

1893

JAN. 11,

18 B. 86.

APPELLATE CIVIL.

APPEL-

LATE

CIVIL.

18 B. 86.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

LOMBA GOMAJI (*Original Plaintiff*), Appellant v. VISHVANATH
AMRIT TILVANKAR (*Original Defendant*), Respondent.*
[11th January, 1893.]

Mortgage—Sale of property subject to a mortgage in execution of a money decree obtained by plaintiff against mortgagor—Subsequent mortgage of same property by original mortgagor and first mortgagee paid off—Possession taken by new mortgagee—Suit for possession by plaintiff as purchaser in execution—Right of purchaser to recover—Right of second mortgagee to be repaid his advances by plaintiff keeping alive the first mortgage.

On the 10th June, 1885, Tikaram mortgaged the property in dispute to Ganpat along with some other property. In 1886 the plaintiff obtained a money decree against Tikaram and in execution of his decree he sold the property in dispute and obtained a certificate of sale on the 1st November, 1886.

On the 13th February, 1888, Tikaram mortgaged the property, in dispute along with other property to the defendant and paid off Ganpat's mortgage. Ganpat thereupon returned the mortgage-deed to Tikaram with a receipt for payment endorsed. After payment of Ganpat's mortgage the defendant took possession of the property. In July, 1888, Tikaram executed a further mortgage of the property to the defendant for Rs. 8,000.

On the 30th August, 1888, the plaintiff having attempted to take possession was obstructed by the defendant. Thereupon the plaintiff brought this suit for possession.

Held, that the plaintiff was entitled to possession. The mortgage to the defendant was subsequent to the plaintiff's purchase of the equity of redemption. The defendant did not know of that purchase. He took the mortgage from Tikaram, to whom he advanced the money to pay off the previous mortgage to Ganpat. There was nothing to show that there was any intention to keep Ganpat's mortgage alive in favour of the defendant.

Gokul Doss v. Rambux (1) distinguished.

Held, also, that as plaintiff was seeking to recover property which but for the defendant's payment to Ganpat would have been burdened with Ganpat's mortgage, [87] and as the defendant when he advanced the money to Tikaram to pay off that mortgage did not know that Tikaram was no longer the owner of the equity of redemption, the plaintiff should give credit to the defendant for the sum paid by him; but as the defendant's mortgage comprised other properties besides the one in dispute, the plaintiff should recover possession on payment to the defendant of a proportionate part of Ganpat's mortgage-debt having regard to the value of the property in dispute and that of the other mortgaged properties.

Mahomed Shumsool v. Shewukram (2) followed.

[F., 35 B. 433 = 13 Bom. L.R. 867 = 12 Ind. Cas. 362; R., 18 B. 348 (354); 21 B. 567 (569); Expl., 36 C. 193 (221) = 5 C.L.J. 611.]

SECOND appeal from the decision of T. Hart-Davies, Assistant Judge of Poona.

On the 10th June, 1885, one Tikaram Lachhiram mortgaged the property in question with other properties to Ganpat Dalsaram for Rs. 500. The mortgagee was given possession.

On the 18th June, 1886, the plaintiff, who had obtained a money decree against Tikaram (the mortgagor), caused the mortgaged property to be sold in execution, and at the sale himself became the purchaser. The sale to him was confirmed in November, 1886.

* Second Appeal No. 454 of 1891.

On the 13th February, 1888, Tikaram executed a mortgage of the property in dispute along with other properties to the defendant for Rs. 5,000. Ganpat Dalsaram joined in this transaction, and on the 14th February, 1888, his mortgage was paid off out of the Rs. 5,000. He returned his mortgage-deed to Tikaram with an endorsement of satisfaction of his debt as follows:—"I, the creditor named Ganpat Dalsaram Gujar, having entered satisfaction on the back of this mortgage, have received moneys as follows:—Rs. 500, I have received Rs. 500 in respect of the said mortgage right. . . . The above-mentioned amount of Rs. 3,606, which is caused to be paid by Vishvanath Amrit Tilvankar . . . for redeeming two mortgaged fields, two bungalows and two houses in all, which I held in mortgage, and for mortgaging the same to Tilvankar, I have received in full. Now there is nothing whatever due to me on the property. I have relinquished all my mortgage rights, and have delivered all the letters and papers to him for enjoyment."

