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April 21.

Before Mr. Justice Spankie and Mr. Justice Straight.

BADRI PRASAD (PLAINTIFF) v. DAULAT RAM (DEFENDANT).*

Mortgage—Agreement to convey the mortgaged property in case of default—Suit for specific performance of contract—First and Second mortgagees—Act I of 1877 (Specific Relief Act), s. 27 (b)

On the 7th February, 1873, *F* mortgaged the equity of redemption of a certain estate to *B* and *G*. On the 7th August, 1877, he mortgaged such estate to *P*, agreeing that, if he failed to pay the mortgage-money within the time fixed, he would convey such estate to *P*, and that, if he failed to execute such conveyance, *P* should be competent to bring a suit "to get a sale effected and a deed of absolute sale executed." On the 6th October, 1877, *F* mortgaged such estate to *B* and *D*. By this mortgage the lien created by the mortgage of the 7th February, 1873, was extinguished. In December, 1877, *B* and *D* obtained a decree against *F* on the mortgage of the 6th October, 1877, and in June, 1878, in execution of that decree, such estate was put up for sale and was purchased by *D*. In February, 1880, *P* sued *F* and *D* for the execution of a conveyance of such estate to him in accordance with *F*'s agreement of the 7th August, 1877.

Held that the mortgage of the 7th August, 1877 was not in the nature of a mortgage by conditional sale and there was no necessity for *P* to take proceedings to foreclose the mortgage, and the suit was maintainable. Also that, assuming that *D* had no notice of the agreement of the 7th August 1877, it was very doubtful whether under s. 27 (b) of Act I of 1877 *D* could claim that specific performance of that agreement should not be granted, inasmuch as the contest lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under a sale in execution of a decree for the enforcement of the subsequent lien.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambar Nath* and Babu *Oprokash Chandar Mukarji*, for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This is a suit for specific performance of a contract, as also for the possession of certain immoveable property. The following are the circumstances of the case. Faiz Bakhsh Khan, defendant, was the owner of zamindari shares in Muhammad

* First Appeal, No. 71 of 1880, from a decree of Rai-Bakhtawar Singh, Subordinate Judge of Meerut, dated the 13th March, 1880.

pur Kalan and mauza Ganaura Shaikh, zila Bulandshahr. Some-time prior to February, 1873, he mortgaged his share in Ganaura Shaikh to one Ghulam Husain for an advance of Rs. 300. On the 7th February, 1873, having obtained a loan from Balkishan deceased, represented in this suit by his sons, and Ganga Ram of Rs. 400, Faiz Bakhsh Khan pledged and hypothecated, as security for the same, his equity of redemption in the share already mortgaged to Ghulam Husain. Interest was to be paid on the Rs. 400 at the rate of Re. 1-12-0 per cent. per mensem, at the end of every six months, and in case of default of a "single day," it was to be increased to Rs. 2 per cent. per mensem from the date of the execution of the bond. On the 7th August, 1877, in consideration of Rs. 8,400, cash actually advanced to him, or paid on his behalf, Faiz Bakhsh Khan made another instrument in favour of Badri Prasad, plaintiff in the present suit, and his now deceased brother Ram Prasad, bankers of Bulandshahr, which after providing, among other matters, that the amount was to be repaid within two years, with interest at Re. 1-4-0 per cent. per mensem, went on to say:— "I pledge and hypothecate my $7\frac{1}{4}$ biswa zamindari share in mauza Muhammadpur : also one biswa, two biswansis, four nanwansis, nine tanwansis zamindari share in mauza Ganaura Shaikh ; I shall not transfer them anywhere : should I do so, the same will be null and void : if I fail to pay the said sum within the above term, I shall make a sale of the said shares, and if I do not effect the sale thereof and bring any objections, then the creditors shall be competent on the basis of this contract to bring a claim to get a sale effected and a deed of absolute sale executed." This instrument was duly registered at Bulandshahr on the 7th August, 1877. On the 6th October, 1877, Faiz Bakhsh Khan executed a bond to Balkishan deceased and his son Daulat Ram, defendant No. 2, for Rs. 1,200, the details of the payment of which amount is entered at the foot of the document to the following effect. The sum of Rs. 848 was taken to be the total amount of principal and interest due to date upon the bond of 7th February, 1873, from Faiz Bakhsh Khan to Balkishan and Ganga Ram. Of this Rs. 424 was to be considered as having been paid to Balkishan and Rs. 424 was left in his hands to discharge Ganga Ram his co-obligee. The remaining Rs. 352 was taken in cash by the obligor. The security given was

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as follows:—"I pledge and hypothecate in this bond a one biswa $2\frac{1}{4}$ biswansi zamindari share in the $12\frac{1}{4}$ biswa thoke of mauza Ganaura Shaikh, which shall remain hypothecated until payment of this sum : I shall not hypothecate it to any one else : I shall pay the interest of Re. 1-8-0 per cent. per mensem at the end of every year : should I fail to pay the interest at the end of any year, I shall pay interest on that interest also at the same rate of Re. 1-8-0."

