APPELLATE CIVIL.

Before Wort and Agarwala, JJ.

1936.

August, 19, 20, 21.

SRIMATI NATHUNI SAHUAIN.

v.

DHARNIDHAR JHA.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *section* 61—*amended section, if retrospective—consolidation—same property mortgaged by two deeds—mortgagee whether entitled to a decree for a consolidated amount—interest, mortgagee, whether entitled to, from date of actual payment of sums left with him for payment to his creditors or from the date of the bond.*

Where the plaintiff brought a suit on two mortgages and the properties mortgaged in the first mortgage were included in the second mortgage and the defendants contended inter alia (*i*) that the plaintiff was not entitled to consolidation of the two debts and (*ii*) that he was not entitled to charge interest on certain sums which he had undertaken to pay to the mortgagors, creditors, from the date of the mortgage transaction but was entitled to interest from the date of actual payment.

Held, that section 61 of the Act of 1929 was not retrospective and that section as it stood before the amendment enacted by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter related to the same property and therefore the mortgagee had a right of consolidation.

Parmeshwar Pandey v. *Raj Kishore Prasad* (1) and *Tajjo Bibi* v. *Bhagwan Prasad*(2), dissented from.

Panaganti Ramarayanimgar v. *Maharaja of Venkatagiri*(3), relied on.

Held, also that inasmuch as the mortgagor had incurred no liability under the mortgage till the consideration had

*Appeal from Original Decree no. 191 of 1932, from a decision of Babu Bishundeva Narayan Singh, Subordinate Judge of Deoghar, dated the 4th April, 1932.

(1) (1924) I. L. R. 3 Pat. 829.
(2) (1893) I. L. R. 16 All. 295.
(3) (1926) L. R. 54 Ind. App. 68.

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been advanced, he incurred no liability to pay interest, before the date of actual payment by the mortgagee to the mortgagor's creditors.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of WORT, J.

S. N. Bose and *Amir Ali Khan Warsi*, for the appellants.

G. C. Mukharji, for the respondents.

WORT, J.—This is an appeal by the defendants from the decision of the Subordinate Judge in an action brought on two mortgages. The first was dated the 9th of April, 1924, for a consideration of Rs. 2,000 and the second the 18th of September, 1926, the consideration being stated as Rs. 7,000. In the first mortgage the property no. 1 of the schedule to the plaint was mortgaged. In the second mortgage that same property together with other properties were provided as security for the mortgage monies.

The defences raised by the defendants in the Court below were first that as regards the mortgage of the 9th of April, 1924, the consideration had been inaccurately stated; that whereas it was stated as Rs. 2,000, in fact the amount advanced was Rs. 1,000 only. That point can be disposed of by stating that the learned Judge in the Court below has come to the conclusion that the consideration was stated correctly in the deed and that Rs. 2,000 was in fact paid. There is no appeal as regards that and therefore it can be dismissed from our consideration. As regards the second mortgage of the 18th of September, 1926, for Rs. 7,000, the Judge has come to the conclusion that the money actually advanced was Rs. 6,172-12-0. The arrangement made by the parties was that the consideration should be left with the mortgagee for the payment of certain debts and the decision of the learned Judge was that in pursuance of that agreement the debts were in fact paid to the amount mentioned above. Certain payments

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alleged to have been made by the mortgagee had been disallowed and there is no cross-appeal with regard to this.

The sums actually advanced by the mortgagee on this mortgage by way of payments to the mortgagors' creditors have been found to be Rs. 1,689 paid on the 27th of August, 1928, and Rs. 2,700 paid on the 20th of December, 1926. It will therefore be seen that as regards the latter sum the mortgagee took about three months to pay the creditor and in the case of Rs. 1,689 a period of two years. As a matter of fact by the time the Rs. 1,689 was paid by the mortgagee the amount had increased, on account of interest, to a sum of Rs. 2,040. But again no point arises with regard to that except an incidental question with which I shall in a moment deal. The learned Judge in the circumstances has made a decree for a sum of Rs. 11,000 odd, principal and interest, and a decree for sale of all the properties, the subject-matter of the mortgage.

