

(1927) 07 AHC CK 0022
In the Allahabad High Court

Badri Prasad

APPELLANT

Vs

Sri Thakurji Maharaj Birajman Mandir

RESPONDENT

Date of Decision : 15-07-1927

Acts Referred:

Citation : (1927) 07 AHC CK 0022

Hon'ble Judges : Kendall, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Kendall, J.—This appeal arises from a suit in which the plaintiff-appellant Munshi Badri Prasad, sued to compel the defendant respondent 1, Sri Thakurji Maharaj, to pay a sum of Rs. 1,400, together with interest said to be due on account of a mortgage executed in favour of the appellant in 1909; or, in the alternative, if the respondent should fail to pay that amount, that the appellant should be put in possession of the property in suit. The facts of the case are quite simple and may be briefly stated. On the 25th August 1909 Munni Lal mortgaged his zamindari to the appellant. On the 26th October 1911, he gifted the greater part of the same property to the respondent Sri Thakurji Maharaj, the idol of a temple of which the donor made his minor son Raja Ram, the manager. Mutation in favour of the temple was effected in 1915. The same year the appellant-mortgagee filed a suit for sale of the mortgaged property, but did not make Sri Thakurji or the temple a party to the suit. He obtained a preliminary decree in 1915 and a final decree on the 28th November 1918, and, in execution of that decree he himself purchased the mortgaged property. It may be mentioned that Raja Ram, the son of the mortgagor, who was the manager of the temple, was made a party to the mortgage suit in his personal capacity, but not as manager of the temple. In 1923 Raja Ram sued for a declaration that he was not bound by the mortgage decree, the mortgage having been executed without legal necessity, etc., but his suit was dismissed. Later in the same year the appellant-mortgagee filed the present suit which, as will be seen, is practically one for

foreclosure against Sri Thakurji.

2. The trial Court gave the plaintiff an unconditional decree for possession of the property at present in possession of Sri Thakurji but the lower appellate Court dismissed the suit on the ground that Sri Thakurji had not been made a party to the mortgage suit and that the mortgage itself had become barred by limitation.

3. This finding has been attacked in second appeal on two grounds. The first of these was that Sri Thakurji had been substantially represented in the mortgage suit by Raja Ram, and that the only privilege that Sri Thakurji could have claimed in the mortgage suit was the option of redeeming the mortgage, which option the plaintiff-appellant proposed to extend to him in the present suit. In the trial Court it was held that the failure to describe Raja Ram as the manager of the temple was merely a misdescription and that probably the plaintiff had made an honest mistake. Had the omission to make Sri Thakurji a party to the mortgage suit been merely a misdescription of one of the defendants, it might have been possible to uphold the decision of the trial Court. It is quite clear, however, that it was not merely a misdescription of one of the defendants. The fact of omitting Sri Thakurji from the array of defendants was that the deed of gift in favour of Sri Thakurji was never before the Court, and its bearing on the rights of the parties was not considered. Under Order 34, Rule 1, Sch. 1, Civil P.C., it is necessary for a mortgagee in bringing a suit relating to a mortgage to implead all persons having an interest either in the mortgage security or in the right of redemption, and Sri Thakurji, should certainly have been impleaded. The law does not even prescribe that the mortgagee must have notice of the interest of the party concerned, but as a matter of fact in the present case it can hardly be doubted that the mortgagee had notice of the gift to Sri Thakurji, for not only was the deed of gift or endowment registered (this alone, according to the decision of their Lordships of the Privy Council in *Tilakdhari Lal v. Khedan Lal* AIR 1921 P.C. 112 might not be sufficient to amount to due notice), but mutation had been effected in Sri Thakurji's name; and, as the transfer was a gift with possession, and not merely a simple mortgage, the mortgagee must in the ordinary course have been aware of the existence of the deed of gift. "Whether notice was given or not to the mortgagee, however, I have no doubt that the learned Judge was quite right in holding that Sri Thakurji was not substantially represented in the mortgage suit, and the result of this omission is that Sri Thakurji is not affected by the proceedings in the mortgage suit in any way.

