

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1913.
July 16.

SHANKAR VENKATESH KARGUPPI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 8 AND 9), APPELLANTS, v. SADASHIV MAHADJI KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Prior and subsequent mortgagees—Suit on prior mortgage to which the subsequent mortgagee not a party—Subsequent mortgagee obtaining decree on his mortgage in absence of first mortgagee—Sale of property subject to first mortgage—Subsequent mortgagee purchasing property with permission of Court—Execution of decree by first mortgagee—Subsequent mortgagee can ask the mortgage amount of first mortgage to be determined again—By purchase subsequent mortgagee does not lose his rights under his mortgage—Extinguishment of mortgage—Transfer of Property Act (IV of 1882), section 101.

In 1886, certain property was mortgaged to V. It was again mortgaged by the same mortgagors to H in 1887. In 1892, V obtained a decree on his mortgage. H was not made a party to the suit. V having sold his rights, his assignee K obtained another decree in 1896 against the mortgagors on the mortgage and other debts. To this suit also H was not a party. In 1895, H sued on his own mortgage without making the first mortgagee a party. A decree was passed in terms of an award. The property was sold in execution of the decree subject to the first mortgage and was purchased by H with the permission of the Court. In 1908, the decree-holder applied to execute the decree of 1896. H was made a party to the execution proceedings. It was contended by H that he was not bound by the decree under execution and was entitled to have the mortgage amount determined again in the execution proceedings. The decree-holder urged that H's mortgage had been extinguished by his purchase at the Court sale, and as such purchaser he was bound by the decree by which the original mortgagors were bound at the date of the auction-sale, and that H did nothing to show that he intended to keep alive his mortgage.

Held, that as a second mortgagee H was entitled to redeem the first mortgage; and to have the amount of the first mortgage determined again as between himself and the first mortgagee.

Held, further, that as auction-purchaser H became entitled to all the rights which the mortgagors and the mortgagee had at the date of the sale, *i.e.*, to all the rights of the mortgagors as they existed at the date of the mortgage upon which the decree was based.

* First Appeal No. 237 of 1912.

Held, also, that H must be presumed to have intended to keep his mortgage alive, as it was clearly for his benefit to do so.

APPEAL from the decision of G. N. Kelkar, First Class Subordinate Judge at Belgaum.

Execution proceedings.

In 1886, the property in dispute was mortgaged by Venkatesh to Vithalrao. It was again mortgaged by Venkatesh to Huchrao in 1887. In 1892, Vithalrao sued on his mortgage without making Huchrao a party to the suit; and obtained a decree on an award. Shortly afterwards he sold his rights to Kanburgikars, represented by the plaintiff. In 1896, Kanburgikars obtained another decree, also based on an award, for the mortgage-debt of 1896 and other debt. To this suit, Huchrao was not a party. In 1895 Huchrao sued on his own mortgage without making the first mortgagee a party. A decree was passed in the suit. In execution of the decree the property was sold subject to the first mortgage of 1886; and was purchased by Huchrao with the permission of the Court in 1898. Huchrao sold his own rights to Karguppikars (defendants). In 1908, the decree-holder applied to execute the decree of 1896 by sale of the property. Both Huchrao and his assignee were made parties to the execution proceedings. It was contended by Huchrao that he was not bound by the first decree to which he was no party; that he was entitled to redeem the first mortgage; and that he was entitled to have the amount of the first mortgage determined again.

The Subordinate Judge overruled this contention and held that both Huchrao and his assignee were bound by the decree to the extent of the property in their hands.

The defendants Nos. 8 and 9, assignees of Huchrao, appealed to the High Court.

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K. H. Kelkar, for the appellant:—Huchrao was neither a party to the decree of 1892 nor to the decree of 1896. We are not bound by those decrees and are entitled to have the account of the first mortgage taken over again. See *Pandurang v. Sakharchand*⁽¹⁾; *Debendra Narain Roy v. Ramtaran Banerjee*⁽²⁾; *Ram Churn Sing v. Dhaturi Sing*⁽³⁾; and *Ram Narain Sahoo v. Bandi Pershad*⁽⁴⁾. A purchaser at an auction-sale becomes the owner not only of the mortgagor's rights but also of those of the mortgagee. See *Maganlal v. Shakra Girdhar*⁽⁵⁾.

