

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

HARI NARAIN BANERJEE

v.

KUSUM KUMARI DASL.*

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April 1.

Mortgage—Registration—Registration Act (III of 1877) s. 17, cl. (n)—Endorsement on a mortgage-bond of payment made in satisfaction of a previous mortgage-debt—Civil Procedure Code (Act XIV of 1882) s. 43—Payment by a subsequent mortgagee under s. 74 of the Transfer of Property Act (IV of 1882), effect of.

The endorsements on a mortgage-bond of payments made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by cl. (n) of section 17 of the Registration Act, and as such do not require registration.

Jivan Ali Beg v. Basa Mal (1) and *Uppalakundi Kunhi Kutbi Ali Haji v. Kunnam Mithal Kottapath Abdul Rahiman* (2) followed.

A subsequent mortgagee who makes a payment of a prior mortgage-debt under the provisions of section 74 of the Transfer of Property Act, in a suit to enforce his original mortgage against the security which, by his payment of the former mortgage, he has protected and made more valuable for the realisation of his debt, is bound, under s. 43 of the Code of Civil Procedure, to join in that suit any further claim which he has against that property by reason of such payment made by him.

Sundar Singh v. Bholu (3) distinguished

SECOND APPEAL by the plaintiff, Hari Narain Banerjee.

The defendant No. 1, Shama Sundari, executed two mortgage bonds in favor of Jagannath Shaha, defendant No. 2, one dated the 16th of Agrahayan 1302 (28th November 1895), and the other the 29th Jaista 1304 B. S. (6th of June 1897). In 1305 B. S. (1898 A. D.), defendant No. 1 mortgaged to the plaintiff certain other properties including the properties covered by

*Appeal from Appellate Decree, No. 716 of 1907, against the decree of Arthur Goodeve, District Judge of Birbhum, dated Jan. 28, 1907, confirming the decree of Umesh Chandra Sen, Subordinate Judge of Birbhum, dated May 30, 1906.

(1) (1886) I. L. R. 9 All. 108.

(2) (1896) I. L. R. 19 Mad. 288.

(3) (1898) I. L. R. 20 All. 322.

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the two aforesaid mortgage-bonds, and borrowed from him a larger sum of money. On the 14th of January 1903, the plaintiff paid off the amounts due on the two mortgage-bonds of 1895 and 1897, and the payments were endorsed on the bonds, and the bonds were handed over to the plaintiff. The plaintiff brought a suit against defendant No. 1 on the basis of his bond of 1898 and obtained a decree. In the meantime defendant No. 1 sold her interest in the mortgaged properties to defendants Nos. 2, 3 and 4, and these defendants paid to the plaintiff the amount of the decree which he had obtained against defendant No. 1. The present suit was brought by the plaintiff to recover the money due on the two bonds of 1895 and 1897, which he had paid to Jagannath Shaha, defendant No. 2.

The defence was that the two bonds in favor of Jagannath Shaha were not executed by Shama Sundari; that the plaintiff had no right to pay off those bonds; that he acquired no right to the mortgaged properties by virtue of his alleged payment; and that the suit was barred by section 43 of the Civil Procedure Code, 1882.

The Court of first instance held that the plaintiff acquired no interest in the mortgaged properties by virtue of the alleged payment, inasmuch as the endorsement on the back of the bond was not registered; it also held that the suit was barred by section 43 of the Civil Procedure Code, but passed a modified decree holding that the plaintiff was entitled to a personal decree against defendant No. 1 for the amount due under the bond of 1304 B. S. (1897 A. D.) only.

Both the parties appealed to the District Judge, who allowed the appeal of the defendant and dismissed that of the plaintiff.

Against this decision the plaintiff appealed to the High Court.

