

and accepting the appeal with costs throughout we modify the decree passed by the Courts below accordingly.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Agha Haidar.

FATEH ALI AND OTHERS (PLAINTIFFS) Appellants

versus

GEHNA AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 318 of 1923.

Mortgage—prior mortgagee purchasing the rights of a subsequent mortgagee—whether he loses the rights secured to him under his prior mortgage—presumption.

Held, that a prior mortgagee by purchasing the rights of a puisne mortgagee does not lose the rights which had been secured to him by the earlier mortgage, even though the puisne mortgagee had been, according to the terms of the mortgage taken by him, authorized to redeem the prior mortgage. In such cases the presumption is that he intended to keep alive the prior security and would be entitled to fall back upon it in case of necessity.

Tenison v. Sweeny (1), and *Miln v. Walton* (2), referred to.

First appeal from the decree of Rai Sahib Lala Murari Lal, Khosla, Subordinate Judge, 1st class, Sialkot, dated the 22nd December 1922, declaring that the defendants cannot redeem the land in suit till they pay interest on the sum of Rs. 2,600.

G. C. NARANG and MAYA DAS, for Appellants.

S. A. NASIR and DHANPAT RAI, for Respondents.

JUDGMENT.

TEK CHAND J.

TEK CHAND J.—On the 13th of February 1914 defendants 4, 5 and 6, Nagahia, Sultan and Babu,

(1) (1844) 1 Jones & Lat. 710, 717. (2) (1843) 60 R. R. 184.

executed a deed of mortgage in respect of 135 *kunals* and 16 *marlas* of land in favour of plaintiffs, 1, 2, 5 and 6 and Hakim, the predecessor-in-interest of plaintiffs 3 and 4 and defendant No. 7, for a sum of Rs. 3,455. The mortgage was with possession and the mortgage money was to bear no interest. The term of the mortgage was fixed as 17 years and it was specifically provided that within that period "the mortgagors were not entitled to redeem the land nor could the mortgagees demand their mortgage money from the mortgagors." It was stipulated that when on the expiry of this period the principal mortgage-money was paid the land would be redeemed. This mortgage was recorded in the revenue papers and the mortgagees took possession of the land as agreed upon.

On the 6th of March 1916 the mortgagors executed another mortgage-deed in respect of the same property in favour of one Hari Singh for a sum of Rs. 6,000. It was stated in this deed that out of the mortgage money Rs. 3,400 was kept in deposit with the mortgagee (Hari Singh) for payment to Hakim, etc., prior mortgagees under the deed dated the 13th of February, 1914. The balance of Rs. 2,600 was paid in cash partly to the mortgagors and partly adjusted in discharge of their other liabilities to Hari Singh and third persons. It was also stipulated that interest on Rs. 2,600 was chargeable at the rate of Re. 1-4-0 *per cent. per mensem*. Hari Singh was authorised to take possession of the land on payment of the mortgage money due to Fateh Ali, etc., on the prior mortgage, and in that event interest on this sum of Rs. 3,400 was to counterbalance the produce of the land.

On the 27th of August 1917 Hari Singh, the mortgagee under the deed of the 6th of March 1916

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transferred his mortgagee rights to Fateh Ali, etc., (the mortgagees under the deed of the 13th of February, 1914), for a sum of Rs. 6,000. The consideration was recited as having been received as follows:—

“(i) Given credit for to the vendee out of Rs. 3,455 (which was kept in trust with him) on account of the mortgage deed dated the 13th of February, 1914 Rs. 3,400.

“(ii) To be received in cash before the Sub-Registrar at the time of registration Rs. 2,600.”

It was also stated that “the vendees are already in possession. They should remain in future as well, on payment of the Government revenue so long as redemption is not effected. The owners shall redeem the land mortgaged when they pay the mortgage money with interest due from them.”

On the 26th of January, 1922, the mortgagors Jawahir, etc., executed another mortgage-deed for 197 *kanals* 7 *marlas* of land (which included 138 *kanals* and 16 *marlas* mortgaged under the earlier transactions) in favour of defendants 1 to 3, Gahna, Shera and Saraj Din, for Rs. 9,500. Out of this sum Rs. 6,000 was left in deposit with these mortgagees for payment to Fateh Ali, etc., the prior mortgagees. The term of this mortgage was fixed as 10 years at the expiry of which the mortgagors were entitled to redeem the land mortgaged.

On the 20th of February, 1922, defendants 1 to 3 (mortgagees under the last mentioned mortgage, dated the 26th of January 1922) presented an application under the Redemption of Mortgages Act, No. II of 1913, to the Collector asking for redemption of the land from Fateh Ali, etc., prior mortgagees, on payment of Rs. 6,000. Fateh Ali, etc., resisted the

application contending that the term of their mortgage was 17 years and redemption could not take place before the expiry of that period. This contention was overruled and the defendants' application granted on the 18th of March, 1922.

