APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

1928

January, 31.

RAM RATAN, LALA AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* BABU ADITYA PRASAD (PLAINTIFF-RESPONDENT).*

Mortgage—Mortgagee in possession—Sale by mortgagor of his rights to a third person—Mortgagor's conduct and declarations subsequent to sale, effect of—Adverse possession of mortgagor, whether possible—Interest on a mortgage, whether to be regarded as a charge on the property—Deed of further charge—Claim on a deed of further charge, when can become time-barred—Transfer of Property Act (IV of 1882) sections 61 and 62, applicability of.

Where the property in a suit was mortgaged with possession and the mortgagees and their successors were in possession of it and the mortgagor had been out of possession from the date of the mortgage, the mortgagors' conduct and declarations subsequent to the sales in favour of a third person are of no consequence whatsoever. A valid title having passed to the vendee under the sales, the mortgagor could not extinguish that title either by adverse possession, because the possession was with the mortgagees, or by mere repudiation.

The general rule is that the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge upon the estate. Where there was nothing in the mortgage deed barring the application of the general rule, and the preamble as also the terms entered in it support the interpretation that the interest stood on the same footing as the principal, the principal and interest both constitute a charge.

A separate claim by a mortgagee on a deed of further charge might be barred, but his right to the money due to him under that deed cannot be held to have been extinguished so long as his lien by possession lasts.

*First Civil Appeal No. 97 of 1927, against the decree of Saiyid Shaukat Husain, Additional Subordinate Judge of Gonda, dated the 14th of April, 1927, partially decreeing the plaintiff's claim.

1928

RAM RATAN, LALA v. BABU ADITYA PRASAD.

Section 61 enacts by implication the liability of mortgagor to satisfy all mortgages on the property sought to be redeemed. The terms of section 62 are inapplicable where it is not a case of redemption of property which has no mortgage in relation to it except a usufructuary mortgage pure and simple. It has, therefore, no application where there is a usufructuary mortgage and also a simple mortgage. *Ehtisham Ali* v. *Jamna Prasad* (1), *Ganga Ram* v. *Natha Singh* (2), *In re Hepburn Ex parte Smith* (3), *Panaganti Ramarayanimgar* v. *Maharaja of Venkatagiri* (4), followed.

Messrs. *Niamat Ullah* and *Naim Ullah*, for the appellants.

Messrs. *Haider Husain*, *J. N. Chak*, *Ali Zaheer* and *Mahabir Prasad*, for the respondents.

HASAN and RAZA, JJ. :—This is the defendants' appeal from the decree of the Additional Subordinate Judge of Gonda, dated the 14th of April, 1927. The appeal arises out of a claim for redemption of a 14 annas 6 pies share *minus* 20 bighas of *sir* land and a three-fourths share in *chak haqiat mutafarraqa* of village Parsapur, pargana Nawabganj, in the district of Gonda. The remaining one anna six pies share of the said village now admittedly belongs to the defendants, and there is no controversy in this suit in respect of it.

The mortgage sought to be redeemed is dated the 11th of July, 1881, and relates to the entire village of Parsapur. It was executed by one Babu Raj Kishore for a consideration of Rs. 5,500 in favour of two persons Sheo Dial Sah and Ramphal (exhibit 10). It is agreed that the defendants are the representatives of the mortgagees in respect of the 14 annas 6 pies share in the suit. The title to the said share has come to be vested in the plaintiff in the following manner :

Raj Kishore's son and sole heir, Mahabir Prasad, sold 11 annas' proprietary share of the village of Parsapur to one Hanoman Sah by a deed of the 23rd of March,

(1) (1921) L.R., 48 I.A., 365. (2) (1924) L.R., 51 I.A., 377.
(3) (1884) 14 Q.B.D., 394. (4) (1927) L.R., 54 I.A., 68.

1887 (exhibit 12). Again on the 29th of October, 1888, Mahabir Prasad sold 3 annas 6 pies share of the same property to the same Hanoman Sah (exhibit 1) in whose favour the sale of the 23rd of March, 1887, was made.