Mr. Hill (with him *Babu Naliniranjan Chatterjee*), for the appellant. The learned District Judge was wrong in dismissing the suit on the ground that the receipts given to the plaintiff by Jagannath had not been registered as required by sections

17 and 49 of the Indian Registration Act (III of 1877). Plaintiff made the payments as a puisne mortgagee, under section 74 of the Transfer of Property Act (IV of 1882), and the endorsements on the mortgage bond of such payments in satisfaction of the prior mortgages do not require registration under the Act, it comes within the purview of clause (n) of section 17 of the Act (III of 1877), as amended by Act VII of 1886, and as such is exempted from the operation of clause (b) and clause (c) of section 17. Payment to Jagannath had the effect of transferring and not of extinguishing the mortgage. The mortgage continued, and the intention of the parties was to pay off the charge; and the mere fact that it was paid off did not extinguish the mortgage. Nor was it an assignment within the meaning of clause (c) of section 17 of the Act, as no formal assignment was necessary. The cases of *Jiwan Ali Beg v. Basa Mal* (1) and *Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottaprath Abdul Rahiman* (2) support my contention. The cases of *Sajdar Ali Khan v. Lachman Das* (3) and *Gurdial Mal v. Jauhri Mal* (4) are also in my favor.

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The suit was not barred by section 43 of the Civil Procedure Code (Act XIV of 1882). The section does not apply, inasmuch as "the cause of action" in the suit on the second mortgage is not the same as that on the prior mortgage. Under section 85 of the Transfer of Property Act, I was not bound to include in my previous suit any claim that I had on account of having paid off the prior mortgages, the first mortgagee had not an "interest in the property comprised" in the second mortgage, for the property comprised in the suit to enforce the second mortgage is the interest of the mortgagor in the property *minus* the mortgagor's right of equity of redemption of the prior mortgage. I rely on the cases of *Sundar Singh v. Bholu* (5) and *Dorasami v. Venkateshayyar* (6).

Mr. B. Chakravarti (with him *Mr. B. C. Seal, Babu Taruck Chunder Chuckerbutty, and Babu Manindra Lal Banerjee*), for

(1) (1886) I. L. R. 9 All. 108.

(2) (1896) I. L. R. 19 Mad. 288.

(3) (1879) I. L. R. 2 All. 554, 558.

(4) (1885) I. L. R. 7 All. 820.

(5) (1898) I. L. R. 20 All. 322.

(6) (1901) I. L. R. 25 Mad. 108.

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the respondents. The receipts should have been registered as required by the provisions of the Registration Act. The plaintiff ought to show that he is an assignee of the prior mortgagee, and as such he is entitled to his interest and rights. The assignment can only be made by a registered instrument. Section 74 of the Transfer of Property Act provides a more economical method than the method of an assignment of the mortgage by deed, provided it fulfils the requirements of law. The words "subject to the provision of law...regulating the registration of documents" in section 74 of the Transfer of Property Act refers to section 17, clause (c) of the Indian Registration Act, and they would be absolutely meaningless if an endorsement of the present nature did not require registration; for in what cases then would the receipt require registration? The receipts purported to extinguish the rights of Jagannath, the defendant No. 2, and assign them to the plaintiff: *Ganpat Pandurang v. Adaji Dadabhai* (1).

The suit is also barred by section 43 of the Code of Civil Procedure (XIV of 1882). The whole object of the Transfer of Property Act is to work up the rights and liabilities of the mortgagor and the mortgagee, and to avoid multiplicity of suits. Section 85 of the Transfer of Property Act contemplates that all persons interested in the property should be made parties: *Dorasami v. Venkateshayaar* (2) and *Keshavram Dulavram v. Ranchhod Fakira* (3). The meaning of "cause of action" has been well discussed in the last case. The plaintiff is a subsequent mortgagee who has acquired all the rights and powers of the prior mortgagee subject to his position as the holder of his own mortgage; and he was bound to include in the previous suit his present claim.

Mr. Hill, in reply.

Cur. adv. vult.

BRETT AND SHARFUDDIN, JJ. Shama Sundari, defendant No. 1, executed in favour of one Jagannath Shaha, defendant

(1) (1877) I. L. R. 3 Bom. 312, 318. (2) (1901) I. L. R. 25 Mad. 108.

(3) (1905) I. L. R. 30 Bom. 156.

