

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice,
and Mr. Justice Collister

1933
August, 17

BANSIDHAR AND ANOTHER (PLAINTIFFS) v. SHIV SINGH
AND OTHERS (DEFENDANTS)*

Transfer of Property Act (IV of 1882), section 92—Subrogation—Prior and puisne mortgages—Puisne mortgagee paying off prior mortgagee's decree—Effect of—Whether charge created thereby—Suit to recover the money paid—Limitation—No fresh period of limitation from date of the payment—Civil Procedure Code, schedule III, paragraph 11.

A puisne mortgagee who pays off a prior mortgagee's decree does not thereby acquire a fresh charge in his favour giving him a fresh start of limitation for a suit to recover the money by enforcement of the prior mortgage. If the period of limitation prescribed for a suit on the prior mortgage has already expired, he can not bring a suit to enforce his remedy as against the mortgaged property.

A mortgage made in contravention of paragraph 11 of schedule III of the Civil Procedure Code is absolutely void.

Sir *Tej Bahadur Sapru* and Mr. *T. N. Sapru*, for the appellants.

Messrs. *S. K. Dey*, *Hazari Lal Kapoor* and *Raghubar Dayal*, for the respondents.

SULAIMAN, C. J., and COLLISTER, J.:—This is a plaintiffs' appeal arising out of a suit for sale on the basis of two mortgage deeds.

It appears that on the 20th of March, 1906, a mortgage deed was executed by Shib Singh in favour of Lachhmi Narain and others, hypothecating shares in three villages, Nahil, Sambhalpur and Nawadia. This was a simple mortgage, on the basis of which a suit was instituted subsequently and a mortgage decree obtained in 1916.

On the 6th of May, 1919, the mortgagors executed another mortgage in favour of plaintiff Mahnge Lal and

*First Appeal No. 130 of 1930, from a decree of S. M. Said-uddin, Additional Subordinate Judge of Pilibhit, dated the 2nd of December, 1929.

others for Rs.7,000 carrying interest at Rs.1-4-0 per cent. per mensem compoundable annually, under which shares in two out of the three villages, namely Nahil and Sambhalpur only, were mortgaged.

There was another mortgage of the 1st of March, 1920, in favour of another person, Lachhman Prasad.

On the 12th of March, 1921, the mortgagors executed a second mortgage deed in favour of the plaintiffs Mahnge Lal and others for Rs.22,000 carrying interest at 14 annas per cent. per mensem compoundable yearly. In this also the same two out of the three villages, namely Nahil and Sambhalpur, were hypothecated and there was a fourth village, Tukra Jungle, also mortgaged. Money was left in the hands of the mortgagee for payment of the prior mortgage decree of 1916 as also for the payment of the mortgage of 1st March, 1920, and some other debts, and some money was taken in cash for purposes of payment of revenue and private expenses. Mahnge Lal assigned his rights to Bansidhar and another on the 10th of August, 1925. Both Mahnge and Bansidhar and another have joined in this suit.

But for one difficulty the plaintiffs would have had a plain-sailing case inasmuch as the previous mortgages were both incorporated in the third mortgage, a suit on which was well within time.

It, however, happened that on the date of the mortgage dated the 12th of March, 1921, the mortgagors were not competent to hypothecate village Nahil, because there had been a money decree against this village put in execution, of which the execution had been transferred to the Collector under schedule III of the Civil Procedure Code and he had taken action thereunder. In view of paragraph 11 of that schedule, as interpreted by their Lordships of the Privy Council in *Gaurishankar Balmukund v. Chinnumiya* (1), the mortgage of Nahil made in contravention of paragraph

(1) (1918) I.L.R., 46 Cal., 183.

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11 of schedule III of the Civil Procedure Code was absolutely void and the charge is incapable of being enforced.

The whole trouble has arisen because the plaintiffs took a mortgage of this village and now consider that the total amount is unlikely to be realised out of the remaining property.

