in order to reap the full benefits of the transaction. The mortgagee ought not to be denied the right to protect his interest under s. 310A of the Code of Civil Procedure, simply on the contingency that the purchaser's future inaction may make the exercise of that right superfluous.

S. C. G. *Rule made absolute.*

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PARESH NATH SINGHA *v.* NABOGOPAL CHATTOPADHYA.

Pratt J.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Gupta.

BHIKU . . . . . DEFENDANT.

v

SHUJAT ALI AND OTHERS . . . . . PLAINTIFFS.*

1901 *July* 16.

Mortgage—Payment—Prior mortgagee—Subsequent mortgagee—Limitation—Limitation Act (XV of 1877) Art. 11—Civil Procedure Code (XIV of 1882) s. 335, rejection of objection under.

If an objection under s. 335 of the Civil Procedure Code (XIV of 1882) is rejected, the objector is not precluded by Art. 11 of the Limitation Act (XV of 1877) from instituting a suit to enforce his mortgage lien over the property comprised in the order rejecting the application, more than a year after the date of the order.

A subsequent mortgagee in paying off prior mortgages has a right to keep them alive for his own benefit or to extinguish them, and it must be presumed that he acted in accordance with what is best for his own interests.

Gokuldas Gopal Das v. *Puran Mal Premsukhdas* (1), *Dino Bandho Shaw Chowdhry* v. *Nistarini Dasi* (2), and *Amar Chandra Kundu* v. *Roy Goloke Chandra Chowdhuri* (3) relied upon.

* Appeal from Appellate Decree No. 2291 of 1898, against the decree of G. W. Place, Esq., District Judge of Sarun, dated the 11th of August 1898, affirming the decree of Babu Mohendra Nath Mitter, Subordinate Judge of that District, dated the 5th of September 1896.

(1) (1884) I. L. R. 10 Calc. 1035. (2) (1898) 3 C. W. N. 153.
(3) (1900) 4 C. W. N. 769.

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THE defendant No. 1, Bhiku, alone appealed to the High Court.

The defendants Nos. 2 and 3 were the owners of 30 bighas *lakheraj* land, and, when minors, they executed through their father a *zurpeshgi* deed in favour of one Madan Gopal of 27 bighas of this land on the 7th January 1864 for Rs. 1,000; and on the 27th September 1866 they executed a *bai-bil-wafa* deed (conditional sale deed) of the whole 30 bighas for Rs. 450. Both these documents were registered. The same defendants subsequently executed an unregistered mortgage of the 30 bighas *lakheraj* land for Rs. 645 odd in favour of defendant No. 1, who, without making the registered mortgagee in possession a party to his suit, obtained a mortgage decree against defendants Nos. 2 and 3 on the 10th June 1871, and in execution of that decree purchased the 30 bighas of the *lakheraj* holding on 4th July 1882 and took possession by help of the Court on 17th May 1884.

In the meantime the heirs of Madan Gopal took foreclosure proceedings under Regulation XVII of 1806. They obtained an *ex-parte* decree on 19th February 1877. Defendant Nos. 2 and 3 applied to have it set aside, but their application was rejected, and then they made an application for review which was still pending, when the heirs of Madan Gopal and the defendants Nos. 2 and 3 entered into a compromise by which it was stipulated that on payment of the *zurpeshgi* and the *bai-bil-wafa* money the deeds would be returned and would become inoperative between the parties, and the defendants Nos. 2 and 3 would get back the property. The date of this *solenamah* was 25th March 1878. The plaintiffs' ancestor obtained a *zurpeshgi* of the property on the 1st August 1879, and agreed as its consideration to pay the *zurpeshgi* debt and the *bai-bil-wafa* debt to the heirs of Madan Gopal. This was done and some more money paid as interest; and the plaintiff's ancestor was put into possession of the property, and after him the plaintiffs, his heirs, were in possession of the property until 17th May 1884, when defendant No. 1 took possession in execution of his decree. Plaintiffs Shiyat Ali and others, put in a claim under s. 335 of Civil Procedure Code, which was rejected on the 13th September 1884, and, about 10 years later, on the 13th July 1895, instituted this suit for the possession of 30 bighas of the *zurpeshgi lakheraj* land

and for *wasilat*, or in the alternative to recover the Rs. 1,400, which their ancestor paid to satisfy the first mortgage on the land.

