

(1907) 11 AHC CK 0006
In the Allahabad High Court

Dwarka Prasad and Others

APPELLANT

Vs

Ambika Partap Singh and Dalel Kunwar and Others

RESPONDENT

Date of Decision : 20-11-1907

Acts Referred:

Citation : (1908) ILR (All) 95

Hon'ble Judges : John Stanley, C.J.; William Burkitt, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Stanley, C.J. and William Burkitt, J.—This appeal is connected with F.A. No. 154 of 1905, and arises out of a suit brought by the plaintiff to enforce payment of the amount alleged to be due on a mortgage of the 17th of January 1894. By this mortgage Musaminat Dalel Kunwar, the widow of one Chaudhri Gandharp Singh, alleging herself to be the owner in possession, hypothecated a ten biswas share in four villages to secure a principal sum of Rs. 7,000 in favour of one Shukul Ganga Prasad deceased, the father of the four plaintiffs. The amount claimed in the plaint is no less a sum than Rs. 38,917, the interest claimed being Rs. 32,556-1-1. The mortgaged property formed part of the estate of Chaudhri Gandharp Singh, who died on the 23rd of December 1891, leaving the defendant Ambika Partap Singh; his adopted son and heir, and also his widow Musammat Dalel Kunwar him surviving. A claim to this estate was set up on behalf of Bindraban alias Ambika Partap Singh, the grandson of the mortgagee, and son of the plaintiff Shukul Dwarka Prasad. He was put forward as being the adopted son of Gandharp Singh, and was strongly supported in this claim by Dalel Kunwar. Thereupon the defendant Ambika Partap Singh instituted a suit in forms pauperis in the Court of the Subordinate Judge of Mainpuri for recovery of possession of the estate of Gandharp Singh, and his claim was decreed. on the 21st of March 1890. An appeal to the High Court was preferred, but the decree of the Court below was upheld on the 12th of May 1899 and on the 12th of August following he obtained possession of the estate. It was during the pendency of this suit that

Musammat Dalel Kunwar, who supported the false claim of the grandson of Ganga Prasad the mortgagee, mortgaged the property in favour of Ganga Prasad, as the head of the family of the plaintiffs. In the mortgage-deed the money is stated to have been borrowed to pay up a decree obtained by parties of the name of Chunni Lal and Munni Lal against Gandharp Singh, and other debts due by Gandharp Singh and Dalel Kunwar, the mortgagor, and also alleged irrigation charges.

2. The learned Subordinate Judge found that Dalel Kunwar acted in collusion with, and was helped by, the plaintiff Dwarka Prasad and that she tried her utmost to deprive the defendant Ambika Partap Singh of Gandharp Singh's estate; that Dwarka Prasad was trying his very best to secure the whole estate for his own son, setting him up as the real Ambika Partap and also setting up a verbal will by Gandharp Singh in his favour. In his judgment he says: "The widow and Dwarka Prasad knew very well that the defendant (Ambika Partap) had a strong case. They had no hope of success. They therefore tried their best to get hold of some portion of the property, and in order to do so they got up the bond in suit." He then states that "they knew very well that the question of legal necessity would arise" and had one item, namely, the decree of Chuanilal to support a case of legal necessity. As regards the other items he found that they were fictitious and false. But he found that Dalel Kunwar was competent to mortgage the property for the benefit of the minor owner for the sake of saving any portion of it, and that the mortgage to the extent of the amount of the decree of Chunni Lal and Munni Lal was binding upon the defendant Ambika Partap.

3. This ruling is now challenged on the ground that under no rule of law, or equity is Ambika Partap bound to pay any portion of a mortgage executed by a party who could in no way be said to have acted for him, but, on the contrary, resisted his claim in collusion with, and helped by, the plaintiff Dwarka Prasad. This Dwarka Prasad was the chief actor in the transaction, as he himself admits. In his evidence he deposed that the mortgage was executed under his supervision and that he was instrumental in obtaining it.

4. That Dalel Kunwar resisted the claim of the plaintiff and espoused the cause of the false claimant Biudrabai is admitted; that she in no way in the transaction acted or purported to act on behalf of the defendant Ambika Partap Singh, also is not and could not be denied. She repudiated his claim throughout. The question then is whether, despite the adverse attitude of the mortgagor against her husband's adopted son, a mortgage executed by her in collusion with the mortgagee, not as guardian of such son, but in her own right) can be enforced against the son to the extent of a debt which was not a charge on the estate, merely on the ground that the estate was benefited by the payment of such debt. In support of an affirmative answer to this question the well-known case of Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree (1856) 6 Moo. I.A. 393, in which the powers of a manager for an infant heir to create

