

(1916) 12 BOM CK 0013
In the Bombay High Court

Har Chandi Lal

APPELLANT

Vs

Sheoraj Singh

RESPONDENT

Date of Decision : 18-12-1916

Acts Referred:

Contract Act, 1872 — Section 41

Citation : (1917) 19 BOMLR 444

Hon'ble Judges : Sumner, J;Parker, J;Lawrence Jenkins, J;John Edge, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Parker, J.—This is an appeal from a decree dated the 25th February, 1913, of the High Court (Allahabad), reversing a decree dated the 8th July, 1911, of the Subordinate Judge of Bareilly. The question is whether the appellants are entitled to enforce a mortgage against the respondents.

2. The mortgage in question is dated the 13th November, 1876 and was executed by Jai Chand in favour of Lala Chatri Lal, the mortgaged property being a five-sixths share in the mauza Nagaria Bikrampur. The amount secured was 5,500 rupees. The mortgagor died leaving a widow, Musammat Nandan and a separated nephew, Phul Singh. Under the Hindu law Musammat Nandan had a widow's interest and Phul Singh had a reversion contingent on his surviving her in the property subject to the mortgage. Musammat Nandan could dispose of the property with the concurrence of Phul Singh, but Phul Singh could not, without the concurrence of Musammat Nandan, dispose of the reversion so as to defeat the interests of those who would become entitled if he died in her lifetime.

3. Phul Singh was the owner of the remaining one-sixth share in the mauza in question. On the 6th March, 1879 and the 26th September, 1881, he mortgaged his one-sixth in favour of Lala Chatri Lal for 1,000 rupees and 3,000 rupees, respectively, with interest. Obviously, therefore, Lala Chatri Lal had a better security for the 5,500 rupees due on Jai Chand's five-sixths share than he had

for the 1,000 rupees and 3,000 rupees due on Phul Singh's one-sixth share. On the 9th September and 30th October, 1887, respectively, Musammat Nandan and Phul Singh, executed or were expressed to execute, two mortgages in favour of Lala Chatri Lal. Each mortgage purported to affect the entire mauza, the first being in respect of the principal and interest due on Jai Chand's mortgage of the 13th November, 1876 and the second being in respect of the principal and interest due on Phul Singh's mortgages of the 6th March, 1879 and the 26th September, 1881. If these mortgages were valid, Lala Chatri Lal would get the security of Jai Chand's property for the indebtedness of Phul Singh and the security of Phul Singh's property for the indebtedness of Jai Chand.

4. In the year 1896 the mortgagee instituted a suit on the basis of the two deeds of 1887. The Subordinate Judge decreed the suit in full, so that judgment went for the whole amount of the indebtedness both of Phul Singh and Jai Chand against the entire mauza. Both Phul Singh and Musammat Nandan appealed, but Phul Singh having shortly afterwards died, his appeal was abandoned by his heirs (the first three defendants in the present suit). The appeal of Musammat Nandan however came on for hearing and was allowed by the High Court. It was held that even if she had in fact executed the deeds of 1887, they were not binding on her. The mortgagee appealed to His Majesty in Council. Musammat Nandan died pending the appeal and the first three defendants in the present suit as Jai Chand's heirs were made respondents in her place. The appeal was dismissed. The real effect therefore of the deeds of 1887 must be determined on the footing that Musammat Nandan had never been made a party thereto. On this footing, Phul Singh must be taken to have made his own property a security of Jai Chand's indebtedness and to have tried to make Jai Chand's property a security for his own indebtedness—an attempt which could only succeed if he survived Musammat Nandan, which event did not happen. It follows that on Musammat Nandan's death the first three defendants succeeded to Jai Chand's property, subject to the mortgage of the 13th November, 1876, but free from any further charge purported to be created by Phul Singh. The only difficulty is that the High Court, in allowing the appeal of Musammat Nandan, left the order of the Subordinate Judge standing as against Phul Singh. But the first three defendants do not claim Jai Chand's property as heirs of Phul Singh, but as heirs of Jai Chand and it appears that after Musammat Nandan's death the order of the Subordinate Judge was executed (and in their Lordships' opinion, rightly executed) only as against Phul Singh's own one-sixth share of the mauza and not against Jai Chand's five-sixths share. The real question is whether anything has happened to preclude the mortgagee from enforcing the mortgage of the 13th November, 1876, against the first three defendants as the now owners of Jai Chand's five-sixths share.

5. It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu (inter alia) of the security of the 13th November, 1876. Pursuant to this

intention, he appears to have handed over the mortgage of the 13th November, 1876, to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Musammat Nandan and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Musammat Nandan and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th November, 1876. In their Lordships' opinion, the 41st section of the Indian Contract Act, upon which the High Court relied, has no application to a case like the present. It applies only where a contract has been in fact performed by some person other than the person bound thereby. If the mortgage of the 13th November, 1876, be looked upon as a contract to pay money it cannot be said to have been performed at all, for though Phul Singh's one-sixth share was sold in the suit of 1896, the amount realised was not sufficient to meet the indebtedness of Phul Singh himself. Still less can Phul Singh be said to have performed the contract contained in the mortgage of the 13th November, 1876, if such mortgage be looked on as a contract to give security, for his attempt to create a security on Jai Chand's property admittedly failed. In their Lordships' opinion, therefore, the mortgage of the 13th November, 1876, was in the events which happened wholly unaffected by the mortgages of 1887.

6. It being admitted that if the mortgage of the 13th November, 1876, is a subsisting mortgage, it is not statute-barred, the appeal succeeds and the order of the Subordinate Judge ought to be restored with costs here and below. Their Lordships will humbly advise His Majesty accordingly.