

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice
A. H. deB. Hamilton

LALA GHANSHYAM DAS (DEFENDANT-APPELLANT) v. DURGA
BAKSH SINGH AND OTHERS (PLAINTIFFS-RESPONDENTS)*

1938

Mortgage—Subrogation—Prior mortgage paid up by subsequent mortgage in favour of same person—First mortgage, if can be used as a shield against intermediate mortgage—Intention to keep alive prior mortgage, presumption of.

January,
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Where a mortgagee takes another mortgage in lieu of his prior mortgage and the case is not strictly covered by the provisions of the Transfer of Property Act, the mortgagee can claim the benefit of the doctrine of subrogation and he can use his earlier mortgage as a shield against any claim for priority of an intermediate mortgagee, as the original mortgagee should be presumed to have intended what was to his benefit and he ought to be deemed to have intended to keep alive the earlier mortgage to be used as a shield against the intermediate mortgagees. The fact that the former mortgagee did not return the first mortgage deed to the mortgagor when he executed the second mortgage deed but kept it himself, is an indication of the fact that he intended to keep alive the first mortgage. The circumstances that while a larger share was mortgaged by the first deed but only a smaller share was mortgaged by the second deed, that the last mortgage was usufructuary while the first was simple and that no mention was made in the last mortgage deed of an intention to keep alive the first mortgage does not show that he did not intend to keep alive the first mortgage. *Ram Kumar v. Dwarka Prasad* (1), and *Kanhaiya Lal v. Gulab Singh* (2), relied on.

Messrs. *Hyder Husain* and *H. H. Zaidi* for the appellant.

Mr. *Radha Krishna Srivastava* for the respondents.

ZIAUL HASAN and HAMILTON, JJ.:—This is a defendant's appeal against a decree of the learned District Judge of Rae Bareilly who affirmed a decree of the learned Civil Judge of Partabgarh, by which the suit of the

*Second Civil Appeal No. 228 of 1935, against the decree of K. N. Wanchoo, Esq., I.C.S., District Judge of Rae Bareilly, dated the 26th of April, 1935, upholding the decree of Saiyed Abid Raza, Civil Judge of Partabgarh, dated the 30th of November, 1934.

(1) (1912) 15 O.C., 211.

(2) (1932) I.L.R., 7 Luck., 655.

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plaintiff-respondent Durga Bakhsh Singh for sale on the basis of three mortgages was decreed.

The facts are that Balbhaddar Prasad, father of defendant no. 1, Bhagwat Prasad, owned a two-annas eight pies share in village Pura Bhagwat. He executed three mortgages in favour of Durga Bakhsh Singh. The first (exhibit 5) was made on the 2nd of January, 1917, the second (exhibit 2) on the 24th of June, 1921 and the third (exhibit 4) on the 12th of June, 1922. By all these deeds a one anna four pies share was mortgaged. In January and May, 1923, the entire two annas eight pies share was mortgaged to Ghanshiam Das defendant, who is now represented by his son Pitambar Das. On the 17th of November, 1923, Balbhaddar Prasad made a fourth mortgage in favour of Durga Bakhsh Singh. This mortgage was usufructuary and related to an eight pies share only and the consideration for this mortgage was made up of the amounts due under the three previous mortgages and some money obtained in cash. Ghanshiam Das brought a suit on his two mortgages of 1923 and impleaded Durga Bakhsh Singh in that suit. Durga Bakhsh Singh set up his three previous mortgages which were admitted by Ghanshiam Das but the question of priority was left undecided by the Court at the request of the parties. Ghanshiam Das's suit was decreed and the property sold in execution of the decree and was purchased by Ghanshiam Das himself.

The suit which has given rise to this appeal was brought by Durga Baksh Singh on his first three mortgages and Ghanshiam Das pleaded that those mortgages were extinguished by the later mortgage of the 17th of November, 1923. The plaintiff Durga Baksh Singh on the other hand contended that he was entitled to sue on those mortgages and to claim priority as against Ghanshiam Das.

Both the courts below have overruled the plea raised by Ghanshiam Das and decreed the plaintiff's suit.

Hence this second appeal filed by Ghansham Das and now continued by his son Pitambar Das.

We have heard the learned counsel for the parties and have no doubt whatever that the courts below came to a right conclusion in the case. Although section 92 of the Transfer of Property Act, which deals with subrogation, does not in terms apply to a case like the present, courts have consistently applied the principle of subrogation to a prior mortgagee who takes a subsequent mortgage. Sir D. F. Mulla in his commentary on the Transfer of Property Act at page 559, second edition says—

“Under the doctrine of subrogation, a third mortgagee redeeming a first mortgage acquires the rights of the first mortgagee and has priority over the second mortgage only as regards the third mortgage. Conversely a first mortgagee making a fresh advance after a second mortgage, on a renewed mortgage, even if that *fresh advance is to pay off the first mortgage*, retains priority over the second mortgagee as regards the first mortgage but not as to the fresh advance in respect of which he is in the position of third mortgagee”.

In *Ram Kumar v. Dwarka Prasad* (1) it was held that where a mortgagor being unable to repay a loan an account is taken of the money due to the mortgagee and a fresh bond is executed, the priority of the original mortgage is not affected, although any fresh advance made under the subsequent deed will not have any effect as against an intermediate encumbrancer. Similarly in *Kanhaiya Lal v. Gulab Singh* (2) it was held that where a mortgagee takes another mortgage in lieu of his prior mortgage and the case is not strictly covered by the provisions of the Transfer of Property Act, the mortgagee can claim the benefit of the doctrine of subrogation and he can use his earlier mortgage as a shield against any claim for priority of an intermediate mortgagee. It was further said that the original mortgagee should be presumed to have intended what

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was to his benefit and he ought to be deemed to have intended to keep alive the earlier mortgage to be used as a shield against the intermediate mortgagees. In the present case the fact that Durga Bakhsh Singh did not return the first three mortgage deeds to Balbhaddar Prasad when he executed the fourth mortgage deed of the 17th of November, 1923, but kept them himself, is also an indication of the fact that he intended to keep alive the first three mortgages. The circumstances relied on by the learned counsel for the appellant, namely, that while a one anna four pies share was mortgaged by the first three deeds, only an eight pies share was mortgaged by the fourth deed, that the last mortgage was usufructuary while the first three were simple and that no mention was made in the last mortgage deed of an intention to keep alive the first three mortgages, do not in our opinion show that Durga Bakhsh Singh did not intend to keep alive those mortgages. On the other hand as already pointed out, the fact of his keeping those mortgage deeds himself is a strong indication of his intention to keep alive those mortgages.

There is still another circumstance which goes against the appellant's contention. In his own suit Ghansham Das admitted the first three mortgages in favour of Durga Bakhsh Singh but asked the Court not to decide the question of priority in that suit. It does not therefore lie in his mouth or in that of his successor to question the priority of Durga Bakhsh Singh's first three mortgages.

The appeal has, in our opinion, no force and is dismissed with costs.

Appeal dismissed.