

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

LAXMAN GANESH RAJENDRA (ORIGINAL PLAINTIFF), APPELLANT, v.
MATHURABAI NARAYAN GOVIND (ORIGINAL DEFENDANT), RESPONDENT.*

1913.

September 23

Transfer of Property Act (IV of 1882), section 101—Extinguishment of charge—Mortgagee having two charges—Purchase by mortgagee at the sale under the first mortgage—Second mortgage cannot be enforced.

G took a mortgage of certain lands in 1886. They were mortgaged to him again in 1894. In 1895, he sued on his first mortgage and obtained a decree. In execution of the decree the lands were sold subject to the mortgage of 1895 and purchased by G with the permission of the Court. In 1905, a partition took place between G's heirs, at which the certificate of sale went to the share of the defendant and the mortgage-deed of 1895 went to the share of the plaintiff. The plaintiff next sued the defendant to enforce the mortgage against her :—

Held, that the plaintiff could not sue the defendant on the mortgage, for after what had occurred, in 1895 G could have had no right to sue himself in a double capacity as mortgagee under the mortgage of 1894 and mortgagor under the sale-certificate of 1895, that is he could have had no cause of action against himself, and the plaintiff as his heir could have no higher rights.

SECOND appeal from the decision of C. E. Palmer, District Judge of Nasik, confirming the decree passed by Gulabdas Laldas, First Class Subordinate Judge at Nasik.

Suit on mortgage.

The lands in dispute were mortgaged by Mahadu to Govind on the 26th April 1886. They were again mortgaged by Mahadu to Govind in May 1894, for a period ending with 22nd June 1895.

On the 11th February 1895, Govind sued on his mortgage of 1886 and obtained a decree for sale. The lands were sold in execution of the decree, subject to the mortgage of 1894 and were purchased by Govind himself with the permission of the Court. The usual certificate of sale was issued to him in due course.

* Second Appeal No. 531 of 1912.

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On Govind's death, a partition took place between his grandson (the plaintiff) and the defendant, who was the widow of Govind's son Narayan who survived his father by a few months. At this partition the sale-certificate went to the share of the defendant, whilst the deed of mortgage dated 1894 went to the plaintiff's share. The defendant took possession of the lands.

In 1910, the plaintiff sued the defendant on the mortgage of 1894.

The lower Courts dismissed the suit on the ground that by reason of the purchase at the Court-sale the mortgage of 1894 had ceased to exist and all the rights had merged in Govind.

The plaintiff appealed to the High Court.

Gadgil, with *K. H. Kelkar*, for the appellant.

D. R. Patvardhan, for the respondent.

BEAMAN, J. :—The property in suit was first mortgaged by its owner to Govind and his two brothers in the year 1886. In 1894 the land was again mortgaged to Govind for Rs. 2,500. In the meantime it would appear that Govind's two brothers must have died because in 1895 Govind brought a suit upon the mortgage of 1886 and obtained a decree. The mortgage amount claimed was Rs. 2,000. Govind obtained permission to bid at the sale of the property, and also applied to the Court that that sale should be made subject to his own second mortgage of 1894. It appears that this application was at first rejected, but the sale-certificate shows that the property was sold subject to Govind's second mortgage of Rs. 2,500, and was purchased by Govind himself for Rs. 1,791. Govind is the grandfather of the present minor plaintiff. Govind appears to have had two sons, Ganesh, the father of the plaintiff, and Narayan, whose widow is the defendant in this suit. Ganesh predeceased Govind. The defendant's husband survived Govind by a short

time, both dying in the year 1904. Therefore, the family appears to have consisted before the death of Govind, of Govind, his son Narayan, and his grandson, the plaintiff. On the death of Govind the family consisted of Narayan and the plaintiff, and on the death of Narayan the ordinary result would have been that all the joint family property would have come into the sole and exclusive ownership of the minor plaintiff. But in 1905 it appears that a partition was sanctioned by the District Court of Nasik between the minor plaintiff and his aunt, the defendant, the latter taking in the proportion of 6/16ths. Speaking for myself I must record my surprise that any arrangement of that sort should have been come to and sanctioned by the District Court, since on the facts, which have been stated on appeal, it appears to me perfectly clear that the minor was entitled to the whole of the joint family property, whatever it may have been, and the defendant merely to maintenance.

Reverting to what happened in 1895, when Govind redeemed the first mortgage of 1886, it would appear that as a result of that sale and his purchase, the property, which was the subject-matter of that mortgage and his own subsequent mortgage of 1894, became his exclusive property, or that of the joint family of which he was a member.

It has been contended on behalf of the plaintiff that having regard to the terms of the sale-certificate, we are bound to hold that Govind kept alive the charge represented by his second mortgage of Rs. 2,500 upon this property in his own interest within the language and intention of section 101 of the Transfer of Property Act.

Now, when the partition of 1905 was effected a very curious procedure was adopted, as apparently the officer

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entrusted with making lots put up all the documents, which had the appearance of being valuable securities, in sixteen packets, of which the defendant drew six and the plaintiff ten. Very unfortunately, I think, one of those lots contained the sale-certificate of 1895, and the other the mortgage-deed of 1894. The former was drawn by the defendant, who has ever since been in actual possession of the property. The latter was drawn by the minor plaintiff, who now seeks to enforce it against the defendant, as though the relations subsisting between them were the ordinary relations of mortgagor and motgagee.

In our opinion, it is clear that after what has occurred in 1895, Govind could have had no right to sue himself in a double capacity as mortgagor under the mortgage of 1894, and mortgagor under the sale-certificate of 1895. We think that as he could have had no cause of action against himself, it is impossible that those who claim under him as heirs should have any cause of action against each other upon the same materials. For these reasons, we are of opinion, that the decision of the lower appellate Court is right and ought to be confirmed with all costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

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October 3.

BEHRAM RASHID IRANI (ORIGINAL DEFENDANT), APPELLANT, v. SORABJI RUSTOMJI ELAVIA (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), section 59—Equitable mortgage—Deposit of title-deeds of property situate in mofussil—Intention to create charge, proof of—Registration.

The plaintiff deposited with the defendant in Bombay title-deeds of his property situate at Nasik and borrowed a sum from the defendant.

* Second Appeal No. 236 of 1912.