The defendants joined issue and the following issues were framed :—

First.—Whether the suit is barred by rule of 1 year's and 12 years' limitation.

Second.—Whether the *zurpeshgi* deed, dated the 1st August 1879, was executed during the pendency of an attachment in execution of a decree by the defendant No. 1; if so, whether the attachment and the document in question are valid ?

Third.—Whether the *zurpeshgi* deed on which the suit is based is genuine ?

Fourth.—Whether by means of the *zurpeshgi* in question the plaintiff's ancestor paid off the prior *zurpeshgi*, dated the 7th January 1864, and the *bai-bil-wafa*, dated the 29th September 1866, and whether the plaintiffs are entitled to the benefit of the prior lien ?

Fifth.—Whether the plaintiffs are entitled to recover possession and mesne profits ?

Sixth.—Whether the plaintiffs are entitled to recover their dues by the sale of the property covered by the *zurpeshgi* lease ?

Seventh.—To what reliefs, if any, are the plaintiffs entitled ?

Both the lower courts held that under art. 11 of the Limitation Act the suit was barred with regard to possession and mesne profits, but not with regard to the recovery of money by sale of the mortgaged property.

With regard to the second issue it was found that no attachment was subsisting, when the *zurpeshgi* deed was executed, and moreover that the attachment itself in execution of the mortgage decree by the defendant No. 1 was illegal and unnecessary. The *zurpeshgi* deed of 1879 in favour of the plaintiff's ancestor was found to be a genuine document, and it was also found that the *zurpeshgi* debt and the *bai-bil-wafa* debt were paid off by the plaintiff's ancestor, and that, when doing so, he intended to keep alive the said prior mortgages of 1864 and 1866.

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The lower courts decided that the plaintiffs were not entitled to recover possession and mesne profits, but that they were entitled to the same priority, which could be claimed by the heirs of Madan Gopal in respect of their own mortgages and to recover their dues by sale of the properties covered by their *zurpeshgi* of 1879.

Moulavi Syed Shamsool Huda for the appellant.

Dr. Rash Behari Ghose and *Moulavi Mahomed Mustafa Khan* for the respondent.

JULY 19. RAMPINI and GUPTA JJ. This is an appeal against a decision of the District Judge of Sarun, dated the 11th of August 1898.

The suit out of which the appeal arises relates to certain mortgage transactions between the parties. The details of these mortgage transactions are set out in the judgments of the lower Appellate Court and the Court of first instance, and it is unnecessary for us to recapitulate them here. It is sufficient to say that the appellant before us is the defendant No. 1, and on his behalf it has been urged, *first* that the suit is barred by limitation; *secondly*, that the District Judge is wrong in saying that an attachment in the case of a mortgage decree is illegal and unnecessary; *thirdly*, that the lower Courts are wrong in finding that the plaintiffs, when they took the *zurpeshgi* of the 1st of August 1879 from the defendants Nos. 2 and 3 intended to keep alive the prior mortgages of 1864 and 1866, which the defendants Nos. 2 and 3 paid off with the money then received from the plaintiff; *fourthly*, that when the defendants Nos. 2 and 3 executed the *zurpeshgi* of 1879 in favour of the plaintiffs their equity of redemption was foreclosed.

In support of the first of these grounds the learned pleader for the appellant argues that the suit is barred under art. 11 of the second schedule to Act XV of 1877, not only as regards present possession, but altogether. That article prescribes a period of one year's limitation for a suit brought "by a person against whom an order is passed under ss. 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his rights to, or to the

present possession of, the property comprised in the order." Now the pleader for the appellant contends that this article of limitation precludes the plaintiffs suing in any way after the lapse of one year from the date of the order, in order to establish his right of any kind with regard to the property. We cannot take this view of the meaning of the article. It has been held that the plaintiffs' right to present possession of the property is barred. But the lower Courts are of opinion that the plaintiffs are entitled to sue to enforce their mortgage lien over the property comprised in the order under s. 335 of the Code of Civil Procedure within twelve years, and it appears to us that this view is correct. The plaintiffs, when seeking to establish their mortgage lien over the property to recover their mortgage debt, are not seeking to establish a right to the property, but merely suing to recover a debt which is owing to them and as security for which they have got a charge upon the property.

