge of the prior mortgages were made, one on the very day of the mortgage, namely, the 22nd of March, 1911, and the other on the following day, goes to show that Gulzari Lal was not acting *bond fide* but

was attempting under colour of the mortgages made in his favour to secure an advantage over Aziz Fatima and others to which he knew perfectly well, he was not entitled. It has been argued before us that the question of *bona fides* does not arise and that it has been held in at least one ruling of the Madras High Court, that a payment which has not been made *bona fide* may entitle the person to the benefit of subrogation. That case is *Syamalarayudu v. Subbarayudu* (1).

It has not been argued before us that the statement of the law contained in the case of *Umrai Lal v. Rukmin Kuar* (2), is in any way erroneous. It is obvious that there was no express agreement between the lender and the borrower, that the former was to have the benefit of subrogation, and we are unable to find in the plaintiff's favour that there were any circumstances which would entitle us to assume that such an agreement was entered into between the parties. Gulzari Lal cannot claim that merely by his having paid off the sums which were due on these two earlier deeds, he is entitled to claim priority over the transferees of subsequent date. We have already mentioned that in the suit which was brought for specific performance, it was found that the whole transaction between Gulzari Lal and Ali Ahsan was collusive and fraudulent, and we think the proper view to take is that even if it could be assumed that there was any agreement made between the parties, which is not entered in the deeds, Gulzari Lal cannot be allowed to derive any benefit out of his own fraud.

The decision of the court below appears to us to be perfectly correct and we see no reason to interfere with it.

No other ground of appeal has been argued before us and the result is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1897) I. L. R., 21 Mad., 143.

(2) (1916) 14 A. L. J., 553.

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