

## APPELLATE CIVIL.

*Before Mr. Justice Dunkley.*

## DAW KYIN v. KO BA TIN AND ANOTHER.\*

1938

Aug. 2.

*Mortgage—Successive mortgages of same property to creditor—No merger—Separate mortgages on different properties—Properties situate in different districts—One suit on both mortgages—Causes of action separate—Transfer of Property Act, s. 67 A—Civil Procedure Code, ss. 16, 17.*

Where a debtor has created two successive mortgages on the same property in favour of the same creditor, unless there is something in the second deed of mortgage to show a contrary intention, the creditor must be presumed to have intended to keep the earlier security alive for his own protection. The doctrine of merger does not apply to mortgages.

*Gopal Chunder v. Holdar*, I.L.R. 16 Cal. 523, referred to.

Where a mortgagee holds two mortgages executed by the same mortgagor, but the mortgaged properties are different and separate suits in respect thereof can only be filed in different Courts, he is not bound to bring only one suit to enforce both the mortgages. The words "all the mortgages in respect of which the mortgage money has become due" in s. 67A of the Transfer of Property Act must be limited to those mortgages which the Court in which the mortgagee sues has jurisdiction to enforce.

*Premisukh v. Mangal Chand*, 41 C.W.N. 854, referred to.

*Held* (on the application for a certificate for further appeal) that the mortgage of property situate in one district gave rise to a cause of action entirely distinct and separate from the cause of action arising from the mortgage of property situate in another district, and consequently the provisions of s. 67A of the Transfer of Property Act or s. 17 of the Civil Procedure Code or of both together could not give the Court in whose jurisdiction the latter property was situate any jurisdiction over the property situate wholly in the first district.

*Irvine-Jones* for the appellant.

*Sim* for the respondent.

DUNKLEY, J.—The defendant-appellant, Daw Kyin, mortgaged to the plaintiffs-respondents, Ko Ba Tin and Ma E Kin, three holdings of agricultural land for a sum of Rs. 3,000, by a registered deed of mortgage dated the 3rd October, 1934. These paddy lands are

\* Civil 2nd Appeal No. 136 of 1938 from the judgment of the District Court of Insein in Civil Appeal No. 38 of 1937.

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situated in the Insein district. On the 10th October, 1934, Daw Kyin executed another mortgage, for a principal sum of Rs. 8,000 in favour of the respondents also, of eight holdings of agricultural land which are situated in the Pegu district. On the 29th July, 1935, a third mortgage by registered deed for a principal sum of Rs. 8,600 was executed by Daw Kyin and four other persons in favour of the respondents as mortgagees, the property mortgaged being the same lands which were mortgaged to the respondents by Daw Kyin by the mortgage of the 10th October, 1934. The suit out of which the present appeal arises, being Regular Suit No. 26 of 1937 of the Subdivisional Court of Insein, was a suit by the plaintiffs-respondents against the defendant-appellant on the mortgage of the 3rd October, 1934. The main ground of defence in the suit (and the only point which has been argued before me in this second appeal) was that the provisions of section 67A of the Transfer of Property Act were applicable; that the mortgage of the 10th October, 1934, was still subsisting; and that as this mortgage was between the same parties the respondents could not bring a suit on their mortgage of the 3rd October, 1934, without consolidating in the same suit the mortgage of the 10th October, 1934. This argument did not find favour with the Subdivisional Court, and the suit of the respondents was decreed. On appeal to the District Court the decision of the learned Subdivisional Judge was upheld. The learned District Judge said that the mortgage of the 10th October, 1934, had merged into, or become extinguished by, the mortgage dated the 29th July, 1935 and

“In these circumstances it seems to me quite apparent that the mortgagee has not at present any right to obtain a decree by reason of the mortgage dated the 10th October, 1934.”

The learned District Judge then went on to say that it was pointed out in argument that in certain circumstances the respondents might be able to fall back on the mortgage of the 10th October, 1934, but it was not at that time subsisting and he was only concerned with the present circumstances.

