

[684] APPELLATE CIVIL.

1893

OCT. 10.

APPEL-
LATE

CIVIL.

18 B. 684.

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

PADMANABH BOMBSHENVI (*Original Plaintiff*), Appellant v. KHEMU
KOMAR NAIK AND OTHERS (*Original Defendants*), Respondents.*
[10th October, 1893.]

*Mortgage—Suit on registered mortgage—Execution—Sale—Proceeds of sale how applied—
Priority—Unregistered mortgage—Money decree—Priority of holder of unregistered
mortgage to holder of money decree—Incumbrances—Transfer of Property Act (IV
of 1832), s. 97.*

The plaintiff Padmanabh held a mortgage of certain land belonging to the first defendant. The mortgage was not registered. The second defendant, Marpal, was a mortgagee of the same land under a mortgage which was subsequent in date but was duly registered. Marpal obtained a decree upon this latter mortgage and applied in execution for sale of the land. The plaintiff intervened, but his claim was rejected on the ground that Marpal's mortgage was registered and had priority to his mortgage, which was not registered. The land was sold by auction to Ramchandra (defendant No. 4) and the proceeds of the sale were partly applied in satisfaction of Marpal's claim, and a further sum of Rs. 164 was paid to one Santapa (defendant No. 3), who had obtained a money decree against the mortgagor (defendant No. 1). A balance of Rs. 103-8-11 was paid into Court and subsequently returned to defendant No. 1 (the mortgagor). The plaintiff Padmanabh now sued for payment of his mortgage-debt out of the proceeds of sale or from the defendants. The lower Court held that defendant No. 3 (Santapa) could not be called upon to refund the money which had been paid to him out of the proceeds, and that the plaintiff had a cause of action only against the mortgagor (defendant No. 1) not merely for the balance of Rs. 103-8-11, but for the whole of his claim. On appeal to the High Court,

Held, that the claim of the plaintiff in virtue of his mortgage although unregistered was prior to that of the third defendant (Santapa) under his money decree. The plaintiff's earlier mortgage was postponed to that of Marpal because it was not registered, but the plaintiff had the right of a second mortgagee over the balance in virtue of his mortgage. The proceeds of the sale after satisfying the first incumbrancer (Marpal) became payable first to the other incumbrancers, if any, and then to the mortgagor (defendant No. 1). The judgment-creditor (defendant No. 3) could only take any balance that remained subject to the equitable right of the plaintiff.

[R., 33 C. 92 (103) = 9 C.W.N. 989; 4 A.L.J. 492 = 27 A.W.N. 201.]

SECOND APPEAL from the decision of A. H. Unwin, District Judge of Kanara.

On 28th October, 1886, defendant No. 1 mortgaged certain land (No. 166) without possession to the plaintiff. The deed was [685] not registered, and it fixed no time for repayment of the mortgage-debt.

Subsequently defendant No. 1 mortgaged the same land together with other land for Rs. 200 without possession to defendant No. 2. This mortgage-deed was registered.

On this latter mortgage defendant No. 2 filed a suit (No. 6 of 1890) against his mortgagor (defendant No. 1) and obtained a decree for the sale of the mortgaged property. When he applied in execution for the sale of the land, the plaintiff intervened and set up his prior mortgage lien upon part of the lands comprised in the mortgage and decree of defendant No. 2. His claim was rejected on 13th September, 1890, on the ground that the mortgage of defendant No. 2 being registered was prior to his which was unregistered.

* Second Appeal No. 402 of 1892.

1893
OCT. 10.
—
APPEL-
LATE
CIVIL.
—
18 B. 684.

In execution accordingly of the above decree two lots of land were sold, *viz.*, No. 111, which was only included in the second mortgage, and No. 116, which was included both in the first and second, and which had, therefore, been mortgaged both to the plaintiff and the defendant No. 2. At the Court sale, defendant No. 4 purchased the former for Rs. 125 and the latter for Rs. 415. Out of the total proceeds of sale, Rs. 272-6-4 were paid to defendant No. 2 in satisfaction of his decree and Rs. 164-0-9 were paid to defendant No. 3 in satisfaction of a money decree which he had obtained against defendant No. 1, and the balance of Rs. 103-8-11 remained as a deposit in Court.

