

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, and Mr. Justice Brown.

NYAUNGLEBIN CO-OPERATIVE BANK

v.

MAUNG BA U AND OTHERS.*

1928

Mar. 12.

Mortgagee purchasing at Court auction part of mortgaged property, effect of—Discharge of proportionate share of mortgage debt—Values of properties whether to be taken at date of mortgage or date of purchase—House on mortgaged site nearly complete and included in mortgage—Transfer of Property Act (IV of 1882), s. 82.

Held, that when a mortgagee has purchased part of the property mortgaged to him at a Court auction subject to the mortgage, his purchase has the effect of discharging a proportionate share of the mortgage debt. The amount so discharged bears the same ratio to the whole mortgage debt as the value of the property purchased bears to the value of the whole of the mortgaged property. In calculating the proportionate values of the properties, a question arises whether the value at the date of the mortgage, or that at the date of the purchase, should be considered. In the present case the value of the house purchased by the mortgagee, which was not complete at the date of the mortgage, must be considered along with the value of the house site, in determining the proportionate amounts to be charged on the various mortgaged properties, as, at the date of the mortgage, the house was being built and well on its way to completion and was included in the mortgage deed.

Bisheshur v. Ram Sarup, 22 All. 284; *Fakiraya v. Gadigaya*, 26 Bom. 88; *Mardan Singh v. Thakur*, 27 All. 549—*referred to*.

P. K. Basu for the appellant.

Ba Thein (1) for the 10th respondent.

RUTLEDGE, C.J., and BROWN, J.—The appellants in this case, the Nyaunglebin Co-operative Town Bank, lent money on a registered mortgage deed to the first two respondents, Maung Ba U and Ma Hnin Myaing, on the 25th June 1923. On the 16th February 1925, the appellant mortgagees purchased at a Court auction one of the properties mortgaged subject to the mortgage. They claim that at the time of the mortgage the properties that they have

* Civil First Appeal No. 168 of 1927 from the judgment of the District Court of Pegu in Civil Regular No. 12 of 1926.

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subsequently purchased were worth the same amount as the remainder of the mortgaged properties. At the date of their purchase the mortgage debt amounted to Rs. 10,286. The sum of Rs. 5,143 therefore remained to be satisfied out of the remaining properties. They have therefore sued for a mortgage decree on the remaining properties for Rs. 5,143 with interest from that date on half of the original principal sum.

The properties on which they claim this mortgage charge have since the mortgage been sold to the 10th respondent, Ma Kywe. The trial Court has found that the house and house-site which the mortgagees have purchased is worth Rs. 7,500 and the other mortgaged properties Rs. 4,000. The Court has also found that of these other mortgaged properties the respondent Ma Kywe owns half only. The total amount now due on the mortgage has been held to be Rs. 2,903-3-0 only and of this sum Ma Kywe has been found liable to pay Rs. 500 only. We do not understand precisely how the learned trial Judge has calculated the sums now due, but we do not think that his findings can possibly be upheld. The question of contribution to the mortgage debt in such circumstances is a matter of some difficulty. The matter was very fully discussed in the Allahabad case of *Bisheshur Dial and another v. Ram Sarup* (1). It was there held that when a mortgagee has purchased part of the property mortgaged to him at a Court auction subject to the mortgage, his purchase has the effect of discharging a proportionate share of the mortgage debt. The amount so discharged bears the same ratio to the whole mortgage debt as the value of the property purchased bears to the value of the whole of the mortgaged property.

(1) (1900) 22 All. 284.

In a later case *Mardan Singh v. Thakur Shee Dayal* (1), the same Court further held that in calculating the proportionate values of the properties the values had to be considered as they stood at the date of the mortgage, and not as they stood at the date of the purchase. The principles approved in *Bisheshur Diul's* case may, we think, be accepted.

In the Bombay case of *Fakiraya v. Gadigaya* (2) the question was discussed. Fulton, J., who was a member of the Bench that decided that case, was of opinion that the principle of rateable contribution could not equitably be applied in such a case. But the majority of the Bench were of a contrary opinion. Jenkins, C.J., in the course of his judgment cited with approval the dictum of Sir Charles Farran in an earlier case: "It is clear that the plaintiff when he purchased the equity of redemption in the house purchased it subject to its due proportion of the mortgage debt. That proportion of the mortgage debt thus ceased to exist, and the plaintiff's right as mortgagee to recover the money secured by his mortgage was reduced to that extent. What proportion of the mortgage debt was thus wiped out depends upon the proportion of the value of the house to the value of the rest of the mortgaged properties." We do not understand the correctness of this exposition of the law seriously to have been questioned in this appeal.

