

LETTERS PATENT APPEAL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

1936

Jan. 30.

K.S.P. SUBBIAH NAIDU

v.

RAM SABAD.*

Mortgage—Marshalling—Hypothecation of movables—Doctrine of marshalling applicable to mortgage of immovable property only—Equal footing of funds—No prejudice to prior mortgagee—Prior mortgagee's release of part of security—Puisne mortgagee's claim to redeem prior mortgage—Claim to pay only proportionate amount—Transfer of Property Act (XX of 1929), ss. 60, 81—Contract Act (IX of 1872), ss. 43, 44.

[By an instrument of mortgage the appellant obtained a mortgage of immovable property and a hypothecation of 50 head of cattle belonging to the mortgagors. He obtained an *ex parte* mortgage decree against the mortgagors, but did not include in the suit any claim to the cattle on the ground that some of the cattle had died and others had been sold by the mortgagors. Neither did he implead in his suit the respondent who was a puisne mortgagee of the immovable property. The latter obtained a mortgage decree against the mortgagors, and the appellant then sued the respondent for payment of the amount due under the mortgage or in the alternative for a declaration that the respondent's mortgage was subject to the appellant's mortgage, and that the respondent was not entitled to execute his mortgage decree before the property had been brought to sale by the appellant. The respondent contended that (1) under s. 81 of the Transfer of Property Act he was entitled to have the mortgage of the immovable property and the hypothecation of the cattle marshalled for his benefit; (2) he could redeem the property on payment of only that proportion of the original mortgage debt which remained outstanding after deducting therefrom the value of the cattle hypothecated.

Held, that (1) s. 81 of the Transfer of Property Act applied to mortgages of immovable property and not to the hypothecation of movables. Even assuming that the doctrine of marshalling could be applied to movable property it could only be applied to two funds standing on an equal footing, and if the rights of the prior mortgagee would not be prejudiced thereby. But the rights and obligations of a mortgagee of immovable property are not the same as those of a person to whom movables have been hypothecated, and in the circumstances of the case the mortgagee would probably be involved in litigation with the purchaser of the cattle, and the doctrine, therefore, could not be invoked;

Moosa v. Maung Tun Kyaing, I.L.R. 9 Ran. 182; *Webb v. Smith*, 30 Ch. Div. 192—referred to.

(2) where several properties are mortgaged to the same mortgagee for the same debt each of those properties is liable as between the mortgagor and the

* Letters Patent Appeal No. 4 of 1935 from the judgment of this Court in Civil Second Appeal No. 217 of 1934.

mortgagee for the whole of the debt, and the mortgagee has the right to recover the debt out of any part of the mortgaged property. There is no obligation on him to proceed against the whole of the property, and he has the right to release part of the mortgaged property. The respondent, therefore, could only redeem the property upon payment of the whole of the mortgage debt.

The conflict of law on the subject has been set at rest by the amendment of s. 60 of the Transfer of Property Act. Also, by virtue of ss. 43 and 44 of the Contract Act, which apply to the Transfer of Property Act, mortgagors are jointly and severally liable for the mortgage debt.

Imam Ali v. Baij Nath, I.L.R. 33 Cal. 613; *Sheo Prasad v. Behari Lal*, I.L.R. 25 All. 79; *Sheo Tahal Ojha v. Sheodan Rai*, I.L.R. 28 All. 174; *V. P. Pillai v. R.M.M.R.M. Raman Chettiar*, I.L.R. 40 Mad. 968—considered.

Basu for the appellant. The doctrine of marshalling as enunciated in s. 81 of the Transfer of Property Act applies only to mortgages of immovable property. The section speaks of mortgages, and a mortgage is defined by s. 58 as “the transfer of an interest in specific immovable property.” The hypothecation of movables and the mortgage of immovables stand on different footings.

[PAGE, C.]. Cannot the doctrine of marshalling be applied to the hypothecation of movables as a matter of justice, equity, and good conscience ?]

