

(1946) 09 AHC CK 0016
In the Allahabad High Court
Case No : Second Civil Appeal No. 127 of 1941

Husain Mirza and others

APPELLANT

Vs

Raghubar Dayal and others

RESPONDENT

Date of Decision : 24-09-1946

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Transfer of Property Act, 1882 — Section 100

Citation : (1946) 09 AHC CK 0016

Hon'ble Judges : Kilwai, J

Bench : Single Bench

Advocate : Niamatullah and Mr. S.M. Hafeez, for the Appellant; M. Wasim and Naziruddin, for Respondents 2 and 4, for the Respondent

Final Decision : Allowed

Judgement

Kidwai, J.—Mohammad Ahmad Khan was taluqdar of Kasmandi Khurd in the Lucknow district. He had several wives and sons and daughters by each wife. In order to provide for all his children he executed a will on the 21st January 1889, by the terms of which his sons got one or more villages and each daughter got a monthly maintenance charged upon the property bequeathed to her full brother or brothers. (At one time it was disputed that the will created any charge but this is no longer so). Mohammad Ahmad Khan died in September 1903 and among the sons three from his fourth wife, Imtiaz Begam, namely Khwaja Ahmad Khan, Mohammad Zaman Khan and Mohammad Said Khan, got the whole of village Aumau and a half share of village Gahdeo. Mst. Masooda a full sister of these legatees, was given an allowance of Rs. 15 per month out of the profits of the two villages.

2. After having obtained the property, the sons of Mohammad Ahmad Khan made various transfers. First of all Mohammad Said Khan mortgaged his two annas four pies share in village Gahdeo in 1915 to Lata Majlis Rai. This was a simple mortgage. In 1921 Lala Majlis Rai, having obtained a decree on the basis of his

mortgage, put that decree into execution and purchased the share himself. Subsequently Lala Majlis Rai transferred this property to Lala Raghubar Dayal. It has been held in a previous litigation between the parties to which Lala Majlis Rai was also a party that the purchase by Majlis Rai was without notice of the charge and consequently that he and his transferees were relieved of the liability of making any payment of the guzara allowance to Mst. Masooda by reason of the second paragraph of Section 100 of the Transfer of Property Act.

3. After this Mohammad Said Khan transferred his five annas eight pies share in village Aumau to his two brothers. In January 1918, the two other sons of Mohammad Ahmad Khan namely Khwaja Ahmad Khan and Mohammad Zaman Khan, mortgaged with possession to Lala Raghubar Dayal by two separate deeds their five annas eight pies share in village Gahdeo and the whole of village Aumau.

4. The mortgagees brought a suit for foreclosure on the basis of the mortgage in their favor in respect of the five annas eight pies share of village Sabdeo and obtained a final decree in May 1925.

5. The equity of redemption in village Aumau was put to sale in execution of a simple money decree and a five annas four pies share was purchased by one Mahesh Prasad who sold it to Lala Raghubar Dayal in 1923. The equity of redemption in the remaining 10 annas 8 pies of village Aumau was also sold in execution of a money decree and was purchased by Mahesh Prasad from whom it has been acquired by Lala Raghubar Dayal.

6. In 1925 Mst. Masooda Begum filed a suit in the Court of the Munsif against her brothers and all their transferees of both the villages. (Thus all the parties to this suit were parties to that suit). The Munsif decreed the suit against all the Defendants, including all the transferees, holding that the transferees had constructive notice. The transferees, appealed and the Subordinate judge of Mohanlalganj, Lucknow by his judgment dated the 31st July, 1926, which is Ex. 8 on the record, partly allowed the appeal and modified the decree of the Munsif. He held that the will created a charge on the properties in favor of the daughters that the guzara was not payable by Lala Majlis Rai both because it was not shown to be a charge on village Gahdeo and because Lala Majlis Rai was a bona-fide transferee for value without notice, and that, in his capacity of mortgagee with possession, Lala Raghubar Dayal was not bound by the charge because he also was a transferee without notice. Thus there was no charge on any portion of Gahdeo. It was, however, held that, as the transferee of the equity of redemption in a five annas four pies share village Aumau, Lala Mahesh Prasad had acquired it with notice and had subsequently transferred it to the sons of Lala Raghubar Dayal who formed a joint family with him, this resulted in the extinguishment of the mortgage to that extent and this property was liable to satisfy the charge. It was also held that the ten annas eight pies share was also acquired by Lala Mahesh Prasad with notice. That property was, therefore also held liable to satisfy the charge. There was an appeal to this Court and by the judgment and

