(1912) 09 CAL CK 0014

Calcutta High Court

Case No: None

Dalip Narayan Singh and Another		APPELLANT
	Vs	
Chait Narayan Singh and Others		RESPONDENT

Date of Decision: Sept. 3, 1912

Acts Referred:

- Transfer of Property Act, 1882 - Section 79, 80

Citation: 17 Ind. Cas. 927

Hon'ble Judges: Beachcroft, J; Ashutosh Mookerjee, J

Bench: Division Bench

Judgement

1. These appeals are directed against two decrees in cross suits for the enforcement of mortgage securities. On the 20th April 1908, four persons, who maybe briefly described as the mortgagors, executed a mortgage security in favour of Dalip Narayan Singh and Balmiki Prasad for a sum of Rs. 15,539. The consideration for the mortgage comprised judgment-debts due from the mortgagors to the mortgagees, and also arrears of rent due in respect of leases granted by the mortgagees to the mortgagors. The mortgagees have joined as defendants not merely the mortgagors, but also junior incumbrancers. One of the defendant is Harak Narayan Singh, who claims under a mortgage-bond executed in his favour by the mortgagors on the 12th. October 1900. Prima facie, he is a prior incumbrancer, and, consequently, not a proper party to the mortgage suit, but the plaintiffs have joined him as a defendant as they claim priority against him. The suit was commenced on the 11th October 1909, and Harak Narayan died shortly afterwards, whereupon his infant sons were brought on the record. On the 11th April 1910, they filed their written statement wherein they repudiated the claim to priority set up by the plaintiffs. Meanwhile, on the 15th November 1909, they had instituted a suit to enforce their security of the 12th October 1900, and joined therein as defendants the mortgagees of the 20th April 1908, as puisne incumbrancers. The latter filed their written

statement on the 19th April 1910, and claimed priority on the basis of three securities of the 14th June 1900, 28th September 1900 and 27th April 1903, which they contended had not only been not superseded but actually kept alive by the mortgage of the 20th April 1908. The substantial question in controversy in the two cross suits, consequently, was whether the mortgage of the 20th April 1903, is entitled to priority over the mortgage of the 12th October 1900, and if so to what extent. The Subordinate Judge has negatived the claim for priority and has not only given mortgage decrees to the two sets of mortgagees, but, has, in the suit by the mortgagees of the 12th October 1900, given them a personal decree against the mortgagees of the 20th April 1908. These mortgagees have now appealed to this Court, and on their behalf the decrees of the Subordinate Judge have been assailed OK two grounds, namely, first that the security of the 20th April 1903, is entitled to precedence over the security of the 12th October 1900, and, secondly, that a puisne mortgagee, as holder of a fragment of the equity of redemption, cannot be held personally responsible for the re-payment of the mortgage-debt which is primarily payable by the mortgagors.

2. To test the soundness of the first contention, reference must briefly be made to some of the earlier transactions between the parties. On the 28th September 1900, the mortgagors took a lease from the mortgagees of a half share of a property Balibigha, for a term of nine years, on an annual rental of Rs. 1,500. On the same date, the mortgagors executed a security bond to secure the due performance by them of their engagement to pay rent. These two documents were presented for registration on that very date and were actually registered on the 11th October 1900. The lessees made default in payment of rent. The consequence was that the landlords sued to recover arrears of rent, and joined as defendants several persons, among them Harak Narayan Singh, the mortgagee under the bond of the 12th October 1900, on the allegation that they had acquired an interest in the properties given by the lessees by way of security. The suit as framed was not merely a suit for rent but also a suit for enforcement of the security given by the lessees. A decree was made in favour of the landlords on the 13th March 1907. The decree declared the prior title of two of the defendants, but not of Harak Narayan Singh. On the 24th May 1907, the landlords obtained another decree for rent. Under these two decrees, the lessees became liable for a considerable sum to their landlords. On the 27th April 1903, the mortgagees had granted another lease of a property Mahespara to the mortgagors for a period of nine years at an annual rent of Rs. 1,654. On the same date, the lessees executed a security bond to the lessors for the due payment of the rent. On the 20th. April 1903, it was found that a considerable sum of money was due to the lessors under the two decrees already mentioned and farther arrears which had accrued due. The lessees accordingly executed the mortgage-bond in suit for sum of Rs. 15,539; the mortgage lien created under the securities of the 28th September 1900 and 27th April 1903, were kept alive in express terms. The mortgagees of the 20th April 1908, now contend that they are entitled to fall back