C. A. Rele, for the respondent:—The appellant is not a puisne mortgagee. He is bound by the decree by which the original mortgagors were bound at the date of the auction-sale. Huchrao's rights as second mortgagee were extinguished, having purchased the property at the auction-sale. See *Ramkrishna Sadashiv v. Chothmal*⁽⁶⁾. Section 74 of the Transfer of Property Act does not apply; but the doctrine of merger (section 101) applies. Huchrao has done nothing to show that he intended to keep his mortgage alive.

Kelkar, in reply.

Cur. adv. vult.

SHAH, J. :—This is an appeal arising out of certain execution-proceedings under the following circumstances :—Certain properties were mortgaged by Venkatesh and others to Vithalrao in 1886. They were mortgaged again to Rao Bahadur Huchrao in 1887 by the same mortgagors. In 1892 Vithalrao obtained a decree on an award on his mortgage against the mortgagors to which decree Huchrao was not a party, and subsequently in the same year he assigned his rights to the

(1) (1906) 31 Bom. 112.

(2) (1903) 30 Cal. 599.

(3) (1890) 18 Cal. 146.

(4) (1904) 31 Cal. 737.

(5) (1897) 22 Bom. 945.

(6) (1888) 13 Bom. 348.

Kanbargikars, who are now represented by the present plaintiff (decree-holder). In 1896 the Kanbargikars obtained a fresh decree against the mortgagors for the mortgage-debt of 1886 and for other debts, which the mortgagors owed to them, in respect of the lands mortgaged in 1886 and some other lands. This also was a decree on an award and Huchrao was not a party to it. In 1895 R. B. Huchrao got a decree against the mortgagors on his second mortgage directing the sale of the mortgaged property subject to the first mortgage of 1886 in favour of Vithalrao. The first mortgagee and his assigns were not joined as parties to this suit by Huchrao. In execution of his decree Huchrao, with the permission of the Court, himself purchased the property subject to the first mortgage of 1886, at a Court-sale in or after 1898. Huchrao sold his rights as auction-purchaser to the Karguppikars in 1911.

The decree-holder applied in 1908 to execute the decree obtained on an award in 1896 against the mortgagors, and to bring to sale all the properties—including the properties which were mortgaged to Vithalrao in 1886 and again to Huchrao in 1887. The application was made in the first instance against the mortgagors or their legal representatives. Subsequently on the decree-holder's application Huchrao and the Karguppikars were joined as defendants Nos. 7, 8 and 9 respectively in the present execution-proceedings.

The facts as stated above are admitted by both the parties. In the lower Court several issues were raised. But the controversy in this appeal is confined to issues Nos. 11 and 14. The lower Court held that Huchrao and the Karguppikars were necessary parties to these proceedings, and that they were bound by the decree under execution though they were not parties to it. In the appeal, which has been preferred by defendants 8 and 9 (the Karguppikars) against the order made by the

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lower Court on the basis of the above findings, the correctness of the findings on both the issues is questioned.

It is contended on behalf of the appellants that they are not bound by the decree but that they are entitled to redeem the first mortgage in favour of Vithalrao and to have the mortgage amount determined again. So far as the appellants' right to redeem the mortgage of 1886 is concerned, the decree-holder does not contest it. The real point in dispute between the parties is whether or not the present appellants are bound by the decree under execution.

The appellants have got all the rights which Huchrao had and if Huchrao would not be bound by the decree the appellants clearly would not be bound by it. It is necessary, therefore, to consider Huchrao's rights. We think that Huchrao not being a party to the decree is not bound by it. Huchrao as a second mortgagee could have been and should have been joined as a party to the decree of 1892 as well as to the decree of 1896. But he was not so joined. Considering Huchrao's position simply as a second mortgagee, we think it is clear, that he would be entitled to redeem the first mortgage and would not be bound by any adjudication as to the mortgage amount between the mortgagors and the first mortgagee. While redeeming the first mortgage he would be entitled to have the mortgage amount determined again as between himself and the first mortgagee. This appears to us to be a necessary consequence of the second mortgagee not being made a party to the suit between the mortgagors and the first mortgagee.

In the case of *Umes Chunder Sircar v. Mussummat Zahoor Fatima*⁽¹⁾, their Lordships observe that "Persons who have taken transfers of property subject to a mortgage

⁽¹⁾ (1890) L. R. 17 I. A. 201 at p. 212.

cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor, to which they are never made parties". The cases of *Thenappa Chettiar v. Marimuthu Nadan*⁽¹⁾ and of *Debendra Narain Roy v. Ramtaran Banerjee*⁽²⁾ also support the same view.