Thereupon Fateh Ali, etc., the prior mortgagees, instituted the present suit on the 30th of March, 1922, under section 12 of Act II of 1913, claiming a declaration that the term of their mortgage, *i.e.*, 17 years, is still intact and it is not open to the original mortgagors or the subsequent mortgagees, defendants 1 to 3, to redeem them before the expiry of that period. The claim was resisted by defendants 1 to 3 principally on the ground that the plaintiffs by purchasing the mortgagee rights of Hari Singh, under the sale deed of the 27th of August, 1917, had extinguished the prior mortgage in their favour and cannot take advantage of the provisions thereof.

The lower Court, in a judgment which it is not easy to understand, has upheld the defendants' contention and disallowed the plaintiffs' claim to rely on the clause securing the property to them for 17 years but has passed a decree for interest on the sum of Rs. 2,600 (which is the item over and above Rs. 3,455 the principal sum secured on the foot of the first mortgage) the liability to pay which was also denied by the defendants.

The defendants have accepted the findings of the Court below with regard to the item of interest but the plaintiffs have preferred a first appeal asking for a declaration that the mortgage in their favour cannot be redeemed till after the expiry of 17 years from the 13th of February, 1914.

The sole question to be decided is whether by taking over the mortgagee rights from Hari Singh

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under the deed of sale dated the 27th of August, 1917 the plaintiffs can be said to have either expressly or by necessary implication given up the rights that were secured to them by the original mortgage, dated the 13th of February, 1914. After hearing Dr. Narang for the appellant and Mr. Nasir for the respondents, I am of opinion that the decision of the lower Court cannot be sustained. There is nothing in the provisions of the sale-deed aforesaid, from which it could be concluded that the plaintiffs intended to abandon the rights that had been secured to them under the prior mortgage-deed in their favour, nor is there any rule of law under which a prior mortgagee by purchasing the rights of a puisne mortgagee loses the rights which had been secured to him by the earlier mortgage. Indeed, in such cases, the presumption is that he intended to keep alive the prior security and would be entitled to fall back upon it in case of necessity.

The learned counsel for the respondents contends that in this case, by purchasing the mortgagee rights of Hari Singh, the appellants had clothed themselves with his rights and now stand in his shoes, and as the mortgage in favour of Hari Singh was for a consolidated sum of Rs. 6,000 and in that deed it was stated that Rs. 3,400 was kept in trust for payment to the appellants, they should be considered to have automatically redeemed themselves, the moment the sale of Hari Singh's rights in their favour was effected. After giving full consideration to the contentions of the learned counsel and considering the terms of the deed, I am, however, of opinion that all that the plaintiffs did by entering into the transaction of the 27th of August 1917, was to take over from Hari Singh an additional mortgage for Rs. 2,600 that had been created in his favour. The practical effect of the

sale was to create an additional charge for this amount in their favour on the same property. There was no intention to abandon the rights under the prior mortgage nor does the creation of an additional mortgage extinguish the rights which they had already acquired under the prior mortgage.

In this connection reference may usefully be made to the remarks of Lord St. Leonards in *Tenison v. Sweeny* (1), "Then another point was started, that, as the successive mortgages were for the sum secured by the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-debtors had a right to come before the last mortgage. That is a very novel view of the operation of the deeds. It is clear that the former mortgages continued untouched and operative notwithstanding the new mortgages and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether by taking a new security for their old debt and for further advances they do not prejudice their original securities." I may also refer to the decision of Vice-Chancellor Knight Bruce in the well-known case of *Miln v. Walton* (2) that a creditor having a mortgage on the funds of his debtor for part of his debt, does not necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage on the same funds of the whole of the debt.

In the case before us there is the additional fact, that the first mortgage in favour of the plaintiffs was for Rs. 3,455 and in the mortgage-deed in favour of

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Hari Singh and the sale-deed of his mortgagee rights by the latter in favour of the plaintiffs, dated the 22nd of August 1917, the sum of Rs. 3,400 and not the full amount of Rs. 3,455 was recited as having been kept in deposit for payment on account of the prior mortgage. This clearly indicates that the intention of the parties to the later transactions was not to extinguish the prior mortgage but rather to keep it alive. Further the mortgagors were not parties to this sale-deed and, therefore, this transaction could not affect the rights of the appellants and the mortgagors *inter se*, which had been secured to each of them by the mortgage-deed, dated 13th February, 1914.

In the lower Court, Sultan, one of the mortgagors stated that as a matter of fact Rs. 3,400 had been actually paid to the plaintiffs in redemption of the first mortgage. This allegation was, however, contrary to the case put forward by the contesting defendants in their written statement and was rightly rejected by the lower Court. I have considered the evidence which was led in support of this allegation and have no hesitation in agreeing with the learned trial Judge that it is unreliable.

For the foregoing reasons I would accept the appeal and grant the plaintiffs the declaration prayed for, but, having regard to all the circumstances of the case, I would leave the parties to bear their own costs throughout.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.
A. N. C.

Appeal accepted.