

the learned Judge who decided that case observed in his judgment that if the accomplice had been sent up as an accused person his evidence would have been inadmissible.

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I hold therefore that Musa remained an accused person up to the time of his giving evidence, and that he was consequently not a competent witness and his evidence is inadmissible.

[*The remainder of the judgment is not required for the purposes of this report—Ed.*]

Revision accepted.

APPELLATE CIVIL.

Before Mr. Justice Shadi Lal and Mr. Justice Dundas.

JIWAN DAS AND OTHERS (DEFENDANTS)—

1919

Appellants

July 21.

versus

THARAJ AND OTHERS (PLAINIFFS)—

Respondents.

Civil appeal No. 226 of 1916.

Mortgage—Redemption—Consolidation of several mortgages on different properties—agreement not to redeem one mortgage without the others must be clearly proved—Transfer of Property Act, IV of 1882, section 61.

The question arising in this appeal was whether plaintiff could redeem his mortgage of 18th August 1882 without redeeming also his two subsequent mortgages of 9th September 1882 and of 8th February 1889. The mortgages related to different properties. In the mortgage of September 1882 it was stipulated that the mortgage would be redeemed along with the prior mortgage, dated 18th August 1882, while in the 1889 mortgage it was agreed that "should the mortgagor redeem the land mortgaged by the deeds of the 18th August 1882 and 9th September 1882, they will redeem the present charge at the same time."

He'd, that although the parties contemplated that the money due on all the mortgages should be paid at the same time that was not enough to establish the defendant's plea of consolidation, but that it was incumbent upon the latter to show that plaintiffs expressly and unequivocally contracted themselves out of their right to redeem the first mortgage without redeeming at the same time the two later mortgages.

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Ganga Rai v. Kirtarath Rai (1) and *Gava Din v. Har Karan* (2), referred to—also Transfer of Property Act, section 61.

Parabh Dial v. Kharku (3), distinguished.

Allu Khan v. Roshaz Khan (4) referred to, as having been dissented from in *Sheo Shankar v. Parma Mahton* (5).

Second appeal from the decree of T. P. Ellis, Esquire, District Judge, Jhang, dated the 11th October 1915, modifying that of Lala Maya Bhan, Senior Sub-Judge, Jhang, dated the 29th March 1915, decreeing the claim conditionally.

SHEO NARAIN and BAHADUR CHAND, for Appellants.

FAZAL-I-HUSSAIN, for Respondents.

The judgment of the Court was delivered by—

SHADI LAL, J.—This was an action for the redemption of certain property mortgaged to the defendants, and the sole question, which arises in this second appeal preferred by the mortgagees, is whether they are entitled to consolidate the different mortgages effected in their favour. Now, there are altogether five mortgages, and as regards three of them the District Judge has upheld the contention of the defendants, and his finding on that point has not been questioned before us. The learned Judge, however, holds that the defendants cannot compel the plaintiffs to pay at the same time the money due to them on the strength of the remaining two mortgages effected on the 9th September 1882 and 8th February 1889, respectively; and the question for determination is whether the defendants have established their right of consolidation in respect of these two securities.

We may clear the ground by stating that it is beyond dispute that the aforesaid two mortgages do not comprise any property covered by the other mortgages and are absolutely separate transactions. The principle of law, which finds expression in section 61 of the Transfer of Property Act, is to the effect that a mortgagor seeking to redeem any one mortgage, shall, in the

(1) (1911) I. L. R. 33 All. 393.

(3) 2 P. R. 1890.

(2); (1918) 22 Indian Cases 132.

(4) (1881) I. L. R. 4 All. 85.

(5) (1904) I. L. R. 26 All. 559.

absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage on property other than that comprised in the mortgage which he seeks to redeem. It is, therefore, clear that the *onus* lies upon the defendants to establish a contract which precludes the plaintiffs from redeeming the property affected by the three mortgages without paying the money due on the two mortgages in question. It must be remembered that as consolidation has the effect of interfering with the right of a mortgagor to redeem a mortgage on one property without being required to redeem another mortgage relating to a different property, a court of justice will always struggle against an interference with the mortgagor's right, unless the covenant is shown to be express and unequivocal.

Have the defendants satisfied this requirement of the law? Now, the clauses in the two deeds, upon which the learned Advocate for the appellants places his reliance, are briefly as follows:—In the mortgage of the 9th September 1882 there is a stipulation that the mortgage would be redeemable along with the prior mortgage effected on the 18th August 1882 (one of the three mortgages referred to above). In the mortgage deed of the 8th February 1889 the covenant is that “should the mortgagors redeem the land mortgaged by the deeds of the 18th August 1882 and 9th September 1882, they will redeem the present charge at the same time.”

We have bestowed our careful consideration upon the wording of these covenants in the light of the arguments advanced by the learned Advocate, and we are not prepared to hold that they amount to a clear and express contract depriving the mortgagors of their right to redeem the mortgage of August 1882 without redeeming these two mortgages. It may be that the parties contemplated that the money due on all the mortgages should be paid at the same time, but that is not enough. The defendants, in order to succeed, must show that the plaintiffs expressly and unequivocally contracted themselves, out of their right, to redeem the first mortgage without redeeming at the same time the two mortgages relating to a different property

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In *Ganga Rai v. Kirtarath Rai* (1) the learned Judges in dealing with a stipulation by which the mortgagor agreed to redeem a later mortgage before redeeming a prior mortgage held that the covenant was nothing more than a provision fixing the time for payment, and that there was no agreement in the second mortgage that the mortgagor would not be entitled to redeem the first mortgage without paying the money due under the second mortgage. To the same effect is the judgment of the Oudh Court in *Gara Din v. Har Karan* (2). The ruling of the Chief Court in *Parabh Dial v. Kharku* (3) relied upon by Mr. Sheo Narain, appears to deal with a case of two charges created on the same property, and has no bearing upon the present case in which the question of the consolidation of mortgages comprising different properties is involved. Further the judgment follows the Allahabad ruling in *Allu Khan v. Roshan Khan* (4) which has been expressly dissented from in *Sheo Shankar v. Parma Mahlon* (5).

In view of the wording of section 61 of the Transfer of Property Act, and the law as to consolidation enunciated above, we must hold that the defendants, on whom the onus rested, have failed to prove any express contract which entitled them to prevent the plaintiffs from redeeming the mortgages on one property without redeeming the mortgages affecting another property.

We accordingly confirm the decree of the Lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) (1911) I. L. R. 33 All. 393.

(3) 2 P. R. 1890.

(2) (1913) 22 Indian Cases 132.

(4) (1881) I. L. R. 4 All. 85.

(5) 1904) I. L. R. 26 All. 559.