On the 1st of March, 1893, Sheo Prasad Sah and his three brothers, all sons of Hanoman Sah, and six other persons, representing the interest of Hanoman Sah sold the 14 annas 6 pies share of village Parsapur, together with some other immoveable property to one Babu Lal Sah (exhibit 2).

Hasan and Razvi, JJ.

On the 22nd of April, 1904, Babu Lal Sah made a gift of a 4 annas 6 pies share out of the 14 annas 6 pies share of village Parsapur which he had purchased under the deed of the 1st of March, 1893, in favour of Munshi Achambhit Lal (exhibit 4).

On the 25th of April, 1904, Babu Lal Sah sold the remaining 10 annas proprietary share of village Parsapur to the same Munshi Achambhit Lal for a sum of Rs. 10,000 (exhibit 5).

It will thus be seen that Munshi Achambhit Lal became the owner of the 14 annas 6 pies share now in suit. Munshi Achambhit Lal is dead and the plaintiff is his son and heir. The transfers stated above are not disputed. It follows that the plaintiff has a title to the 14 annas 6 pies share of village Parsapur and this is the share which he desires to redeem in the suit, out of which this appeal arises, unless his title is barred by any rule of law.

The defendants pleaded this bar on two grounds :—

(1) that the sales of the 22nd of March, 1887, and of the 29th of October, 1888, were repudiated by the vendor Mahabir Prasad on the ground that the vendee Hanoman Sah did not perform his part of the contract. It is alleged that the primary purpose of the sales

1928

RAM RATAN, LALA v. BABU ADITYA PRASAD.

was that Hanoman Sah would institute suits against the widows of Mahabir Prasad's brothers who had predeceased their father, Raj Kishore, to establish title in favour of Mahabir Prasad alone, but Hanoman Sah did not institute such suits, and

Hasan and Raza, JJ.

(2) that Hanoman Sah and his successors lost title by reason of adverse possession on the part of Mahabir Prasad.

We are of opinion that the trial court has rightly decided the two matters mentioned above against the defendants. The facts bearing on the two pleas in bar of the plaintiff's title are as follows :—

It appears that after the death of Raj Kishore the entries in the revenue registers in respect of the entire village of Parsapur were made in the names of Mahabir Prasad, Musammat Deo Kuar (widow of a predeceased son of Raj Kishore) and Avadh Kuar (widow of another predeceased son of Raj Kishore) in the year 1884 and it further appears that after the execution of the sale deed of the 23rd of March, 1887, by Mahabir Prasad in favour of Hanoman Sah the name of the former was expunged and in place thereof the name of the latter was entered in respect of a 5 annas 4 pies share in pursuance of the aforementioned sale (exhibit 16). Subsequently when the revision of the settlement of the district took place in 1896-1898 the name of Hanoman Sah disappeared from the *khewat* altogether (exhibit A7) and the name of Mahabir Prasad together with the name of Musammat Deo Kuar, one of his sisters-in-law, was restored and when Musammat Deo Kuar died the names of her sons were entered in place of her name (exhibit A8). Babu Lal Sah's name never found a place in the village papers in respect of any interest in the village of Parsapur.

1928

RAM RATAN, LALA v. BABU ADITYA PRASAD.

Hasan and Raza, JJ.

In the year 1888 Mahabir Prasad sought to redeem the mortgage effected by his father on the 11th of July, 1881, from the hands of the mortgagees under the provisions of section 83 of the Transfer of Property Act, 1882. The mortgagees declined to redeem mainly on the ground that the term of the mortgage had not expired. Eventually Mahabir Prasad's attempt proved futile with the result that the mortgage remained unredeemed (exhibits 13, 14 and 15). In the year 1913, Munshi Achambhit Lal made an attempt to obtain an entry of his name in the revenue registers, but did not succeed. Mahabir Prasad seems to have intervened and to have attacked the sale made by him in favour of Hanoman Sah on the ground of non-payment of consideration and of absence of "actual and legal possession". He claimed ownership in himself (exhibits A4, A6, 18 and 41). Mahabir Prasad died in or about the year 1915. It is argued that adverse possession against the vendee and his successors began from the date of Mahabir Prasad's application just now mentioned and that was the 2nd of January, 1913 (exhibit A4).