The further question dealt with in *Mardan Singh's* case is not however so easy of decision. Section 82 of the Transfer of Property Act lays down that "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of

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(1) (1905) 27 All. 549.

(2) (1901) 26 Bom. 88.

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each property the amount of any other incumbrance to which it is subject at the date of the mortgage." There is nothing here as to the date at which the proportionate values of the properties is to be calculated. It is true that with regard to the amount of a previous incumbrance reference is made to the date of the mortgage. But clearly the date of the mortgage would have to be considered with reference to such an incumbrance because, unless the incumbrance existed at the time of the mortgage, it would have to be postponed to the mortgage. In the Bombay case of *Fakiraya v. Gadigaya* (1) to which we have already referred, Candy, J., remarks at page 98 with reference to the valuation: "That value would apparently be at the date of the purchase." That was however merely an *obiter dictum* and no reasons were given for his conclusion by the learned Judge.

The matter is of importance in the present case because at the time of the mortgage the house which has been purchased by the mortgagees was not completed, and the value of the site at the time of the mortgage was therefore considerably less than the value of the house and house site which has been purchased subsequently. It has been pointed out in *Mardan Singh's* case that to take the valuation at a date later than the date of the mortgage might operate harshly on the owner of one of the mortgaged properties who had expended money and labour in improving his property. It might similarly however be argued that to take the date as the date of the mortgage would operate hardly on an owner whose property through no fault of his own had very seriously depreciated since the mortgage.

We think, however, that, whatever might be the correct rule to apply in cases in which there are no

(1) (1901) 26 Bom. 88.

special circumstances to consider, in the present case the value of the house must be considered in apportioning the contributions amongst the various mortgaged properties. Theng Taik, clerk of the appellant Bank, in giving evidence says that at the time of the mortgage there was no building on the site. He admits however that the building had been begun, and the kitchen had been built. The mortgage deed itself describes this part of the mortgaged property as "house, semi-pucca, six posts in the frontage, five rooms upper storey, timber walling and flooring, zinc roofing, lower storey brick walling and flooring with kitchen and house-site". If the building had not been completed at the time of the mortgage the deed suggests that it was at least well on the way to completion, and that at the time of the mortgage the parties had in contemplation that the building would form part of the mortgaged property, and would bear its proportionate share of the mortgage debt. We are therefore of opinion that the value of the house must be considered in determining the proportionate amounts to be charged on the various mortgaged properties.

The valuation of the house and site is impossible to assess with any great degree of accuracy. The trial Court has fixed it at Rs. 7,500. Maung Taik says it is worth Rs. 5,000 whilst the witness Baga Singh says that a house and site of his in the neighbourhood are worth Rs. 10,000. His house is he says rather more substantial than the mortgaged house, and he also says that the price of land has risen by about one-half in the last three years. We do not think that in the circumstances the valuation of Rs. 7,500 accepted by the trial Judge is excessive.

As regards the rest of the mortgaged property, it is admitted that there has been a mistake. The same

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land has been shewn in the plaint twice over under a different description, and the total area is about forty-five to fifty acres. The trial Judge says in his judgment that Ma Kywe produced a certified copy of a sale deed showing that she had paid Rs. 2,000 for the lands. We cannot find that sale deed, nor has Ma Kywe given evidence. If she paid Rs. 2,000 for the lands subject to the mortgage their total value would presumably be largely in excess of the Rs. 2,000. The estimate of prices for land similar to the land in question varies from Rs. 125 an acre (Ko Sein Bwin 9.P.W.) to about Rs. 50 an acre on the good portions only (Maung On Sein D.W. 2). We think that something in between these extremes must be taken as the correct value. We estimate the mortgaged property in the hands of Ma Kywe as worth Rs. 3,750. Contribution must therefore be fixed at the rate of 75 to 37.5. Her rateable liability on the mortgage debt will therefore be in the proportion of one to two. The effect of the purchase of the house and site was therefore to discharge two-thirds of the mortgage debt, reducing the sum of Rs. 10,286 then due to Rs. 3,428-10-8.

From the date of sale interest will be allowed on one-third of the original principal, that is on Rs. 2,750. The amount due at the date of suit was therefore Rs. 3,428-10-8 *plus* Rs. 429-1-0 or a total of Rs. 3,857-11-8.

The decree of the trial Court is set aside and we pass a mortgage decree in favour of the appellant-plaintiffs for Rs. 3,857-11-8, with interest at the mortgage rate on Rs. 2,750 from the date of suit to six months after the date of this decree.