Appellate Jurisdiction(a)

Special Appeal No. 230 *of* 1873.

RA'MU NAIKAN..........................*Special Appellant.*
SUBBARA'YA MUDALI..................*Special Respondent.*

A prior mortgagee, having purchased, may still use his mortgage as a shield against the claims of subsequent mortgagees.

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THIS was a Special Appeal against the decision of C. G. Plumer, the Civil Judge of Chittúr, in Regular Appeal No. 168 of 1872, modifying the Decree of the Court of the District Munsif of Sholinghúr in Original Suit No. 282 of 1871.

The facts sufficiently appear in the following judgment of the Civil Judge:—

"In this case the plaintiff sued to recover the amount due under a mortgage bond, (A), executed in his favor by 1st defendant in 1869, by means of the mortgaged property. The 1st defendant admitted the execution of the bond sued on and did not contest plaintiff's claim. The 2nd defendant pleaded that the property mortgaged under 'A' had been mortgaged to him under various bonds executed by 1st defendant's father between 1861 and 1870.

There is no doubt of the genuineness of the bonds filed by 2nd defendant, nor can there be any doubt of the priority of his mortgage over that of plaintiff.

The 2nd defendant obtained a simple money decree on his bonds and attached the mortgaged lands; they were sold at auction and purchased by the 2nd defendant himself for a sum considerably less than the amount of his claim against the 1st defendant under the several deeds of mortgage.

The 2nd defendant contests plaintiff's claim in a double capacity as prior mortgagee of the lands which the plaintiff seeks to have held liable for his debt under 'A' and as actual proprietor and possessor of those lands.

The decree of the 2nd defendant being a simple money decree, without any reference being made in it to his mortgage

(a) Present: Holloway, Ag. C. J. and Kindersley, J.

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lien, he, when he purchased the lands in auction, took them, of course, subject to all existing charges; so that, as proprietor of the lands, he could not successfully prevent the lands from being held liable to plaintiff's mortgage lien.

But, as prior mortgagee, he undoubtedly has the right to have these lands held liable for his debt, first. These lands have been actually sold for a sum insufficient to discharge the mortgage debt due by 1st defendant. All the questions at issue between the plaintiff and 2nd defendant are in litigation in the present suit, and I consider that it would be needlessly multiplying suits to say to 2nd defendant—You must bring a suit to establish your lien—as he, undoubtedly, must succeed, because his mortgage lien is undoubtedly prior in date to that of plaintiff.

I hold that, as prior mortgagee, the 2nd defendant is entitled to resist plaintiff's demand; that the lands should be held liable to his bond-debt, as in point of fact the lands have been proved insufficient to satisfy 2nd defendant's debt alone.

I reverse so much of the judgment of the District Munsif as holds the lands mortgaged under 'A' liable for plaintiff's claim, and I direct that plaintiff do pay the costs of 2nd defendant, Original and on Appeal."

The plaintiff preferred a Special Appeal to the High Court on the following grounds:—

I.—The Civil Judge is wrong in saying that the disputed lands cannot be held liable to plaintiff's claim because the 2nd defendant possessed a prior mortgage claim over the same, and because the proceeds of the sale of the lands were considerably less than the amount due to the 2nd defendant.

II.—The decree obtained by the 2nd defendant not giving him any lien over the lands, the 2nd defendant has not his lien over them.

III.—Even if that were not so, he is, as purchaser of the equity of redemption, liable to all mortgages created by the mortgagor. whether prior or subsequent to his (2nd defendant's) own mortgage.

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Sunjiva Rau, for the special appellant, the plaintiff.

Nallathumby Mudaliar, for the special respondent, the 2nd defendant,

The Court delivered the following

JUDGMENT:—The question is whether the prior mortgagee, who has purchased, is, or is not, able to protect himself against payment of the whole demand of a subsequent mortgagee. Whether, in fact, there has been a complete confusion of his own security and he stands simply in the place of the original mortgagor.

The English doctrine may, perhaps, now be stated to be that such a purchaser is postponed to subsequent incumbrances of which he has notice; unless distinct steps are taken to keep his own alive (*Watts* v. *Symes*, 1, DeG., M. & G., 240; *Garnett* v. *Armstrong*, 4, Dru. & War, 198: where, perhaps, "of which he has actual or constructive notice" should be inserted after "puisne incumbrance." *Heyden* v. *Kirkpatrick*, 34, Beav., 645). In these later cases the Judges have sought to mitigate the rigidity of the doctrine of Sir W. Grant in *Toulmin* v. *Steere*, 3, Mer., 210.

The whole doctrine stands upon the assumed impossibility of a man having a right of pledge over his own—a concept which Puchta declares to be a monstrosity. Arndts, Dernburg, Windscheid and others, justly observe that logical antimony is more easily to be borne than a doctrine which fails to deal fairly with the rights of the parties [See Dernburg, II, 570, *et seq*: "Law does not exist for the sake of "formalism; on the contrary, formalism is to subserve legal "interests. Since there was no substantial ground for "rendering the thing pledged practically unpurchaseable by "the pledge creditor, since the rights under the subsequent "hypothesis remained unchanged by the purchase of the prior "pledgee, the prior had a right to maintain in presence of the "subsequent his original situation"] and these two great lawyers maintain that Roman law did protect the prior mortgagee after he had. become the purchaser Vangerow and many others maintain that there was confusion, except in

the cases of ignorance by the buyer of his own right of pledge, or of the subsequent ones. The better opinion seems to be that the rule of law was narrowed by no such exceptions.

Dernburg justly observes that the subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the prior mortgagee.

It seems to us that the rule, as thus laid down, is the true rule and the one to which the minds of the English Judges are gradually tending. Not being bound by the English rule, we decide that the prior mortgagee may still use his mortgage as a shield and that this appeal must be dismissed with costs.