

## APPELLATE CIVIL.

*Before Mr. Justice Das.*

MAUNG SHAN HPYU

v.

U PO THAW.\*

1927

July 27.

*Sub-mortgage—Payment by mortgagor to mortgagee without knowledge of sub-mortgage—Effect on sub-mortgagee's rights.*

*Held*, that when a mortgagee sub-mortgages his mortgage to another person without the knowledge of the original mortgagor and the original mortgagor pays off the mortgage amount to the mortgagee, the sub-mortgagee's rights against the land are extinguished.

*Sahadev Ravji Bagade v. Shekh Papa Miya*, 29 Bom. 199—referred to.

*Kale*—for Appellant.

*Ba Hla*—for Respondent.

DAS, J.—The appellant filed a suit for a declaration that he was in possession of a piece of land; and that the fifth defendant could not sell the land in execution of his mortgage decree.

The facts of the case are as follows:—The first defendant Ma E Byu mortgaged the land in question to the sixth defendant Maung Gyi with possession. Then Maung Gyi mortgaged the land to the respondent for Rs. 250. Subsequently Maung Gyi executed a mortgage of the land in favour of Golammadin for Rs. 300 with possession. Then the original owner redeemed the land from Maung Gyi and Golammadin by borrowing money from the appellant and mortgaged the land to the appellant for Rs. 526 with possession by a registered document. It is not alleged that either the plaintiff or the original owner knew of the mortgage of the land by Maung Gyi to the present respondent. Subsequent to the mortgage to the appellant the present respondent filed a mortgage suit

\* Special Civil Second Appeal No. 43 of 1927.

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against Maung Gyi and obtained a mortgage decree. He did not make either the original owner or the present appellant-plaintiff a party to his suit. The present respondent denied the allegations in the plaint and contended that his mortgage decree could not be affected. The trial Court passed a decree in favour of the plaintiff. The fifth defendant appealed. The lower Appellate Court dismissed the plaintiff's suit, and the plaintiff now appeals to this Court.

It is quite clear that, when a mortgagee sub-mortgages his mortgage to another person without the knowledge of the original mortgagor and the original mortgagor pays off the mortgage amount to the mortgagee, the sub-mortgagee's rights against the land are extinguished. The sub-mortgage is only good to the extent of the amount due on the original security, on the payment of which the security is released. So when, as in this case, the original mortgagor paid off his mortgagee the amount due on his mortgage, the sub-mortgagee had no further rights over the property. In this case it is clear that the original mortgagor did not know anything of the sub-mortgage when she paid off the mortgage debt. It is not alleged by the sub-mortgagee that he gave notice to the mortgagor of his mortgage. I am fortified in my opinion by a decision in the case of *Sahadev Ravji Bagade v. Shekh Papa Miya* (1), where it was held that when a mortgagor makes a payment to the mortgagee in good faith without knowledge of a registered sub-mortgage, the payment is not vitiated on the ground that it was made subsequent to the registration of the sub-mortgage. I must therefore hold that the sub-mortgagee lost all his rights over the property when the mortgagor paid off the original mortgagee. His mortgage decree against the mortgagee

cannot affect the land and he is not entitled to take any steps against the land in execution of his decree.

The plaintiff in this case is in actual possession of the land by virtue of his character as a usufructuary mortgagee. That being so, he is entitled to the declaration prayed for. I therefore set aside the decree of the lower Appellate Court and pass a decree in favour of the plaintiff in terms of the prayer in his plaint. The appellant will get his costs throughout.

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### APPELLATE CIVIL.

*Before Mr. Justice Pratt.*

MAUNG PO PE

v.

MAUNG KWA AND ONE.\*

1927

July 28

*Civil Procedure Code (Act V of 1908), O. 21, rr. 58 and 60—Application for removal of attachment must be made prior to sale in execution.*

*Held*, that an application for removal of attachment under Order 21, Rule 58 of the Civil Procedure Code, should be made before the property attached has been sold. A Court acts in excess of jurisdiction if it entertains such application after sale.

*Gopal Chandra Mukerjee v. Notary Kundu*, 16 C.W.N. 1029; *Punjab Doo Euer v. Ram Charitar Bathi*, 74 I.C. 87—*referred to*.

*Chatterjee*—for Applicant.

*Mitter*—for Respondent.

PRATT, J — This is an application under section 115, Civil Procedure Code, to revise the order of the Township Judge, Myaing, in Civil Miscellaneous Case No. 1 of 1927, ordering the removal of attachment attached in execution case No. 31 of 1927.

It is contended that the order of attachment was *ultra vires* as the property has been sold before the application.

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\* Civil Revision No. 32 of 1927