No. Marshalling is a creation of English law, and the decision in *Webb v. Smith* (1) shows that the securities must be on the same footing for the doctrine to apply. So far as the hypothecation of movables is concerned there is only a personal contract, and it does not bind a subsequent transferee unless he had notice, nor does it apply so as to prejudice the rights of a third party. *Moosa v. Maung Tun Kyaing* (2); *James Dolphin v. Aylward* (3).

Sections 43 and 44 of the Contract Act apply to transfers of property by virtue of s. 4 of the Transfer

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(1) 30 Ch.D. 192.

(2) I.L.R. 9 Ran. 182.

(3) 4 H.L. 486, 501.

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of Property Act, and mortgagors are jointly and severally liable for the mortgage debt. This is a departure from English law, but the Calcutta High Court lost sight of this fact in *Hari Kissen v. V. Hossein* (1). See also *Imam Ali v. Baij Nath* (2); *Mayashankar v. Batlivala* (3). The integrity of a mortgage cannot be broken unless the mortgagee purchases the property. Under section 60 the release of one of the mortgagors from his obligation cannot affect the right of the mortgagee to proceed against the other mortgagors. See *Latchmi Narayan v. Muhammad Yusuf* (4)¹; *Ali Jan v. Majid-ul-din* (5); *V. Perumal v. R.M.M.R.M. Raman Chettiar* (6); *Krishna Charan v. Sanat Kumar* (7).

The amendment of s. 60 in 1929 has now set at rest the conflict of opinion, and the word "only" was added to make it clear that the integrity of a mortgage will be broken only if the mortgagee himself purchases the mortgaged properties.

J. B. Sanyal for the respondent. The respondent as a puisne mortgagee is entitled to have the securities included in appellant's mortgage marshalled in his favour by reason of s. 81 of the Transfer of Property Act. Mortgages of movables are common in India, and in the absence of any special statutory law governing such mortgages the provisions of the Transfer of Property Act should be applied to them as a matter of justice, equity and good conscience.

Although *prima facie* a mortgage is indivisible, the integrity of it can be broken by consent

(1) I.L.R. 30 Cal. 755.

(4) I.L.R. 17 All. 63.

(2) I.L.R. 33 Cal. 613.

(5) I.L.R. 45 All. 524.

(3) 27 Bom. L.R. 1449.

(6) I.L.R. 40 Mad. 968.

(7) I.L.R. 44 Cal. 162.

expressed or implied or by waiver on the part of the mortgagee. *Yadali Beg v. Tukaram* (1); *Rathna Mudali v. Perumal* (2).

The first mortgagee cannot relinquish his claim on part of the mortgaged property and throw the whole burden on the remaining property to the prejudice of the second mortgagee so as to affect his right of subrogation. *Rajkeshwar v. Muhammad* (3); *Hari Kissen v. V. Hossain*; *Jugal Kishore v. Kedar Nath* (4).

In this case the mortgagee in his first suit expressly relinquished his claim in respect of the cattle, and cannot now refuse to accept the consequence of his own act. The amendment of s. 60 of the Transfer of Property Act was not intended to have the far reaching effect of wiping out the established principles of equity. The insertion of the word "only" in that section was to prevent sweeping generalizations being made, as was done in *Mayashankar's* case.

PAGE, C.J.—This appeal is allowed.

In 1927 the S.A.S.P. Firm took a mortgage of certain immovable property from Ram Khati and Ma San Hte. Under the document of mortgage there was also effected a hypothecation to the mortgagees of 50 head of cattle and any progeny that they might produce. In 1928 the mortgagors executed a second mortgage of the immovable property to the respondent. In 1930 the S.A.S.P. Firm assigned their interest in the mortgage of 1927 to the appellant. In 1932 the appellant brought a suit, No. 97 of 1932, in the Township Court of Thayetmyo upon the mortgage to S.A.S.P. that

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(1) I.L.R. 39 Mad. 17.

(2) I.L.R. 38 Mad. 310.

(3) I.L.R. 3 Pat. 522.

(4) I.L.R. 34 All. 606.