On the 20th December, 1877, Balkishan and Daulat Ram obtained a decree against Faiz Bakhsh Khan upon his bond of 6th October, 1877, and in execution on the 20th June, 1878, brought to sale his share in mauza Ganaura Shaikh, Daulat Ram one of the decree-holders himself purchasing it. The present suit was instituted on the 2nd of February, 1880, after demand made upon Faiz Bakhsh Khan to execute a sale-deed in accordance with the terms of the contract of 7th August, 1877, and refusal by him to do so. The Subordinate Judge decreed the plaintiff's claim in so far as it related to Muhammadpur, but he dismissed it as regards mauza Ganaura Shaikh. The appeal before us, in which the plaintiff is the appellant, solely relates to this last mentioned property, and the pleas taken are in substance that, when the new bond of 6th October, 1877, was executed, the old contract of 7th February, 1873, came to an end, and that under the bond of 6th October, 1877, the defendant Daulat Ram and his deceased father Balkishan could have no lien on mauza Ganaura Shaikh in face of the plaintiff's security thereon of the preceding month of August. On the part of Daulat Ram, respondent, it is urged that the grant of specific relief being entirely a matter of discretion for the Court, it should not be given against a "*bonâ fide*" purchaser for value without notice; that the lien on mauza Ganaura Shaikh created by the bond of 7th February, 1873, was never surrendered when the bond of 6th October, 1877, was executed, but that on the contrary it was kept in force; that the instrument of the 7th August, 1877, being in the nature of a mortgage by conditional sale, proceedings should have been taken for foreclosure.

We are of opinion that this appeal should prevail and that the plaintiff-appellant is entitled to have a conveyance executed to him of the share of Faiz Bakhsh Khan in mauza Ganaura Shaikh.

The instrument of August, 1877, was not a conditional sale-deed. On the contrary it hypothecated that share for the two years for which the loan was made, and specifically provided that, if there was default in repayment of Rs. 8,400 by the appointed date, the obligees might call upon the obligor to execute a legal transfer of the property pledged. The terms of the latter part of the instrument of August, 1877, would in our judgment of themselves have precluded proceedings for foreclosure, and we see no reason to regard them as amounting to more than an ordinary contract to do a particular act at a time designated, of which specific performance may be enforced by the promisee. The present suit has been properly brought, and the respondent, Daulat Ram, being the purchaser and in possession of a portion of the property hypothecated to the plaintiff and included in the deed of August, 1877, has been rightly made a defendant. The contention of the pleader for Daulat Ram that the lien created by the bond of February, 1873, was subsisting at the time of the sale in execution in June, 1878, is altogether untenable. It seems clear to us from the terms of the bond of October, 1877, and the mode in which the money advanced under it was disposed of, that the bond of February, 1873, was regarded as defunct and at an end, and that an entirely fresh transaction, with a new obligee, in the person of Daulat Ram, instead of Ganga Ram, was entered into. Moreover it was assumed at the hearing that the bond of February, 1873, mortgaged the share of Faiz Bakhsh Khan in mauza Ganaura Shaikh, but that is incorrect. It was his equity to redeem Ghulam Husain's charge that was pledged, whereas by the bond of October, 1877, better security was obtained in the hypothecation of the share itself. Besides, the crediting of Balkishan with the Rs. 424 and the leaving a corresponding sum in his hands to satisfy the claim of his co-obligee Ganga Ram goes a long way towards establishing that the bond of February, 1873, was discharged and put an end to when the new relations were created by that of October, 1877. Under all the circumstances we find it impossible to hold that, at the time of purchase of mauza Ganaura Shaikh by Daulat Ram, Balkishan's lien under the bond of February, 1873, was still subsisting. The only point urged for the respondent at all deserving consideration is, that he should be treated as coming within the exception contained in sub-section (b) of s. 27

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of the Specific Relief Act. The argument is a specious one and at first sight would appear to have some force, for it seems only equitable that specific performance of a contract should not be enforced where property would be affected that had passed into the hands of "a transferee for value, who has paid his money in good faith and without notice of the original contract." But if the question of notice could enter into our consideration in the present case which it properly cannot, the implication of notice is irresistible. The instrument of August, 1877, and the bond of October, 1877, were executed within two months of one another and registered in the Bulandshahr registry; and it passes belief that, being fully alive to the purposes and objects of the registration law, the obligees of the bond should have made no inquiries at the office to ascertain whether there were any prior charges on their security. But apart from this we entertain very grave doubts whether the exception of sub-section (b) of s. 27 of the Specific Relief Act could have any application to the circumstances of this case, where the contest lies between a prior and subsequent lien created upon the same property, which has passed to the transferee under a sale in execution of a decree for enforcement of the subsequent lien.

The appeal is decreed with costs, and we declare the plaintiff appelland entitled to a decree in full for the relief sought by him in his petition of plaint.

Appeal allowed.

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CIVIL JURISDICTION.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HIMALAYA BANK (PLAINTIFF) v. HURST AND ANOTHER (DEFENDANTS).

Sale in execution of Small Cause Court decree—Rateable division of sale-proceeds—Holder of decree made by Judge of Small Cause Court in the exercise of the powers of a Subordinate Judge—Act X of 1877 (Civil Procedure Code), s. 295.

The Judge of a Court of Small Causes sitting in the exercise of his powers as such and in the exercise of his powers as a Subordinate Judge is not one and the same Court but two different Courts.

Held, therefore, that the holder of a decree made by the Judge of a Small Cause Court in the capacity of Subordinate Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby entitled to