

the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative, not having been made within sixty days, is barred by Article 171 of the Limitation Act of 1908. It is obvious, however, that in a partition suit all the parties should be before the Court. The suit has actually reached the stage of a commission to divide the property, and the applicant is a sharer. Nothing in the Code limits or affects the inherent power of the Court to make such orders as may be necessary for the ends of justice, and under Order I, Rule 10, the Court may, at any stage of the proceedings, order that the name of any person whose presence may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. We, therefore, order that the applicant be added as a defendant in the suit, being bound by all the proceedings up to date.

Costs costs in the cause.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

SUBRAYA BIN VENKATESH BUDDA SHETTI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANPA *alias* GOVIND NARAYAN NAIK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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April 11.

Mortgage—Mortgagee failing to pay a part of consideration as provided in the mortgage-deed—Failure of consideration—Subsequent payment cannot be taken as part of mortgage-debt—Transfer of Property Act (IV of 1882), sections 56, 81, 88—Marshalling of securities.

In 1896, G. mortgaged some lands (Serial Nos. 1—10) to V. for Rs. 400, of which Rs. 200 were paid in cash and Rs. 200 were to be paid to N., a prior mortgagee. V. having failed to pay to N., G. sold to defendant No. 5 some of the lands mortgaged (Serial Nos. 6—10) and other property and redeemed N.'s mortgage by paying Rs. 200 to him. Subsequently V. paid Rs. 200 to G.

* Second Appeal No. 797 of 1907.

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Shortly afterwards G mortgaged some more lands (Serial Nos. 1, 3, 4 and 5) to defendant No. 4 for Rs. 400. The defendant No. 4 sued on his mortgage and obtained a decree against G. In execution of the decree the lands, Serial Nos. 1, 3, 4, 5, were sold and were purchased by defendant No. 4. V. then sued on his mortgage treating it as one for Rs. 400, to recover the amount by sale of all the ten numbers. The lower Courts recognized V.'s mortgage only for Rs. 200, and granted him a decree authorizing him to proceed against Serial No. 2 alone and if the sale-proceeds failed to satisfy his claim, to proceed against the other serial numbers which were sold to defendants Nos. 4 and 5. On appeal:—

Held, that V. was not entitled to treat his mortgage as one for Rs. 400; since V. having failed to pay Rs. 200 to N. either at once or within a reasonable time, there was partial failure of consideration for the mortgage and the subsequent payment of Rs. 200 to G. by V. could not serve in law to undo the effect of that failure, so as to prejudice the rights of defendant No. 5.

Held, further, that the Court had power, under section 83 of the Transfer of Property Act (IV of 1882), to pass in such a suit a decree for sale, ordering that, in default of G. paying, the mortgaged property or a sufficient part thereof be sold.

Per Curiam.—The provisions of section 56 of the Transfer of Property Act, 1882, apply only as between a seller and his buyer, not as between a mortgagee of the seller and the buyer.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kanara, confirming the decree passed by K. R. Natu, Subordinate Judge at Kumta.

Suit on mortgage.

On the 3rd January 1896, Ganpa (defendant No. 1), as manager of a joint Hindu family consisting of himself and his two brothers, defendants Nos. 2 and 3, mortgaged lands (Serial Nos. 1—10) to Venkatesh Shetti (father of plaintiffs) for Rs. 400. Rs. 200 were paid in cash at the time and the remainder was covenanted to be paid to Nagappa, a prior mortgagee. Venkatesh failed to make the payment. On the 10th July 1897, Ganpa sold some of the lands (Serial Nos. 6—10) and other property to Rango (defendant No. 5) for Rs. 300, and out of the money redeemed Nagappa's mortgage. On the 15th March 1898, Venkatesh paid Rs. 200 to Ganpa. On the 30th March 1898, Ganpa mortgaged four more lands (Serial Nos. 1, 3, 4 and 5) with Shivram (defendant No. 4). In 1902,

Shivram sued on his mortgage and obtained a decree. In execution of the decree, the lands Serial Nos. 1, 3, 4 and 5 were sold and purchased by Shivram himself.

In 1904, the plaintiffs sued to recover their money (Rs. 400) by sale of the mortgaged property. The Subordinate Judge held that as the plaintiffs had paid Rs. 200 under the mortgage, the mortgage held good to that amount only, and that the subsequent payment of Rs. 200 which they made to Ganpa was no part of consideration for the mortgage and applying section 56 of the Transfer of Property Act, 1882, he ordered that on failure by Ganpa to pay the mortgage amount within six months of the date of the decree, the plaintiffs should first put up to sale land, Serial No. 2, and if there was any deficiency after that sale, the other land Serial Nos. 1 and 3—10 should be sold.