I should have stated that one of the defences to the action in the Court below was that the mortgage debts had been paid and it is with regard to that defence that a question arises in this Court. With that point I shall at once deal. The case of the defendants was that up to January 1927 various payments made by them on account of both mortgages had been endorsed on the bonds and, as regards those payments the learned Judge in the Court below has given the defendants credit for two sums, Rs. 834 and Rs. 219. The defence was that after January, 1927, payments were made but they were entered in hathchitha and not endorsed on the mortgage bonds. No particular reason was advanced as an explanation for this although it was suggested in the argument before us that the mortgage bonds were not available. But the fact remains that the alleged payments after January, 1927, were not endorsed on the mortgage bonds. The Judge in the Court below has discarded the defendants' story about these payments made

after January, 1927, and there has been no argument advanced by Mr. Bose on behalf of the appellants which would lead us to a conclusion different from that at which the Judge in the Court below has arrived. The case of the defendants was that entries of these various payments were made by the mortgagee himself, that is to say, the entries on the hathchitha which were relied upon to establish these payments. But in cross-examination the defendants' witness no. 1 admits that he only saw the plaintiff making one entry in the book and that related to a sum of 4 annas. I might add that although the witness stated in his examination-in-chief that the entries were made by the plaintiff, he did not state that he was familiar with the plaintiff's hand-writing. Having regard to this fact and the statement of the witness in cross-examination to which I have referred and also the fact that the sums credited to the defendants by the Subordinate Judge were all endorsed on the bonds and those now claimed to have been paid were not so endorsed, I am not in the least surprised that the learned Judge entirely discarded the story as to these further payments on account.

Two other substantial questions are raised by Mr. Bose on behalf of the defendant-appellants. One is that in settling the account, interest should not run on the sum of 1,689 before the date of payment by the mortgagee, that is, 27th of August, 1928, and on Rs. 2,700 before the 18th of September, 1926. There were two arguments addressed to us by the respondents on this point. One was that the question did not strictly arise as a point of law, as it depended upon the facts of the case; and if the mortgagor-defendants desired to have credit in the manner which I have stated, they should have established the facts which would entitle them to that relief. There is nothing in that point. The defendants denied the passing of consideration in their written statement and the Judge has in fact decided that it did pass and also the date of payment by the

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mortgagee. The second argument was that the mortgagors should be kept strictly to the contract and that as the contract entitled the mortgagee to have interest from the date of the mortgage, the mortgagors should be liable for interest from that date. It was put in another form, namely, that as the mortgagee had undertaken to pay the debts of the mortgagors, and as from the dates of the mortgages, the mortgagors ceased to have any liability as regards those debts, and if they were to escape paying interest to the mortgagee between the dates of the mortgage bonds and the dates of payments, they would escape entirely the payment of interest. The mortgagee would be unable to recover interest from the mortgagors and thus lose the interest under the mortgage bonds which he would have to pay to the mortgagors' creditors. The fact that the mortgagee had to pay more than he contracted to pay, as interest had run up in the meantime, was a matter entirely within the mortgagee's control. In my judgment the contention of Mr. Bose must be sustained and for this reason. It is admitted by the respondents that had the mortgagee called upon the mortgagors to pay interest from time to time, he certainly could not have recovered interest on the Rs. 1,689 before the date upon which the amount was paid on behalf of the mortgagors, that is to say, the 27th of August, 1928. The mortgagee could not sue on the mortgage monies before the date upon which he had made payment to the mortgagors' creditors: in other words, the mortgagors had incurred no liability under the mortgages as the consideration had not been advanced. That being so they would have incurred no liability to pay interest. In my judgment the contention of Mr. Bose on this point must be, as I have stated, sustained, and in making up the account interest is chargeable by the mortgagee on the sum of Rs. 1,689 from the 27th of August, 1928, and on the sum of Rs. 2,700 from the 20th of December, 1926, only.

The last and perhaps the most difficult point is whether the mortgagee is entitled to what Mr. Bose has described as a consolidated decree. The decree made by the learned Judge is for the sum of Rs. 11,876-8-0 on the payment of which the mortgaged property will be released but in the event of failure to pay that sum the mortgaged property will be sold. Mr. Bose contends that that is depriving him of the mortgagors' rights under section 61 of the Transfer of Property Act. It is quite clear that under the section, as it now stands after the amendment made by the Act of 1929, Mr. Bose's contention would be correct. But the Act of 1929 clearly states that section 61 has no retrospective effect and therefore, for the purposes of this case, we have to apply the law as it existed prior to the Act of 1929. The old section was to this effect:

"A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him or by any person through whom he claims other than that comprised in the mortgage which he seeks to redeem."

