

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

RAM SARUP (PLAINTIFF) v. RAM LAL AND OTHERS (DEFENDANTS).*

1922
May, 9.

Act No. IV of 1882 (*Transfer of Property Act*), section 101—*Mortgage—Position of prior mortgagee who has acquired the rights of his mortgagee.*

The shield of a subsequent mortgagee who acquires the rights of a prior mortgagee is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor, or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation. *Gokaldas Gopaldas v. Purnamal Premeekhdas* (1), *Laxman Ganesh v. Mathurabai* (2) and *Baldeo Prasad v. Uman Shankar* (3) referred to. *Athan Kutti v. Kuttanat* (4) and *Mati-ullah Khan v. Banwari Lal* (5) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen* and *Munshi Kailas Chandra Mital*, for the appellant.

Babu Harendra Krishna Mukerji, for the respondents.

LINDSAY and KANHAIYA LAL, JJ.:—These appeals arise out of two suits brought by a subsequent mortgagee for the recovery of the money due on two simple mortgages. The claims were resisted by a person who had purchased the mortgaged property in execution of a simple money decree due by the mortgagor. That person also held certain prior mortgages on the same property. He asserted that the plaintiff was not entitled to sue for the recovery of the money due on the subsequent incumbrance until he had paid the money due on the prior mortgages. The first court decreed the claim without requiring the plaintiff to pay the money due on the prior mortgages. The view taken by it was that the prior mortgages had ceased to subsist and that the defendant could not set up those mortgages as a shield against the claim brought by the subsequent mortgagee. The lower appellate court, however, held otherwise and granted a decree to the plaintiff subject to his redeeming the prior mortgages set up by the defendant respondent.

* Second Appeal No. 1451 of 1920, from a decree of Abdul Halim, Subordinate Judge of Meerut, dated the 9th of September, 1920, modifying a decree of Pran Nath Aga, Munsif of Meerut, dated the 29th of April, 1920.

- (1) (1884) I. L. R., 10 Cal., 1035.
- (2) (1913) I. L. R., 38 Bom., 369.
- (3) (1907) I. L. R., 32 All., 1.
- (4) (1916) 37 Indian Cases, 756.
- (5) (1909) I. L. R., 32 All., 138.

1922

RAM SARUP
v.
RAM LAL.

It is urged on behalf of the plaintiff appellant that the prior mortgages had ceased to be subsisting, because no step had been taken to enforce them within the period allowed by law. The mortgagee, however, had purchased the mortgaged property in execution of a simple money decree due by the mortgagor, and it was not open to him to sue for the recovery of the money due on his prior mortgages after the rights of the mortgagor had merged in him. Section 101 of the Transfer of Property Act lays down that where the owner of a charge or other incumbrance on immovable property is or 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 such continuance would be for his benefit.

The ordinary rule, as laid down by their Lordships of the Privy Council in *Gokaldas Gopaldas v. Puranmal Prem-sukhdas* (1), is that if a man is entitled to act in either of two ways, he shall be assumed to have acted according to his interest, and the presumption, therefore, is that the mortgagee intended to keep his prior incumbrances subsisting, in order that he might be able to use them to protect himself against any subsequent incumbrancer. That being so, the defendant respondent could set up these prior mortgages as a shield against the claims brought by the subsequent mortgagee.

The learned counsel for the plaintiff appellant contends that no such shield is available to a person who has purchased the mortgaged property otherwise than in execution of a decree on the prior mortgage; but he has not been able to cite authority in support of that proposition. He relies on the decision in *Athan Kutti v. Kuttanat* (2), but that was a case in which a suit was brought to redeem a usufructuary mortgage against a person who also held a simple mortgage of a subsequent date on the same property. The latter was barred by time. There were certain conditions in the simple mortgage which imposed fetters on the right of the mortgagor to redeem the former; and all that was laid down in that case was that the plaintiff was entitled to redeem the usufructuary mortgage irrespective of

(1) (1884) I. L. R., 10 Cal., 1035 at 1046.

(2) (1916) 37 Indian Cases, 750.

1922

RAM SARUP

v.

RAM LAL.

those fetters, and that as the liability of the mortgagor under the simple mortgage was quite independent of his liability under the usufructuary mortgage, the simple mortgage could not in any case be set up as a shield against the claim of the mortgagor to redeem the usufructuary mortgage. There was no covenant therein for tacking or consolidation and no shield was available. He has also relied on the decision in *Mati-ullah Khan v. Banwari Lal* (1), but that was not a case in which the mortgagee had purchased the equity of redemption in the mortgaged property. There was a certain person who had mortgaged the property in succession with two different persons and subsequently sold it to a third party. The third party made a mortgage in favour of a person who, thereafter, redeemed the first mortgage out of the money left with him for the purpose by his mortgagor. He subsequently filed a suit for the recovery of the money due on his mortgage and obtained a decree in satisfaction whereof the rights of the mortgagor were sold by auction and purchased by a person against whom an attempt was afterwards made by the intermediate mortgagee to enforce his mortgage. One of the defences taken by the auction purchaser was that the mortgagee, in satisfaction of whose decree he had purchased, had acquired the rights of the prior mortgagee by payment of his money, and it was held by this Court that he was entitled to use that mortgage as a shield against the claim of the intermediate mortgagee, if the right to enforce that mortgage was subsisting.

There is, however, a considerable difference between cases where a subsequent mortgagee has acquired the rights of a prior mortgagee by payment of the money due to him under section 74 of the Transfer of Property Act and cases where the rights of the mortgagors have merged in the mortgagee within the meaning of section 101 of the Transfer of Property Act. There is no question of merger in the former as there is in the latter. Under the latter section, if at any time the purchaser is sought to be deprived of the mortgaged property, it is open to him to set up his original rights as a prior mortgagee as a shield against any rights which might be claimed under a subsequent incumbrance. Having purchased the mortgaged property, he can redeem

(1) (1909) I. L. R., 32 All., 138.

1922

RAM SARUP
2
RAM LAL.

any subsequent incumbrance, but he is under no obligation to do so. He can retain possession of the mortgaged property until an attempt is made by a puisne mortgagee to oust him by redemption or sale.

The shield of a subsequent mortgagee, who acquires the rights of a prior mortgagee, is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation, for, as pointed out in *Lawman Ganesh v. Mathurabai* (1), he cannot be required to sue for the recovery of the money due on his mortgage from his own property. Indeed, being both the mortgagee and the mortgagor, he cannot have any cause of action against himself.

It makes no difference how the rights of the mortgagor are acquired by the mortgagee. In *Baldeo Prasad v. Uman Shankar* (2), a mortgagee, who had in the exercise of a right of pre-emption purchased the property mortgaged to him, was held to have 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 a mortgage held by the latter.

The other pleas taken in the memoranda of appeals have not been pressed. A question was raised as to the right of the defendant respondent to claim interest beyond the date on which he got possession of the mortgaged property, but the lower appellate court has not awarded interest beyond the date on which possession was so obtained by the defendant respondent. The appeals, therefore, fail and we dismiss them with costs.

Appeals dismissed.

(1) (1913) I. L. R., 38 Bom., 369 at 372.

(2) (1907) I. L. R., 32 All., 1.