The new mortgage-deed to the defendant contained the following passage:—"We have received, in all, from you Rs. 5,000 of [88] the Surat currency for paying to Rajeshri Ganpat Dalsaramshet in order to redeem our property which is mortgaged to him and to mortgage the same to you . . . We . . . have of our own free will received payment in respect of this mortgage-deed. The details are as follows: having paid Rs. 3,606 in cash to Rajeshri Ganpat Dalsaramshet we have obtained the mortgage deed with an intention of satisfaction thereon, &c."

Upon the execution of this mortgage the defendant took possession, the previous mortgagee (Ganpat Dalsaram) having been paid off as already mentioned.

On the 5th July, 1888, Tikaram executed a further mortgage of the property to the defendant for Rs. 8,000.

On the 30th August, 1888, the plaintiff attempted to take possession of the property under his sale certificate, and he was resisted by the defendant. He then applied to the Court executing the decree to have the obstruction removed, but his application was rejected.

The plaintiff thereupon brought the present suit to have the order rejecting his application set aside, and for possession of the property.

The defendant contended (*inter alia*) that as he had satisfied Ganpat Dalsaram's mortgage lien, which was prior in date to the plaintiff's purchase and had been put in possession and that the plaintiff was aware of that fact, that the plaintiff's remedy was a suit for redemption and not for possession.

The plaintiff preferred a second appeal.

Inverarity (with *Mahadeo Bhaskar Charval*), for the appellant (plaintiff).—When the plaintiff purchased the property in execution of his decree, Ganpat's mortgage lien was in existence. Subsequently to that purchase Tikaram paid off Ganpat's mortgage, and the result was that when the plaintiff sought to recover possession in execution, the property was free from that mortgage. The documents clearly show that the parties to the transaction of February, 1888, intended simply to wipe off Ganpat's mortgage; if they had intended otherwise, the defendant would have taken an assignment of the mortgage from Ganpat. The plaintiff is, therefore, [89] entitled to recover possession without paying anything to the respondent—*Ram Tuhul Singh v. Biseswar Lall* (1), *Gadgeppa v. Apaji* (2) *Krishna Reddi v. Muttu Narayana Reddi* (3). Supposing that

(1) 2 I. A. 131 (143).

(2) 3 B. 287.

(3) 7 M. 127.

1898
JAN. 11.
APPEL-
LATE
CIVIL.
15 B. 86.

the plaintiff is liable to make any payment to defendant on account of Ganpat's mortgage lien on the ground that that lien was prior to his purchase, this liability should be limited to the property which he purchased. He should not be made liable to pay the whole of the lien, which extended over some other property which he has not purchased.

Mahadeo Chimnaji Apte, for the respondent (defendant).—The intention to keep alive Ganpat's mortgage lien in the defendant's favour is shown by the endorsement made on his mortgage-deed and also by the conduct of the parties. If Ganpat's mortgage had been merely wiped off, the mortgage-deed would not have come into the defendant's possession. The endorsement distinctly says that Ganpat's mortgage was paid off for the purpose of mortgaging the property to the defendant. Therefore the transaction is tantamount to an assignment—*Gokuldoss v. Rambux* (1); *Gangadhara v. Sivarama* (2), *Mahomed Shumsool v. Shewakram* (3). The defendant had no notice of the plaintiff's purchase, and, therefore, he paid off Ganpat's mortgage, and advanced money to the mortgagor. But now owing to the plaintiff's purchase the defendant's transaction was, by the lower Court, held to be abortive. A man paying an incumbrance honestly, though unauthorisedly, is entitled to be recouped in justice, equity and good conscience—*Nilo Pandurang v. Rama Patloji* (4).

JUDGMENT.

SARGENT, C. J.—As the defendant's mortgages in 1888 were subsequent to the plaintiff's purchase at auction-sale on 18th June, 1886, of Tikaram's equity of redemption, it is plain that the defendant can have no defence to the plaintiff's suit for possession, unless Ganpat Dalsaram's mortgage, to which the property was subject when the plaintiff purchased it, can be regarded: for there was no formal assignment of it, as having been kept alive in his favour. We agree with the Joint [90] Subordinate Judge that no such intention can be gathered from what took place when the first mortgage was passed to defendant.