decree dated the 23rd August 1937, this Court upheld the decision of the learned Civil judge (vide Ex. 3).

7. On the 10th September 1938, Mst. Masooda brought the suit out of which this appeal arises against Lala Raghubar Dayal and his sons alone since all the property had by this time come to be vested in them. The Plaintiffs claimed that the whole of the allowance was charged upon village Aumau and that they were entitled to recover it from the Defendants. The plaint also recited the fact that in a previous case for maintenance a decree had been passed against the Defendants and Mehesh Prasad in respect of five annas four pies and ten annas eight pies of Aumau respectively. The present suit was valued at over Rs. 2,000 and consequently brought in the Court of the Civil Judge, Malihabad at Lucknow.

8. The Defendants pleaded that in the previous case it had been decided between the parties that the purchasers of the half share of village Gahdeo were bona fide transferees for value without notice; that owing to the negligence of the Plaintiff the said share is no longer liable; that by this action as well as because of remission the income of the property liable to satisfy the charge has been considerably reduced, consequently a proportionate reduction should be made in the allowance and the Plaintiff is not entitled to get more than Rs. 5 per month; that there was no contract for interest and none is payable; and that the Plaintiff is in no case entitled to a decree against the Defendants personally.

9. In the oral pleadings on the 24th January 1939, the Plaintiff's pleader admitted that the decision in the previous suit barred him and so he could not claim the allowance from Gahdeo but he claimed that the Defendants were also barred by the rule of res judicata from denying their liability as owners of Aumau, for the whole allowance. He withdrew the Plaintiff's prayer for a personal decree, on the same day the Defendants while claiming in this written statement the benefit of the previous judgment with regard to Gahdeo, denied that they were barred by the rule of res judicata. The trial Court framed several issues of which only two issues 2 and 6 are now material. They read:

2. Is the Plaintiff's maintenance liable to any reduction as alleged? If so, by how much?

3. Is the question that the maintenance is not liable to any reduction on account of Gahdeo having been freed from its charge res judicata between the parties?

10. After the issues had been framed and all the evidence led the parties Counsel agreed that

if no reduction is made on account of Gahdeo being released from the charge the defendants will not be entitled to any reduction because the income of Aumau is practically the same.

11. They also agreed that if a reduction is made on the ground of Gahdeo having been released, the amount payable to the Plaintiff would be at the rate of Rs. 6 per month.

12. The trial Court found that it was admitted by the Plaintiff's counsel that both the previous suits were fought out in the Munsif's Court and that the decision in them could not operate as *res judicata*. 2. That it was the duty of the Plaintiff, as charge holder to give notice of her charge to the purchasers of Gahdeo. 3. That owing to the Plaintiff's own default the security had been reduced and so the amount of the money charged was liable to a proportionate reduction.

13. The Court, therefore, passed a decree for allowance at the rate of Rs. 6 per month and refused to allow interest. The decree thus was for Rs. 654 with future interest from the date of the decree at 3 1/4 per cent.

14. The Plaintiff appealed to the District Judge, Lucknow and among the various grounds taken in appeal were the following:

2. That the Plaintiff was entitled to recover her whole maintenance allowance from village Aumau only.

4. That the Appellant was not guilty of any laches and no laches were proved against her.

5. That in no case were the Respondents entitled to a proportionate reduction of the maintenance allowance charged.

7. That no such principle of law can be deduced from the rulings put forward by the Defendants.

8. That in the two previous cases between the same parties which went to the Chief Court, the alleged principles of law were completely negatived and the decree for the whole amount was passed against Aumau only.

