

APPELLATE CIVIL.

1920.

November
30.*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

NARAYAN BUDHAJI MOKAL (ORIGINAL PLAINTIFF NO. 1), APPELLANT
v. POSHA JAMA THAKUR AND OTHERS (ORIGINAL DEFENDANTS
NOS. 1 TO 3 AND PLAINTIFFS NOS. 2 TO 6), RESPONDENTS².

Transfer of Property Act (IV of 1882), section 74—Prior and subsequent mortgagee—Subsequent mortgagee redeeming prior mortgagee—No receipt obtained for the payment made to prior mortgagee—In lieu of receipt mortgage deed secured—Subsequent mortgagee gets a right to sue for amount on the first mortgage.

If a second mortgagee pays off the first mortgagee without obtaining an assignment of the mortgage and without getting a receipt for the amount paid, but in lieu thereof obtains the actual mortgage document, it cannot be said according to the principle of justice, equity and good conscience that the first mortgage is extinguished, and that the second mortgagee has no right to sue for the amount due under the first mortgage.

Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh⁽¹⁾, followed.

SECOND appeal against the decision of J. A. Saldanha, Joint Judge at Thana, reversing the decree passed by M. B. Pradhan, Second Class Subordinate Judge at Alibag.

Suit to recover amount due on a mortgage.

The property in suit originally belonged to the defendants' family. On the first February 1880, it was mortgaged with possession by the defendant's father to one Ramchandra Raghunath for Rs. 250. Thereafter on the 6th March 1880, Ramchandra sold mortgage rights to one Tatyia Keshav.

On the 15th March 1893, the property was again mortgaged with the plaintiff No. 1's father Budhaji for

² Second Appeal No 84 of 1920.

Rs. 600 by a document which on the face of it purported to be a sale-deed.

In 1898, the plaintiffs' father paid off the first mortgagee Tatyā Keshav and obtained possession from him of suit property together with title deeds under the original mortgage of the 1st February 1880. The possession, however, was continued with the original mortgagor's family as tenants, the rent-notes being passed to the plaintiffs the last of which was dated May 1906.

In 1915, the plaintiffs filed a Suit No. 279 of 1915 against the defendants for ejectment on the strength of the rent-notes passed by the defendants. The defendants contended that the sale to the plaintiffs was really a mortgage. The plaintiffs admitted that the nature of the transactions was really a mortgage and a redemption decree was passed. In this suit the plaintiffs had prayed that they may be allowed to tack on the prior mortgage of Tatyā redeemed by them to the one which the defendants sought to redeem. This prayer was disallowed, though the Court held that Rs. 357-8-0 were due to the plaintiffs for the mortgage redeemed by them.

The plaintiffs, therefore, filed a suit to recover the sum of Rs. 357-8-0 from the defendants due on the mortgage of 1st February 1880 or in the alternative to recover the sum by sale of the mortgage property, or to recover possession of the property by foreclosure.

The defendants contended *inter alia* that the plaintiffs not having taken a registered receipt or deed from the prior mortgagee, they had not acquired his rights under section 74 of the Transfer of Property Act, 1882.

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The Subordinate Judge passed a decree in favour of the plaintiff for the amount claimed, viz., Rs. 357-8-0. He held that the plaintiffs' claim was not bad for not complying with the provisions of section 74 of the Transfer of Property Act. His reasons were as follows :—

“It is argued for the defendant that the words ‘shall, on obtaining such receipt, acquire’ are imperative and that therefore the receipt is necessary for the acquisition of the prior mortgagee's rights. But the commas after the words ‘shall’ and ‘receipt’ are significant. The word ‘shall’ goes with acquire and the whole sentence means that by the mere fact of having obtained a receipt, the mortgagee shall have acquired the rights of the prior mortgagee and nothing more such as delivery of possession or title deeds or a reconveyance is necessary.....In the case under consideration, the prior mortgagee Taty Keshav accepted the tender as he was bound to do, returned the title deeds (Exhibits 14 and 16) to the plaintiff's father and delivered possession when the defendants entered into possession as the tenants of the plaintiff's father. Thus there was no necessity of a receipt to evidence the acquisition of the prior mortgagee's rights when the plaintiff's father was actually clothed with those rights. Moreover, according to section 74 it is the prior mortgagee who is bound to pass a receipt and not the subsequent mortgagee who is bound to demand one. If the receipt was necessary for the acquisition of rights the wording would have been express to that effect and it would have been laid down that the subsequent mortgagee shall not acquire the rights in the absence of a receipt.”