Mr. Apte relied on the Privy Council's decision in *Gokul Doss v. Rambux* (1) to show that the intention ought to be presumed, but the principle laid down in that case only applies where, as their Lordships explain it, "the estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, in which case (in England) it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable." Such was the case in *Gangadhara v. Sivarama* (2), which proceeded on the ruling in *Gokul Doss v. Rambux* (1). But here there was no intermediate mortgage to be protected against from which an intention to keep Ganpat's mortgage alive can be gathered, nor has it ever been suggested in either Court, that the defendant was aware of the plaintiff's purchase. On the other hand, the evidence that defendant took no part in paying off Ganpat's mortgage, and that the receipt endorsed on it was in favour of Tikaram, together with the recital in defendant's mortgage-deed that the mortgage had been paid off out of the money advanced by defendant, without any words showing an intention to keep it alive, indicates that the only object the defendant had in view was to insure the property being cleared from Ganpat's mortgage.

(1) 11 I. A. 126.

(2) 8 M. 246.

(3) 2 I. A. 7 (17).

(4) 9 B. 35.

1893
 JAN. 11.
 —
 APPEL-
 LATE
 CIVIL
 —
 18 B. 86.

It remains, however, to consider whether this is a case in which the Court ought, as Mr. Apte contends it should, on the principle acted on by the Privy Council in *Mahomed Shumsool v. Shewukram* (1), to refuse to give the plaintiff possession except on the condition of his recouping the defendant for what he paid to satisfy Ganpat's mortgage, and thus freeing the estate from an incumbrance to which it would have been liable in his lands. The cases of *Ram Tuhul Singh v. Biseswar Lall Sahoo* (2) and *Gadgeppa v. Apaji* (3) were relied on by Mr. Inverarity for the plaintiff. In the case before the Privy Council it is to be observed that the plaintiff was the party who had [91] paid the money, and he sought to recover it from the defendant who had benefited by it, and their Lordships at the bottom of page 141 distinguished it on that ground from the case of *Bellamy v. Sabine* (4) before Lord Cottenham and others of that class where the plaintiff seeks the aid of a Court of Equity and the Court proceeds on the broad ground that he who seeks to be relieved on equitable grounds must do equity. Moreover, the money was paid in that case against the will of the party who was said to have benefited by it. In *Gadgeppa v. Apaji* (3) the plaintiff was also the party who had paid the money, and the Court relied on *Ram Tuhul Singh v. Biseswar Lall Sahoo* (2).

Those cases, therefore, differ from the present one, in this important respect that the plaintiff is here invoking the aid of the Court to recover the property from defendant, which, but for defendant's payment to Ganpat, would have been burdened with Ganpat's mortgage; and unless defendant knew that Tikaram was no longer the owner of the equity of redemption, when he advanced the money to Tikaram, which, as found by the Subordinate Judge, was not the case, and was not relied on in the lower Court of appeal, it is difficult to see how the present case is in principle to be distinguished from *Mahomed Shumsool v. Shewukram* (1). In both cases there is a subsisting charge on the property paid off by the person in possession, which, as their Lordships say, makes it "equitable when the plaintiff reclaims the estate, that credit should be given to the purchaser (in this case the mortgagee) for the payment of the mortgage which the plaintiff would otherwise have had to meet."

It was said, however, and we think rightly, that plaintiff cannot be called on to pay more than a proportionate part of the money paid in satisfaction of Ganpat's mortgage-debt, as his mortgage security consisted of other properties as well as the one in dispute. That is all the defendant would have had ultimately to meet, as, even if he must have paid the whole mortgage-debt to recover the property in question, he would have been entitled to contribution by Tikaram in respect of the rest of the mortgaged property.

[92] We think, therefore, that the decree must be varied by directing that the plaintiff do recover the property on payment to the defendant of the proportionate part of Ganpat's mortgage-debt, having regard to the values of the property in question and that of the other mortgaged properties. The sum to be so paid to be determined in execution. Parties to pay their own costs of this appeal.

Decree varied.

(1) 2 I. A. 7 (17).

(2) 2 I. A. 131.

(3) 3 B. 237.

(4) 2 Ph. 425.