In 1890 the plaintiff filed this suit to recover Rs. 90 as principal and Rs. 57 as interest, in all Rs. 147, contending that his mortgage being earliest in date, his right was superior, and he had, therefore, a right to the land as well as to the proceeds of the sale. He, therefore, prayed that his claim might be satisfied (1) from the proceeds of the sale lying in deposit in Court, (2) from the defendants who might be liable to pay, or (3) by sale of the mortgaged land. Defendant No. 4 relied on his purchase at the auction held in execution of the decree passed in the duly registered mortgage of defendant No. 2 and denied his liability to the plaintiff.

[686] Defendant No. 3 put in a similar defence, and further contended that the plaintiff's debt, if any, was a charge upon the land and not on the proceeds of the sale, and that he (defendant No. 3) was unnecessarily made a party to the suit.

Defendants Nos. 1 and 2 did not appear.

The Subordinate Judge found that the plaintiff's mortgage was proved, that the plaintiff was entitled to recover the money due to him from defendants Nos. 1 and 3, and that though the plaintiff's personal remedy against defendant No. 1 was time-barred, the suit having been filed after the expiration of three years from the date of the deed, still defendant No. 1 was liable to the plaintiff's claim to the extent of Rs. 103-8-11, he having after the institution of the suit taken out of Court that sum which had been deposited there after the sale. He, therefore, made the following order:—

"I order that out of the sum claimed by plaintiff he should, in the first instance, recover Rs. 103-8-11, with costs in proportion, from defendant No. 1. In the event of this being found impossible, he should recover the said amount and costs, or so much thereof as might remain unpaid from defendant No. 3. The plaintiff to recover the rest of the amount claimed from defendant No. 3 alone with costs in proportion. Defendant No. 3 to bear his own costs, and costs of defendants Nos. 2 and 4 to be paid by plaintiff."

On appeal by the plaintiff the District Judge amended the decree and directed the plaintiff to recover the amount claimed and his costs from the property of defendant No. 1 alone, and to bear the costs of the other defendants. His reasons were as follows:—

"Although plaintiff intervened under s. 278 of the Civil Procedure Code (XIV of 1882) pending the attachment which followed the registered mortgagee defendant No. 2's decree, it appears that he intervened unsuccessfully, and that defendant No. 3's suit (No. 192 of 1890.) against defendant No. 1 on a money bond and decree thereon meantime anticipated plaintiff's suit. And the Court having, after satisfaction of the registered mortgagee's decree for Rs. 272 odd, out of the sale proceeds already paid away to defendant No. 3 Rs. 164-0-9 out of the balance Rs. 267 odd, cannot

possibly be justified in cancelling or altering this order by calling upon the payee to refund any portion of this Rs. 164 under any circumstances. Plainly, it is the mortgagor defendant No. 1 alone against whom plaintiff had a cause of action and against whom a decree can be passed here, not merely for the Rs. 103-8-11 [687] which was returned to him as the surplus of the sale proceeds, but also for the whole of plaintiff's claim; the Subordinate Judge being wrong also in supposing that plaintiff's personal remedy against his mortgagor is barred by limitation. His suit is to 'enforce payment of money charged (under Ex. 21) upon immoveable property'—Art. 132, Sch. II of Act XV of 1877—and he had, therefore, twelve years within which to sue from the date of the bond, 28th October, 1886; *vide* the Full Bench ruling in *Lallubhai v. Naran*, I.L.R., 6 Bom. 719."

1893
OCT. 10.
—
APPEL-
LATE
CIVIL:
—
18 B. 684.

Plaintiff preferred a second appeal.

Narayan Ganesh Chandavarkar, for the appellant (plaintiff):—Defendant No. 3 was merely the holder of a money decree against defendant No. 1, while the plaintiff holds a mortgage right over the mortgaged property. Defendant No. 3 cannot, therefore, have a preferential right over the plaintiff under ss. 272 and 295 of the Civil Procedure Code (XIV of 1882,). Compare also s. 97 of the Transfer of Property Act (IV of 1882)—*Raja Kishendatt v. Raja Mumtaz Ali Khan* (1).

Shamrao Vitthal, for respondent No. 3 (defendant No. 3).