4. In the second place, although it is admitted on behalf of the appellant that he would be barred by limitation if he wished to file a suit against Sri Thakurji on the basis of his mortgage deed of 1909, yet it is claimed that, as an auction purchaser under his own mortgage decree, he can still use his mortgage as a screen against the title of Sri Thakurji and compel a redemption. In support of this contention two decisions have been referred to. In the case of *Ram Prasad v. Bihari Das* [1904] 26 All. 464 it was held that the auction-purchaser in a mortgage decree could compel the auction-purchaser in a simple money decree,

who had obtained possession of the property before the purchaser in the mortgage decree, to redeem the mortgage. The important distinction between that case and the present, however, is that at the time of the suit the mortgage was still alive. This decision, therefore, is of no help to the appellant. The other decision relied on is the case of Babu Lal v. Jalakhia [1917] 14 A.L.J. 1146. This is a decision of a Bench of this Court dated 1916, and it certainly supports the appellant's argument. The facts are not exactly similar to those of the present suit, but the same principles are involved, though the defendant in Babu Lal v. Jalakhia [1917] 14 A.L.J. 1146 was an auction-purchaser in a decree on a puisne mortgage instead of a donee. The decision of their Lordships was that, although the prior mortgage was barred by limitation and although the plaintiff had not impleaded the puisne mortgagee in his suit, yet the necessary parties were now before the Court and the duty of the Court was simply to work out the equities between them; and they did so by ordering the purchaser in the decree of the puisne mortgagee to redeem the prior mortgage, though the period of limitation had expired before the plaintiff's suit was instituted. For the respondents only one decision has been referred to, namely that in the case of Hargu Lal v. Govind Rai [1897] 19 All. 541. This is the decision of a Full Bench, but it only shows that the holder of a simple mortgage who has got a decree and proceeded to execute it, and to purchase the mortgaged property himself, may not in a suit for possession eject the vendee, for the reason that his mortgage gives him no right to present possession. This does not cover the facts of the present suit in which the plaintiff sues not for present possession, but for a decree to compel the donee to redeem the mortgage.

5. There are two important decisions on the question at issue which, curiously enough, were not referred to in arguments before me. The well-known ruling of their Lordships of the Privy Council in the case of Sukhi v. Ghulam Safdar Khan AIR 1922 P.C. 11 shows that in somewhat similar circumstances the owner of property who is in the rights of the first mortgagee and also of the original mortgagor by sale under the first mortgage, may, at the suit of the puisne mortgagee who is not bound by the sale or decree on which it proceeded, set up his first mortgage as a shield. I can find nothing, however, in this decision to show that it was the intention of their Lordships to allow a mortgage which has become barred by limitation to be so used as a shield. The second important decision on which the respondent might certainly have relied is a recent one of a Bench of this Court, namely the case of Lachmi Narain Das and Another Vs. Hirdey Narain and Others In this the earlier decision of 1916 in Babu Lal v. Jalakhia [1917] 14 A.L.J. 1146 is expressly dissented from. Previous decisions on the point are reviewed at some length in this judgment, which I feel myself justified in following. In the present case it is true that the only right that Sri Thakurji would have had in the mortgage suit, would have been the option of redeeming the mortgage. What the plaintiff-appellant seeks in the present suit, however, is not to permit, him to exercise an option, but to compel him to redeem the mortgage. In other words, after neglecting the provisions of the law

to make Sri Thakurji a party to his mortgage suit, he asks to be put in a still stronger position on account of his mistake than he would have occupied if he had obeyed the provisions of Order 34.

6. The result is then that I agree with the lower appellate Court in holding that the appellant's mortgage of 1909 is barred by, limitation, though the learned Judge, apparently by inadvertence, suggests that the date from which limitation would run would be the 26th October 1911 when the deed of gift was executed, It does not appear to me that the execution of this deed would start a fresh period of limitation for the mortgage but this makes no difference in the present suit as in either case the mortgage is barred by limitation. The appeal is therefore dismissed with costs.