On appeal, the District Judge confirmed the decree, but placed reliance on section 81 and not on section 56 of the Transfer of Property Act of 1882, in support of the order of sale.

The plaintiffs appealed to the High Court.

Nilkant Atmaram, for the appellants :—I submit we are entitled to a decree for the full mortgage amount, *i. e.*, Rs. 400. The money that were payable to Nagappa was eventually paid to defendant No. 1, who had in the meanwhile made the payment himself. By accepting payment from plaintiff, the defendant No. 1 allowed the mortgage charge to be valid to the extent of Rs. 400. In any view of the case the defendant No. 4 should not be allowed any priority in virtue of his mortgage. Further, the lower Courts have erred in restricting the plaintiffs' right to Serial No. 2 in the first instance. The Court of first instance has erred in applying section 56 of the Transfer of Property Act, 1882; and the lower Court has mistakenly relied on section 81 of the Act, in making the order. See *Indukuri Rama Raju v. Yerramilli Subbaragudu*⁽¹⁾, *Lala Dilawar Sahai v. Dewan Bolakiram*⁽²⁾ and *Bhikkhari Das v. Dalip Singh*⁽³⁾. See also *Kishun Pershad Chowdhry v. Tipan Pershad Singh*⁽⁴⁾.

(1) (1882) 5 Mad. 387.

(2) (1885) 11 Cal. 258.

(3) (1895) 17 All. 434.

(4) (1907) 24 Cal. 735.

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P. M. Vinekar, for the respondent, referred to *Webb v. Smith*⁽¹⁾, *Tidd v. Lister*⁽²⁾ and *Gibson v. Seagrim*⁽³⁾.

CHANDAVARKAR, J. :—It is necessary to state at the outset the facts found by the lower Court of appeal, so far as they are material for the purposes of the two questions of law argued before us.

The facts are briefly these.

On the 3rd of January 1896, defendant No. 1, as manager of the undivided Hindu family consisting of himself and defendants Nos. 2 and 3, mortgaged by a registered deed (Exhibit 42) ten lands to one Venkatesh Shetti, deceased, represented in this litigation by the plaintiffs, for a debt due from the family. The consideration for the mortgage was Rs. 400, of which Rs. 200 were paid at the time of its execution to the mortgagor; as to the balance, the mortgagee covenanted by the mortgage-deed to pay it to one Nagappa, a previous mortgagee of defendant No. 1's family.

Venkatesh Shetti, the mortgagee, having failed to pay to Nagappa, defendant No. 1 sold to defendant No. 5, on the 10th of July 1897, some of the lands mortgaged under Exhibit 42 and other property not covered by that deed; and by means of the proceeds of the sale defendant No. 1 through defendant No. 5 redeemed the mortgage to Nagappa.

On the 15th of March 1898, Venkatesh Shetti, the mortgagee under Exhibit 42, paid to defendant No. 1 Rs. 200.

On the 30th of March 1898, defendant No. 1 mortgaged under a registered deed (Exhibit 60) to defendant No. 4 for Rs. 500 four only out of the ten lands covered by plaintiff's mortgage, Exhibit 42.

In 1902, defendant No. 4 sued defendant No. 1 on his mortgage, and, in execution of the decree for sale obtained therein, became purchaser through Court of the four lands covered by his mortgage, Exhibit 60.

The result was this. Plaintiffs were mortgagees of defendant No. 1 for Rs. 400 under Exhibit 42, but they did not, as agreed,

(1) (1885) 30 Ch. D. 192 at p. 200.

(2) (1852) 10 Hare 140.

(3) (1855) 20 Beav. 614.

pay Rs. 200 out of that amount to defendant No. 1's previous mortgagee, Nagappa, until after defendant No. 1 had sold some of the mortgaged lands to defendant No. 5 and satisfied Nagappa's mortgage. Defendant No. 4, a mortgagee subsequent of some other lands mortgaged under Exhibit 42, became Court-purchaser of those lands in execution of a decree on his mortgage.

Plaintiffs now sue to recover on their mortgage, Exhibit 42. Both the lower Courts have given them a decree treating their mortgage as one for Rs. 200 only, instead of Rs. 400; further, the Courts have directed by the decree that in the event of defendants Nos. 1 to 3 failing to pay the amount found due on the mortgage; plaintiffs should first proceed against that portion of the mortgaged property which is in the hands of those defendants and bring to sale the properties sold respectively to defendants Nos. 5 and 4, only in case the decree is not satisfied by a sale of the former.

Plaintiffs impugn on this second appeal the correctness in law of both these restrictions on their right under their mortgage, Exhibit 42.