On appeal, the joint Judge decided all points in favour of the plaintiffs, except the one arising under section 74 of the Transfer of Property Act. He held that obtaining a receipt was a *condition precedent* to acquiring the rights of the mortgagee and the receipt not being obtained the plaintiff's claim was bad. The decree was therefore reversed and plaintiff's suit dismissed.

The plaintiff No. 1 appealed to the High Court.

P. B. Shingne, for the appellant :—Section 74 of the Transfer of Property Act has not been properly construed. The taking of a receipt is not a condition precedent to the vesting of the right of the prior mortgagee.

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The section should not be construed to affect the rights that may accrue by means of payment of the money due to the prior mortgagee, and the delivery of mortgage-deed by the prior mortgagee to the appellant : see the remarks of their Lordships of the Privy Council in *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*⁽¹⁾. The decision of the lower appellate Court is, therefore, erroneous.

W. B. Pradhan, for respondent No. 3:—The language of section 74 of the Transfer of Property Act is clear and unambiguous. The provision is peremptory and no right can accrue in favour of the appellant unless he obtains a receipt as required in the section. If the contention advanced on behalf of the appellant is accepted, the section will be rendered nugatory. The point involved in this appeal was not pertinently before their Lordships of the Privy Council in the case of *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*⁽²⁾.

D. C. Virkar, for *P. V. Nijasure*, for respondents Nos. 4, 5 and 8 :—I support the appellant.

MACLEOD, C. J. :—The plaintiffs filed this suit to recover the sum of Rs. 357-8-0 from the defendants or in the alternative to recover the sum by sale of the mortgaged property, or to recover the possession of the property by foreclosure. It appears that this property was mortgaged by the then owners, who are now represented by the defendants, to one Ramchandra Raghunath on the 1st of February 1880 for a sum of Rs. 250 with possession. The mortgagee sold his right to one Tatyā Keshav on the 6th of March 1880. It was provided that the mortgage debt was not to carry interest, and the mortgagee was to enjoy the property mortgaged

(1) (1912) 39 Cal. 527 at pp. 554, 555.

(2) (1912) 39 Cal. 527.

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in lieu of interest. The defendants then passed a document in favour of the present plaintiffs' father on the 15th March 1893. That document on the face of it appeared to be a sale-deed transferring the property to the plaintiffs' father in consideration of Rs. 600. In 1898 the plaintiffs' father paid off the first mortgagee, Talya Keshav, and obtained possession from him of the suit property, together with the title deeds under the original mortgage of the 1st of February 1880. The property continued in the possession of the original mortgagors' family as tenants, rent-notes being passed to the plaintiffs, the last of which was dated May 1906, Exhibit 13 in the case. In 1915 the plaintiffs filed a suit against the defendants for ejection on the basis that their father was the owner of the property and the defendants were his tenants. The defendants pleaded that the document of 1893, although ostensibly a sale-deed, was in reality a mortgage. This point was conceded by the plaintiffs with the result that a redemption decree was passed. The plaintiffs then contended that the defendants could not be allowed to redeem without paying off not only what should be held to be due under the document of 1893, but also what was due under the mortgage of the 1st of February 1880. The learned Judge came to the conclusion that the defendants should be allowed to treat the plaintiffs as second mortgagees only and that they were not bound to redeem both mortgagees, relying upon the explanation to Order XXXIV, Rule 1, by which the prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. I should say it would be very doubtful whether that applies to a case where the prior mortgagee is the same person as the subsequent incumbrancer. However that may be, the result of that suit was that accounts were taken of the second mortgage under the Dekkhan Agriculturists' Relief Act and possession was given to

the defendants, they being allowed to pay off the mortgage amount by instalments. It cannot be said that anything was decided in that suit with regard to the first mortgage except this that the defendants were allowed to redeem the second mortgage without also at the same time paying off the first mortgage, and under the provisions of the Dekkhan Agriculturists' Relief Act they were allowed to go into possession. The plaintiffs unfortunately did not appeal against that decree.

