

APPELLATE CIVIL.

Before Tek Chand and Tapp JJ.

1930
April 24.

PUNJAB AND SINDH BANK, LTD.,
GUJRANWALA (PLAINTIFF) Appellant

versus

AMIN CHAND AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 2740 of 1927.

Transfer of Property Act, IV of 1882, section 81—Marshalling securities—prior mortgagee of 3 properties—releasing one—whether loses thereby his prior right on one of the other properties as against a second mortgagee.

The plaintiff Bank, having advanced Rs. 8,000 to defendants 2 and 3 on a pronote and equitable mortgage by deposit of title deeds of 3 properties, received Rs. 6,150 in part payment and obtained a decree for the balance due chargeable against two of the hypothecated properties shewn as (a) and (b), the third property (c) having been released by it. A. C., defendant 1, having meanwhile obtained from one of the mortgagors, defendant 2, a mortgage on property (b) for Rs. 4,000, obtained a decree on the footing of this mortgage and attached the property in execution of decree. The Bank's objection having been rejected, it brought the present suit for a declaration of priority of its mortgage claim against property (b) over that of A. C. the puisne mortgagee.

Held, applying the principle laid down in section 81 of the Transfer of Property Act, that while a second mortgagee who has not notice of the first mortgage is entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend, the rights of the first mortgagee in either property are not in any way to be prejudiced, and that therefore the release of property (c) by the plaintiff-Bank cannot prejudice its right and interest in the property (b) in dispute, and its claim must be decreed.

Thanmul Sowcar v. Ramadoss Reddiar (1), relied upon.

First appeal from the decree of Khan Sahib Shahzada Sultan Asad Jan, Senior Subordinate Judge, Gujranwala, dated the 30th July, 1927, dismissing the plaintiff's suit.

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JAGAN NATH AGGARWAL, D. C. RALLI, and SUNDAR SINGH, for Appellant.

DIWAN MEHR CHAND, N. C. MEHRA, and DEVI DYAL, for Respondents.

TAPP J.—The facts relating to the suit out of which this appeal arises are as follows:—

On the 18th July 1922 the 2nd and 3rd defendants executed a promissory note for Rs. 8,000 in favour of the Punjab and Sindh Bank, Ltd., Gujranwala, and created an equitable mortgage by the deposit of title deeds in respect of three properties as under:—

- (a) A house situate in *Gali Jawahar Singh Gujranwala*.
- (b) A two-storied house situate in *Thakar Singh Gate Bazar, Gujranwala*.
- (c) A shop situate in *Bazar Chauk Kalan, Gujranwala*.

On the 16th October 1924 these two defendants repaid Rs. 6,150-13-3 out of the amount due by them and the Bank released the property described under (c). The Bank subsequently sued the two defendants for the balance and on the 15th August 1925 was granted a decree for Rs. 5,073 including costs, chargeable on the hypothecated property. On the 5th October 1922 the 2nd defendant Diwan Chand effected a mortgage in respect of the property described under (b) in favour of Amin Chand for

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Rs. 4,000, and, on the 29th May 1925, *i.e.*, before the Bank obtained its decree, Amin Chand obtained a decree for Rs. 5,800 and costs on the footing of this mortgage. He later obtained an order for sale of this property, and an objection by the Bank asserting its prior lien was rejected on the 3rd July 1926. The Bank thereupon brought the present suit for a declaration as to its claim under the decree of the 15th August 1925 on the security of the house in question having priority over the claim of the defendant Amin Chand. The defendant Amin Chand, who alone contested the suit, raised various pleas which will be apparent from the following issues:—

- (1) Is the plaintiff's right over the property in dispute superior to that of the defendant 1?
- (2) What is the effect of the release of the shop by the plaintiff?
- (3) Is the item of interest and costs a charge upon the disputed property?
- (4) Had the plaintiff knowledge of defendants' mortgage at the time of release?

The learned Subordinate Judge in a very brief judgment held that owing to the plaintiff-Bank having released the property described under (c) it had lost its superior right over the property in dispute. Hence the 1st and the 2nd issues were decided against the plaintiff; the 3rd issue was left undecided and on the 4th the Lower Court found that the plaintiff Bank had knowledge of the mortgage in favour of defendant Amin Chand when it released the property described under (c). The suit was thereupon dismissed with costs and against this dismissal the present appeal has been preferred.

Now, there can be not the least doubt that the view of the Lower Court as to the Bank having lost its superior right to the property in dispute by release of the property described under (c) is wrong. No authority has been cited for the proposition laid down by the learned Subordinate Judge and, as urged by Mr. Ralli on behalf of the appellant, there is no law to preclude a prior mortgagee from releasing part of his security. As held in *Thanmul Sowcar v. Ramadoss Reddiar* (1), a subsequent mortgagee of one of two properties under mortgage to a previous mortgagee has no right under section 81 of the Transfer of Property Act to compel the prior mortgagee to proceed in the first instance against the property not mortgaged to the puisne mortgagee, as the obligation laid under the section is only on the mortgagor and not on the prior mortgagee. Applying the principle laid down in section 81 of the Transfer of Property Act it seems to me quite clear that while a second mortgagee who has not notice of the first mortgage is entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend, the rights of the first mortgagee in either property are not in any way to be prejudiced. Thus the release of the property described under (c) by the plaintiff-Bank cannot prejudice its rights and interest in the property in dispute.

The only other question which arises for determination is whether an equitable mortgage was created in respect of the property in dispute by a deposit of the document relied upon as being a title deed by the plaintiff-Bank. This document purports to be a copy of a registered deed of relinquishment executed by defendant Diwan Chand on the 4th August 1921 in

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favour of his father Amar Singh and will be found at pages 30-31 of the paper book. In consideration of the defendant Diwan Chand relinquishing all connection or concern with his father Amar Singh and his property, the property in dispute, which was valued at Rs. 6,000 and a sum of Rs. 1,000 in cash were given to him. A copy of this document, as appears on the face of it, was obtained by Diwan Chand on the 4th August, 1921, and this copy was deposited with the plaintiff-Bank as a title deed. In my opinion this document is, in the circumstances, the only document of title to the property in dispute held by Diwan Chand and the deposit of this document with the Bank was sufficient to create an equitable mortgage. The document in question is signed by both Diwan Chand and his father Amar Singh, and it was admitted by the learned counsel for the respondent Amin Chand that on the basis of this document Amar Singh, the father, could resist any claim of Diwan Chand, the son, to any other property belonging to the former. It is obvious that Diwan Chand could not be in possession of the original and his title deed of the property in dispute could be only a copy of the deed of relinquishment.

For the above reasons I would hold that the plaintiff-Bank has a prior lien on the property in suit and accepting the appeal I would decree the claim with costs throughout.

TEK CHAND J.

TEK CHAND J.—I agree.

A. N. C.

Appeal accepted