The plaintiffs did not at first pay off the amount due under the previous mortgage decree but when one of the properties, namely Nahil, was put up for sale they deposited Rs.10,350-4-4, the total amount due under the decree, in court on the 9th and 14th September, 1921, and thereby got that property released from sale and the previous auction sale set aside. The plaintiffs now claim that they are entitled to recover this sum paid by them as against a subsequent mortgagee who came on the scene in the following way. Just before the date when Mahnge Lal made the deposit in court the mortgagors had already mortgaged their property in Nahil, Sambhalpur and Tukra Jungle to Ram Saran Lal, defendant No. 3, for Rs.11,000. This was on the 8th of September, 1921. Ram Saran Lal brought a suit to enforce this mortgage and obtained a decree and himself purchased it again on the 22nd of March, 1927. In the present suit the plaintiffs are claiming to recover the sum of Rs.10,000 and odd, on account of the mortgage decree of 1916, against Ram Saran Lal's property, although the second mortgage in his favour of Nahil was void.

The learned Subordinate Judge came to the conclusion that the circumstances of this case were such that the parties could not have intended to keep alive the previous mortgage of 1906 on the date when the mortgage of 12th March, 1921, was executed. He has pointed out that the rate of interest under the second mortgage was much higher and it was in the interest of the mortgagee to claim this higher rate rather than fall back on the original mortgage decree which was carry-

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ing interest at 6 per cent. per annum. He has also pointed out that one village, Nawadia, which had been included in the previous mortgage, was not mortgaged again in the second mortgage and has suggested that if the parties had intended to keep alive the mortgage that property also would have been included. He has also commented on the circumstance that neither in the mortgage deed nor in the previous suit for sale, which was brought and withdrawn by the plaintiffs, was there any mention of the keeping alive of this earlier mortgage. He has also emphasised that by the mortgage of 12th of March, 1921, the mortgagors had intended to extinguish the rights under the earlier mortgage of the 6th of May, 1919, and when money had been left in the hands of the mortgagee for the discharge of the previous mortgages it was understood that those mortgages should stand extinguished.

There is, however, the fact that there was an intermediate mortgage of the 1st of March, 1920, and it might have been in the interest of the mortgagee to keep alive the earlier mortgage which he was paying off in order to use it against that intermediate mortgage. We think that it is not necessary to decide this question finally and we are prepared to assume in favour of the plaintiffs appellants that when they intended to take the mortgage on the 12th of March, 1921, it was intended that the previous mortgages would not be extinguished when the amounts left in their hands were paid. But the chief difficulty in the way of the plaintiffs is, as has been found by the court below, that the claim for the recovery of the amount due under the previous mortgage is now barred by time.

The learned advocate for the appellants strongly argued before us that by paying Rs.10,000 and odd in September, 1921, the plaintiffs acquired a charge on the properties originally mortgaged, which they are entitled to enforce within 12 years of the date of the payment. He has relied very strongly on the case of

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Shib Lal v. Munni Lal (1). That case no doubt supports his contention. It has, however, been dissented from by the Madras High Court in *Kotappa v. Raghavayya* (2).

In a case which came up before a Full Bench of this Court, *Ram Sanchi Lal v. Junki Prasad* (3), this question did not directly arise, though the principle underlying the contention urged on behalf of the appellants arose in that case. Four out of five Judges considered that the authorities seemed to establish that if the purchaser in execution of a prior mortgagee's decree is not in possession and is suing as plaintiff against the purchaser in execution of a subsequent mortgagee's decree then he can enforce his remedy if limitation on the prior mortgage has not yet run out; but he cannot recover the mortgage money if limitation has run out. The majority of the Judges were clearly of opinion that when a person is sued as plaintiff to enforce a simple mortgage he cannot get a decree for money if the period of limitation prescribed for a suit on that mortgage has already expired. They, however, thought that if he were found in possession he might be entitled to use the discharge of the previous mortgage as a shield for purposes of defence only and not as a weapon of attack. We are prepared to concede in favour of the appellants that as the point did not directly arise in that case it is not of binding authority in the same way as it is as regards the point which directly arose in that case. Even if we were to assume that the ruling in *Shib Lal's* case (1) was not by implication overruled by this Full Bench, we must point out that the principle laid down therein is contrary to another ruling of this Court, namely *Anpurna Kunwar v. Ram Padarath* (4), where another Bench held that the period of limitation prescribed for a suit brought against a puisne mortgagee

(1) (1921) I.L.R., 44 All., 67.

(2) (1926) I.L.R., 50 Mad., 626.

(3) (1931) I.L.R., 53 All., 1023

(4) (1926) I.L.R., 49 All., 430.

