

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice King.

MADHO SINGH (PLAINTIFF) *v.* PANCHAM SINGH

AND OTHERS (DEFENDANTS).*

1926
July, 13:

Mortgage—Suit by prior mortgagee—Decretal amount paid off by sale of one of the properties mortgaged—Subsequent suit on second mortgage—Purchaser held entitled to set up the first mortgage as a shield.

S executed two mortgages, one on the 9th of May, 1904, in favour of *RS*, and the other on the 12th of May, 1915, in favour of *MS*. In 1916, *RS* brought a suit for sale on his mortgage, and impleaded therein the second mortgagee as well as the mortgagor. The plaintiff obtained a decree, and the properties mortgaged were put up for sale. The mortgagor, however, by selling one of the mortgaged villages, paid off the decretal amount. In the deed of sale it was expressly stated that the executants were paying off the first mortgage—that of 1904—and that the purchaser was to have the property free from all incumbrances.

Held, on suit by the second mortgagee on the mortgage of 1915, that the purchaser was entitled to set up the first mortgage as a shield against the second mortgagee's claim.

Dinobundhu Shaw Chowdhry v. Jogmaya Dasi (1), followed.

ONE Musammat Sahodra executed two mortgages, one in favour of Ranjit Singh, on the 9th of May, 1904, and the other in favour of Kunwar Madho Singh, on the 12th of May, 1915. The present suit was based on the second mortgage. In it Madho Singh claimed recovery of Rs. 2,000 principal amount, and Rs. 3,000 as interest by sale of three properties mortgaged to him. The defendants Nos. 2 to 4, representing one Ram Chandra, were made parties as subsequent transferees.

* Second Appeal No. 660 of 1924, from a decree of G. C. Badhwar, District Judge of Aligarh, dated the 15th of January, 1924, confirming a decree of Abdul Hasan, Subordinate Judge of Aligarh, dated the 14th of August, 1923.

(1) (1901) I.L.R., 29 Cal., 154.

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The suit was contested by the defendants Nos. 2 to 4 alone, and they said that although, in form, they were subsequent transferees, practically they were prior mortgagees. Their defence was based on the following facts. Ranjit Singh brought a suit for sale on his mortgage of 1904 in 1916 and made Madho Singh a party to the suit. A decree for sale was obtained and the properties mortgaged were put to sale. One of the properties, viz., Nagla Chamaran, was sold for a sum of Rs. 20,000 on the 20th of February, 1919. Musammat Sabodra, however, did not allow the sale to be confirmed. She managed to raise some money and to pay off the decretal amount plus the penalty and the fees payable for the sale. This was on the 16th of March, 1919. She sold the village of Nagla Chamaran to Ram Chandra for a sum of Rs. 30,000. The contention of Ram Chandra's successors was that his money went to satisfy the earlier mortgage of 1904, and, therefore, to the extent that his money went to satisfy that mortgage, his successors were entitled to claim priority over the second mortgage held by Kunwar Madho Singh.

The suit was dismissed by the first court, and this decree was upheld in appeal. The plaintiff then appealed to the High Court.

Pandit *Gopi Nath Kunzru*, for the appellant.

Dr. *Kailas Nath Katju* and Babu *Sailanath Mukerji*, for the respondents.

The judgement of the Court (MUKERJI and KING, JJ.), after stating the facts as above, thus continued :—

The main question for determination in this appeal is whether the defendants Nos. 2 to 4 are entitled to priority due to the mortgage of 1904.

We have heard the learned argument addressed to us by the learned counsel for the appellant. We think that the courts below were right. The sale-deed relating to village Nagla Chamaran has been read to us. We find that the executants expressly say that they were paying off the first mortgage, that is to say, of 1904, and the vendees were to have the property free from all encumbrances. There can be no doubt that the intention of the parties to the sale-deed was that the first mortgage should be kept alive for the benefit of the vendees. The case of *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (1) is really conclusive on the point. In that case there were two prior mortgages and there was an attachment of the property subject to those mortgages. The mortgagor made a third mortgage, raised a sum of Rs. 40,000 and paid off the two prior mortgages. The purchaser at auction sale, which followed the attachment, contended that he had purchased the property free from the two prior mortgages and that the third mortgagee was not entitled to any priority due to the first two mortgages. It was held by their Lordships of the Privy Council that it must be assumed that the third mortgagee advanced the money to pay off the first two mortgages with the idea of keeping the benefit to himself and not to benefit the auction-purchaser by the transaction. The same principles apply to this case. It cannot be said that Ram Chandra advanced the money for the sole benefit of Madho Singh, viz., to enlarge his security, and not to keep for himself the priority which was due to the mortgage he was satisfying. The mere fact that Musammat Sahodra made a private sale to Ram Chandra does not, in any way, affect the principles on which the suit should be decided.

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Similar argument applies to the mortgage of the same date and in favour of Ram Chandra. We are, therefore, of opinion that the courts below were right in giving priority to the descendants of Ram Chandra.

The result is that the appeal fails, and it is hereby dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mukerji and Mr. Justice King.

1926
July, 15.

SHEO DAYAL, NIRANJAN LAL (PLAINTIFF) v. GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANT).*

Act No. IX of 1890 (Indian Railways Act), sections 77 and 80—Interpretation of Statute—Suit against a railway company for compensation for loss of goods—Notice—"Loss"—"Non-delivery."

On the 26th of January, 1920, plaintiff's agent at Hapur handed over to the Oudh and Rohilkhand Railway certain bags of sugar and wheat for carriage to plaintiff at a place in the Banda district. The consignment did not reach plaintiff until the 29th of October, 1920, when it was discovered to be short by 17 bags. On the 13th of January, 1921, plaintiff gave notice to the Great Indian Peninsula Railway, who had carried the goods for the latter part of the journey, and sued the company for the value of the goods lost, and for the refund of an alleged overcharge that he had been made to pay. The suit was dismissed.

Held, on appeal, that the dismissal was right. Non-delivery includes "loss" as that term is used in section 77 of the Indian Railways Act, 1890, and notice of suit had not been given within time. Nor could a claim for refund of the overcharge be made against the Great Indian Peninsula Railway Company in any case. *East Indian Railway Company v. Fazal Ilahi* (1) and *Assam Bengal Railway Co., Ltd. v. Radhika Mohan* (2), followed. *Badri Prasad v. Great Indian Peninsula Railway* (3), distinguished.

* Second Appeal No. 850 of 1924, from a decree of K. G. Banerji, District Judge of Cawnpore, dated the 18th of February, 1924, confirming a decree of Zorawar Singh, Additional Subordinate Judge of Banda, dated the 9th of December, 1922.

(1) (1924) I.L.R., 47 All., 136.

(2) (1922) 72 Indian Cases, 714.

(3) (1924) 22 A.L.J., 897.