Wasudeo Gopal Bhandarkar, for respondent No. 4 (defendant No. 4) the auction-purchaser:—The first Court dismissed the suit as against us. We were not joined as a party to the appeal in the lower Court, and yet we have been joined as a respondent in second appeal. So the appeal as against us must be dismissed with costs.

JUDGMENT.

SARGENT, C. J.—The District Judge has misconceived the respective rights of the plaintiff and the judgment-creditor, defendant No. 3, in the surplus proceeds of the sale effected in execution of the mortgage-decree obtained by defendant No. 2. Although plaintiff's earlier mortgage was postponed to that of defendant No. 2, by reason of its non-registration, the plaintiff still had the same rights over the balance as if he had been the second mortgagee in point of date. In *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1) the Privy Council say: "The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers and ultimately for the mortgagor." The same must be the result [688] when the Court sells to satisfy the first mortgage. The proceeds which are paid into Court after satisfying the first incumbrance become payable first to the other incumbrancers (if any) and then to the mortgagor, and so it is virtually provided by s. 97 of the Transfer of Property Act (IV of 1882), which directs that "the residue is to be paid to the person proving himself to be interested in the property sold." Such being the right of the plaintiff over the balance in virtue of his mortgage, the attaching creditor could only take the balance subject to that equitable right.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision having regard to the above remarks. In

1893
OCT. 10.
—
APPEL-
LATE
CIVIL.
—
18 B. 684.

dealing with the case it will be necessary to bear in mind that the balance, Rs. 267-9-8, was the result of the sale of two properties Nos. 111 and 166, in the latter of which alone the plaintiff was interested. Costs to abide the result as regards appellant and defendant No. 3. But the appeal must be dismissed as against defendant No. 4 with costs.

Decree reversed and case sent back.

18 B. 688.

APPELLATE CIVIL.

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

ABAJI GANGADHAR (*Original Plaintiff*), *Appellant v. MUKTA KOM RAGHU AND ANOTHER (Original Defendants), Respondents.**
[11th October, 1893.]

Gift—Necessity of possession—Attestation of deed, effect of.

In 1873, Ramji, a Hindu, executed a deed of gift of his immoveable property to his daughter Mukta (defendant No. 1). The deed was attested by the plaintiff. In 1878, Ramji mortgaged to the plaintiff some of the land comprised in the deed of gift. Ramji died in that year, and in 1882 his grandson conveyed the equity of redemption to the plaintiff, who was already in possession of the mortgaged land as mortgagee. In the year 1888 the plaintiff being dispossessed by Mukta (defendant No. 1) and the second defendant, to whom she had sold the land, he brought the present suit to recover possession. The defendants relied upon the gift.

Held, that the plaintiff was entitled to possession. At the time of the mortgage to him in 1878 Ramji had not completed his gift to Mukta by giving possession. He was, therefore, in a position to give the plaintiff a good title. It had not been shown that Mukta had ever been treated as the owner of the equity of redemption.

[689] *Held*, also, that the circumstances that the plaintiff attested the deed of gift in 1873 could not affect his title, as the gift had not been completed by delivery of possession.

[R., 21 P.L.R. 1901.]

SECOND APPEAL from this decision of T. Hart-Davies, Acting District Judge of Ahmednagar.

In 1873, by a registered deed of that date Ramji Jaitha made a gift of his immoveable property, including the land in dispute in this suit, to his daughter Mukta (defendant No. 1). The deed was attested by the plaintiff and by one of the donor's sons. Ramji, however, remained in possession, and in 1878 he mortgaged to the plaintiff a part of the lands comprised in the deed of gift and put the plaintiff in possession as mortgagee. Ramji died in the same year. In 1882, Ramji's grandson, Vithal, conveyed the equity of redemption to the plaintiff. In 1888, Mukta and the second defendant, to whom she had sold the land in question, forcibly dispossessed the plaintiff, and he then brought this suit to recover the land. The defendants relied upon the gift to Mukta by her father Ramji.

The Subordinate Judge dismissed the suit, holding that the gift to Mukta was valid and had been acted upon by delivery to her of possession of other lands.

* Second Appeal No. 399 of 1892.