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KALIKA PRASAD v. AJUDHIA PRASAD.

Ashworth, J.

though neither party can question it. It would lead to an impossible situation if by section 105(2) of the Civil Procedure Code a High Court were, in an appeal from a decree, to be debarred from taking on a law point a different view from that taken by the District Judge in an interlocutory order. Section 151 is wide enough to prevent such an *impasse*. I would decree the suit with costs throughout and give the plaintiff a decree for foreclosure in the ordinary form, six months being allowed for paying the mortgage money.

BY THE COURT:—The order of the Court is that the appeal is allowed with costs and the appellant will have a decree in the usual form for foreclosure if the amount of Rs. 669-7-0 found due on September 12, 1923, with interest at 6 per cent. from that date, and the costs, are not paid within six months from the date of the decree.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

1929 *February*, 28.

ANGAN LAL AND OTHERS (DEFENDANTS) *v.* SARAN BIHARI AND OTHERS (PLAINTIFFS).*

Act No. IX of 1872 (Contract Act), section 62—Novation of contract—Fresh agreement in substitution for existing mortgage—Mortgage not existinguished by mere executory contract to create new mortgage and lease—Ineffective transaction for want of execution and registration.

A fresh agreement, made between the parties to a mortgage, to substitute for the existing mortgage a new usufructuary mortgage and a lease by the mortgagee, cannot supersede the existing mortgage unless the agreement is completed by the execution and registration of the new mortgage and lease. A mere executory contract, which has to be specifically enforced to bring about the contract which is to be substituted for the old contract, will not supersede a registered mortgage deed by which an interest in immovable property has passed.

Mr. *S. C. Das*, for the appellants.

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*First Appeal No. 202 of 1927, from a decree of Akbar Husain, Subordinate Judge of Muttra dated the 17th of January, 1927.

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ANGAN LAL v. SARAN BIHARI.

Dr. *K. N. Katju*, Messrs. *N. P. Asthana* and *K. C. Bhatia*, for the respondents.

MUKERJI and NIAMAT-ULLAH, JJ. :—One Jagan Prasad, for himself and as the natural guardian of his three sons, two of whom are among the appellants, executed a mortgage bond for Rs. 10,000 in favour of the ancestors of the respondents to this appeal on the 17th of July, 1915. The suit out of which this appeal has arisen was brought to enforce that mortgage. One of the sons of Jagan Prasad is dead and is represented in this litigation by his wife, Musammat Manbhari, one of the three appellants.

Several pleas were taken in defence, but only three of these are pressed before us, and, therefore, need be noticed. The first plea was that the parties agreed that a certain mortgage transaction should be entered into by the parties in satisfaction of not only the bond in suit but also of another mortgage bond, and, that being the case, the present suit was not maintainable. [The other pleas not being material to this report, are omitted.]

On the first point the learned Subordinate Judge found that there was, no doubt, an agreement that a fresh transaction of mortgage and a lease should be entered into, but he held that no documents creating the lease or the mortgage having been executed and completed, it was open to the plaintiffs to maintain the suit. The learned counsel for the appellants has contended that under section 62 of the Indian Contract Act it is enough if there was an "agreement" to substitute a contract, although no contract was completed in the shape of execution and registration of a mortgage and a lease. We are unable to accept this contention of the learned counsel. In the deed in suit we have a contract and a transfer of property. If this transaction is going to be superseded by a contract, that transaction also must be a completed transaction.

It should be a contract which is enforceable in law. The substitution, as we have said, must be by a contract, and a mere agreement to execute in future a usufructuary mortgage deed and a lease cannot be said to be a contract which was to be substituted in place of the original contract. To put the same thing in different language, the defendants' case is that the bond in suit was to be replaced by a usufructuary mortgage for a sum of Rs. 37,000 which was to be raised under certain circumstances to Rs. 44,000. It was further the case of the defendants that there was to be a lease of the mortgaged property in favour of the defendants. These are transactions which can only reach a stage of completed contract on being executed on stamped documents and on being registered. As we read section 62, there should be an actual substitution of the old contract by a new contract. A mere agreement that there would be, in future, a substitution would not be sufficient to wipe out the mortgage in suit. "Agree to substitute" is equivalent to "agree in substituting." Till the second contract, contemplated, is brought into existence, the old contract will still exist and continue to be enforceable.

Let us take, for example, the illustration which one of us put to the learned counsel for the appellants in the course of the arguments. Suppose that for three years after the completion of the "agreement" relied on by the defendants nobody took any action,—the plaintiffs did not bring any suit for sale and the defendants did not bring any suit for specific performance of the contract. Could it then be argued that, when a suit is instituted after the end of three years, the plaintiffs' mortgage has become extinguished? We think that such an argument would be utterly untenable. We are of opinion that the learned Subordinate Judge was right in holding that a mere executory contract, which has to be specifically enforced to procure the contract which is to be

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substituted for the old contract, would not supersede a registered mortgage deed by which an interest in the property has passed.

[The judgement then proceeded to deal with other pleas and concluded.]

Under these circumstances the appeal fails and it is hereby dismissed with costs.

Before Mr. Justice Ashworth and Mr. Justice Kendall.

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March, 5.

ACHHAIBAR SINGH (PLAINTIFF) *v.* RAJMATI AND OTHERS (DEFENDANTS.)*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 65(*a*) —*Transfer of equity of redemption—Covenant of title binding upon transferee—Estoppel.*

The implied covenant under section 65(*a*) of the Transfer of Property Act that the mortgagor has power to transfer the property is one that is binding upon a transferee of the equity of redemption, and the transferee is estopped from pleading that the mortgagor had no right to make the mortgage. *Renga Srinivasa Chari* v. *Gnanaprakasa Mudaliar* (1), distinguished. *Debendra Nath Sen* v. *Mirza Abdul Samed* (2) and *Doe* v. *Stone* (3), referred to.

Mr. *P. L. Banerji*, for the appellant.

Mr. *Haribans Sahai*, for the respondents.

ASHWORTH and KENDALL, JJ. :—This second appeal arises out of a suit brought by the plaintiff appellant for sale of certain property on the basis of a mortgage. The property was mortgaged to him by one Behari Das Goshain. The mortgage was a simple mortgage. Subsequently Behari Das sold the equity of redemption to Musammat Rajmati who is the mother of the defendants respondents.

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* Second Appeal No. 699 of 1927, from a decree of C. Deb Banerji, Additional Subordinate Judge of Jaunpur, dated the 11th of February, 1927, reversing a decree of Banwari Lal Mathur, Munsif of Shahganj, dated the 30th of April, 1926.

(1) (1906) I.L.R., 30 Mad., 67. (2) (1909) 10 C.L.J., 150.
(3) (1846) 3 C.B., 176.