

APPELLATE CIVIL.

Before Mr. Justice Brown.

MAUNG SHWE OK AND ONE

v.

KARAMBU PILLAY AND TWO OTHERS.*

1927

Dec. 9.

Puisne mortgagee—Rights unaffected by action of prior mortgagee without joining puisne mortgagee as party—Civil Procedure Code (Act V of 1908), O. 34, r. 1.

Held, that when a prior mortgagee brings property to sale in execution of the decree on his mortgage and a second mortgagee of the property is not joined as a party to the suit on which the mortgage decree was obtained, the rights of the second mortgagee are unaffected by the suit of the first mortgagee and the sale in execution of the decree.

The mortgagees of the property in suit were in possession of the mortgaged property and therefore could not be evicted by a purchaser at a Court-sale of the said property which was sold at the instance of an alleged prior mortgagee who had not made the puisne mortgagee parties in his suit.

San Bwin v. A. V. K. Nagamulu, 8 L.B.R. 216—*referred to*.

Shaffee for the appellants.

Ganguli for the respondents.

BROWN, J.—The land in dispute in this case was originally the property of the 2nd and 3rd respondents, Maung Hlaing and Ma Waing. In the year 1919 they mortgaged their land by a registered deed to the appellants, the mortgage being a simple mortgage. In 1923 a further registered deed was executed and in place of the simple mortgage the appellants obtained a usufructuary mortgage for a sum of Rs. 984-8-0.

In Suit No. 75 of 1924 of the Township Court, Lewe, the 1st respondent, Karambu Pillay, filed a mortgage suit with regard to this land against the 2nd and 3rd respondents and obtained a decree.

* Special Civil Second Appeal No. 46 of 1927.

The mortgage on which he sued was dated after the first simple mortgage to the appellants but before the subsequent usufructuary mortgage. The appellants were not impleaded as parties to the mortgage suit. The land was put up to sale in execution of the mortgage decree and was purchased by the 1st respondent. He then applied to the Court for possession. This possession was given.

An application made by the appellants under rule 100 of Order XXI of the Civil Procedure Code was dismissed. The appellants then brought the suit out of which this appeal arises. They asked for a decree declaring that the decree and sale in favour of the 1st respondent were inoperative against the appellants and that the 1st respondent be ordered to restore the plaintiffs' possession. On these facts the trial Court passed a decree in favour of the plaintiffs declaring that the mortgage decree was inoperative provided the plaintiffs paid off the 1st defendant's mortgage. Against this decree the appellants appealed to the District Court. That Court altered the decree into one for possession of the land provided the appellants paid their proportionate share of the 1st respondent's mortgage. The appellants have now filed a further appeal and it seems to me clear that they must succeed.

It has been suggested before me on the authority of *Alangaran Chetti and another v. Lakshmanan Chetti and others* (1), that the appellants are entitled to merge their second mortgage in their first and to be regarded as the prior mortgagees. This point, it is, however, unnecessary to decide, because even as puisne mortgagees, the plaintiffs are entitled to the relief they asked for. It is settled law that when a prior mortgagee brings property to sale in execution of the

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(1) (1896) 20 Mad. 274.

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BROWN I.

decree on his mortgage and a second mortgagee of the property is not joined as a party to the suit on which the mortgage decree was obtained, the rights of the second mortgagee are unaffected by the suit of the first mortgagee and the sale in execution of the decree. This principle was accepted in the Lower Burma case of *San Bwin v. A.N.K. Nagamutu* (1). In that case property had been sold under a mortgage decree. The second mortgagee, who had not been a party to the previous litigation, sued for a declaration that the decree and sale were inoperative against his interests in the land and that the auction-purchaser was not entitled to disturb his possession. It was held that he was entitled to such a decree.

It seems to me clear therefore that the plaintiffs were entitled to the relief they asked for in the present case. Why their application under rule 100 of Order XXI of the Civil Procedure Code was not allowed I do not know. It is clear that within the meaning of rule 101 they were in possession of the property on their own account and not on account of the judgment-debtor and that the order disturbing their possession was entirely unjustifiable. They are therefore entitled under the provisions of rule 103 to bring a suit to be restored to possession. What the ultimate rights of the decree-holder with regard to this land will be it is unnecessary for the purposes of this case to decide. The appellants are entitled to be restored to the possession they were in before the passing of the illegal order ejecting them from possession and it will be for the 1st respondent to take such steps as he may be advised for enforcing his rights on the land.

I set aside the decrees of the lower Courts and pass a decree in favour of the appellants for possession of

(1) (1915) 8 L.B.R. 266.

the land in suit and declaring that the decree and the sale in Civil Regular No. 75 of 1924 and Civil Execution No. 61 of 1925 are inoperative against the plaintiffs. The 1st respondent will pay the costs of the appellants throughout.

APPELLATE CIVIL.

Before Mr. Justice Brown.

MAUNG BA AND ONE

v.

MAUNG KYWE AND ONE.*

Possession of land not recoverable by person with invalid title—Transfer of Property Act (IV of 1882), s. 54; Registration Act (XVI of 1908), s. 49—Possession in virtue of invalid sale a good defence.

A person in possession of immoveable property under a contract for sale is entitled to resist a suit for possession and he has that right even if the original transaction purported to be an outright sale but was not a valid sale owing to the absence of a registered sale deed. But that does not mean that a title can be conferred in total disregard of the provisions of the Transfer of Property Act, and therefore a person who is not in possession of property cannot bring a suit for possession based on an invalid title.

Held, that a person who purported to derive title to immoveable property from his vendor who based his title on an unregistered sale document, where the provisions of section 54 of the Transfer of Property Act applied, could not eject a person in possession of the property and who was not put in possession thereof by him or his vendor.

Maung Myat Tha Zan and two v. Ma Dun and one, 2 Ran. 285; *Ma Ma E and two v. Maung Tun*, 2 Ran. 479—*distinguished*.

Ba Thein (1) for the appellants.

Ganguli for the respondents.

BROWN, J.—The appellants sued the respondents, Maung Kywe, Ma E Me and Ma Ngwe Myit, mother of the respondent Maung Kywe, to evict them from

* Special Civil Second Appeal No. 193 of 1927 from the judgment of the District Court of Pegu in Civil Appeal No. 233 of 1926.

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BROWN, J.

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Dec. 12.