

(1887) 02 AHC CK 0005
In the Allahabad High Court

Beni Ram

APPELLANT

Vs

Jhuna

RESPONDENT

Date of Decision : 24-02-1887

Acts Referred:

Citation : (1887) ILR (All) 439

Hon'ble Judges : John Edge, J;Brodhurst, J

Bench : Division Bench

Final Decision : Allowed

Judgement

John Edge, Kt., C.J.—In this action, the plaintiff, who had sold a shop to persons called Earn Chand and Raghubar Dial, claimed to have a mortgage on which the defendant had previously brought an action and obtained a decree against Earn Chand and Raghubar Dial, set aside, and the decree for the enforcement of lien on that mortgage against this shop also set aside, or to have the shop exempted from the effect of that decree. Now in the previous action, the plaintiff's--the present defendant's--claim was as mortgagee. In that action, his mortgage was established, and a decree was given as against the shop in question and Earn Chand and Raghubar Dial, who were in possession and apparently the owners of the shop. Before that action, the present plaintiff had sold the shop, or any interest he had in it to Earn Chand and Raghubar Dial, and he had covenanted with them that he had a good title. In the present action, to which Earn Chand and Raghubar Dial were not parties, the plaintiff claims to set aside that mortgage and the decree obtained in the previous action on the ground that the mortgage, the subject-matter of the previous action, was fraudulent and did not bind him, and on the ground that, as he was liable on his covenant, he was entitled to maintain this action.

2. The first Court dismissed the claim, on the ground that the plaintiff had no interest, and, for the reasons to be stated hereafter, I think the first Court was right. The Lower Appellate Court went into the matter and came to the conclusion that the mortgage was a fraudulent one, and that the plaintiff was

entitled to maintain, u/s 39 of the Specific Belief Act, the present action.

3. We must see how far the latter conclusion was justified. That section gives to any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument if left outstanding may cause him serious injury, a right to bring an action for the cancellation of the instrument. With regard to this, my first observation is that the instrument in question had merged in the decree, and practically this action can only be maintained if Mr. Chakarbati could satisfy us that his client was entitled to have the decree in the prior suit set aside. The present plaintiff has no interest in the property in question, he parted with all his interest before the suit, and it is admitted that the hypothecation bond cannot be enforced as against the plaintiff himself. Under these circumstances, can this action be maintained? I am clearly of opinion that the plaintiff has shown no interest which would entitle him to maintain this action. He has shown no authority for the proposition that he can question the decree which was passed in a properly instituted suit in a previous litigation, and against parties interested at the time. The conclusion I come to on this point is that the plaintiff had no interest, and consequently cannot maintain his action; and in my opinion this appeal must be allowed, and the judgment of the first Court affirmed with costs.

Brodhurst, J.

4. I am of the same opinion.