upon the security of the 28th September 1900, to the extent of their debt secured thereby. They further contend that this question is res Judicata by virtue of the decision in the rent suit given on the 13th March 1907, at any rate, to the extent of the amount covered by that decree. The two questions, therefore, which require examination are, first, what is the true effect of the decree of the 13th March 1907, and, secondly, is the security bond of the 28th September 1900, entitled to priority over the mortgage of the 12th October 1900.

3. With respect to the first of these questions, it is plain that the decision of the 13th March 1907, operates as res judicata. The then plaintiffs claimed priority in respect of their security of the 28th September 1900 as against Harak Narayan Singh, the mortgagee of the 12th October 1900 From the judgment in that suit, it is not clear whether Harak Narayan Singh claimed priority in respect of his mortgage, but it is immaterial whether he did so or not. If he did resist the claim and was unsuccessful, he is bound by the decision; if he did not resist the claim, inspire of the opportunity afforded to him, he is equally bound by the decision. In support of this view, reference may be made to the cases of Sunjiram, Marwari v. Barhamdeo Persad 1 C.L.J. 337; Srigopal v. Pirthy Singh 29 I.A. 118 (P.C.) : 24 A. 429 : 4 Bom. L.R. 827 : 6 C.W.N. 889 and Muhammad Ibrahim v. Ambika 15 C.L.J. 41l : 39 I.A. 68 : 39 C. 527 : 14 Ind. Cas. 496 : 11 M.L.T. 265 : (1912) 1 M.W.N. 367 : 9 A.L.J. 332 : 14 Bom. L.R. 280 : 16 C.W.N. 505 : 22 M.L.J. 468 which reverses upon this point the decision in Baijnath Singh v. Mahomed Ibrahim Hossein 2 C.L.J. 574. As, however, the general question of the priority of the security bond of the 28th September 1900, over the mortgage of the 12th October 1900, was not directly put in issue, the effect of that decision will be deemed conclusive only in respect of the sum then in controversy, for the Court will not extend the doctrine of what has been called constructive res judicata beyond the subject-matter of the particular litigation: Surjiram Marwari v. Barhamdeo Prasad 1 C.L.J. 337. The learned Vakil for the respondents, the mortgagees of the 12th October 1900, contended that as a decree had been obtained on the security bond, the security had merged in the decree and could no longer be set up against a puisne incumbrancer. This contention is manifestly fallacious, and is opposed to the decision in Bibijan Bibi v. Sri Sachi Bewah 31 C. 863: 8 C.W.N. 684 (F.B.) and Surjiram Marwari v. Barhamdeo Prasad 2 C.L.J. 202 at p. 214. We hold, therefore, that in respect of the sum covered by the decree of the 13th March 1907, the mortgagees of the 20th April 1908, are entitled to priority over the mortgagees of the 12th October 1900, to the extent defined by that decree. We add this important qualification, because the decree directed the realisation of the decretal amount by the sale of the lease-hold interest in the first instance, and by the sale of the security properties only in the event of a deficit. Consequently, the market-value of the leasehold interest on the 13th March 1907, must be determined by the Court below and deducted from the decretal amount. The balance alone will be deemed charged upon the security properties. That balance, again, has to be distributed proportionately upon the two properties covered by the security; when this has

been done, the mortgagees of, 1908 will be entitled to claim priority against the mortgagees of 1900 in respect of the sum so determined.