Then, the second ground of appeal is that the attachment in the case of a mortgage decree is illegal and unnecessary. It seems to us immaterial whether the view of the Judge on this point is correct or not. The Subordinate Judge held that there was no subsisting attachment issued at the instance of the defendant No. 1, when the plaintiff's *zurpeshgi* of 1879 was executed, and the District Judge says with regard to this question: "As to the second issue the learned Subordinate Judge seems also to be correct, and attachment in the case of a mortgage decree is illegal and unnecessary." This latter part of the sentence seems to us a mere addition to his finding that the Subordinate Judge was right in holding that no attachment was subsisting at the date of the *zurpeshgi*. But whether he is correct in this additional reason or not, it appears that his finding as to the subsistence of the attachment during the execution of the mortgage in favour of the plaintiffs is a finding of fact, which concludes us. And whether or not such attachment was subsisting is immaterial in this case in the view we take as to the prior mortgages of 1864 and 1866.

This leads us to consider the third ground of appeal, namely, that the lower Appellate Court was wrong in holding that the plaintiffs, when they took the *zurpeshgi* of 1879, intended to keep

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alive the prior mortgages of 1864 and 1866. In the first place, it appears to us that this is a question of fact. But whether it be a question of fact or not, we think that the view which the lower Courts have both taken of this question is one which is supported by the judgment of the Privy Council in the case of *Gokaldas Gopal Das* v. *Puran Mal Premsukhdas* (1). According to that decision the plaintiffs in this case had a right to maintain their prior mortgages for their own protection or to extinguish them, and it must be presumed that they acted in accordance with what is best for their own interests. Both the lower Courts have held that they did act in accordance with their interests, and that they intended to keep alive the mortgages of 1864 and 1866. The judgment of the Privy Council above referred to seems to be authority for the view which the lower Courts have taken on this question. It is to be noted that the mortgage of 1879 was not taken merely to pay off the prior mortgages of 1864 and 1866. The consideration for that mortgage was Rs. 3,500, and only Rs. 1,400 was devoted to paying off the prior mortgages. Therefore the plaintiffs were not merely assignees of the mortgages of 1864 and 1866, but they were also in the position of subsequent mortgagees, and therefore they were entitled on the authority of the case of *Gokaldas Gopal Das* v. *Puran Mal Premsukhdas* (1) to act as they are held to have done. But even supposing that they were not subsequent mortgagees, but mere outsiders and strangers, we think that the view of the lower Courts is supported by the cases *Dino Bandho Shaw Chowdhry* v. *Nistarini Dasi* (2) and *Amar Chandra Kundu* v. *Roy Goloke Chandra Chowdhry* (3) in which the doctrine laid down in the case of *Gokaldas Gopal Das* v. *Puran Mal Premsukhdas* (1) has been extended to others besides subsequent mortgagees.

Then with regard to the fourth ground of appeal, we would observe in the first place that this ground was apparently not raised before the District Judge. There is no trace of any such plea in his judgment, and the appellant is therefore, strictly speaking, not entitled to raise it before us. However this may be, it appears to us that this plea has no force. It

(1) (1884) I. L. R. 10 Calc. 1035. (2) (1898) 3 C. W. N. 153.
(3) (1900) 4 C. W. N. 769.

is true that the heirs of Madan Gopal obtained an *ex-parte* decree against the defendants Nos. 2 and 3 on the 19th of February 1877, and an application for review of this *ex-parte* decree was applied for and was pending, when the heirs of Madan Gopal and the defendants Nos. 2 and 3 entered into a compromise, by which it was stipulated that on payment of the *zurpeshgi* and *bai-bal-wafa* money the deeds would be returned, and would become inoperative between the parties and the defendants Nos. 2 and 3 would get back the property. A *solenamah* was filed, and it appears to us to have been agreed by the *solenamah* that the foreclosure decree should be set aside as between the parties. We, therefore, think that the effect of the *solenamah* was to prevent the foreclosure decree from becoming absolute and the right of the mortgagor being extinguished. It has been said that the terms of the decree were that a decree absolute for foreclosure was given and the rights of the mortgagor extinguished. We do not think that can be so, and we are unable to take the view that it was so, because the terms of the decree are not before us. But however this may be, it would seem to us from the *solenamah* filed in this case that the effect of the decree was set aside and the mortgagor's rights were still subsisting, so that the *zurpeshgi* which they executed in favour of the plaintiffs in 1879, was a perfectly valid and good *zurpeshgi*.

For all these reasons we see no ground to interfere with the decision of the lower Appellate Court and we dismiss this appeal with costs.

S. C. B. *Appeal dimissed.*