They have now filed this suit on the mortgage of the 1st of February 1880. The trial Court passed a decree in their favour for the amount claimed, viz., Rs. 357-8-0. But it is conceded that the plaintiffs could not recover in any event more than Rs. 250, the original mortgage amount, as it was expressly provided that the mortgage debt was not to carry interest, the mortgagee being in possession and enjoying the profits.

In appeal the lower appellate Judge decided all the points in the case in favour of the plaintiffs, except one, with the result that the suit was dismissed with costs. The learned Judge thought that as the plaintiffs could not produce a receipt of the amount they had paid to the first mortgagee, they had not the required authority to proceed against the heirs of the original mortgagor for repayment of the amount which had been paid in discharge of the first mortgage. The learned Judge relied upon section 74 of the Transfer of Property Act. That section deals with the rights of a subsequent mortgagee to pay off prior mortgagees. It provides that "any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount ;

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and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender." Under section 17 (2), (11) of the Indian Registration Act, a receipt for payment of money due under a mortgage, when the receipt does not purport to extinguish the mortgage, does not require registration. The argument is that the subsequent mortgagee, having paid off the prior mortgagee without obtaining a receipt, did not acquire any right to stand in the shoes of the first mortgagee for the purpose of recovering the mortgage money from the mortgagor.

The question is a much larger one. The question is not only whether on the facts of this case the Court should dismiss the suit because the plaintiffs have not armed themselves with the receipt for the money which was paid to the first mortgagee, but also whether the facts that the money was paid, and that the mortgage-deed was handed over to them, do not give to them the right in equity to sue for the money due on the first mortgage.

We have been referred to the decision in the case of *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*⁽¹⁾. There was a simple mortgage for Rs. 12,000 of the suit property, dated 20th November 1874, the mortgagee to have possession until the amount was repaid in 1887. Between the 20th November 1874 and the 17th February 1888 the properties in suit were further charged with simple mortgages, some of them relating to two of the properties in suit and one of them relating to the third. Then on the 17th February 1888 a further mortgage was made of the suit properties with

⁽¹⁾ (1912) 39 Cal. 527.

the express purpose of paying off the mortgage of 20th November 1874. The money borrowed on the document of the 17th February 1888 was applied in discharging the debt due on the mortgage of November 1874, and that mortgage was given up to the mortgagee of February 1888. The question was whether that mortgagee was entitled to priority over the intermediate mortgagees in whose favour mortgages had been created between February 1874 and February 1888. Their Lordships of the Privy Council held that the question was whether the mortgagee of 1888 intended when paying off the mortgage of 1874 to keep that mortgage alive. They referred to the decision of the Privy Council in *Gokuldoss Gopaldoss v. Rambux Seochand*⁽¹⁾ in which it was held that a purchaser of an equity of redemption in immoveable property situated in India, who, having notice of a second mortgage, paid off a first mortgage upon the property without an assignment of the first mortgage to him, must be assumed, according to the rule of justice, equity and good conscience, to have intended to keep the first mortgage alive, and consequently was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment.

It may be said that in this case the plaintiffs' father thought that he had purchased the equity of redemption in 1893. The question would then arise whether, when he paid off the mortgage of 1880, he intended that the mortgage should be extinguished or that it should be kept alive for his own protection in case there should be any intermediate incumbrances. But owing to the decision in Suit No. 279 of 1915 this case has assumed a different aspect, because it has now to be considered that in 1893 the plaintiffs' father did not become the owner of the equity of redemption but

(1) (1884) L. R. 11 I. A. 126.

