

(1916) 02 AHC CK 0003
In the Allahabad High Court

Bohra Phul Chand and Another

APPELLANT

Vs

Roshan Lal and Others

RESPONDENT

Date of Decision : 29-02-1916

Acts Referred:

Citation : AIR 1916 All 278 : 36 Ind. Cas. 703

Hon'ble Judges : Tudball, J; P.C. Banerji, J

Bench : Division Bench

Judgement

1. This appeal arises out of, a suit brought by the plaintiffs on the basis of three mortgages dated respectively the 1st of March 1877, the 5th of July 1878, and the 15th of September 1881. The first two mortgages were in favour of Nand Ram, and Jogini Das, the third was in favour of Jogini Das and Musammat Ram Kunwar, Nand Ram and Bhawani Das were brothers being the sons of Behari Lal. Jogini Das is the son of Bhawani Das; Nand Ram's widow was Musammat Ram Kunwar, Nand Ram left a son Ram Dal, whose adopted son is Lachhmi Narayan. Musammat Isa is the widow of Ram Lal, The plaintiffs alleged that the family of Nand Ram and Jogini. Das was joint, that under a partition which subsequently took place between the members of the family the three bonds in suit, were allotted to the share of Jogini Das and, that Jogini Das sold them to the plaintiffs on the 15th of January 1908. It appears that there were two prior mortgages of the 18th of May 1876 executed by the mortgagor Mohan Lal in favour of Basdeo Sahai and Jugal Kishore. The first was a usufructuary mortgage for Rs. 3,000 under which 2 biswas and 13 biswansis of Mauza Mahamai Salabatnagar was mortgaged with possession. The same property was mortgaged to the same mortgagees under a simple mortgage for Rs. 1,000. A suit was brought upon the simple mortgage and a decree was obtained. To that suit Nand Ram and Jogini Das were not parties. In execution of the decree obtained upon the simple mortgage the equity of redemption in Mauza Mahamai Salabatnagar was sold by auction and purchased by Tulshi Prasad, who redeemed the usufructuary mortgage and remained in possession. The defendants second party are the representatives-in-interest of Tulshi Prasad. It was contended on their behalf that

the plaintiffs could not maintain their suit against the property mortgaged without redeeming the prior mortgages made in 1876. The Court below has decreed to the plaintiffs only half of the amount paid by them, on the ground that Nand Ram being one of the mortgagees, a succession certificate ought to have been obtained in respect of these mortgages and this not having been done the plaintiffs could not recover Nand Ram's share of the mortgage-debt. That Court has held, as regards the two prior mortgages of 1876, that the plaintiffs must pay to the defendants of the second party not only Rs. 3,000 due upon the usufructuary mortgage, but also Rs. 22,843 due upon the simple mortgage, calculating interest at the contractual rate up to the 8th of July 1910, the date upon which the present suit was brought. The plaintiffs have preferred this appeal and they challenge the decision of the Court below as regards the portion of the claim which has been disallowed, and also as regards the rate of interest allowed to the defendants of the second party upon the simple mortgage of the 18th of May 1876. As regards the first contention, namely the dismissal of one-half of the claim, we think that the Court below is wrong. The allegation made on behalf of the plaintiffs was that Nand Ram and Jogini Das formed a joint family and that the loans granted under the three mortgages in suit were granted out of joint family funds. If this is so, no succession certificate was necessary. On this point we have first of all the evidence of Jogini Das. He stated in his deposition that Nand Ram remained joint with him and after his death his son Ram Lai and he continued to be joint till Sambat 1915. He further deposed that the consideration of the bonds was paid out of joint funds belonging to the family. The Court below based its judgment upon a statement made by Jogini Das in his cross-examination where he said, after stating that Nand Ram and he used to carry on money dealings jointly, that "whatever was acquired, was acquired by Nand Ram." He clearly meant that Nand Ram managed the affairs and thus the funds of the joint family were acquired. In the next sentence in his deposition Jogini Das, says "the funds now in existence are of the time of Nand Ram and Bhawani Das"; that is to say, the funds belonged jointly to Nand Ram and Bhawani Das, the father of Jogini Das. The learned Subordinate Judge, therefore, was, in our opinion, wrong in assuming that Nand Ram was separate and that the plaintiffs were not entitled to claim one-half of the amount of the three mortgages in suit. Furthermore, the legal representatives of Nand Ram are parties to the suit and they have not put forward any claim to the three mortgages. On the contrary a document was executed by Lachhmi Narayan and Musammat Isa on the 16th of March 1910, in which they stated that the bonds in dispute were allotted to the share of Jogini Das and that they themselves had no interest in the bonds. There was, therefore, no justification for disallowing the claim in regard to one-half of the amount claimed and in this respect the decree of the Court below must be varied.