We are of opinion that the facts stated above do not impair the plaintiff's title in the least. The outstanding fact which has subsisted all along is that the mortgagees and their successors have from the commencement of the mortgage remained in possession of the property in suit in the character of mortgagees. Mahabir Prasad, as before him his father, Raj Kishore has been out of possession from the date of the mortgage. In our opinion Mahabir Prasad's conduct and declaration subsequent to the sales in favour of Hanoman Sah are of no consequence whatsoever. Under the sales valid title passed to the vendee and Mahabir Prasad could not extinguish that title either by adverse possession because the possession was with the mortgagees or by mere repudiation. In the

1928

RAM RATAN, LALA v. BABU ADITY. PRASAD.

Hasan and Raza, JJ.

case of *Ehtisham Ali* v. *Jamna Prasad* (1), which is similar to the case before us, Lord PHILLIMORE said :—

> "As to the alleged subsequent dealings by Ehsan Ali Khan with the property, they could not, if regarded as declarations in his own favour, be received in evidence on behalf of those claiming under him, any more than they could be received if he were himself the defendant. They could not be regarded as acts of ownership so as to prove adverse possession, because he never was in possession, the possession remaining in the mortgagee."

There is no evidence worth the name on the record that there was any agreement contemporaneous with the sales under which Hanoman Sah had bound himself to do an act which he failed to do and which failure gave a right to Mahabir Prasad of rescinding the sales.

The only other point which remains for decision in the appeal is as follows :—

It appears that after the mortgage of the 11th of July, 1881, Raj Kishore further borrowed a sum of Rs. 2,500 from the mortgagees in possession and executed a bond in respect of that debt on the 10th of November, 1881. The debt was to carry interest at the rate of Re. 1-8-0 per cent. per mensem (exhibit 47). The plea in defence is that by the bond of the 10th of November, 1881, the debt of Rs. 2,500 with interest and compound interest is made a charge on the entire village of Parsapur and that the plaintiff must pay the amount due thereunder on the redemption of the earlier mortgage. The lower court has held that the deed of the 10th of November, 1881, does not create a charge on the property sought to be redeemed and the plaintiff is not liable to pay to the defendants any sum of money due under that bond in this claim for redemption.

(1) (1921) I.L.R., 48 I. A., 365.

We do not agree with the lower court. In our opinion the bond of the 10th of November, 1881, is clearly a deed of further charge. The mortgage of the 11th of July, 1881, is a usufructuary mortgage and is for a period of 15 years, 1289 to 1303 *fasli*. It is recited in the first part of the deed under consideration. It is further stated in the same part of it that the "mortgagees have been in possession and occupation of the village of Parsapur in pursuance of the aforesaid mortgage." The deed proceeds :—

Hasan and Raza, JJ.

> "I having borrowed Rs. 2,500 . . . . by way of additional debt bearing interest at Re. 1-8-0 per cent. per month, repayable within the period mentioned in the former mortgage deed, from the aforesaid mortgagees . . . appropriated the said amount to myself. I, therefore, stipulate and reduce it to writing that I shall repay, without any excuse whatever, the entire amount of debt, principal and interest, in a lump sum within the aforesaid stipulated period. It is agreed upon that—
>
> 1. I shall at first pay up this debt including principal and interest and thereafter I can redeem the mortgaged village having paid up the mortgage money. Without the payment of this debt of Rs. 2,500 principal and interest, I cannot redeem the mortgaged village.
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> 2. I shall pay every year the interest on the amount mentioned in this bond from my pocket or from my other property in my possession. If (God forbid) I, the executant, fail to pay interest then I of my own accord shall execute, without

1928

RAM RAJAN LALA v. BABU ADITYA PRASAD.

Hasan and Raza, JJ.

any excuse whatsoever, separate bonds every year bearing Re. 1-8-0 per cent. per month as interest which may accrue due after accounting.