charges on an estate according to Hindu law are defined," is relied on. In that case the widow of Raja Sheo Buksh Singh, who had died, leaving an only son, an infant, assumed on his death the proprietorship of his estates and the guardianship of the son, and to satisfy debts charged on the estate executed a mortgage describing herself therein as being possessed of the mortgaged property in proprietary right. The son, after he came of age, instituted a suit for the recovery of possession of the mortgaged estate, and to have the mortgage created by his mother set aside. It was held by their Lordships of the Privy Council, reversing the decision of the Sadar Dewani Court at Agra, that the Rani ought to be deemed to have executed the mortgage bond in question as and in the character of guardian of her infant son, and that so far as the estates benefited by the mortgage, it was binding on the owner. Their Lordships also stated that, assuming the bond to have been invalid and ineffectual, the mortgagee would nevertheless be entitled to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual. Now in that case it is to be observed that the suit was a suit by the owner to have a mortgage bond set aside and for possession of the estates comprised therein, and not, as in the present case, a suit by the mortgagee to enforce payment of an alleged mortgage debt by sale of the mortgaged property. The suit was not a suit in which an invalid mortgage was sought to be enforced, but a suit in which possession of mortgaged property was sought to be recovered as against a mortgagee. The plaintiff in that case seeking the assistance of a Court of Equity was bound to do equity. The widow in executing the mortgage did not, as in the case before us, set up any adverse title against her son. On the contrary she recognized his rights. In the course of their judgment their Lordships say: "It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been pro tanto a claim adverse to her son; and it is conceded by the respondents" counsel that she did not claim adversely to her son," and later on, "they consider that the acts of the Rani, cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself or others gave to her; that she must be viewed as a manager inaccurately and erroneously described as "proprietor" or "heir" etc." The facts in the case before us are essentially different. In it the holder of an invalid mortgage is not the defendant, but is the plaintiff seeking to recover by sale of the property included in the. invalid instrument the amount expressed to be secured by it. Dalel Kunwar did not purport to act as manager or agent for the appellant Ambika Partap Singh; on the contrary she had espoused the cause of the mortgagee's grandson, who falsely claimed to be adopted son of Gandharp Singh. She executed the mortgage whilst the suit of Ambika Partap Singh for the recovery of the estates was pending, and that too nominally in favour of the grandfather of the claimant, who was supporting the claim of his grandson against the true owner. That the mortgagee knew all the circumstances cannot be doubted. His son, who acted for him and procured the execution of the mortgage, certainly did, and it cannot be said that any of the parties to the

transaction acted bond fide or honestly. We are at a loss to see under such circumstances on what equitable principle the mortgage so executed can be properly enforced. Whether the plaintiff can recover any part of the sum expressed to be secured by the mortgage in an action for debt, or in any other form, is a question we cannot discuss. Suffice it to say that in our judgment they have no right to ask a Court of Equity to enforce by a decree for sale the invalid mortgage, the subject of this litigation, a mortgage which was executed by Dalel Kunwar with the sinister object of depriving the true owner of his property—a mortgage which owed its existence to a dishonest desire on the part of both the mortgagor and the mortgagee to wrest the estates from Ambika Partap. We do not, therefore, think, for the reasons which we have stated, that the ruling in the case of Hunoomanpersaud Panday is applicable. The essential difference between this case and that is that in the latter the attacking party was the owner who had benefited by the invalid mortgage and sought to recover possession from the mortgagees without restoring the benefit which he derived from them, while in this case the mortgagee is the attacking party who is seeking to recover money alleged to be due on an invalid mortgage by sale of the property which it purported to mortgage.

5. But there is another answer to the plaintiff's claim. The mortgage in suit was executed by Dalel Kunwar on the 17th of January 1894; but prior to that date, namely, on the 27th of June, 1893, Ambika Partap Singh had made an application to the Court for permission to sue in formd pauper is for recovery of the estate of Gandharp Singh, part of which was the subject of the mortgage, Dalel Kunwar. and Bindraban being the defendants. Dalel Kunwar resisted this application, and in resisting it acted as guardian for Bindraban. The application was granted on the 12th of May 1894, and the suit was, as we have already said, successfully prosecuted by Ambika Partap Singh as well in the Court of first instance as in the High Court. There was, therefore, at the date of the execution of the mortgage a contentious suit or proceeding pending, in which the right of Ambika Partap Singh to the property which was comprised in the mortgage was directly in question. Section 52 of the Transfer of Property Act prescribes that during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court. No authority was given to Dalel Kunwar to execute the mortgage. Mr. Sundar Lal, on behalf of the respondents, contended that the section of the Act in question has no application. His argument was that until the application of the defendant-appellant for leave to sue in forms pauperis had been granted, that is, on the 12th of May 1894, there was no suit pending within the meaning of that section, and he relied upon Section 410 of the Code of Civil Procedure, which declares that when an application to sue in formd pauperis is granted and has been numbered and registered, it shall then be deemed the plaint in the suit, and he

argued that there was no suit pending at the date of the execution of the mortgage inasmuch as the application for leave to sue had not at that time been numbered and registered. We cannot agree with him in this contention. It appears to us that so soon as the defendant filed his application for leave to sue, there was a contentious suit, or at least a contentious proceeding, pending within the meaning of the section, and it is clear that that suit or proceeding was at the time being actively prosecuted. In this connection we may cite the ruling of their Lordships of the Privy Council in the case of *Faiyaz Husain Khan v. Prag Narain* ILR (1907) All. 339 to the effect that where a suit is contentious in its origin and nature, it is not necessary that the summons should have been served in the suit in order to make it "contentious" within the meaning of Section 52. Mr. Chaudhri relied upon the explanation to Section 4 of the Indian Limitation Act as supporting his proposition that the suit is instituted in the case of a pauper when the application for leave to sue as a pauper is filed. This section, no doubt, gives support to his argument, but we think that there is no need to fall back upon it in view of the clear and specific language of Section 52 of the Transfer of Property Act.

6. For the foregoing reasons we are of opinion that the Court below should have dismissed the plaintiffs claim in toto. We accordingly allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.