

APPELLATE CIVIL

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

BHAGWATI PRASAD (DEFENDANT) *v.* DULLAN SINGH
(PLAINTIFF)*

1939
August, 16

Sub-mortgage—Without notice to mortgagor—Rights of sub-mortgagee—Takes and holds subject to the account between the mortgagor and original mortgagee—Redeemable upon payment by mortgagor of the amount due upon his own mortgage.

Where the mortgagee makes a sub-mortgage and the mortgagor has no notice thereof, the sub-mortgagee holds subject to the state of account between the mortgagor and the mortgagee; payments made by the mortgagor to the mortgagee are binding on the sub-mortgagee until he protects himself by giving notice of the sub-mortgage to the mortgagor, and if the sub-mortgagee is in possession the mortgagor is entitled to redeem and take possession of the property from him upon payment of the amount then due from the mortgagor to the original mortgagee; the fact that the sub-mortgagee is in possession instead of the original mortgagee does not alter the legal position of the mortgagor who has no notice of the sub-mortgage.

M made a usufructuary mortgage in 1905 in favour of *J*. *J* made a sub-mortgage to *B* in 1913. *M* had no knowledge or notice of the sub-mortgage. In 1921 *J* sued *M* on his mortgage, apparently for sale, and a compromise decree for Rs.150 was passed. The decree was not tainted with fraud or collusion. Nothing was done on the decree and the money was not paid. In 1926 *B* brought a suit for sale upon his sub-mortgage against *J* and a widow who was alleged to be the heir of *M* deceased, and obtained an *ex parte* decree, in execution whereof he purchased the mortgaged property and took possession. In 1929 *D*, the reversionary heir of *M*, sued *J* for possession of the mortgaged property, on the allegation that the mortgage debt had been satisfied, and the suit was decreed. Possession, however, was with *B*, so *D* brought a suit for possession against *B*. It was found that the mortgagor's estate was not properly represented in *B*'s suit of 1926 and therefore *D* was not bound by the result of that suit; it was also found that the mortgage debt of 1905 had not been satisfied. The

*Second Appeal No. 1623 of 1936, from a decree of Sheobaran Singh, Additional Civil Judge of Farrukhabad, dated the 1st of June, 1935, reversing a decree of Aftab Ahmad, Munsif of Farrukhabad, dated the 18th of May, 1933.

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question was whether *D* could not obtain possession without payment of the amount due upon the sub-mortgage: *Held* that the plaintiff mortgagor was entitled to redeem and take possession upon payment of Rs.450 which was the amount found due by the decree of 1921 upon the account between the mortgagor and the original mortgagee.

Mr. *J. Swarup*, for the appellant.

Mr. *Lalia Prasad*, for the respondent.

THOM, C. J., and GANGA NATH, J.:—This is a defendant's appeal in a suit for possession of certain zamindari property.

The property in suit was mortgaged by one Manohar Singh in the year 1905. The mortgage was a usufructuary mortgage in favour of Jwala Singh. The plaintiff Dullan Singh claims the property as a reversionary. The contesting defendant Bhagwati Prasad, *vakil*, is a sub-mortgagee of Jwala Singh's mortgagee rights.

In the year 1921 the mortgagee Jwala Singh instituted a suit for sale against Manohar Singh. During the pendency of the suit Manohar Singh died and his minor son Ajab Singh was brought upon the record. The dispute between the parties was eventually compromised and a decree was passed in terms of the compromise. The decree was one under order XXXIV, rule 5, and the decretal amount was Rs.450.

The defendant Bhagwati Prasad took a mortgage of Jwala Singh's mortgagee rights, as already observed, and also over other property of Jwala Singh in the year 1913. He brought a suit upon his mortgage against Jwala Singh and Mst. Bhagwani Kunwar the widow of the said Ajab Singh in the year 1926. This suit was decreed *ex parte*. In execution of the decree the property mortgaged by Manohar Singh was auctioned and purchased by Bhagwati Prasad in the year 1929. In this year the plaintiff Dullan Singh filed a suit against Bhagwani Kunwar and Jwala Singh praying for possession of Manohar Singh's property including the property mortgaged. He averred that after the death of Antu

Singh, the grandson of Manohar Singh, he was entitled to possession as reversioner. The suit was contested by Mst. Bhagwati Kunwar alone. The defence, however, failed and a decree for possession was granted to the plaintiff. Dullan Singh thereafter applied for mutation and discovered that the name of the contesting defendant in the present suit, Bhagwati Prasad, had already been recorded in respect of the property. He has in these circumstances prayed in the present suit for possession.

The contesting defendant had pleaded that the plaintiff was not entitled to a decree except upon the payment of the total amount due upon the sub-mortgage in his favour. The learned Civil Judge in the lower appellate court granted a decree in favour of the plaintiff conditional on payment by the plaintiff of the sum of Rs.450, the amount of the decree in the suit by Jwala Singh on his mortgage.