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had been assigned to him. In that suit he alleged that as some of the cattle that had been hypothecated to him had died and the remainder had been sold by the mortgagors he did not intend to proceed further in respect of the hypothecation of the cattle to him. An *ex parte* mortgage decree was obtained against the mortgagors. At the time when that suit was filed the appellant was not aware of the puisne mortgage of the immovable property that had been effected in 1928, and the respondent as puisne mortgagee was not impleaded as a party defendant in the suit.

In suit No. 80 of 1933, out of which the present appeal arises, the appellant sued the respondent in the Township Court of Thayetmyo for a money decree for Rs. 863-13-9 and interest on the original mortgage of 1927, or in the alternative for "a declaration that the plaintiff's mortgage is prior to that of the defendant's mortgage, and that the defendant's mortgage is subject to the plaintiff's mortgage and that the defendant is not entitled to execute his mortgage decree in C.R. No. 1 of 1933 of S.D.J. Thayetmyo before the properties are brought to sale by the plaintiff."

The respondent raised two defences, the first being that under section 81 of the Transfer of Property Act he is entitled to have the mortgage of the immovable property and the hypothecation of the cattle marshalled for his benefit, and he claims the right to redeem the property on payment of only that amount of the original mortgage debt that remains over after deducting therefrom the value of the cattle hypothecated.

Now, section 81 runs as follows :

"If the owner of two or more properties mortgages them to one person and then mortgages one or more of the proper-

ties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties."

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The first answer to the respondent's contention is that section 81 applies to mortgages of immovable property and not to the hypothecation of movable. This is manifest from section 58 of the Transfer of Property Act in which it is enacted that "a mortgage is the transfer of an interest in specific immoveable property." It follows therefore that in the present case section 81 has no application.

It was further contended that, although section 81 might not apply to the securities under consideration, the principle of that section ought to be invoked on the ground that it is in accordance with justice, equity and good conscience. It is unnecessary for the purpose of disposing of this appeal to decide that question, because even if the doctrine of marshalling securities can be applied in India to movable property it could only be applied to "two funds standing upon an equal footing," [*Webb v. Smith* (1)] and it is clear in this case that these two securities do not stand on the same footing. The rights and obligations of a mortgagee of immovable property are not the same as those of a person to whom movables have been hypothecated—*Moosa Abdul Habib v. Maung Tun Kyaing* (2). Further, even if the principle of marshalling as set out in section 81 is applicable to movables it cannot be enforced "so as to prejudice the rights of the prior mortgagee."

(1) L.R. 30 Ch, Div. 192 at p. 202.

(2) (1931) I.L.R. 9 Ran. 182.

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Now, Ram Khati and Ma San Hte, who had hypothecated the cattle to the S.A.S.P. Firm, subsequently purported to sell all the cattle that had survived, 41 head, to one On Pe, and before the appellant as between himself and On Pe could exercise the rights given to him under the hypothecation by Ram Khati and Ma San Hte he would have to prove at any rate that On Pe when he purchased and took delivery of the cattle had notice of the prior hypothecation of the cattle to the appellant. *Moosa Abdul Habib v. Maung Tin Kyaing* (1). Whether the appellant is in a position to do so is a matter with which we are not concerned in the present case, but in all probability in order to establish his rights under the hypothecation he would have to enter into litigation with On Pe. On the other hand there was no obstacle in his way when seeking to liquidate the mortgage debt by executing the mortgage decree against the immovable property that was the subject of the mortgage. It is plain therefore that it would prejudice the mortgagee and entail considerable hardship upon him if he were compelled in the first instance to liquidate the debt due to him from Ram Khati and Ma San Hte out of the cattle that were subject to the hypothecation. Upon that ground also, and assuming without deciding that the doctrine of marshalling securities applies in India to movable property, the doctrine could not be invoked in the circumstances of the present case.