Mr. Mukharji on behalf of the respondents contends that the meaning of the section properly construed is this that if a property be mortgaged under mortgage and then mortgaged again under a second mortgage with other properties, the mortgagee has a right to consolidate the mortgages; and that it is only in cases where there are two separate mortgages of two separate properties that the right given by section 61 exists. Mr. Bose contends that the last sentence in section 61 is merely descriptive. Another argument which Mr. Bose advances will sufficiently appear from the discussion of the case upon which Mr. Mukharji relies. It is the case of *Panaganti Ramarayanimgar* v. *Maharaja of Venkatagiri*(1). The decision of the Madras High Court, from which this case is an appeal, is to be found in *Panaganti Ramarayanimgar* v. *Maharaja of Venkatagiri*(2). Freed from matters which are

(1) (1926) L. R. 54 Ind. App. 68.
(2) (1920) I. L. R. 44 Mad. 301.

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not relevant to the present inquiry, the facts of the case shortly stated were these. There were four properties mortgaged under what is described by the Madras High Court as a usufructuary mortgage. A lease of one of the properties mortgaged by that mortgage was granted to the mortgagor and the rent made a charge on that property. Both the equity of redemption and the security were transferred and the persons before the High Court and before the Privy Council were the assignees both of the mortgagor and the mortgagee under those transfers. The questions, so far as we are concerned which were argued both in the High Court and in the Privy Council, were first whether the mortgage of the four properties was a usufructuary mortgage, secondly, whether the lease had created a charge on one of the properties, and thirdly, whether section 62 of the Transfer of Property Act or section 61 applied to the case. I should have stated that the appeal arose out of an action for redemption, and the question was whether the mortgagor was entitled to redeem the usufructuary mortgage only on payment of the rent which had become due under the lease and which was said to be charged on one of the properties contained in the first mortgage, or whether he was entitled to redeem without paying that sum. The High Court of Madras decided that section 62 applied and that the mortgagor was not obliged to pay off the arrears of rent. On appeal to the Judicial Committee of the Privy Council Lord Sinha in delivering the opinion of their Lordships stated that the transactions under Exhibit A (the mortgage) and Exhibit I (the lease) were one and the same transaction; that whereas Exhibit A was not a plain usufructuary mortgage but was something in the nature of an anomalous mortgage, Exhibit I created a charge on one of the properties or, in other words, it was a second mortgage on one of the properties. Now the important part of the opinion of the Privy Council for our purpose is found at page 78 of the Report, and I propose to read it.

"It is contended before this Board on behalf of the defendant-appellant that the two deeds Exhibits A and I should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realizing the interest due on the mortgage. Further, that section 62 of the Transfer of Property Act has no application to the case as it applies only to a case of an usufructuary mortgage pure and simple, which Exhibit A is not, as it contains covenants for payment both of principal and interest. The section which the appellant's counsel urges as being applicable to the facts of this case is section 61 of the Transfer of Property Act, which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property. Their Lordships are of opinion that these contentions on behalf of the appellant must prevail." And then later "In their Lordships' opinion, section 62 of the Transfer of Property Act applies only to usufructuary mortgages pure and simple, and is not in any way inconsistent with the provisions of section 61." As I understood the argument, it was contended by Mr. Bose that their Lordships did not decide that the last sentence of section 61 provided that if the property were mortgaged a second time the mortgagee would have a right of consolidation. But having regard to the words of Lord Sinha which I have read to the effect that section 61 'enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property', that argument cannot be supported. On a close examination of the decision it is clear in my judgment that their Lordships of the Privy Council definitely and specifically decided that if a property was mortgaged a second time, as they held was the fact in the case before them, then the mortgagee had