In appeal it was contended for the defendant that the decree in Jwala Singh's suit was not binding upon the defendant. Learned counsel maintained that despite the final decree in Jwala Singh's suit which was passed on the 28th October, 1922, the security still subsisted and the defendant, i.e. the sub-mortgagee, was entitled to the benefit of that security. In support of his contention that the security still subsisted despite the passing of a final decree in a mortgage suit learned counsel for the appellant referred to the case of *Sukhi v. Ghulam Safdar Khan* (1). In that case it was decided by the Privy Council that "when a prior mortgagee brings the property to sale in execution of a decree on his mortgage without impleading the puisne mortgagee to the suit, the rights of the puisne mortgagee are not affected by the sale. But if the puisne mortgagee brings a suit on his mortgage, the auction purchaser in execution of the prior mortgage decree can use the prior mortgage right as a shield, and claim payment of the amount due under the prior mortgage decree, where the puisne mortgagee

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seeks a decree for sale in his favour." The dispute in that case did not concern the rights of a sub-mortgagee but those of a purchaser at an auction in execution of a decree on a prior mortgage. In determining the rights of a sub-mortgagee different considerations apply. Furthermore, in our judgment it does not follow that because the security subsisted despite the passing of a final decree the defendant is entitled to claim the total amount due upon his sub-mortgage. The security no doubt subsists for certain purposes after the passing of a decree but it subsists only in respect of the decretal amount.

The finding of the lower appellate court in the present case is that the mortgagor had no notice of the sub-mortgage. The suit of 1921 was compromised in ignorance, so far as the mortgagor was concerned, of the sub-mortgagee's rights. The lower appellate court has further found that there was no fraud or collusion on the part of the mortgagor and the mortgagee. In these circumstances in our judgment the plaintiff is entitled to take his stand upon the decree.

The suit which was filed by Jwala Singh was in our judgment incompetent. Jwala Singh was a usufructuary mortgagee. He was not entitled to maintain a suit for sale of the mortgaged property. Nevertheless he filed such a suit and in that suit he obtained a decree under order XXXIV, rule 5 for the sum of Rs.450. This sum was not paid by the mortgagor. Jwala Singh allowed the decree in his favour to become a dead letter and remained in possession of the mortgaged property. In these circumstances we are satisfied that in equity the plaintiff who has succeeded to the property is entitled to recover possession of the property on payment of the sum of Rs.450. If this suit had been directed against Jwala Singh he could have had no answer to the plaintiff's claim. In equity no doubt he could have claimed to retain possession until the sum of Rs. 450 was paid to him despite the fact that he had allowed his decree to

become time barred. The sub-mortgagee stands in no higher position than Jwala Singh the mortgagee. He is bound by what has been referred to in a number of cases as "the state of account" between the mortgagor and the mortgagee. In this connection we would refer to Gour on the Law of Transfer of Property, sixth edition, volume 2, page 889. In paragraph 1418 the learned author observes: "The original mortgagor is entitled to sue the sub-mortgagee for redemption, and conversely the sub-mortgagee may sue the mortgagor for recovery of his money from the mortgaged property. The sub-mortgage is extinguished by the payment of the mortgage debt by the mortgagor, if he has no notice or knowledge of the sub-mortgage, and acts in good faith; similarly payments made under these circumstances towards the mortgage debt to the mortgagee will reduce the same *pro tanto* so far as the sub-mortgagee is concerned; but no payment made with notice or knowledge of the sub-mortgage will discharge wholly or partially the mortgage debt due to the sub-mortgagee. Following these principles, a sub-mortgagee of property is entitled to retain its possession against the original mortgagor until the amount due on the sub-mortgage is paid off, and he is not bound to seek his remedy against the original mortgagee. The sub-mortgagee cannot get anything more than the amount due to the original mortgagee at the time when the mortgagor learns of the sub-mortgage."

In *Papala Chakrapani Chetti v. Latchmi Achi* (1) it was held that "where a mortgagor in ignorance of the existence of a sub-mortgage executes, in substitution of the original mortgage, two mortgages covering two distinct portions of the property, whereby the original mortgage is discharged, the sub-mortgagee's rights under his sub-mortgage are not affected by the two mortgages executed in substitution of the original mortgage." Learned counsel relied upon this decision. We are not

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called upon in deciding this appeal to consider whether this decision is sound or not, the circumstances of the present case being quite different. It is to be noted, however, that in the course of their judgment WALLIS, C.J., and NAPIER, J., observed that "In *Matthews v. Wallwyn* (1) it was held that the only rights of a mortgagor without notice of the assignment are that the assignee holds subject to the account between him and the original mortgagee. This latter proposition was re-affirmed in *Chambers v. Goldwin* (2). This principle applies both to payments made prior to the assignment and to those subsequent to it. Vide *Halsbury's Laws of England*, volume 21, page 179 and *Dixon v. Winch* (3) where the limits of the doctrine were considered."