3. I cannot pay up the prior mortgage money until I pay off this debt, principal and interest and be it also known that if I make excuses or delay regarding the execution of bonds, bearing interest, the bankers shall have power to have the aforesaid conditions specifically fulfilled by means of a suit."

At the foot of this deed village Parsapur is described by its boundaries. Now it is admitted that the mortgagees were in possession of village Parsapur on the date of this deed. The fact is also recited in the preamble, as we have already said.

Condition No. 1, therefore, clearly means that the mortgagees will continue to remain in possession also in consideration of this fresh loan, principal and interest both. The mortgagees have, therefore, a lien of possession on the mortgaged property of which they can only be deprived on the discharge of the lien. This conclusion is further strengthened by condition No. 3, which is to the effect that the prior mortgage cannot be redeemed without payment of the debt, principal and interest, that might be found due under the deed of the 10th of November, 1881, and by the description of the village of Parsapur at the end of this deed. Nor do we see any justification in the language of the deed for accepting the argument addressed to us on behalf of the plaintiff-respondent that the charge or lien is restricted to the principal amount alone. The general rule is that the mortgage, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate. We are wholly unable to

1928

RAM RATAN, LALA v. BABU ADITYA PRASAD.

find anything in the deed in question which would bar the application of the general rule. On the contrary, the preamble, condition No. 1, and condition No. 3 all support the interpretation that the interest stands on the same footing as the principal itself [See the case of *Ganga Ram* v. *Natha Singh* (1).]. The provision in condition No. 2 for execution of bonds in consideration of interest in arrears is only, it seems to us, an additional remedy in favour of the creditor arising out of the personal liability of the debtor. It is agreed that bonds for the interest were executed for the first four years of the deed of the 10th of November, 1881, and that suits were brought and decrees obtained on them. It is further admitted that since then neither any amount of interest was paid nor any bond executed in respect thereof. We, therefore, hold that the principal and interest both constitute a charge.

Hasan and Raza, JJ.

On behalf of the appellants compound interest is also claimed on two grounds :—(1) that under condition No. 2 should a bond come to be executed for the arrears of interest that amount of interest becomes principal amount and is to carry interest at the rate of Re. 1-8-0 per cent. per month.

We do not think that the provision as to interest applicable to a bond which might be executed in compliance with condition No. 2 can justify a claim for compound interest when no bond has been executed and the claim rests on the deed of the 10th of November, 1881, and when, as we have held, the charge for the unpaid interest subsists on the immoveable property. The main stipulation as to the interest is given in the first part of the deed where it is stated that Rs. 2,500 bearing interest at Re. 1-8-0 per cent. per month was borrowed.

The second ground is that the right to compound interest has already been adjudicated in favour of the

(1) (1924) L.R., 51 I.A., 377.

1928

RAM RATAN, LALA v. BABU ADITYA PRASAD.

mortgagees and therefore the matter is *res judicata*. There is no proof of any such adjudication before us. The only thing relied upon in this connection is exhibit 44, which purports to be a copy of an extract from the register of the Court of the Subordinate Judge of Gonda in respect of an original suit No. 160 of 1886, decided on the 2nd of October, 1886, *in re Sheo Dayal and Ramphal* v. *Mahabir Prasad*. In one of the columns of this exhibit the entry is as follows :—

Hasan and Raza, JJ.

> " Claim to recover Rs. 2,516 with interest and compound interest on the basis of the deed, dated the 10th November, 1881."

Having regard to the admitted facts the suit mentioned in this document was a suit for the interest of the first four years and might well have been founded on bond or bonds which the debtor might have executed for the interest in arrears for the first four years of the deed of the 10th of November, 1881, as provided for by the same deed.

