

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

RAJA BAHADUR MOTILAL SHIVLAL, APPELLANT (PLAINTIFF) *v.* THE
POONA COTTON AND SILK MANUFACTURING COMPANY, LIMITED,
AND ANOTHER, RESPONDENTS (DEFENDANTS).²

1917.

March 12.

Company—Mortgage by a Company—Second mortgage by a Company—Suit on first mortgage against Company and second mortgagee—Company compulsorily wound up pending the mortgage suit—Liquidator's obtaining sanction to create charges over assets to meet costs of litigation—Liquidator's application opposed by first and second mortgagee—Charge created by the liquidators in favour of the first mortgagee—Sale of mortgaged property in the mortgage suit—Holder of charge claiming priority over the second mortgagee for moneys charged—Holder of charge postponed until the claims of second mortgagee satisfied—Transfer of Property Act (IV of 1882), sections 2 (d) and 52—Lis pendens—Transfer effected under another Court's order pending suit—Sanction not an order capable of execution—Estoppel.

The plaintiff, the first mortgagee of a limited liability company, instituted a suit in the High Court at Bombay to enforce his mortgage against the mortgagor, defendant No. 1, and second mortgagees of the company, defendant No. 2. During the prosecution of the suit the affairs of the first defendant company were ordered to be wound up at the instance of one of its creditors and the liquidation proceedings were transferred to the District Court at Poona where the company had its registered office. The plaintiff, however, obtained leave from the High Court to proceed with his mortgage suit in Bombay against the company in liquidation. Subsequently, the liquidators of the company applied to the Poona District Court in which the liquidation proceedings were going on for sanction to raise Rs. 25,000 for costs of litigation on the security of the assets of the company except the goods pledged to the plaintiff. The plaintiff and the second mortgagees contended that the sanction should not be given so as to affect their security as the assets would not include the interests in the property held by the mortgagees. The sanction was, however, given by the District Judge to the liquidators who, thereupon, executed two documents of charge for Rs. 10,000, each in favour of the plaintiff reciting the decision of the District Judge and agreeing that upon the sale of the mortgaged premises the sums so charged and all interest due thereon should be payable out of the sale proceeds in priority to all other payments. In the mortgage suit an order by consent was passed for sale of the mortgaged properties by the liquidators reserving the contention of all the parties.

²O. C. J. Appeal No. 62 of 1916: Suit No. 554 of 1915.

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The surplus sale proceeds in the hands of the liquidators after satisfaction of the plaintiff's mortgage claim in the suit amounted to Rs. 81,000 or thereabouts. The plaintiff claimed by virtue of the documents of charge to be paid the amount of Rs. 20,000 secured thereby in priority to the claim of the second mortgagees, contending further that as the latter failed to appeal against the decision of the District Judge they were estopped from disputing the same.

Held, overruling the plaintiff's contention, (1) that the second mortgagees were as parties to the pending mortgage suit protected by section 52 of the Transfer of Property Act against any postponement of their security by the charges created *pendente lite* by the liquidators, for the authority of the District Court in Poona could not affect orders in a pending suit in the Bombay High Court :

(2) that the charges created by the liquidators were not transfers *in execution* of an order of a Court within the scope of section 2 (d) of the Transfer of Property Act, inasmuch as the Poona Court's sanction was not an order capable of execution but merely an authority to the liquidators to act in a certain manner if occasion should arise.

SUIT on a mortgage.

The plaintiff, Raja Bahadur Motilal Shivlal, was a Banker and Shroff doing business in Bombay and other places under the name, style and firm of Shivlal Motilal. The 1st defendant, The Poona Cotton and Silk Manufacturing Company, was a limited liability company having its registered office at Poona where its property consisting of a mill for the manufacturing of cotton and silk yarn and cloth was situated. The 2nd defendant, The Poona Bank, was a limited liability Banking Company having its registered office at Poona.

In the year 1900, the plaintiff advanced to the 1st defendant company a loan of Rs. three lakhs on the mortgage of its Mill premises and machinery. The 1st defendant repaid to the plaintiff Rs 50,000 out of this loan and on the 3rd day of January 1906 an agreement was entered into between the plaintiff and the 1st defendant whereby the plaintiff agreed to advance to the said defendant within one year a further sum of Rs. two lakhs if the same was required for placing new

machinery in the said mill. In pursuance of the aforesaid agreement the plaintiff made a fresh loan to the 1st defendant of Rs. two lakhs on the 29th of June 1906 and a consolidated mortgage was executed by the 1st defendant on the same date whereby the 1st defendant agreed to repay to the plaintiff in Bombay the sum of Rs. $4\frac{1}{2}$ lakhs on the 1st day of January 1915 with interest thereon at the rate of $5\frac{3}{4}$ per cent. per annum. The interest was made payable on the 1st day of January in every year in Bombay. The said mortgage comprised all the mill premises and the machinery then lying therein as well as new machinery that might in future be placed in the said mill. The 1st defendant made default in payment of principal and interest and the present suit was brought on 10th May 1915 by the plaintiff against the 1st defendant and the second defendant who were second mortgagees of the first defendant's mill premises and machinery for the amount due under the mortgage and foreclosure or sale. Subsequently The Poona Swadeshi Company who claimed to be the lessees of a portion of the premises, under an agreement with the 1st defendant were added as the the 3rd defendant.