We have so far considered the position of Huchrao as a second mortgagee. In the absence of anything more, the decree could not be binding upon Huchrao. But it is argued on behalf of the plaintiff (decree-holder) that because Huchrao obtained a decree on his mortgage, had the property sold in execution, and purchased it himself at the auction-sale, his right as second mortgagee has been extinguished and that as a purchaser he is bound by the decrees by which the original mortgagors were bound at the date of the auction-sale. In our opinion this contention is based upon a misconception of the auction-purchaser's position in the case of a mortgage-decree. In a number of decisions of this Court it has been held that the purchaser at an auction-sale becomes the owner not only of the mortgagor's rights but also of the mortgagee's rights or in other words the purchaser becomes entitled to all the rights of the mortgagor as existing at the date of the mortgage : see *Khevraj Jusrup v. Lingaya*⁽³⁾, *Dadoba Arjunji v. Damodar Raghunath*⁽⁴⁾, and *Maganlal v. Shakra Girdhar*⁽⁵⁾. If this rule is applied to the present case, it is clear that as auction-purchaser Huchrao became entitled to all the rights which the mortgagors and the mortgagee had at the date of the sale, *i. e.*, to all the rights of the mortgagors as they existed at the date of the mortgage, upon which the decree was based. Thus by the purchase Huchrao obtained some additional right,

(1) (1908) 31 Mad. 258.

(3) (1873) 5 Bom. 2.

(2) (1903) 30 Cal. 599.

(4) (1891) 16 Bom. 486.

(5) (1897) 22 Bom. 945.

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but there was no derogation from any of the rights, which he possessed as second mortgagee before the sale. It has been urged that when the purchaser is the mortgagee himself, the rights of the mortgagee become extinguished, and the purchaser gets only the mortgagor's rights. We think that the circumstance that the purchaser is the mortgagee himself and not a third person makes no difference in the result, so far as the present point is concerned. Huchrao as auction-purchaser got all the rights which a stranger would have got as a purchaser and nothing less. As observed by their Lordships of the Judicial Committee in *Mahabir Pershad Singh v. Macnaghten*⁽¹⁾, "Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser". It is not denied in this case that Huchrao purchased the property after obtaining leave to bid.

It is further urged that Huchrao did nothing to show that he intended to keep alive his mortgage. We do not think that it was necessary for him to do anything to keep the rights alive. By virtue of the purchase, he got certain rights as purchaser which include the rights of the mortgagee. His rights as second mortgagee are not directly asserted as such but as having passed to Huchrao the purchaser. To the state of facts, such as we have, neither section 101 of the Transfer of Property Act nor the principle underlying that section has any application. Assuming, however, that the section or the principle thereof applies, it is clear that under section 101 of the Transfer of Property Act the incumbrance was not extinguished, as it was clearly for the benefit of Huchrao to continue it. Even apart from section 101 of the Transfer of Property Act, the result would be the same. It is a well established rule that a

⁽¹⁾ (1889) L. R. 16 I. A. 107 at p. 114.

Court should presume in the absence of any evidence to the contrary that the incumbrancer intends to keep the incumbrance on foot, when it is for his benefit to do so. In the present case Huchrao must be presumed to have intended to keep it alive, as it was clearly for his benefit to do so. See *Gokuldoss Gopaldoss v. Rambux Seochand*⁽¹⁾ and *Thorne v. Cann*⁽²⁾. We, therefore, hold that Huchrao as second mortgagee was entitled to redeem the first mortgage, that as purchaser at the Court-sale in execution of the decree on his mortgage he got that right, that he is not bound by the decree under execution, and that the Karguppikars as claiming under him are entitled to redeem the first mortgage in favour of Vithalrao, and to have the amount payable on the said mortgage determined as between themselves and the present decree-holder.

In this view of the case, both parties are agreed that the questions between the decree-holder and the Karguppikars cannot be determined in these execution-proceedings, but must be left to be decided in a separate suit.

The result, therefore, is that the appeal is allowed and the darkhast dismissed as against defendants 7, 8 and 9 with costs throughout on the plaintiff.

Appeal allowed.

R. R.

⁽¹⁾ (1881) L. R. 11 L. A. 126.

⁽²⁾ [1895] A. C. 11 at pp. 18, 19.

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