(1894) 08 CAL CK 0005

In the Calcutta High Court

Kanti Ram and Others — APPELLANT

Vs

Kutubuddin Mahomed and Others — RESPONDENT

Date of Decision : 20-08-1894

Acts Referred:

Civil Procedure Code, 1882 — Section 295
Transfer of Property Act, 1882 — Section 75, 96, 97

Citation : (1895) ILR (Cal) 33

Hon'ble Judges : Gordon, J;Ghose, J

Bench : Division Bench

Judgement

Ghose and Gordon, JJ.—This was a suit to enforce a mortgage security. The mortgage in question was executed by one Chowdhri Mahomed Monim in favour of the plaintiffs on the 2nd October 1887, by which a 5 anna 4 pie share of mouza Sairchakla was hypothecated as collateral security for the money lent. The plaintiffs asked that the amount due to them might be realized by the sale of the mortgaged property.

2. In this suit, not only the mortgagor, but several other parties were made defendants, some of them holding mortgages of the same property of dates antecedent to the date of the plaintiffs'' mortgage, and others holding mortgages of subsequent dates. The plaintiffs, however, treated all of them as second mortgagees, and as such asked that the property mortgaged to them might be sold free from the lien of the mortgagees-defendants.

3. The suit has been dismissed by both the Courts below upon the ground that the plaintiff is not entitled to bring to sale the mortgaged property without first redeeming the prior mortgages.

4. The present appeal is by the, plaintiffs.

5. It has been contended on behalf of the appellants that the lower Courts have proceeded upon a mistaken view of the law on the subject, and that they are entitled to bring to sale the mortgaged property subject to the lien of the prior

mortgagees, and that what would be acquired by the purchaser under the sale is the equity of redemption which existed in the hands of the mortgagor at the time of the second mortgage, i.e., the right of the mortgagor to redeem the prior mortgages.

6. On the other hand, it has been contended on behalf of the respondents, relying mainly upon the case of Mata Din Kasodhan v. Kazim Husain ILR All. 432 Full Bench decision of the Allahabad High Court-that the right of the plaintiff''s, the second mortgagees, as against the prior mortgagees, is confined to the right which the mortgagor has against the prior mortgagees, that is to say, the right of redemption, and that the word "property" as defined in the Transfer of Property Act, means the actual Immovable property mortgaged, and not merely the particular rights and interest in such property as distinguished from the property itself, and that the bare equity of redemption could not be sold under the Transfer of Property Act. It has broadly been contended that, until the earlier mortgages are redeemed, the plaintiffs have no right to bring the mortgaged property to sale.

7. The question that has been raised before us is indeed a difficult one, and it requires careful consideration.

8. We propose in the first place to review some of the sections of the Transfer of Property Act which bear upon this matter.

9. Section 58 defines what a mortgage is, and it says: "A mortgage is the transfer of an interest in specific Immovable property for the purpose of securing the payment of money advanced, or to be advanced, by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability." And Clause (b) of that section defines what a simple mortgage is: "Where without delivering possession of the mortgaged property the mortgagor binds himself personally to pay the mortgage-money, and agrees expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee."

10. Now, in the present case, under the terms of his mortgage, the mortgagee has a right to cause the property mortgaged to him to be sold; and that property is the specific Immovable property of the mortgagor, burdened as it is with the prior incumbrance, i.e., the property of the mortgagor minus the interest which he had already transferred to the prior mortgagee; or, in other words, the interest which the mortgagor possessed at the time of the second mortgage.

11. Section 60 of the Act defines the rights and liabilities of a mortgagor; and one of the matters mentioned in the section is that he has a right to redeem the mortgage when the principal money advanced to him becomes payable.

12. Section 67 defines the rights and liabilities of a mortgagee, and it says as follows: "In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold." This section, as it will be observed, is not limited to the first mortgagee, but it uses the word "mortgagee," which we understand to refer to any mortgagee, either first or Subsequent, and it does not qualify the rights of the second mortgagee''" in such a manner as to defer the enforcement of his rights under his mortgage until the first mortgage is due or redeemed.