In this connection we would refer further to the case of *De Lisle v. Union Bank of Scotland* (4). In that case, which was decided in the Court of Appeal in England, PHILLIMORE, L.J., in the course of his judgment observes: "The transferee of a mortgage takes it on the footing that the amount said to have been advanced on the security has been advanced, but with the knowledge that since the creation of the mortgage the debt may have been reduced. He is not bound by the true state of the account between mortgagor and mortgagee at the date of the mortgage, because the statement as to the original loan cannot be falsified; but as to all transactions subsequent to the creation of the security he must take the accounts as they in fact stand unless and until he protects himself by giving notice to the mortgagor." It is further remarked in the same judgment that the assignee of the mortgagee rights must allow any repayment or any discharge made at any time after the execution of the sub-mortgage until he protects himself by giving notice to the mortgagor.

(1) (1798) 4 Ves. Jun. 118; 31 E.R. 62. (2) (1804) 9 Ves. Jun. 254; 32 E.R. 600.

(3) [1900] 1 Ch. 736.

(4) [1914] 1 Ch. 22(33).

Now in the present instance the state of the accounts shows that the sum due by the mortgagor under his mortgage is Rs.450. Learned counsel for the appellant conceded that if this sum had in fact been paid by the mortgagor to the mortgagee then his defence must fail. He has maintained, however, that the learned Civil Judge in the lower appellate court having reached the conclusion that no payment was made under Jwala Singh's decree, the security subsisted in respect of the full amount due under the sub-mortgage. In our judgment this argument is unsound. The sub-mortgagee is bound by the state of the account. It cannot be disputed that the decree of the 28th October, 1922, fixed the state of the account between the mortgagor and the mortgagee. The decree fixing the state of the account is no doubt a compromise decree but it is none the less binding upon the parties. It creates equitable rights both for the mortgagor and the mortgagee and it is not permissible at this stage, in the absence of any allegations of fraud or collusion, to go behind the decree and to examine the considerations which induced the parties to conclude the compromise. After the passing of the decree in 1922 there can be no doubt that the plaintiff would have been entitled to recover from the mortgagee the mortgage property upon the payment of the decretal amount and in our view the fact that the property is now in the possession of the sub-mortgagee does not alter the legal position. The amount due under the mortgage having been reduced by payment or by decree the sub-mortgage security is *pro tanto* restricted, the sub-mortgagee having failed to give notice of the mortgage to the mortgagor.

The learned Civil Judge has granted a decree of possession of the property in suit conditional upon the payment of Rs.450 to the appellant. In our judgment this decision is sound.

We would observe in conclusion that in the sub-mortgage of 1913 Jwala Singh not only mortgaged his

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mortgagee rights under Manohar Singh's mortgage but other property also. This property has been auctioned by the appellant in execution of his decree in the year 1929. We have no information before us as to the amount realised by the sale of this property and accordingly whether more than the sum of Rs.450 is due under the sub-mortgage.

In the result the appeal fails, and it is dismissed with costs.

FULL BENCH

Before Sir John Thom, Chief Justice, Mr. Justice Allsop and Mr. Justice Ganga Nath

UMA SHANKAR (PLAINTIFF) v. RAM CHARAN
(DEFENDANT)*

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Transfer of Property Act (IV of 1882), section 6(a)—Spes successionis—Transfer or relinquishment of prospective right of reversion after the death of a Hindu widow—Invalid unless part of family settlement or compromise of rival claims.

The bare transfer or relinquishment, for consideration, of the interest of a Hindu reversioner in the property which the female owner holds for her life is void under section 6(a) of the Transfer of Property Act as a transfer of a mere spes successionis. Such a transfer or relinquishment, however, may be valid where it is a part and parcel of a family settlement or of a compromise in a dispute between rival claimants to property.

Mr. G. S. Pathak, for the appellant.

Dr. S. N. Sen and Messrs. J. Swarup and R. N. Sen, for the respondent.

THOM, C.J., ALLSOP and GANGA NATH, JJ.:—This is a plaintiff's appeal arising out of a suit in which the plaintiff prayed "that on ejection of the defendant, the plaintiff may be put in possession of the house bounded as below, situate in mohalla Rikabganj, Farrukhabad." One Har Narain was the last male

*Second Appeal No. 53 of 1937, from a decree of J. C. Malik, Civil Judge of Farrukhabad, dated the 7th of October, 1936, reversing a decree of G. D. Sahgal, Additional Munsif of Farrukhabad at Fatehgarh, dated the 14th of December, 1935.