

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dinobundhu Shaw Chowdhry v. Jogmaya Dasi and Others (Representatives of Nistarini Dasi deceased), from the High Court of Judicature at Fort William, in Bengal; delivered 30th November 1901.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD ROBERTSON.

LORD LINDLEY.

[*Delivered by Lord Lindley.*]

The question in this Appeal is whether a purchase of property by the Appellant at a sheriff's sale is subject to or freed from a prior lien claimed by the Respondents.

On the 5th October 1891 the property in question was attached by the Sheriff of Calcutta at the suit of a judgment creditor. At that time the property was subject to two mortgages created by the execution debtor viz. (1) a mortgage dated the 22nd June 1888 for 25,000 rupees bearing interest at 15 per cent. ; and (2) a mortgage dated 9th August 1890 for 3,000 rupees bearing interest at 24 per cent. The attachment in no way affected these mortgages. It affected the execution debtor's beneficial interest in the property attached ; in other words the equity of redemption and nothing else.

At the time of the attachment the mortgagor was making arrangements with one Mustaphi (the

predecessor of the Respondents in the present proceedings) for an advance of 40,000 rupees at 12 per cent. to enable him *i.e.* the mortgagor to pay off the two above-mentioned mortgages and for other purposes. The mortgagor was to obtain the deeds from the mortgagee and to hand them over to Mustaphi and give him a mortgage for his advance of Rs. 40,000 and interest at 12 per cent. It is obvious that if this arrangement had been carried out in English fashion by a skilful conveyancer the old mortgages would have been kept alive and transferred to Mustaphi and provision would have been made for reducing the interest and for securing the excess of the 40,000 rupees advanced over the amount due on the mortgages paid off. If this had been done the position of the execution creditor would have been unaffected in any way. He would have gained nothing by the payment off of the old mortgages, and he would have lost nothing either by that payment or by the further advance which would not have affected him (*see* Section 276 of the Code of Civil Procedure).

Transfers of mortgages are apparently not so common in India as in this country; and what was done was that the mortgagor paid off the two old mortgages, took a reconveyance to himself and then executed a fresh mortgage bond for 40,000 rupees to Mustaphi. This mortgage bond is dated 7th October 1891 and is set out in the Record at page 31. The bond recited the two old mortgages and the loan of 40,000 rupees to pay them off and charged the property with that amount and interest at 12 per cent. The bond stated that the property was not subject to any attachment by the Court and if it should appear that there was any charge on the property then the 40,000 rupees and all interest should become immediately payable. The bond also contained a clause as follows:—"I promise that after

“ repaying the money due on the aforesaid two  
 “ mortgages I shall cause a reconveyance of  
 “ those properties to be executed and registered  
 “ and shall make over to you the mortgage deeds  
 “ which I shall get back.”

This arrangement was carried out; the 40,000 rupees were advanced; the two old mortgages were paid off; the property comprised in them was reconveyed to the mortgagor; he got the deeds and handed them to Mustaphi. This was done on the 8th October 1891 the day after the mortgage bond was executed. Probably at this time the mortgagor was not aware of the attachment.

Pausing here for a moment nothing can be clearer than that the intention of the parties to this transaction was to give to Mustaphi a charge for 40,000 rupees on the property in question in priority to all other charges if any. The property being represented as unincumbered the statement in the judgment of the High Court that it was intended to keep the two old mortgages alive is open to criticism. But it does not affect the substance of the case. The Respondents were intended to have the first and only charge and it is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sheriff's sale.

Subsequently to this transaction viz. in July 1892 part of the property mortgaged was sold under the execution to the Appellant. As will be shown presently he was not a purchaser for value without notice of the Respondents' security. He claimed however to be entitled to the property bought free from all incumbrances. Thereupon Mustaphi having died this suit was instituted by his widow claiming a lien for the full amount of their mortgage bond. She died pending the suit

which was continued by the Respondents and they obtained a decree in their favour. On an appeal this decree was affirmed but was modified without objection on the part of the Respondents by limiting their lien to the amount actually applied in paying off the two old mortgages. From this decree the Appellant has again appealed.

Counsel for the Appellant contended that the Appellant had no notice of the real facts when he bought; and that the only notice he had was that conveyed by the proclamation referred to in the official sale certificate of the Registrar set out in the Record at p. 69. According to this certificate notice was given of the old mortgage of the 22nd June 1888 and of its payment off and of the mortgage for 40,000 rupees on the 7th October 1891 two days after the attachment. Nothing is said about anything more. The certificate was apparently given pursuant to Sect. 316 of the Civil Procedure Code. It appears from the evidence that the Appellant was distinctly informed of both mortgages and of their payment off out of the Rs. 40,000 advanced by Mustaphi and of his widow's claim to a lien on the property. Both the Subordinate Judge and the High Court held that the Appellant had full knowledge of the real facts of the case when he bought the property, and their Lordships are of the same opinion.

The next and main contention raised by counsel for the Appellant was that the two old mortgages were extinguished by the mode in which they were dealt with. The answer given in both Courts to this contention was that so to hold would be to defeat the obvious intention of the parties to the transaction. Their Lordships have already stated that this is the conclusion at which they have themselves arrived.

The law upon this subject and its application to transactions in India will be found in *Mohesh Lal v. Mohunt Bawan Das* L.R. 10 Ind. App. 62 and *Gokuldoss Gopaldoss v. Rambux Seochand* L.R. 11 Ind. App. 126. The Subordinate Judge has summed it up accurately thus "When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot." Here the mortgagor was paying off his own debts but he was doing so for the benefit of Mustaphi and in performance of the agreement with him.

As already stated the intention of the parties in this case was to give Mustaphi a first charge on property represented to be unincumbered and the Appellant knew it.

The last point urged by the Appellant's counsel was that whatever the intentions of the parties may have been, Section 276 of the Civil Procedure Code rendered the mortgage for 40,000 rupees wholly void as against the Appellant. So to construe this section would be quite wrong. So far as the mortgage for 40,000 rupees prejudiced the execution creditor it is void as against him; but the section does not render void transactions which in no way prejudice him; and to hold the mortgage void so as to confer upon him a benefit which no one ever intended he should have is entirely to ignore the object of the section and to pervert its obvious meaning. It is impossible to hold that the effect of that section is to give an

execution creditor an unincumbered fee simple instead of an equity of redemption against the intention of the parties.

Their Lordships will therefore humbly advise His Majesty to dismiss this Appeal and the Appellant must pay the costs of it.

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