The learned advocate for the respondent then developed a second line of defence. He contended that the respondent was bound to pay on redemption only so much of the debt due under the

(1) (1931) I.L.R. 9 Ran. 182.

mortgage of 1927 as remained over after the value of the cattle had been deducted therefrom, upon the ground that, the appellant had waived his rights under the hypothecation and that in such circumstances he was bound to pay only a due proportion of the mortgage debt by way of redemption. In support of his contention he relied upon the doctrine laid down in *Imam Ali v. Baij Nath Ram Sahu* (1). That was a case in which the mortgagee had lost his right to proceed against a part of the property subject to the mortgage. Mookerjee J. observed :

“ In the case before us, all the properties comprised in the mortgage are liable for the satisfaction of the debt and after different persons have become interested in different fragments of the equity of redemption, the properties continue to be so liable ; and all that the owner of any portion of the equity of redemption is legitimately entitled to ask is that not more than a rateable part of the mortgage debt should be thrown upon the property in his hands. This is manifestly just, and the mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises because by reason of their own laches they have lost their remedy as against the remainder. This principle has been recognised by this Court in the cases of *Hari Kissen v. V. Hossein* (2) and *Surjiram v. Barhamdeo* (3).”

See also *Surjiram Marwari and another v. Barhamdeo Persad and others* (4), *Mir Eusuff Ali Haji v. Panchanan Chatterjee* (5), *Jugal Kishore Sahu and another v. Kedar Nath and another* (6), *Budhmal Kevalchand and others v. Rama Valad Yesa Sangle and others* (7) and *Mayashankar Mulshankar v. Burjorji Merwanji Batlivala* (8).

(1) (1906) I.L.R. 33 Cal. 613 at p. 620.

(2) (1903) I.L.R. 30 Cal. 755.

(3) 2 Cal. L.J. 202.

(4) 1 Cal. L.J. 337.

(5) 15 Cal. W.N. 800.

(6) (1912) I.L.R. 34 All. 606.

(7) (1919) I.L.R. 44 Bom. 223.

(8) 27 Bom. L.R. 1449.

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On the other hand the Allahabad High Court laid down the law in a different sense in *Lachni Narain and others v. Muhammad Yusuf* (1), *Sheo Prasad v. Behari Lal* (2), *Sheo Tahal Ojha v. Sheodan Rai and others* (3) and *Ali Jan Khan and another v. Majid-ul-din and another* (4). In *Sheo Prasad v. Behari Lal* (2) Stanley C.J. and Burkitt J. observed :

“ It seems to us that great hardship might be entailed on a mortgagee if he could not relinquish his claim to part of the property purporting to be comprised in his mortgage, except on the penalty of losing his right under section 90, if he found that it was his advantage to do so. For example, it might be that a portion of the property was heavily incumbered ; it might also be that the mortgagor's title to a portion of the property was in dispute : in either of these cases the result of endeavouring to sell the portion so incumbered, or the portion the title to which was in dispute, might entail heavy expenses and protracted litigation. Therefore there seems no reasonable objection under such circumstances to the abandonment by a mortgagee of his claim in respect of a part of his security and to his seeking relief by sale of the remaining portion.”

Again, in *Sheo Tahal Ojha v. Sheodan Rai and others* (3) Banerji J. laid down that :

“ Where several properties are mortgaged to the same mortgagee for the same debt, each of these properties is liable as between the mortgagor and mortgagee for the whole of the debt ; and the mortgagee has the right to recover the debt from any part of the property. There is no obligation on him to proceed against the whole of the property. It may be that as regards a part of it a third party has a paramount title. It may also be that a part is so heavily encumbered as to be of almost no value. In such cases it is competent to the mortgagee to exempt such part from

(1) (1894) I.L.R. 17 All. 63.

(3) (1905) I.L.R. 28 All. 174.

(2) (1902) I.L.R. 25 All. 79.

(4) (1923) I.L.R. 45 All. 524.

liability for the mortgage debt, and I see no reason why he should be compelled to proceed against it. It has been held by this Court that it is competent to a mortgagee to abandon a part of his security and sue for the sale of the remainder. —*Sheo Prasad v. Behari Lal* (1), *Jai Gobind v. Jasram* (2). * * * Such abandonment, except where the mortgagee himself has bought a part of the mortgaged property, cannot work any injustice. It leaves the right of the owners of the several properties comprised in the mortgage to claim and obtain contribution *inter se* wholly unimpaired."