13. Section 74 enacts: "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; 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." And then Section 75 provides: "Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor." Under the first of these two sections the subsequent mortgagee is entitled to pay up the first mortgage and to redeem it, and the other section defines what may be the rights of such subsequent mortgagee against a prior mortgagee, as also against a subsequent mortgagee; but it will be observed that the section does not define what may be the rights of the second mortgagee as against the mortgagor. And in this connection we may refer to Section 48 of the Act, which runs as follows: "Where a person purports to create by transfer at different times rights in or over the same Immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created." It would seem from this section that it was the intention of the Legislature that each successive mortgagee should have a right to enforce his mortgage according to its terms, subject to the rights of the prior mortgagees.

14. Section 85 enacts: "Subject to the provisions of the Code of Civil Procedure, Section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage. Provided that the plaintiff has notice of such interest." It may be open to question whether a prior mortgagee is a person having an interest in the property comprised in a subsequent mortgage within the moaning of this section;

but we think it safer to take it that he is such a person, and that he should be joined as a party to a suit to enforce a second mortgage. The reason why we think this section was enacted was to protect the interest of all parties who may have some interest or other, either as prior mortgagees or subsequent mortgagees in the property mortgaged, so that the Court might be in a position to make an effectual decree adjusting the rights of all parties concerned.

15. Section 86 refers to a suit for foreclosure.

16. Section 88 treats of a suit by a mortgagee, and it says: "In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of Section 86, and also ordering that, in default of the defendant paying, as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying there out the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff'', and that the balance, if any, be paid to the defendant or other persons entitled to receive the same." The words used in this section are "the mortgaged property;" and it was contended before us that these words refer to the specific Immovable property as mentioned in Section 58, and not merely to the interest of the mortgagor and second mortgagee. But what is the mortgaged property? It is the property of the mortgagor burdened with the prior lien.

17. Section 89, in denying the procedure to be adopted by the Court in making an order absolute for sale, uses the same expression, "the mortgaged property."

18. Section 91 lays down the several classes of persons, besides the mortgagor, who may be entitled to redeem the mortgaged property : Clause (a), any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property; Clause (b), any person having any interest in, or charge upon, the right to redeem the property. There can be no doubt whatsoever that the plaintiffs, the second mortgagees, have an interest in the right to redeem the property, and they might have, if they had so chosen, asked for that relief in the present case. But then the question is whether they are not entitled, notwithstanding this section, as also Section 75, to which we have already referred, to bring the property to sale, as it was mortgaged to them.

19. Section 92 relates to a decree in a redemption suit, and after referring to the order which may be made for an account being taken and for the plaintiff-mortgagor paying into Court the amount due upon the mortgage, provides as follows: "That if such payment is not made on or before the day to be fixed by the Court the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property or (unless the mortgage be by conditional sale) that the property be sold." The word "property" used in this section, we take it is the mortgaged property, and that seems to be clear from the subsequent Section 93, which speaks of an order that the mortgaged property be sold in the event of default on the part of the mortgagor in paying,

within the time fixed by the Court, the amount due to the mortgagee.

20. Section 96 relates to the sale of property subject to a prior mortgage. This section, and the following Section 97, are to be found in a part of the Act which is beaded Sale of property subject to prior mortgage." The first mentioned section enacts: ''If any property, the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold." The words "the sale of which is directed under this chapter is subject to a prior mortgage" to our minds are significant. It seems to us that the Legislature had in view, in framing this section, the sale of the property being subject to a prior mortgage; otherwise we do not understand why those words should have at all been used; and we are no way prepared to hold, as it was contended before us, upon the authority of the ruling of the Allahabad High Court, that those words are mere words of description. It will also be observed that the section empowers the Court to order that the property be sold free from any prior incumbrance, if the prior incumbrancer so consents; and this to our minds is also significant because, as it seems to us, the Court might, in a suit where a prior incumbrancer is a party defendant, either order that the sale of property should be held subject to the prior mortgage, or that it should be sold free from the incmmbrance of that mortgage, if the prior incumbrancer so consents.