9. That the judgment of the highest Court of appeal for the province was entitled to the greatest weight even though the matter was technically not *res judicata*.

15. The learned District Judge says that several authorities were cited before him for the proposition that the charge could be enforced in full against the remaining village Aumau but he felt himself bound by the decision of this Court in *Mst. Asia Begam v. Lala Raghobar Dayal* 1940 O.A. 1310 : 1941 A.W.R. (C.C.) 13 : (1940 O.A. 210). That case arose between a sister of the Plaintiff in the present suit and the right which she claimed was identical with the right claimed in the present suit. In that case also the same pleas were taken by the same Defendants for reduction in the amount of the charge, and the pleas were upheld by a learned single Judge of this Court. The District Judge of Lucknow, following that decision, dismissed the Plaintiff's appeal.

16. The Plaintiff came up in appeal to this Court. During the pendency of the appeal in this Court the Plaintiff died and is now represented on this record by her sons. The questions involved in this appeal are:

1. Whether the whole of the allowance can be recovered from village Aumau only; and,

2. whether the decision in the previous case operates as *res judicata*.

17. I have come to the conclusion that on both the points the decision must be in the Appellants' favor. Section 100 of the Transfer of Property Act makes all the provisions of the Act which are applicable to simple mortgages, applicable to charges. The only exception is that, while a mortgage binds even transferees without notice, a charge does not. This difference is no doubt due to the fact that, unlike a charge, a mortgage is a transfer of property. After this transfer has been effected the owner is no longer left with full proprietary rights but only with the equity of redemption which is all that he can transfer. Consequently the transferee of property subject to a mortgage can only get the equity of redemption and nothing more.

18. It is now well-established that, in a mortgage, every square inch of the property is liable to be taken to satisfy every piece of the debt due. This principle of law is well settled but if any authority is needed, it will be found in the case of *Shah Ram Chand v. Pt. Parbhu Dayal* 1912 A.W.R (P.C.) 32 : 69 I.A. 98 at 107. It is consequently open to the mortgagee to proceed against any portion of the property he chooses. The mortgagee is not concerned with such matters as contribution. On the same principles it is open to a charge holder also to realize his money by enforcing his charge against any portion of the property charged. Indeed it is not contested that, if the whole of the property originally charged, was still liable to satisfy the charge the charge holder could realize his money from any portion he liked. The only question for consideration is whether when a portion of the property has been relieved of the charge, the whole amount can still be realized from the remaining property. The case of *Mst. Asia Begum v. Raghubar Dayal* 1940 O.A. 1310 : 1941 A.W.R. (C.C.) 13, lays down the proposition that in such cases the amount of the charge would be reduced proportionately. The authority proceeds chiefly upon the view of law laid down in *Imam Ah v. Baij Nath Ram Sahu* (1906) 33 Cal. 613, and *Budhmal Kevalchand v. Rama valad Yesu Sattgle* (1920) 44 Bom. 223, and would have been entitled to the greatest respect but I find that the cases upon which *Yorke J.*, relied have not been approved by their Lordships of the Judicial Committee in the case *Shah Ram Chand v. Pandit Parbhu Dayal* 1912 A.W.R (P.C.) 32 : 69 I.A. 98 at 107, and that their Lordships have accepted as correct law the proposition laid down by a Full Bench of the Madras High Court in *Perumal Pillai v. Rama Chettiar* (1917) 40 Mad. 968. In these circumstances the authority of *Asia Begam's* case is very considerably reduced.