With the greatest respect, this was scarcely the proper way of looking at the matter. The doctrine of merger is not applicable to mortgages, and the real question is whether there was a novation of contract, that is, whether the mortgage of the 10th October, 1934, had been novated by the mortgage of the 29th July, 1935. In *Gopal Chunder Sreemany v. Herembo Chunder Holdar and others* (1), where the circumstances were similar to those obtaining in the present case, a Bench of the Calcutta High Court held that unless there was something in the second deed of mortgage to show a contrary intention, the creditor must be presumed to have intended to keep the earlier security alive for his own protection. In the present case, there might exist circumstances, which can readily be imagined, such as an earlier undisclosed mortgage, which would render the mortgage of the 29th July, 1935, either useless to the mortgagees, or of less value to them than their earlier mortgage; and, consequently, the presumption arises, in the absence of anything to show a contrary intention, that the mortgagees intended to keep the earlier mortgage of the 10th October, 1934, alive for their benefit. That they intended to do so can be gathered from the express terms of the deed of mortgage of the 29th July, 1935, for in clause 5 of that deed there occurs the following:

"If the principal and the interest due on this document are fully satisfied, the mortgagees shall have no claim on the original mortgage deed, and the said original document shall be cancelled."

(1) (1889) I.L.R. 16 Cal. 523, 529.

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That is, until the principal and interest due on the deed of 1935 had been fully satisfied the deed of the 10th October, 1934, still remained in existence. Consequently, the decision of the learned District Judge of Insein was based upon wrong grounds, and *prima facie* the provisions of section 67A of the Transfer of Property Act are applicable in this case.

On further consideration, however, it appears that the provisions of this section are not applicable, and for the reason that the property which is included in the mortgage of the 3rd October, 1934, is situated in a different district to the property which is included in the mortgage of the 10th October, 1934, and, consequently, under the provisions of section 16 of the Code of Civil Procedure, a suit on the mortgage of the 10th October, 1934, could not be brought in the Subdivisional Court of Insein, or any Court of the Insein district. This limitation on the application of section 67A has been pointed out by the Calcutta High Court in *Premsookh Mahata v. Mangal Chand Maloo and another* (1). In this case the application of section 67A of the Transfer of Property Act was fully considered, and the learned Judges came to the conclusion that the provisions of the section had no application unless a suit on both the mortgages could be brought in the same Court. In the course of his judgment Panckridge J. said :

“As to section 67A of the Transfer of Property Act I may observe that it is never easy to construe a statutory enactment which imposes an obligation but is silent as to what is to happen in the case of a breach of that obligation. It appears to me to be unreasonable to suppose that the statute compels a plaintiff mortgagee to do what the respondent did here, namely, include in his suit mortgage claims over which the Court has no jurisdiction. If this is so, the inclusion cannot be pleaded as a

(1) 41 C.W.N. 854, 867.

compliance with the obligation whatever it may be. \* \* \* \*  
 The section, which was added to the Transfer of Property Act by Act XX of 1929, and which cuts down the former rights of the mortgagees, should not in my opinion be construed more widely than the language clearly warrants. Applying this principle the words 'all the mortgages in respect of which the mortgage money has become due' must be limited to those mortgages which the Court, in which the mortgagee sues, has jurisdiction to enforce."

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With the greatest respect, I am in entire agreement with these observations, and for this reason I am of opinion that this appeal fails and that, although based on wrong grounds, the decisions of the lower Courts were correct. The appeal is therefore dismissed with costs.

[The appellant applied for leave to appeal further under clause 13 of the Letters Patent.\*

*Paget* for the applicant.

*Hay* (with him *Sim*) for the respondents.]

DUNKLEY, J.—I have heard learned counsel on this application for a certificate for further appeal from my decision in Civil Second Appeal No. 136 of 1938.

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The principles on which a certificate should be granted have been considered in *Bulliraju* (alias) *Achayamma v. Satyanarayanamurthi* (1), and the judgment in that case makes it clear that a certificate should not be granted if the Judge who heard the second appeal is convinced that there is no substance in the point which it is desired to reagitate in the Letters Patent Appeal.

Mr. Paget for the applicant argues that section 67A of the Transfer of Property Act and section 17 of the

\* Civil Misc. Application No. 89 of 1938.

(1) (1929) I.L.R. 53 Mad. 405.

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Code of Civil Procedure should be read together, and that when they are read together then the Courts of the Insein District would have jurisdiction in regard to the mortgage of lands situated wholly within the Pegu District. This is a proposition which, in my opinion, is untenable, because the mortgage of the property situated in the Pegu District gave rise to a cause of action which was entirely distinct and separate from the cause of action arising from the mortgage of the property which is situated in the Insein District, and consequently the provisions of section 67A of the Transfer of Property Act or of section 17 of the Code of Civil Procedure, or of both together, could not give the Insein Courts jurisdiction in regard to the mortgage of the lands situated wholly in the Pegu District. I am myself convinced that this is the right view, and, therefore, under these circumstances, a certificate for further appeal ought not to be granted in this case.

The application is dismissed, and as I have thought it necessary to call the respondents before the Court and hear them in regard to this application, I shall award them two gold mohurs as costs of to-day's hearing.