21. Section 97 speaks of the application of the sale proceeds, and it states that they should be applied-"first, in payment of all expenses incident to the sale of property incurred in any attempted sale; secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage; thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made; fourthly, in payment of the principal money due on account of that mortgage." The language of this section strengthens the view which we have expressed in regard to Section 96, for it provides that the proceeds of the sale may be applied towards the payment of an earlier mortgage, if the property has been sold free from that mortgage, and that it may also be applied towards the payment of the mortgage, in consequence of which the sale was directed.

22. It was strongly contended before us that the words "specific Immovable property," as mentioned in Section 58, denote the property itself as distinguished from any equity of redemption which the mortgagor might at the time possess in the said property. The words "immoveable property" have been defined in the General Clauses Act, I of 1868. Section 2, Clause (5) says: "Immoveable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." Regard being had to this definition, it seems to us that the words "immoveable property"

include the rights of the mortgagor in the property mortgaged at the time of the second mortgage, or, in other words, his equity of redemption in that property, and when the Legislature in Section 58, in defining what a mortgage is, speaks of the transfer of an interest in specific Immovable property, we are unable to say that, when a property, subject to a prior mortgage, is mortgaged a second time, or, in other words, when the mortgagor''s equity of redemption in that property is mortgaged to another person, it is not a mortgage of specific Immovable property within the meaning of that section.

23. It was further contended before us that u/s 75 of the Transfer of Property Act, the right which the second mortgagee has is only a right to redeem. But, as already pointed out by us, the section relates only to the right of the second mortgagee as against the prior and subsequent mortgagees; and what may be the rights of the second mortgagee as against the mortgagor must be gathered from the other provisions of the Act,

24. We have given the various sections of the Act our best consideration, but we are unable to agree with the learned vakil for the respondents in holding that, if in a suit by the second mortgagee for enforcement of his mortgage the prior mortgagee is made a defendant, his suit must be dismissed, unless it be for the purpose of redeeming the prior mortgagee. We think there is nothing in the Act which favours such a position.

25. It is, we think, now settled law that a mortgagor may either absolutely sell or mortgage his remaining interest in the property which he has already mortgaged, notwithstanding there may be a covenant in the earlier mortgage prohibiting such a sale or subsequent mortgage. The purchaser, or the second mortgagee, in that event stands in the place of the, mortgagor and takes the property subject to the prior lien. When the second mortgagee seeks to enforce his mortgage, we do not see how the interest of the prior mortgagee can be at all prejudiced if the Court orders a sale of the mortgagor''s then existing interest in the property. No doubt there is no distinct provision in Chapter IV of the Transfer of Property Act protecting the interest of the prior mortgagee beyond what may be taken to be contained in Sections 96 and 97 of the Act, still we do not see how his rights may in anywise be prejudiced if a sale be ordered of the rights of the mortgagor, whatever those rights may be; because, under the sale, the purchaser could not take any higher interest than what the mortgagor possessed at the time of the second mortgage, and all that the purchaser would acquire under the sale is simply the right of redeeming the earlier mortgage.

26. Reference was, however, made in the course of the argument before us to the case of a usufructuary mortgage, it being contended that in such a case the provisions of Chapter IV of the Transfer of Property Act, so far as they relate to the sale of Immovable property, cannot work, if the view that we have expressed is the right one. But we are no way pressed by this consideration, because in the case of an antecedent usufructuary mortgage, the purchaser at a sale, at the instance of the second mortgagee, would only acquire the right to redeem the

usufructuary mortgage notwithstanding the term of the usufructuary mortgage, or after expiry of the term, as the covenants entered into between the parties would permit, and he would not be allowed to obtain possession of the property under his purchase until the usufructuary mortgage is brought to an end. In like manner, in the case of a decree for foreclosure, subject to a prior usufructuary mortgage, the second mortgagee would not be entitled to obtain possession of the property in question until the earlier usufructuary mortgage is redeemed.

27. In a case where the prior mortgagee is not made a party, there could be no question, we think, that the property, burdened as it is with the prior mortgage, might be brought to sale, and the purchaser would acquire the interest of the mortgagor (as it existed at the time of the second mortgage), and that of the second mortgagee, and as such would be entitled to redeem the prior mortgage. We do not see why an order for sale cannot be made in a suit in which the prior mortgagor is a party -an order that the property be sold subject to the prior mortgage.

