

[591] APPELLATE CIVIL.

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

CHHOTALAL GOVINDRAM (Original Plaintiff), Appellant v. MATHUR KEVALRAM (Original Defendant No. 2), Respondent.*
[18th September, 1893.]

1893
SEP. 16.
APPEL-
LATE
CIVIL.
18 B. 59

Mortgage—Redemption—Mortgage to a firm—Subsequent mortgage to one member of the firm for personal loan with stipulation for payment of new debt before prior mortgage-debt—Right to redeem first mortgage independently of later mortgage.

On the 13th July, 1877, a firm, of which defendants Nos. 1 to 4 were members, lent money to Nathu Narbheram on mortgage of certain property. Subsequently defendant No. 2 personally made a further loan to Nathu, who executed two *san* mortgage deeds to him of the same property containing stipulations that these bonds should be paid before the mortgage of July, 1877. Nathu died, and his widow and heir assigned the equity of redemption of the mortgage of July, 1877, to the plaintiff, who sued the defendants to redeem. The defendants contended that the plaintiff was bound to pay off the two later bonds as well as the original mortgage-debt.

Held, that the later loan by defendant No. 2 being a personal loan by him, the firm, as such, had no equity to insist on its being paid before the mortgage was redeemed, whatever right defendant No. 2 in his personal capacity might have. But in this suit, which was one to redeem the mortgage, he was a party as member of the firm, and not in his individual capacity, and he could not, therefore, resist the plaintiff's right to redeem on any ground based on the promise of the two bonds executed to himself.

THIS was a second appeal from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad with appellate powers.

Suit for redemption. One Nathu Narbheram mortgaged the land in question to defendants Nos. 1 to 4 for Rs. 337-4-0 by a registered deed dated 13th July, 1877.

On the 25th November, 1878, Nathu Narbheram obtained a further loan of Rs. 98 from defendant No. 2 (Mathur Kevalram) and executed to him two *san* mortgage-deeds each for Rs. 49, which stipulated for the payment of this *san* debt before the prior mortgage-debt.

Nathu Narbheram died, and on the 25th February, 1890, his widow assigned the equity of redemption of the mortgage of July, 1877, to the plaintiff, who now sued the defendants for redemption.

[592] The defendants contended that the plaintiff could not redeem this first mortgage without also paying off the two *san* mortgages.

The Subordinate Judge held that the two *san* mortgages were not proved, and ordered redemption of the first mortgage on payment, by the plaintiff, of Rs. 337-4-0 within three months from the date of the decree.

On appeal by defendants Nos. 1—4, the Judge found that the *san* mortgages (Exs. D and E) were proved, and that under the stipulation contained in those exhibits the plaintiff could not redeem the first mortgage without paying them off also. He, therefore, varied the decree, and directed the plaintiff to pay the mortgage-debt, Rs. 337-4-0, to defendants Nos. 1—4, and the *san* debt, Rs. 165-4-0, to defendant No. 2, Mathur Keval, within six months from the date of the decree, and to recover possession from the defendants of the mortgaged property free from all mortgage lien. In default, plaintiff to stand foreclosed.

* Second Appeal, No. 264 of 1892.

1893
SEP. 18.
—
APPEL-
LATE
CIVIL.
—
18 B. 591.

The plaintiff preferred a second appeal.

Sitanath Gopinath Ajinkya, for the appellant (plaintiff).—The plaintiff here is not the original mortgagor, but his assignee. He assigned to the plaintiff the equity of redemption of the mortgage of 1877. The equity of redemption which we got by that assignment is not affected by bonds passed by the mortgagor subsequently to the mortgage. Further, the original mortgage-bond was passed to the firm, while the subsequent bonds were passed to defendant No. 2, who is the munim of the firm. This distinguishes the present case from the case of *Hari Mahadaji v. Balambhat*(1).

[SARGENT, C. J.— But the munim is also the member of the firm.]

That is so; but in the case of the *san* mortgage-bonds he acted in his personal capacity, as shown by his taking these bonds in his own name and not in that of the firm. The amount secured by the bonds was a personal loan by him to be paid when the mortgagee demanded the mortgage-debt. The consideration of the bonds came from defendant No. 2 himself, while the mortgage [593] loan was paid from the funds of the firm. The condition that the debt to him should be paid before the mortgage-debt, clogs the equity of redemption, and, therefore, it should not be allowed.

Chimanlal H. Setaiwad, for the respondent (defendant No. 2).—The question whether the subsequent loan was advanced from the funds of the firm or those of the munim is a question of fact not gone into by the lower Court. For the determination of the question the case will have to be sent down.

JUDGMENT.

SARGENT, C. J.—The *san* mortgage-bonds (Exs. D and E) were passed to Mathur Kevalram (defendant No. 2) in consideration of a personal loan, with a charge on the equity of redemption on the lands in question still remaining in the mortgagor Nathu Narbheram, and on the understanding that those loans were to be paid before the bond passed to the firm by the earlier mortgage (Ex. 45). This would not give the firm any equity to insist on bonds D and E being paid before the mortgage (Ex. 45) was redeemed, whatever right Mathur himself might have to insist on it. Mathur is a party to the suit as a member of the firm, and not in his individual capacity, and cannot, in this suit, which is one to redeem the mortgage (Ex. 45), resist the plaintiff's right to redeem for any reason based on the provisions of the other bonds (Exs. D and E).

We must, therefore, vary the decree by directing that plaintiff do redeem the land on payment of Rs. 337-4-0 to the defendants within six months from this day, and reverse so much of the decree as directs payment to defendant Mathur of Rs. 165-4-0. Appellant to have his costs of this appeal. Parties to pay their own costs in the Courts below.

Decree varied.