2. As regards the amount due to the defendants of the second party, there is no controversy as to the Rs. 3,000 due upon the usufructuary mortgage of the 18th of May 1876. As regards the simple mortgage it is contended on behalf of the

plaintiffs that interest ought to have been allowed not at the contractual rate but at the rate at which interest was awarded under the decree obtained on the basis of the mortgage by the mortgagees Basdeo Sahai and Jugul Kishore. This contention is, in our opinion, untenable. Jogini Das and Nand Ram not having been made parties to the suit brought upon the simple mortgage of the 13th of May 1876, the decree obtained on the basis of that mortgage is not binding, on them and they are entitled to redeem that mortgage irrespective of the fact that a decree was obtained upon it and property sold in execution of the decree so obtained. So far as the subsequent mortgages are concerned, the decree must be deemed as if it did not exist. The only basis upon which the simple mortgage of 1876 can be redeemed is that of accounts taken on foot of that mortgage, taking into consideration the contractual rate of interest. This was the principle laid down by this Court in the case of Dip Narain Singh v. Hira Singh 19 A. 527 : A.W.N. (1897) 147, which was approved in many subsequent cases. It is true that the suit in that case was a suit in which redemption was sought upon payment of the amount of consideration paid by the purchaser under the prior mortgage, but the principle laid down in the case equally applies to a case like the present. The plaintiffs can only redeem the prior mortgage as if no decree existed and on the basis of the terms of that mortgage. They are, therefore, liable to pay the contractual rate of interest as provided in that mortgage. The Court below, in our opinion, was right in awarding to the defendants of the second party Rs. 22,843, oil account of the simple mortgage of the 18th of May 1876. The result is that the appeal should prevail to this extent that the plaintiffs should get a decree for the full amount of their claim, but in other respects the appeal must fail. There is an objection on behalf of the respondents-defendants of the second party to the effect that the Court below ought to have allowed them their costs. We think that this objection is valid. As they succeeded in the Court below in proving the full amount which they alleged to be due to them, they ought to have been allowed their costs in that Court. We accordingly vary the decree of the Court below by awarding to the plaintiffs the full amount claimed by them to be recovered by sale of the mortgaged property, provided that the plaintiffs do pay the amount due to the defendants second party as found by the Court below. We extend the time for payment by the representative of the mortgagor to six months from this date. In the event of such payment not being made, the plaintiffs will have four months after the expiry of the six months for payment of the money due to the defendants of the second party and upon such payment being made, the said defendants will have four months more to pay up the consolidated sum due to the plaintiffs, namely the amount paid by them to the defendants second party and the amount due to them under this decree on the basis of their mortgages. In the event of no payment being made, the property will be sold. In the event of the plaintiffs not redeeming the defendants of the second party, the suit for sale of the property purchased by these defendants will stand dismissed. We award to the defendants second party their costs in the Court below as against the plaintiffs and they will also get their costs of this appeal from the plaintiffs. The plaintiffs will get their full costs in

both Courts as against the defendants first party and by sale of the mortgaged property along with the amount of their mortgage. The costs in this Court will include fees on the higher scale. In all other respects we affirm the decree of the Court below.