On the 5th of July 1915, on the application of Messrs. H. I. Dixon & Company, Limited, one of the creditors of the first defendant company, Macleod J. ordered the 1st defendant company to be wound up and transferred the liquidation proceedings to the District Court at Poona. On the 15th September 1915 the District Judge at Poona appointed Messrs. R. D. Sethna and J. P. DeSouza joint liquidators. On the 9th October 1915, the plaintiff obtained leave from that Court to proceed with the mortgage suit filed by him in the High Court at Bombay.

On the 10th November 1915, the liquidators applied to the Poona District Court in which the liquidation

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proceedings were going on for sanction to raise Rs. 25,000 for costs of litigation on the security of the assets of the first defendant company except the goods pledged to the plaintiff. This application was resisted by the plaintiff and second defendant who claimed that no priority could be given for any such sum over their mortgages, as the assets would not include the interests in the property held by the mortgagees. On 22nd November 1915, the District Judge gave the liquidators the sanction and apparently decided that the mortgaged property was assets which could be charged. The order of the District Judge was worded as follows:—"And I do further order that the said Official liquidators be at liberty to raise on the security of the assets of the said company (except the goods alleged to have been pledged with the Raja Bahadur Motilal Shivlal) Rs. 25,000 only and further they be at liberty to create fresh charge of the amounts so raised on such assets of the company."

On the 10th July and 19th August 1916, the liquidators executed two documents of charge for Rs. 10,000, each in favour of the plaintiff, wherein the decision of the District Judge was recited and it was agreed that upon the sale of the mortgaged property the sums so charged and all interest due thereon should be payable out of the sale proceeds in priority to all other payments.

On the 13th March 1916, a consent order was passed for sale of the mortgaged properties by the liquidators reserving the contention of all the parties. The mill was sold on 3rd September 1916 by public auction and purchased by the plaintiff for Rs. 6,70,000 and a conveyance was executed on 5th October 1916 by the liquidators in his favour. Credit was given to the plaintiff in the price for the amount of his mortgage debt and a sum of Rs. 20,000 with interest. The

plaintiff's right to have a preferential credit for the last-named sum of Rs. 20,000 was disputed by the second defendant. The balance of sale proceeds remaining in the liquidators' hands was Rs. 81,000 odd.

The question of the plaintiff's right for the preferential credit for Rs. 20,000 under the documents of charge came on for hearing before his Lordship Kemp J. who after setting out the facts as above delivered the following judgment.

KEMP, J. :—It appears from the reasons given by the District Judge for his order that he considered that as the liquidators had no moneys in their hands and it was contended that the mortgages of the plaintiff and the second defendant were open to defects he was justified in giving a first charge in respect of the proposed loan of Rs. 25,000. The way in which the District Judge's order is worded really gives the first charge on the assets and this of course would save the rights of the plaintiff and second defendant under their mortgages but there is no doubt the District Judge intended to give Rs. 25,000 priority over them. The assets really are whatever remains over after the claims of the secured creditors under their securities have been satisfied. So that if I take it that the District Judge's order means only the assets after satisfaction of the claims of the secured creditors it is not open to objection although the amount of the claims of the secured creditors under their mortgages leave nothing over for the unsecured creditors and there would, therefore, be nothing on a first charge of which the liquidators could raise Rs. 25,000. Clearly, on this construction of the order, the plaintiff who himself subsequently advanced the sum the liquidators required, viz., Rs. 20,000, could have no right to credit for that sum in priority to the claim of the second defendant under his mortgage, in the price at which he (plaintiff) purchased the mill,