19. In *Shah Ram Chand's* case a mortgagee of four villages released one village upon receipt of a certain sum of money. The owner of another of the mortgaged villages thereafter brought a suit for redemption of his village alone upon payment of a proportionate sum of money. Their Lordships discussed the law on the subject and over-ruled the plea holding that this could not be allowed. The case is not on all fours with the present suit but the principles which it lays down provide a valuable guide. Moreover it further increases the authority of the case

of Perumal Pillai. At page 107 of the report we find the following remarks of their Lordships:

It would indeed be unfortunate if the right of contribution which exists as between mortgagors or persons claiming under the mortgagor were found to have been inadequately expressed in the statute. That right arises to them inter se because they cannot require the mortgagee to have recourse to their several properties equally or ratably, the whole debt being charged on every part of the mortgaged property. But it may be doubted whether it gives rise to any equity in them which takes away the right of a mortgagee to diminish his own security except on condition of abating part of the debt. To say nothing of the more stringent penalty of exposing himself to piecemeal redemption. It is not a very plain requirement of good conscience that the right of the mortgagee should give way to the rights of contribution between persons who have taken interests which are subject to the mortgage. However that may be, the first question is whether the release of part of the property by the mortgagee does take away as regards that part the liability to contribute which Section 82 imposes on the different parts. Their Lordships agree with the Full Bench of the High Court of Madras that this proposition is not substantiated, and that a basis for the alleged equity is not made out on the facts of the case.

20. In the case of *Perumal Pillai v. Raman Chettiar* (1917) 40 Mad. 968, a mortgagee brought a suit seeking to realize the amount due to him by sale of a portion only of the property mortgaged to him. He impleaded only the mortgagor and the transferee of the equity of redemption in the item of property which he sought to sell. The Full Bench held that the mortgagee was not bound to reduce his claim to the proportionate sum due in respect of the property sought to be sold but that he was entitled to recover the whole debt from any portion of the property mortgaged.

21. Chitale in Note 43 to Section 60 of the Transfer of Property Act summarizes the law and the note supports the case of the Appellants.

22. The Learned Counsel for the Respondents contended that all this law was really irrelevant for the decision of the present case because he does not dispute the proposition that in the circumstances referred to in *Perumal's* (1917) 40 Mad. 968 case and *Shah Mam Chand's* 1912 A.W.R (P.C.) 32 : 69 I.A. 98 at 107 case the integrity of the mortgage was not split up. He contended, however, that in these cases it was made clear that the right of contribution between the mortgagors and their transferees interest existed while in the present case, since village Gahdeo has been released from all liability to satisfy the charge, he has no claim for contribution against the owners of Gahdeo and, therefore, the amount charged should be abated. He relied upon the case of *Krishna Ayyar v. Uthukumarasawmiya Pillai* (1906) 29 Mad. 217, which lays down the proposition that there is nothing in the Transfer of Property Act to support the view that, as between the mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt ratably upon the

mortgaged properties but that "if the action of the mortgagee-had had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be ratably liable for." He also referred to *Jugul Kishore Sahu v. Kedar Nath* (1907) 34 Cal. 606 : (1907) 34 Cal 606. for the same proposition and he relied upon para 175 of Mukerji's Transfer of Property Act. He points out that the two cases to which he refers are cited in *Perumal's* case and that the Full Bench did not disagree with the views expressed in them. The two cases were decided on the basis of justice, equity and good conscience and in the present case the learned Civil Judge has also relied upon the same principle. In the case of *Shah Ram Chand v. Parbhu Dayal* 1912 A.W.R (P.C.) 32 : 69 I.A. 98 at 107, their Lordships say at p. 107,

It is not a very plain requirement of good conscience that the right of the mortgagee should give way to the rights of contribution between persons who have taken interests which are subject to the mortgage.

