

APPELLATE CIVIL.

Before Das and Adami, JJ.

RAGHUNATH BHAGAT

1922

January, 11.

v.

AMIR BAKSH. *

Mortgage—subsequent sale by mortgagor to third person—consideration for mortgage paid after the sale—date from which mortgage takes effect—Transfer of Property Act, 1882 (Act IV of 1882), Section 58 (a).

A mortgage is perfected by registration and unless the bond provides to the contrary it takes effect from the date of registration and not from the date when the consideration money is paid.

[*Cf. Makhan Lal Marwari v. Hanuman Bux* (1) and *Abdul Hashim Kadar Batcha Sahim* (2), *Ed.*]

Therefore, where, after the registration of a mortgage, the mortgagor sold the property to a third person by a registered deed, and subsequently the mortgagee paid the consideration money for the mortgage to the mortgagor, held, that the mortgagee's right prevailed over that of the vendee.

A mortgage is a conveyance and not a contract.

Tatia v. Babaji (3), approved.

The facts of the case material to this report were as follows:—

The defendants first party executed a mortgage for Rs. 13,000 in favour of the plaintiff on the 3rd May, 1913, and the bond was registered on 5th *idem*. On the 7th *idem* the defendants first party sold some of the properties covered by the mortgage bond to the defendants second party. The sale-deed was presented for registration on the 9th May, 1913, but was not in fact registered on that date.

* Appeal from Original Decree No. 55 of 1919 from a decision of B. Akhouri Nityanand Singh, Subordinate Judge of Darbhanga, dated the 29th November, 1918.

(1) (1917) 2 Pat. L. J. 163. (2) (1919) I. L. R. 42 Mad. 22

(3) (1898) I. L. R. Bom. 176.

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The mortgage bond provided that out of the consideration money for the mortgage Rs. 4,500 should be paid by the mortgagees to the defendant second party on account of certain bonds executed by defendant 1st party in favour of defendant's second party and that the mortgagor should retain possession of the mortgage bond until the consideration money had been paid in full. Rs. 3,400 was paid to the mortgagor on the 6th May, 1913. In the present suit it was alleged that defendant's 2nd party refused to accept the money when tendered by the mortgagee on the same date and it was therefore deposited in court on the 10th May, 1913. The defendant's 2nd party filed objections alleging that their debts had been satisfied by virtue of the sale-deed of the 9th May, 1913. At their instance the sale-deed was compulsorily registered in August 1913. Subsequently defendant 1st party instituted a suit against defendant's 2nd party which was compromised on the 20th May, 1915. The mortgagees thereupon withdrew the money which had been deposited in court and in 1917 they instituted the present suit on their mortgage. The defendant's 2nd party alone contested the suit. The trial court passed a decree for Rs. 3,400 only, being the amount of the consideration which had been paid to the mortgagor. In the event of the decretal amount not being paid within two months from the date of the decree it was ordered that so much of the mortgaged properties as were not covered by the sale-deed should be put up for sale and in the event of the price realized not being sufficient to discharge the decree the properties covered by the sale-deed should also be sold.

Defendant's 2nd party appealed to the High Court

Sultan Ahmed (with him *Md. Hasan Jan*), for the appellants.

Parmeshwar Dayal and *Bhagwan Prasad*, for the respondent.

DAS, J.—This appeal arises out of a suit instituted by the plaintiff-respondent to enforce a mortgage bond executed by the defendant's first party in his favour.

The material facts are these —

On the 3rd of May, 1913, the defendants first party executed a bond for Rs. 13,000 in favour of the plaintiff. This document was registered on the 5th May, 1913. On the 7th May, 1913, some of the properties which had been mortgaged by the defendants first party to the plaintiff were sold by the defendants first party to the defendants 2nd party who are the appellants before us. The deed of sale was presented for registration on the 9th May, 1913, but it appears that it was not in fact registered on that date and was compulsorily registered in August, 1913. The defendants second party contest the claim of the plaintiff and rely upon their document which admittedly was executed subsequent to the mortgage upon which the plaintiff relies. Their case is that although the document was executed on the 3rd of May, 1913, the mortgage was not effective until the full consideration money had been paid to the defendants first party, and as the full consideration money or any portion thereof was not paid by the plaintiff till after the execution of the deed of sale in their favour, their deed of sale is entitled to priority over the mortgage bond upon which the plaintiff relies.

On the question of fact, the learned Subordinate Judge has come to the conclusion that a portion of the consideration money was undoubtedly paid on the 6th of May by the plaintiff to the defendants first party and the balance which was payable under the terms of the mortgage by the plaintiff to the defendants first party was deposited in Court by the plaintiff on the 10th of May.

Now Mr. *Sultan Ahmed*, on behalf of the appellants, concedes that if the payment was in fact made by the plaintiff to the defendants first party on the 6th of May as alleged by the plaintiff, then he must fail. But he argues before us that the evidence on the point is so unsatisfactory that the learned Judge in the Court below should not have accepted it.

Dealing then with the question of fact, I find very great difficulty in accepting the finding of the learned Subordinate Judge. The document states that Rs. 9,600

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was due to the defendants second party and Rs. 1,201 was due to a judgment-creditor of the mortgagors namely one Budhan Sahu, and the document provides that these two sums of moneys should be paid to the creditors and then the balance should be paid to the mortgagor, and that upon such payment the mortgagor should make over the mortgage deed to the plaintiff. That is the document.