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a right of what is described as consolidation. Now, if that is the correct view to take of this matter and of the decision of their Lordships of the Privy Council, there can be no doubt and I do not think it is disputed that the decision of the Subordinate Judge on this point is right. Mr. Bose on behalf of the appellants relies upon the decisions of the High Courts in India. There is a decision of this Court in *Parmeshwar Pandey* v. *Raj Kishore Prasad*(1) but I purposely omit referring to it, because the particular clause upon which reliance is placed by the respondents in this case was not referred to by Sir Jwala Prasad in his judgment, nor does it appear to have been mentioned in the course of the argument. But in the case of *Tajjo Bibi* v. *Bhagwan Prasad*(2) that clause was specifically dealt with, and Sir John Edge, C. J. and Burkitt, J. came to a conclusion which would appear to be contrary to that at which their Lordships of the Privy Council arrived in the case to which I have referred. Had the decision of the Privy Council not been a clear decision on this point, in all probability we should have followed the decision of our own Court in *Parmeshwar Pandey* v. *Raj Kishore Prasad*(1) having regard to the decision of the Allahabad High Court in the case to which I have referred. But, in my opinion, it is quite impossible to hold that the Privy Council did not decide this point specifically.

Mr. Bose further contends that even assuming that this point was expressly decided by the Privy Council, he does not come within the mischief of the decision because this is not a mortgage of the same property a second time. As I understand the contention, it is this that if the second mortgage is the mortgage of the equity of redemption, it is not a mortgage of the same property, but it is a mortgage of another property being a mortgage of a

(1) (1924) I. L. R. 3 Pat. 829.
(2) (1893) I. L. R. 16 All. 295.

different interest. That argument it is difficult to follow in the light of the decision of the Privy Council and the Madras case. An argument might well have been advanced in that case that the charge or mortgage created by Exhibit I was a charge of the lease of the property in contradistinction to a charge of the property itself and therefore not the same property. In developing this argument it is contended that the point depends upon the construction of the mortgage deeds, and Mr. Bose here suggests that if there is in the second charge or mortgage a reference to the first, and in the second mortgage the sum advanced is increased by a further advance, then it is a mortgage of the same property, whereas if the second mortgage deed makes no reference to the first and therefore merely mortgages such right, title and interest as the mortgagor has, it is nothing more than a mortgage of the equity of redemption and therefore a mortgage of a different interest. I very much doubt whether that argument finds any support from section 61 of the Act, and I find it very difficult to believe that the legislature intended to imply any such distinction as suggested by Mr. Bose. But assuming that we accept the argument, in my judgment the proper construction of the second mortgage deed, dated the 18th of September, 1926, meets Mr. Bose's point. This deed first of all refers to a number of mortgages on the property common to both mortgages. There were two prior mortgages and, counting the mortgage of the 9th of April 1924, three. The deed recites that it was necessary for the mortgagors to take a loan of Rs. 7,000 by mortgaging the property described in the schedule, and the property described in the schedule was not only the three additional properties but the property which was mortgaged under the first mortgage. The deed then proceeds to provide

"As a security for this amount, principal as well as interest the properties specified in the schedule below, remain hypothecated to you"

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and then the last clause provided

"Be it stated that the third mortgage deed (i.e. the first mortgage of the 9th of April, 1924) executed in your favour on the 27th Chaitra 1330 B.S. remains in force as before".

That meets in my judgment the argument of Mr. Bose. These observations merely deal with the position if the distinction which Mr. Bose seeks to draw between the equity of redemption and the property itself can hold good. But in either view of the case in my judgment on a plain construction of section 61 of the Act and having regard to the view which their Lordships of the Privy Council take of this matter, I am of the opinion that the learned Judge in the Court below was entitled to pass what has been described here as a consolidated decree on the two mortgages.

The appeal succeeds in part but to the extent only of allowing a remission of interest to the mortgagors on that part of the consideration which was represented by the payment by the mortgagees of Rs. 2,700 between the date of the bond which is the 18th of September, 1926, and the date of payment which is the 20th of December, 1926, and in respect of Rs. 1,689 between the 18th of September, 1926, the date of the bond and the 27th of August, 1928, the date of payment. Subject to this remission as regards interest, the appeal is dismissed with costs. The appellants, however, will be entitled to such costs as are proportionate to their success. The period of grace will be extended to six months from the date of this judgment.

AGARWALA, J.—I agree.

Appeal allowed in part.