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If, however, the District Judge's order is to be taken as expressing what he undoubtedly meant, viz., that the first charge for the proposed loan was to have priority over the mortgages of the plaintiff and second defendant then I am of opinion that that order was not only wrong but passed entirely without jurisdiction. The District Judge could not by any order passed on that petition take away the rights of secured creditors without their consent. The sections of the Indian Companies' Act cited by Mr. Mulla regarding preferential payments and the priority of payment out of the assets of a company of the costs and expenses of winding up refer only to the fund available as assets, i.e., after the claims of secured creditors have been satisfied. If the liquidators themselves realise property subject to a specific charge the proceeds are distributable in priority of the following order, viz., firstly, to the costs of realisation; secondly, in payment of the costs of preservation, strictly so described, so far as the other assets of the company are not sufficient; and thirdly, in payment of the principal, interest and mortgagees' costs, all of which have priority over the general costs of the liquidation and the costs of the carrying on the business of the company. In the present case the money raised by the liquidators under the District Judge's order has been and is being spent partly in litigating with the second defendant-mortgagee regarding a claim for two lacs by the mill against that defendant and partly in the public examination of the agents of the mill. I think it unnecessary to labour the point. It seems to me quite clear that the loan raised by the liquidators under the Poona Court's order of the 22nd of November 1915 is not entitled to priority over the mortgages of plaintiff and second defendant and I, therefore, hold the plaintiff is not entitled to credit for this sum in the price at which he purchased the mill and that Rs. 20,000 must be postponed to second

defendant's mortgage. It is only necessary to add that Rs. 20,000 were advanced to the liquidators by the plaintiff himself under a deed of charge dated the 10th of July 1916 and a deed of further charge dated the 19th August 1916 for Rs. 10,000 each which have been put in and marked Exhibits G and H in the case. Nor can the plaintiff complain that he was misled into a belief that Rs. 20,000 would have a first charge because he was a party to the petition to the Poona Court and vehemently opposed it and even commenced proceedings for an appeal against the order. The plaintiff must pay Rs. 20,273-1-0 with interest at 2 per cent. to the liquidators.

The plaintiff appealed. The 3rd defendant was not made a party to the appeal, the only respondents being the 1st and the 2nd defendant.

Strangman with Inverarity, Desai and Mulla, for the appellants.

Kanga and Taraporevala, for the second respondent.

SCOTT, C. J.:—This is a mortgage suit instituted in this High Court by the present appellant against the mortgagor, the Poona Cotton & Silk Manufacturing Co., in liquidation, the Poona Bank, the second mortgagees and the Poona Swadeshi Company.

On the 9th October 1915, leave was obtained from the Court for the plaintiff to proceed with this suit against the Company in liquidation. Subsequently, the liquidators applied to the Poona District Court in which the liquidation proceedings were going on for sanction to raise Rs. 25,000 for costs of litigation on the security of the assets of the Company except the goods pledged to the plaintiff. On this application both the plaintiff and the second mortgagees contended that the sanction should not be given so as to affect their security as the

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'assets' would not include the interests in the property held by the mortgagees. The District Judge, however, on the 22nd November 1915, gave the liquidators the sanction and apparently decided that the mortgaged property was assets which could be charged. The liquidators, thereafter, on the 10th July and the 19th August 1916, executed two documents of charge for Rs. 10,000, each in favour of the present plaintiff reciting the decision of the District Judge and agreed that upon the sale of the mortgaged premises the sums so charged and all interest due thereon should be payable out of the sale proceeds in priority to all other payments.

On notice of motion for sale of the mortgaged properties made in this suit on the 17th November 1915, an order had been passed by consent on the 13th March 1916 for sale of the mortgaged properties by the liquidators reserving the contentions of all the parties. The surplus sale-proceeds after satisfaction of the plaintiff's mortgage claim in the suit amount to Rs. 81,000 or thereabouts and the plaintiff now claims by virtue of the documents of charge to be paid the amount secured thereby in priority to the claim of the second mortgagees, the Poona Bank.

Kemp J. has decided that the Bank as second mortgagees have priority on the ground that the District Judge had no jurisdiction to sanction the first charge of mortgaged property as assets of the Company in liquidation to the prejudice of the mortgagees.

It is not contended that the decision of the learned District Judge can be supported as a correct decision in law, but the appellant relies upon it as effective as an estoppel because the second mortgagees appeared before the District Judge and did not appeal against his decision,

It appears to us that whether or not the decision is binding as a sanction in face of the mortgagees' protest to the charging by way of first charge assets already mortgaged, the second mortgagees are as parties to the pending mortgage suit protected by section 52 of the Transfer of Property Act, against any postponement of their security by the charges created *pendente lite* by the liquidators, for the authority of the District Court in Poona cannot affect orders in a pending suit in the Bombay High Court. We cannot hold that the liquidators' charges were transfers *in execution* of an order of a Court within the scope of section 2 (d) of the Transfer of Property Act. The Poona Court's sanction was not an order capable of execution but merely an authority to the liquidators to act in a certain manner if occasion should arise.

We affirm the order of the lower Court and dismiss the appeal with costs.

Solicitors for appellants : Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*

Solicitors for respondents : Messrs. *Bhaishankar, Kanga & Girdharlal.*

Appeal dismissed.

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