Now admittedly Budhan Sahu has never been paid by the plaintiffs ; admittedly Rs. 9,600 due to the defendants second party was not deposited in Court until the 10th of May, but it is urged by the plaintiff that he had tendered that amount to the defendants second party on the 6th of May and that they refused to accept the money. The learned Subordinate Judge has not expressed any opinion on the evidence of the plaintiff that Rs. 9,600 was in fact tendered by the plaintiff to the defendants second party on the 6th of May. The evidence is conflicting on this point and it is difficult to say whether or not the tender was in fact made on the 6th of May. It seems to me that the point should have been established by the plaintiff beyond any doubt by the production of his account books. The plaintiff is a money-lender and is presumably in possession of account books. If as a matter of fact the plaintiff paid to the defendants first party the money which he says he paid to them on the 6th of May, then the production of the account books would have settled the question ; but the account books have not been produced in the case and in their absence it is difficult to accept the finding of the learned Subordinate Judge that the money was in fact paid by the plaintiff to the defendants first party on the 6th of May.

I will then assume that this money was not paid to the defendants first party by the plaintiff till after the actual conveyance in favour of the defendants second party, that is to say, it was not paid till the 10th of May. The question which I have now to consider is whether it makes any difference to the rights of the parties that the money was in fact not paid to the mortgagor till after the conveyance of the property by the mortgagor

to the defendants second party. In my opinion it does not. The mortgage was executed on the 3rd of May, 1913, and though it may be that the consideration money was not paid to the mortgagor till the 10th May, still upon payment to the mortgagor, whenever it may have taken place, the mortgage must have become effective on and from the 3rd of May, 1913. The very definition of mortgage in the Transfer of Property Act supports the contention of the learned Vakil who has argued this appeal on behalf of the plaintiff. The definition of a mortgage is the transfer of an interest in specific immovable properties for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The document itself shows that the money was to be paid on a future date. The parties contracted on the basis that the money was to be paid at a future date. The argument that the mortgage does not become effective until the money is actually paid, loses sight of the fact that a mortgage is a conveyance and not a contract. That distinction was pointed out by Farran, C. J., in *Tatia vs. Babaji* (1). That learned Judge said as follows in the course of his judgment in that case :—
 “I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the *Moffussil* perfected by possession or registration, where the consideration expressed in the conveyance to have been paid has not in fact been paid, in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem to me to have been sufficiently borne in mind throughout the judgment”. In this case there is no doubt that the mortgage became perfected by registration and the only question between the parties is whether the consideration money was paid on the 6th of May as is alleged by the plaintiff, or on the 10th of May as is alleged by the defendants second party. I am of opinion that if there is nothing in the mortgage deed to suggest that the

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mortgage was not to become effective until the consideration money was paid, the mortgage deed became operative as from the date of the execution of the mortgage.

This brings me to the argument of Mr. *Sultan Ahmed* that the document in fact shows that the mortgage was not to become effective until the payment of the consideration money. He draws my attention to a passage in the mortgage which provides that the mortgagor undertook to make over the mortgage deed to the mortgagee upon the payment of the full consideration money. In my opinion this provision does not amount to a contract between the parties that the mortgage is not to take effect until the payment of the consideration money, and my ground is, that the document itself says as follows :—

“In security and satisfaction of the said loan, principal with interest, I have mortgaged and hypothecated the entire and whole 8 annas *pokhta*, etc.”

In other words the mortgage and hypothecation was complete as and from the date of the execution of the mortgage bond, but for his own protection the mortgagor provided that the mortgage bond was not to be made over to the mortgagee until the payment of the full consideration money. In my opinion then there is nothing in the contract which establishes that the title was not to pass to the mortgagee as and from the date of the execution of the mortgage bond : that being so, the mortgage was clearly prior in date to the deed of sale.

I must, therefore, affirm the decree passed by the learned Subordinate Judge though not on the grounds stated by him. So far as the cross appeal is concerned. I am of opinion that the view of the learned Subordinate Judge is correct and must be affirmed. It may be that a tender was made by the plaintiff to the defendants second party on the 6th of May but if the plaintiff's case is to be believed the defendants second party unequivocally refused to accept the money : if that be so, then there was no obligation on the part of the plaintiff to deposit the money in court. He should have offered to pay the money to the mortgagor if he wanted

it. There was absolutely nothing in the contract to compel the plaintiff to pay the money into court if the person in whose favour the deposit was to be made unequivocally refused to take the money.

Both the appeals must be dismissed and dismissed with costs.

ADAMI, J.—I agree.

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Appeal dismissed.

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Before Das and Adami, JJ.

MATHURA PRASAD SAHU

v.

DASAI SAHU*

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*Transfer of Property Act, 1882 (Act IV of 1882), section 52—
 Lis pendens, whether doctrine of, applies to involuntary sale—
 mortgaged property sold for arrears of land-revenue pending suit on the
 mortgage, effect of—Bengal Land-Revenue Sales Act, 1859 (Act XI of
 1859) sections 13 and 54,*

The doctrine of *lis pendens* applies both to voluntary and involuntary sales.

Therefore, where, after a mortgagee had obtained a final decree on his mortgage, the right, title and interest of the mortgagor was sold for arrears of land-revenue, held, that the mortgagee who had purchased the property in execution of his decree subsequently to the sale for arrears of land-revenue was entitled to succeed in a suit for possession against the purchaser at the latter sale.

Har Sankar Prasad Singh v. Shew Gobind Shaw (1), approved.

The facts of the case material to this report were as follows :—

On the 24th February, 1905, Badri Narain executed a mortgage bond in favour of Dasai Sahu in respect of a 13-annas share in Manopur Gambhir. On the 4th August, 1906, he executed a bond in favour of

*Appeal from Original Decree No. 64 of 1912, from a decision of B. Rajeshwar Prasad, Subordinate Judge of Chapra, dated the 18th February, 1919.