No. 2, two mortgaged bonds by which, as security for payment of the mortgage debts, she hypothecated an 8 annas share of the *dar-patni* right in taraf Nalhati. The first of these deeds was executed on the 16th Agrayan 1302 (28th November 1895), and was for a debt of Rs. 621 ; the second was executed on the 29th Jaista 1304 (6th June 1897) and was for a debt of Rs. 713.

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Shama Sundari with her daughter, daughter's son, etc., executed, on the 29th June 1898, a third mortgage bond in favour of the plaintiff Hari Narain Bannerjee to cover a debt of Rs. 4,237, and hypothecated, as security, not only the 8-anna *dar-patni* right already mortgaged in the two previous bonds, but also the 8-anna *patni* right in the same property and 8-anna *zemindari* and *patni* rights in other properties.

On the 14th January 1903, the plaintiff paid off the two debts due on the bonds of Jagannath Shaha, and the payments were endorsed on the bonds, and the bonds handed over to the plaintiff.

On the 14th January 1905, the defendant No. 1 sold to defendants 3, 4, and 5 the 8 annas *dar-patni* right in taraf Nalhati which had been hypothecated in the two mortgage bonds executed in favour of Jagannath Shaha.

The present plaintiff brought a suit to enforce his mortgage of the 20th June 1898 and obtained a decree. The decretal debt was paid off with the money obtained from defendants 3, 4, and 5.

The present suit was instituted on the 8th July 1905 by the plaintiff to recover the money which he had paid to Jagannath Shaha in discharge of the two debts due to him from Shama Sundari Dasi under his two mortgage bonds.

The main points raised in the lower Courts in defence to the suit were (i) that the plaintiff was not entitled to bring the suit to recover the money due on the bonds executed in favour of Jagannath Shaha, because the receipts given to him by Jagannath Shaha had not been registered as required by sections 17 and 49 of the Registration Act ; and (ii) that the suit was barred by the provisions of section 43 of the Civil Procedure Code, as the plaintiff was bound to include in his suit brought for the

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enforcement of his mortgage debt the claim which he had after discharging the debts due to the prior mortgage.

The lower Appellate Court has held that both these pleas should prevail and has dismissed the plaintiff's suit. Further, the District Judge has held that section 85 of the Transfer of Property Act would have applied, and that the plaintiff was bound, in his suit to enforce his own mortgage, to include the claim which he now sets forward on the ground that he has paid off the prior mortgage debts.

The plaintiff has appealed. The same two points have been pressed in appeal before us.

On the first point, we are unable to agree with the view taken by the lower Appellate Court that registration of the receipt was required by the law in order to give the plaintiff all the rights and powers of the prior mortgagee. There can be no doubt, and the contrary is not even suggested by the defendants, that the plaintiff, when paying off the debts due to Jagannath Shaha, had no intention of extinguishing the mortgages so as to relieve the mortgagor from all future liability for the mortgage debts. In such circumstances we have no doubt that the provisions of clause (n) of section 17 of Act III of 1877 (which was added by the amending Act VII of 1886) apply, and that such endorsements are expressly excluded by it from the operation of clause (c) of the same section. The endorsements in the present case are endorsements acknowledging the payment of the whole or any part of the mortgage money, or any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. The extinction or transfer of the rights of Jagannath Shaha by the payment to him by the plaintiff of the sums due under the mortgages neither purported to extinguish, nor had the effect of extinguishing, these mortgages. The payments were simply made by the plaintiff as puisne mortgagee for his own protection under the right given to him by section 74 of the Transfer of Property Act. Nor was the registration of the receipt necessary as an assignment. No formal assignment of the rights of the mortgagee, Jagannath, to the plaintiff being

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under the law necessary, as the plaintiff, after obtaining the receipt from Jagannath, had under section 74 of the Transfer of Property Act acquired all the rights and powers as mortgagee which Jagannath had under his prior mortgages. It is not, therefore, necessary for us to discuss the rulings to which we have been referred on this point. We need only say that the cases of *Safdar Ali Khan v. Lachman Das* (1), *Gurdial Mal v. Jauhri Mal* (2) have no application to the present case, the facts being different. The cases of *Jiwan Ali Beg v. Basa Mal* (3) and *Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapraath Abdul Rahiman* (4) support the view which we take that endorsements on a mortgage bond of payments made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by clause (n) of section 17 of the Registration Act, and do not come within the purview of clause (b) or (c) of that section.