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This view has found favour also with the Madras High Court, and in *V. Perumal Pillai v. R.M.M.R.M. Raman Chettiar* (3) Wallis C.J., referring to section 60 of the Transfer of Property Act, observed :

"This section ignores the equitable doctrine of consolidation which requires the mortgagor to pay something more than the mortgage money as a condition of redemption, but it adopts and gives statutory force to the rule that a part of the mortgaged property is not to be redeemed except on payment of the mortgage money. One exception only is made for the case of the mortgagee having himself acquired part of the mortgaged property. To insist on the mortgagor paying the mortgagee the whole mortgage money in such a case without a proportionate abatement would give the mortgagor an immediate right of suit against the mortgagee or his assignees to recover back by way of contribution what he had paid in excess of his proportionate share, and this the legislature has avoided by the exception. It has not made any such statutory exception in favour of the mortgagor in the case, mentioned in the Order of Reference, of a mortgagee voluntarily releasing from the suit a portion of the mortgaged property, and we are not at liberty to derogate from the terms of the section by introducing one. Nor can we entertain the argument that such a case can be considered to come within the exception because the action of the mortgagee in releasing part of the mortgaged property is an acquisition by himself within the meaning of the section."

(1) (1902) I.L.R. 25 All. 79.

(2) W.N. (1898) 120.

(3) (1917) I.L.R. 40 Mad. 968.

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This conflict of opinion between the Courts in India is now set at rest by section 60 of the Transfer of Property Act as amended in 1929. That section *inter alia* provides that :

“ Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.”

The word “ only ” was added by the amending Act (XX of 1929), thus giving effect to the Allahabad and the later Madras decisions in preference to the view taken in Calcutta and Bombay. It is to be observed that in the Calcutta and Bombay decisions the attention of the Court does not appear to have been drawn to sections 43 and 44 of the Contract Act. under which the mortgagors would be jointly and severally liable for the mortgage debt, sections 43 and 44 being applied to the Transfer of Property Act by section 4 thereof.

Now, applying the law thus laid down to the present case it appears to me to be plain that the right of the respondent to redeem the property subject to the mortgage of 1927 is a right to redeem upon payment not of a part but of the whole of the mortgage debt. The respondent elected to take a puisne mortgage of the immovable property from the mortgagors with knowledge of the existence of the appellant's mortgage. He need not have done so, and he has no cause for complaint for he must be taken to have known that he was only entitled to such rights as the puisne mortgage under the law would give him. I do not propose to express any opinion on the question whether the respondent if he exercises his right of

redemption will be able to obtain contribution under section 82 from those persons who executed the hypothecation agreement or are transferees from them. —*Behari Lal Sen v. Indra Narayan Bandopadya and others* (1). That is a question that does not arise in the present case. Nor shall we express any opinion as to what would be the rights of the respondent by way of subrogation or otherwise if the respondent elected to redeem the mortgage of 1927 as a whole.

For these reasons the appeal is allowed, the decrees passed in all the Courts are set aside, and a decree will be passed granting the appellant the declaration for which he prayed in the alternative in the trial Court. The appellant is entitled to his costs in all the Courts.

BA U, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

S.T.K.T. KATHERASAN CHETTYAR

v.

THE SPECIAL COLLECTOR OF TWANTE.*

Land acquisition—Estimate and award to be made by Collector only—Collector's use of information for forming an estimate—Supply of information by Government or any other person—Practice of Collectors—Preliminary estimate—Government's choice—Withdrawal from acquisition—Further information supplied by Government—"Instructions" to Collector—Ultra vires action—Land Acquisition Act (I of 1894), s. 11.

Under s. 11 of the Land Acquisition Act it is the Collector who makes the award. The award has to be of such a sum by way of compensation as, in the opinion of the Collector and of no other person, is a fair and proper estimate of the compensation that should be allowed for the land.

In making the award the Collector is not acting as a judicial officer, and therefore he is at liberty and bound to take into account all available

(1) 45 Cal. L.J. 571.

* Civil First Appeal No. 43 of 1935 from the order of the District Judge of Hanthawaddy in Civil Misc. No. 32 of 1934.

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