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only obtained the position of a subsequent incumbrancer, who was entitled to pay off prior incumbrances, and it appears to us that the same principles must apply as were applied by their Lordships of the Privy Council in *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*⁽¹⁾, namely, that if a second mortgagee pays off the first mortgagee without obtaining an assignment of the mortgage and without getting a receipt for the amount paid, but in lieu thereof obtains the actual mortgage document, then it cannot be said, according to the principle of justice, equity and good conscience, that the first mortgage is extinguished, and that the second mortgagee has no right to sue for the amount due under the first mortgage. If it had not been for the special provisions of the Dekkhan Agriculturists' Relief Act, the plaintiffs would still have been in possession of the mortgaged property. Therefore they would have been in a stronger position than they are now, as they have been compelled under those provisions to give up possession in favour of the mortgagor under the decree in the former suit. But it does not appear to me that there are special provisions existing in this Presidency in favour of the mortgagor who seeks to redeem, so that he could then evade those general principles of justice, equity and good conscience by which we are bound in a case of this description when dealing with the claim of the plaintiffs. It certainly would seem most inequitable in this case, if the plaintiffs who paid off the amount due under the first mortgage to the assignee of that mortgage, should not be entitled to occupy the position of the first mortgagee. There being no dispute whatever with regard to that payment, there is no reason why the plaintiffs should be debarred from recovering that amount on the grounds claimed by the

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present respondents. In my opinion, therefore, the decision of the learned appellate Judge was wrong. He ought to have held that the plaintiffs were still entitled to rely upon the first mortgage of the 1st of February 1880, and he ought to have passed an ordinary mortgage decree in favour of the plaintiffs for a sum of Rs. 250 with costs throughout with interest at 6 per cent. from the date of the suit. The plaintiffs will get their costs on the amount for which they succeed.

SHAH, J. :—I concur. I desire to add a word with reference to the argument based upon section 74 of the Transfer of Property Act. The lower appellate Court has accepted the construction of the section which is pressed on behalf of the defendants before us. The argument is that under the section the prior mortgagee is bound to accept the tender made by the subsequent mortgagee, and to give a receipt for the amount tendered, and that the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee as such, to whom he has made such tender. It is urged that unless the second mortgagee has obtained a receipt referred to in the section, no rights in respect of the first mortgage in his favour can arise even though he has in fact paid the amount due under the first mortgage with the intention of acquiring the rights under that mortgage. I am unable to accept this argument. The section no doubt provides that on obtaining such a receipt the subsequent mortgagee shall acquire the rights of the next prior mortgagee. But it does not follow, in my opinion, that in case such a receipt is not obtained, the subsequent mortgagee can never acquire such rights. I am unable to accept the view that the obtaining of a receipt is a condition precedent to the acquisition of such rights. Where the Legislature mean to provide that a document of a particular nature

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is necessary in order to create or acquire a right, appropriate language conveying that meaning has been used in the Act, as would appear from sections 54, 59, 107, 118 and 123. No such language is used in this section; and it seems to me that the construction of the section which has been pressed before us, if accepted, would lead to injustice. For instance, in this very case where it has been proved that the subsequent mortgagee has paid the amount due under the prior mortgage with a view to acquire the rights under that mortgage, that the prior mortgagee has handed over the mortgage bond to the subsequent mortgagee, and that though the prior mortgagee has received the amount due under his mortgage, but has failed to pass a receipt as required by the section, the subsequent mortgagee would be able to acquire no rights whatever in respect of the prior mortgage. That would be an unjust result which would follow upon the narrow construction of section 74 suggested by the defendants. I do not think that the provisions of that section are intended to be exhaustive. All that the section provides is that on the obtaining of such a receipt the rights of the subsequent mortgagee will undoubtedly come into existence. But it does not follow that in the absence of such a receipt such rights cannot come into existence at all. On the facts it is clear that if section 74 is no bar to the acquisition of such rights, the second mortgagee has undoubtedly acquired such rights.

Decree reversed.

J. G. R.