(1036).

was not extended either by execution of an intermediate usufructuary mortgage or by receipt of profits of the mortgaged villages by the mortgagee. The latter view was based on the facts of that case. The Bench relied for authority on *Mahomed Ibrahim Hossava v. Ambika Pershad Singh* (1). This last mentioned Privy Council case was not brought to the notice of the Division Bench in *Shib Lal's* case (2). We agree that the decision of their Lordships in *Mahomed Ibrahim Hossain's* case is very much in point. There, in the first place, there was a zar-i-peshgi lease of 1874 in favour of Girwar Singh for Rs.12,000 under which possession was delivered. This was followed by mortgages of 1879, 1880 and January, 1888. Lastly there was a mortgage of the 17th of February, 1888, in favour of Mst. Alfian, which was for the express purpose of paying off the zar-i-peshgi debt which Mst. Alfian discharged (page 550). The representatives of Mst. Alfian brought a suit in 1900 to enforce not only the mortgage of the 17th of February, 1888, but also to recover the sum of Rs.12,000 due on the zar-i-peshgi lease, on the ground that they had paid that amount and thereby acquired priority as against the intermediate mortgagees of 1879, 1880 and January, 1888. There were pleas of *res judicata* and limitation and also a plea that the charge created by the zar-i-peshgi lease had not been kept alive. On page 555 their Lordships came to the conclusion that the charge created by the zar-i-peshgi lease was kept alive for the benefit of Mst. Alfian. On page 558 their Lordships held that as Mst. Alfian had not been made a defendant in a previous suit brought by an intermediate mortgagee, although she was a necessary party, her rights were not affected by the decree and there was no bar of *res judicata*. Having recorded these findings their Lordships went on to observe at page 558: "But as the Rs.12,000 were, under the zar-i-peshgi deed of the 20th of November, 1874,

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(1) (1912) I.L.R., 39 Cal., 527.

(2) (1921) I.L.R., 44 All., 67.

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repayable in Jeth, 1294 Fasli (September, 1887), and this suit was not brought until the 22nd of September, 1900, the claim of the plaintiffs to priority is barred by article 132 of the second schedule of the Indian Limitation Act, 1877." Mst. Alfian's representatives were therefore not allowed to claim priority on account of their having paid off the amount due under the zar-i-peshgi lease although that lease was prior in point of time to the mortgages of the contesting defendants; and the ground on which the claim was disallowed was that the period of limitation prescribed for the enforcement of the charge under the zar-i-peshgi lease had expired. The mere fact that Mst. Alfian paid off the lease in July, 1888, did not entitle her representatives to recover the amount. It is possible that even twelve years had expired from the date of payment when the suit was brought, as it is stated on page 550 that possession was delivered on the 15th of July, 1888. But their Lordships did not base the dismissal on this ground but based it on the ground that the claim on the zar-i-peshgi deed itself had become time barred under article 132 of the Limitation Act. The authority of this case is therefore in point.

We find that the Patna High Court in the case of *Sibanand Misra v. Jagmohan Lall* (1) has come to the same conclusion and put the same interpretation on the decision of their Lordships in *Mahomed Ibrahim Hossain's* case (2).

We are accordingly of opinion that it is too late now for the plaintiffs to recover the amount paid by them to discharge the previous mortgage of 1906.

By paying it off they acquired a right for reimbursement but that did not give them any charge on any immovable property capable of being enforced within twelve years. They might have enforced their personal right of re-imbusement under section 69 of the Contract Act, for which there is a shorter period of limita-

(1) (1922) I.L.R., 1 Pat., 780.

(2) (1912) I.L.R., 39 Cal., 527

tion though it would start from the date of payment. But they cannot claim that the payment made by them created a fresh charge in their favour which gave them a fresh start of limitation as against everybody concerned. We may note that this view has also been expressed in Sir D. F. Mulla's new treatise on the Transfer of Property Act at page 486.

The plaintiffs are undoubtedly entitled to claim this amount as a charge against the villages other than Nahil, inasmuch as they hold a mortgage of the 12th of March, 1921, on those properties. They have already got a decree for this from the court below. But we are clearly of opinion that they are not entitled to enforce this charge against Nahil, of which the mortgage was void in law, and cannot take the case out of the law of limitation by pleading that a fresh charge was created in their favour.

The appeal is accordingly dismissed with costs.

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