4. With respect to the second question raised, whether apart from the question of res judicata, the security bond of the 28th September 1900, is entitled to priority over the mortgage of the 12th October 1900, the answer must depend upon the true construction of Sections 79 and 80 of the Transfer of Property Act. At the date of the execution of the mortgage bond of the 12th October 1900, no instalment of the rent had fallen due. Whatever debt, therefore, became ultimately secured under the bond of the 28th September 1900, accrued due after the 12th October 1903. Now, Section 80 of the Transfer of Property Act provides that, except in the case provided for by Section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance. Section 79 provides that if a mortgage, made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage. These provisions deliberately depart from the rule laid down by the House of Lords in Hopkinson v. Rolt (1861) 9 H.L.C. 514 : 74 L.J. Ch. 468 : 7 Jur. (N.S.) 1209 : 5 L.T. (N.S.) 90 : 9 W.R. 900 : 131 R.R. 313 and Bradford Banking Co. v. Briggs (1886) 12 A.C. 29 : 56 L.J. Ch. 364 : 56 L.T. 62 : 35 W.R. 521 and repeatedly accepted as good law in Ireland and America; In re Macnamara''s Estate (1883) 13 L.R. Ir. 158, In re Keogh''s Estate (1895) ILR 201; Shirras v. Caige (1812) 7 Cranch 74. Assistance, therefore, cannot be derived from an examination of the English authorities on the subject; and the answer to the question raised must depend upon the construction of Sections 79 and 80 of the Transfer of the Property Act. The general rule laid down is that a mortgagee, making a further advance, shall not in respect of that advance acquire any priority as against an intermediate mortgagee; but this is subject to the exception that the intermediate mortgagee who has notice of the prior mortgage is postponed in respect of advances subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded. Let us test the security bond of the 28th September 1900, from these points of view. The first question is, does it express the maximum amount secured thereby, and the second question is, whether the mortgagee of the 12th October 1900, had notice of the prior security. With regard to the first question, it cannot be disputed that the security bond does not explicitly express the maximum amount secured, though from the recitals the amount may be calculated; but further consideration of the first question is needless, because, upon the second question, it is clear that the puisne incumbrancer had no notice of the earlier security. The security bond was presented for registration on the 28th September 1900,

apparently immediately before the Durga Puja Holidays, and was not registered till the 11th October, after the office had re-opened. The mortgage bond of the 12th October 1900, was presented for registration and registered on that very date. Even if, therefore, the view taken in the cases of Lakshmandas v. Dasrat 6 B. 168; Dina v. Nathu 26 B. 538 : 4 Bom. L.R. 253; Janki Prasad v. Kishen Dat 16 A. 478 : A.W.N. (1894) 151 and Nand Kishore v. Anwar Husain 30 A. 82 : A.W.N. (1908) 13 : 5 A.L.J. 91 : 3 M.L.T. 185 which is contrary to the view taken in Inderdawan Pershad v. Gobind Lal Chowdhry 23 C. 790; Magniram v. Mehdi Husain 31 C. 95; 8 C.W.N. 20; Ram Narain Sahoo v. Bandi Pershad 31 C. 737; Preonath Chattopadhya v. Ashutosh Ghose 27 C. 358 : 4 C.W.N. 490 namely, that registration is equivalent to notice, were adopted, it could not be said that the subsequent mortgages had notice of the prior mortgage; before the puisne incumbrancer negotiated for the advance of his money, he could not have discovered by the most diligent search in the registration office, the fact of the prior mortgage. There is also no reliable evidence to show that the puisne incumbrancer had actual knowledge of the prior mortgage. Under these circumstances, we must hold that the security bond of the 28th September 1900, is not entitled to priority over the mortgage of the 12th October 1900, except to the extent that the matter is res judicata by virtue of the decree of the 13th March 1907 as already explained. The first contention of the appellants must, consequently, be allowed in part.

5. To test the soundness of the second contention, namely, that in the suit by the mortgagee of the 12th October 1900, no personal decree can be made against the mortgagees of the 28th September 1900, we have only to remember that the personal covenant was by the mortgagors alone and does not bind other holders of the equity of redemption. Jumna Das v. Ram Outer Pandey 15 C.L.J. 68 : 39 I.A. 7 : 34 A. 63 : 13 Ind. Cas. 304 : 16 C.W.N. 97 : 11 M.L.T. 6 : 9 A.L.J. 37 : (1912) 1 M.W.N. 32 : 14 Bom. L.R. 1 : 21 M.L.J. 1158. The second contention of the appellants must, therefore, prevail.

6. The result is that these appeals must be allowed, the decrees made by the Subordinate Judge discharged, and the cases remanded to him in order that accounts may be taken on the principle explained in this judgment, and after determination of such other questions as may be incidental thereto. The materials on the record are not sufficient to enable this Court to make the final decree between the parties. There will be no order for costs in these appeals, as the appellants have been only partially successful in their contention.