On the second point, however, we are of opinion that the plaintiff's suit must fail, and that it is barred by the provisions of section 43 of the Civil Procedure Code.

The Judge of the lower Appellate Court has expressed the opinion that the provisions of section 85 of the Transfer of Property Act might be applied to a case like the present so as to compel the plaintiff, when bringing his suit on his subsequent mortgage, to include in it any claim that he might have on account of having paid off the two prior mortgages. Against the acceptance of this view there is, however, the fact that the property comprised in the suit to enforce the second mortgage is the interest of the mortgagor in that property, which is left after excluding the interest hypothecated under the first mortgage, that is to say, the mortgagor's right of equity of redemption of the prior mortgage. Strictly speaking, therefore, the first mortgagee has not an interest in the property comprised in the second mortgage. But at the same time we doubt, having regard to the expression used in section 85 of the Transfer of Property Act, whether it was not the intention of the Legislature

(1) (1879) I. L. R. 2 All. 554.

(3) (1886) I. L. R. 9 All. 108

(2) (1885) I. L. R. 7 All. 820.

(4) (1896) I. L. R. 19 Mad. 288.

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that all persons interested in the immoveable property, against which the plaintiff sought to enforce his mortgage, should not be made parties to the suit, whether those persons be prior or subsequent mortgagees, if the plaintiff had notice of such interests. The object of the section appears to us to be to protect alike the interests not only of all mortgagors and mortgagees, but also of *bonâ fide* purchasers for value.

On behalf of the appellants, reliance has been placed on the decision of the High Court of Allahabad in the case of *Sundar Singh v. Bholu* (1), and it has been argued that under the law there is nothing to prevent the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit. It has been argued that section 43 of the Civil Procedure Code cannot be taken to apply, as the cause of action in the suit on the second mortgage is not the same as that on the prior mortgage. In the case relied on, however, the Judges were careful to observe that "it was difficult to see what benefit the two decrees would be to the plaintiffs, except that they might execute one of the decrees by sale of the property, and, if there was a surplus arising from the sale, they might probably attach the surplus in execution of the other decree."

That decision has been dissented from by the High Courts of Madras and Bombay in the cases of *Dorasami v. Venkateshdayar* (2) and *Keshavram Dulavram v. Ranchhod Fakira* (3) respectively. Moreover, it cannot, in our opinion, be taken to apply to the facts of the present case.

The present plaintiff is not a mortgagee who has taken two separate mortgages from the same person, but he is a subsequent mortgagee who, as such, has been enabled, under the provisions of section 74 of the Transfer of Property Act, to pay up the prior mortgages in order to protect and strengthen the security for payment of his debt which he held under the subsequent mortgage. Though by so doing he acquired all the rights and powers of the prior mortgagee, he must be taken to

(1) (1898) I. L. R. 20 All. 322.

(2) (1901) I. L. R. 25 Mad. 108.

(3) (1905) I. L. R. 30 Bom. 156.

have done so subject to his position as the holder of his own mortgage. When, therefore, he sought to enforce by suit his original mortgage against the security which by his payment of the former mortgage he has protected and made more valuable for the realisation of his debt, he was bound in our opinion to join in that suit any further claim which he had against that property by reason of payments made by him under section 74 of the Transfer of Property Act, the sum so paid being treated as an addition or accretion to the claim on his original mortgage. In such circumstances the present plaintiff was, under the provisions of section 43 of the old Code of Civil Procedure, bound to include the present claim in the suit brought on his mortgage, and as he failed to do so, he is barred in the present suit from enforcing his claim or pursuing his remedy by sale of the property in suit.

We see no reason to differ from the view taken by the Judge of the lower Appellate Court with regard to the right to a personal remedy against defendant No. 1 claimed by the plaintiff. The payment by the plaintiff to the prior mortgagee of the mortgage debt due from defendant No. 1 within 6 years from the due date of the second mortgage would not entitle the plaintiff to a further period of limitation against that defendant.

For the above reasons, we confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

S. C. G.

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