The next argument on behalf of the plaintiff-respondent against the enforcement of the charge arising out of the deed of the 10th of November, 1881, is that the claim for the money due under that deed is barred both by three years' and twelve years' rule of limitation and therefore it should not be allowed. We are unable to accept this argument. It might be that a separate claim by the defendants on the deed in question is barred, but their right to the money due to them under that bond cannot be held to have been extinguished so long as their lien by possession lasts. *In re Hepburn Ex parte Smith* (1) CAVE, J. says :—

> " There is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has in point of law ceased to

(1) (1884) 14 Q.B.D., 394.

exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien, but not for enforcing the remedy by action."

Hasan and Raza, JJ.

The last argument on behalf of the plaintiff-respondent in this connection is that the mortgage of the 14th of July, 1881, being a purely usufructuary mortgage he is entitled to redeem it in spite of the contract contained in the deed of the 10th of November, 1881, by force of the provisions of section 62 of the Transfer of Property Act, 1882. We think that this argument is wholly repelled by the recent decision of their Lordships of the Judicial Committee in the case of *Panaganti Ramarayanimgar* v. *Maharaja of Venkatagiri* (1). As pointed out in that case section 61 enacts by implication the liability of the mortgagor to satisfy all mortgages on the property sought to be redeemed. Further the deed of the 10th of November, 1881, clearly by its terms consolidates the two debts. The terms of section 62 are inapplicable to the facts of this case. This is not a case of redemption of property which has no mortgage in relation to it except a usufructuary mortgage pure and simple. In the present case there is the usufructuary mortgage of the 11th of July, 1881, and there is also a simple mortgage of the 10th of November, 1881, as we interpret the last-mentioned deed.

(1) (1927) L.R., 54 I. A., 68.

1928

RAM RATAN, LALA v. BABU ADITYA PRASAD.

Hasan and Raza, JJ.

These were all the points that were urged at the hearing of the appeal. No other point was urged.

Before we take leave of this case we would like to mention a circumstance which arose at the time when the appeal first came to be heard by us. The learned Counsel for the plaintiff-respondent drew our attention to an application of the 11th of April, 1927, made by the plaintiff in the court below. By that application the plaintiff wanted to raise certain issues, the burden of proving which would have lain on the defendants. The learned Additional Subordinate Judge rejected the application. We intimated to the learned Counsel that in case he desired to press the application it would be only fair and just that the defendants should be given an opportunity to meet the case raised by the application and for that purpose we would make an order of remand to the lower court. When the appeal came to be heard by us on the second and the last occasion the learned Counsel for the plaintiff-respondent in the presence of the plaintiff himself informed us that he did not desire a remand for opening an inquiry into the case set forth in the application of the 11th of April, 1927, and that he did not press that application. He said that he would argue the appeal on the record as it stands.

The plaintiff-respondent filed cross-objections, but at the hearing of the appeal they were not pressed.

The result is that we allow this appeal, set aside the decree of the court below and in lieu thereof we direct that a decree in the following terms under order XXXIV, rule 7, of the Code of Civil Procedure for redemption of 14 annas 6 pies share *minus* 20 bighas *sir* land and three-fourths share in *chak haqiat mutafarraqa*, the details of which are given in the decree of the court below, of village Parsapur, pargana Nawabganj district Gonda be prepared in this Court.

1928

RAM RATAN, LALA v. BABU ADITYA PRASAD.

(A) The following sums of money shall be declared due at the date of the decree to the defendants :—

(1) Rs. 5,500 under the deed of the 11th of July, 1881.

(2) Rs. 2,500 principal under the deed of the 10th of November, 1881, and simple interest thereon at the rate of Re. 1-8-0 per cent. per month from the 10th of November, 1881, to the date of the decree *minus* the interest for the first four years.

Hasan and Raza, JJ.

The total sum shown to be due to the defendants will be reduced by the amount in the same proportion that 14 annas 6 pies bear to 16 annas.

(B) Six months' time for payment will be allowed to the plaintiff-respondent and the interest as directed in A(2) will further be added for the aforesaid period of six months and interest after six months till realization will be added at the rate of six per cent. per annum.

(C) The defendants-appellants will be entitled to their costs in both courts on the amount found due to them on the date of the decree.

The cross objections are dismissed with costs.

Appeal allowed.