First, it is contended for them that as they paid the balance of Rs. 200 to defendant No. 1, they are entitled to treat the mortgage, Exhibit 42, as one for the full consideration of Rs. 400. The finding of the Court below disposes of that contention. According to that finding, the mortgagee had kept the amount of Rs. 200 for payment to Nagappa. He was bound to pay the amount to the latter either at once or within a reasonable time after the contract to pay. He did not perform the contract and defendant No. 1 was in consequence compelled to sell some of the mortgaged lands to defendant No. 5 and to satisfy Nagappa's debt out of the sale-proceeds. There was, therefore, partial failure of consideration for the mortgage, Exhibit 42, and the subsequent payment of Rs. 200 to defendant No. 1 by the plaintiffs could not serve in law to undo the effect of that failure, so as to prejudice the rights of defendant No. 5. Those rights are as of the date on which the sale to him took place. The plaintiffs' contention, that the subsequent payment of Rs. 200 must be treated as a future advance made under Exhibit 42 so as to entitle him to tack on the amount to

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the sum of Rs. 200 paid according to its terms on the date of its execution, ignores the fact that there was no contract for any future advance in that deed. Nor can the plaintiffs hold defendant No. 1 personally liable for the sum of Rs. 200, the personal liability having become barred by limitation.

The next question is whether the lower Courts have rightly decreed that, in the event of defendants Nos. 1 to 3's failure to pay the decretal amount found due upon the mortgage, Exhibit 42, the plaintiffs should first proceed by way of sale against that portion of the mortgaged property which is in the hands of the former, and that they should proceed against the property purchased through Court by defendant No. 4, in case the proceeds of that sale are not sufficient to extinguish the decretal debt. The Subordinate Judge relied on section 56 of the Transfer of Property Act in support of this portion of the decree. That section applies only as between a seller and his buyer, not as between a mortgagee of the seller and the buyer. The District Judge relies on section 81.

Defendant No. 4 is now, no doubt, a purchaser at a Court-sale of some of the lands mortgaged under Exhibit 42. But before his purchase he had been a puisne mortgagee under Exhibit 60, and the doctrine of law is that a mortgagee, who purchases mortgaged property in execution of his decree for sale on his mortgage, becomes a purchaser by estoppel; that is to say, he purchases the interests of both the mortgagor and the mortgagee: *Kheeraj Jusrup v. Lingaya*⁽¹⁾. Defendant No. 4 is, therefore, entitled to say that he must be treated as a puisne mortgagee for the purposes of plaintiffs' mortgage, and that he must be allowed the benefit of section 81 of the Transfer of Property Act.

But then that section requires that the puisne mortgagee should have had no notice of the former mortgage. Here it is found by the Courts below that defendant No. 4 had notice. Section 81, therefore, cannot avail him.

Though the decree of the Court below cannot be supported on the ground of either of the sections mentioned, the Court has

(1) (1873) 5 Bom. 2 at p. 5.

power, under section 88 of the Transfer of Property Act, to pass in such a suit a decree for sale, ordering that, in default of the defendant paying as directed by the decree, the mortgaged property or a sufficient part thereof be sold. The lower Court's decree, directing the sale of the portion of the mortgaged property which is in the hands of the mortgagors (respondents Nos. 1 to 3) first, before the appellants can proceed against the property in the hands either of respondent No. 4 or respondent No. 5, must be upheld as being in substantial compliance with section 88, unless the appellants are able to satisfy the Court that the direction in question has prejudiced or is likely to prejudice their rights: *Appayya v. Rangayya*⁽¹⁾. No such complaint having been made in the lower Court of appeal, it should not be allowed in second appeal. On these grounds the decree must be confirmed with costs.

Decree confirmed.

R. R.

(1) (1908) 31 Mad. 419 at p. 423.

CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

*IN RE BABA YESHWANT DESAI.**

Criminal Procedure Code (Act V of 1898), sections 119, 200, 437—Security for good behaviour—Discharge by Magistrate—District Magistrate ordering fresh inquiry—Accused—Discharge—Interpretation.

A District Magistrate can, under section 437 of the Criminal Procedure Code, 1898, order fresh inquiry into the case of a person "discharged" by a Subordinate Magistrate under section 119 of the Code.

The phrase "any accused person" as used in section 437 is not confined in its application, to a person against whom a complaint has been made under section 200 of the Code. It includes a person proceeded against under Chapter VIII of the Code.

The term "discharged" is not defined in the Code, and there is no valid ground for departing in respect of it from the rule of construction that where

* Criminal Application for Revision, No. 58 of 1911.

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