28. Referring to the case law on the subject we find that there are several cases in which, in circumstances like this, a sale was ordered by the Court. We may, amongst others, refer to the case of Vencatachella Kandian v. Panjana Dien ILR Mad. 213 where Turner, C.J., observed:

When a second mortgage is created in favour of a person, who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that dictates the preservation of the right created by the first charge, I am unable to see why the acquisition by the first mortgagee of the right remaining in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the rights of the first mortgagee. If the first mortgagee had not acquired the rights remaining in the owner, it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently. have applied to the Court to order a sale (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale), then a sale should have been ordered of the property to discharge both mortgages, and the proceeds should have been applied to their satisfaction in order of priority; but I believe the course which would have best fulfilled the contracts and secured the rights of the parties would have been to allow a sale subject to the first incumbrance.

29. The same view was adopted in the case of Khub Chand v. Kalian Das I.L.R All. 240. In Raghunath Prasad v. Jurawan Rai I.L.R All. 105 a Full Bench of the Allahabad High Court, presided over by Petheram, C.J., held, as we understand the judgment, that a second mortgagee has a right to sell the property hypothecated to him subject to the rights existing in favour of the first

mortgagee, and the decree that was made in the cause was in accordance with this view. In Gangadhara v. Sivarama I.L.R Mad. 246 the High Court of Madras held, in somewhat similar circumstances, that the plaintiff, second mortgagee, was entitled to sell the property subject to the lien of the prior mortgagees. In Umes Chunder Sircar v. Zahwr Fatima I.L.R Cal. 164 : ILR. IndAp 206 where the District Judge and the High Court in appeal decreed a sale of the mortgaged property free from all incumbrances, the nett proceeds of the sale to be divided amongst the mortgagees according to their respective priority, the Judicial Committee, while modifying the decree of the High Court, upheld the order for sale. It was contended at the bar before their Lordships by Mr. Doyne that the decree was wrong in directing a sale of the whole property, and leaving the rights of the parties to be worked out against the purchase-money, and he claimed to treat the suit as a redemption suit. Upon this point their Lordships observed as follows: ''To this it is sufficient to answer that the plaint asks for a sale, and that the plaintiff has not, till the hearing of this appeal, suggested that the Court should deal with the property in any other way. The decree is right in ordering a sale, and the respective rights of the plaintiff and Zahur in the purchase-money must be adjusted on the footing that the plaintiff has the right to redeem Zahur''s two annas. "

30. Reference was made to certain cases in the Allahabad and Bombay High Courts, namely, Gaya Prasad v. Salik Prasad I.L.R All. 682 Har Prasad v. Bhagwan Das I.L.R All. 196 Mul Chand Kuber v. Lallu Trikam ILR 6 Bom. 404 and Parsi v. Girand Singh Weekly Notes . 1885 ALL where an opposite principle is said to have been followed. But it will be found upon an examination of the facts of those cases, that the first mortgagee had, subsequent to the second mortgage, purchased the equity of redemption of the mortgagor, and it was held that the second mortgagee was bound to redeem the earlier mortgage. In that state of facts we should be disposed to say that the second mortgagee is not entitled to bring to sale the mortgagor''s interest, because it no longer exists in the mortgagor : it has already passed into the hands of the first mortgagee.

31. The rule of law which we gather from the various sections of the Transfer of Property Act, to which we have already referred, may, we think, be supported by reference to Section 295 of the Code of Civil Procedure, wherein, speaking of the rateable distribution among various decree-holders of the proceeds of an execution sale, it is enacted as follows: "When any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale, as he had against the property sold." The provision contained in this section seems to be similar in scope to Sections 96 and 97 of the Transfer of Property Act.

32. For these reasons we are of opinion that the decree of the Court below in dismissing the suit of the plaintiffs is erroneous. The plaintiffs in our judgment

are entitled to have an order for sale of the mortgaged property subject to the lien of the prior incumbrancer, and we direct that the usual mortgage decree be drawn up in accordance with the Transfer of Property Act.

33. No order as to costs.