23. In a case in which a mortgagee has by his own actions to which neither the mortgagor nor any subsequent transferee from the mortgagor was a party released property from his mortgage in such a way as to make it out liable even for contribution, it is possible that equity may step in and say that since the owners of the remaining property cannot claim contribution from the holder of the property released, the mortgagee should himself suffer and not they but here the case is quite different. In the present case the charge cannot be enforced against the Village Gahdeo by reason of the action of the owners of Gahdeo themselves. They transferred the property without giving their transferees any notice of the charge. Thus it is not the charge-holder but the owner of the property who is responsible for the extinction of the charge. Suppose village Aumau was still in the possession of Khwaja Ahmad Khan and his brothers and the suit had been brought against them to enforce the charge against the property regaining in their possession, they could not possibly plead any equity against the right of the charge-holder. The Respondents who are their transferees with notice of the whole charge are in a no better position than Khwaja Ahmad Khan and his brothers and they too cannot plead any equity in their favour The learned Civil Judge is entirely incorrect in his appraisal of the situation when he says that it was the charge-holder's duty to inform the transferee. It is not shown that the charge-holder had any knowledge of the proposed transfer or was in a position to give notice before (not after) the transfer. I Further it might well be that the charge-holder was satisfied with the reduced security and so even if she know of the proposed sale she did not care to give any notice considering it to be a matter solely between the transferor and the transferee as to who would pay the amount charged the question of contribution between them not being a matter which concerned her. In this view of the matter it remained. open to the charge-holder to realize her entire allowance from any one portion of the property charged and the Court ought not to have reduced the amount of guzara proportionately.

24. Coming to the question of res judicata I find that the case is entirely covered by a Full Bench decision of this Court reported in Maqsood Alt v. H. Hunter 1943 O.A. 158 : O.W.N. 280 (F.B.). In the present case the first suit was brought against all the transferees in the Munsif's Court and the second suit in the Civil Judge's Court because, owing to the lapse of a greater period of time, a higher sum had become due. In Maqsood Alt's case the position was exactly the same. The decision in the previous suit would on the basis of the authority of Maqsood Ali's 8 case operate as res judicata but it is argued that, while in Maqsood Ali's case the same points were in dispute in the two cases, in the present case this is not so. It is no doubt true that, as a reference to Ex. 8, the judgment in appeal of the Civil Judge in the previous case shows, the question of a ratable reduction was not raised. There can, however, be no doubt that it might and ought to have been raised. With regard to a part of the property, the present Respondents had themselves obtained it as transferees without notice and they had obtained the rest as transferees with notice. When the charge-holder claimed the whole amount from them they ought to have pleaded that in any case they were not liable for more than the proportionate share due in respect of the property of which they were still in possession. They did not take any such plea and consequently Explanation IV of Section 11 Code of Civil Procedure. is fully applicable.

25. It was urged that in cases like the present one, in which there is a recurring liability Explanation IV cannot apply and it is only by reason of specific findings on points actually raised and decided that the principle of res judicata can come into operation. The Learned Counsel for the Appellant relied upon Notes 14 and 15 to Section 11 Code of Civil Procedure. contained in Chitaley's Commentary, which deal with rent suits. Note 1b to the same section is of more assistance since that relates to suits for maintenance. The principles upon which Courts are to proceed have, however, been clearly set forth in a very recent decision of their Lordships of the Judicial Committee in Rao Sobhasingh v. Rao Ranjit Singh ILR (1945) Kar. 299 P., which was given in a suit for a share in the. annual offerings, In the previous suit between the same parties the Plaintiff claimed a half share in the whole income from the offerings and his title was upheld and a half share was decreed. In the subsequent suit he made the same claim in respect of subsequent years and it was then pleaded that the Plaintiff was entitled to a half share in the income of one portion only of the offerings, namely, the shamilat khut or joint account. Their Lordships held that this defense might and ought to have been made a ground of defense in the previous suit and was, therefore, to be deemed to have been a matter directly and substantially in issue in that suit within the meaning of Explanation (iv) to Section 11 of the Code of Civil Procedure. This decision is fully applicable to this present case and the plea taken in defense is barred by res judicata. in Maqsood Alt's case also the point raised in the subsequent suit had not been raised in the previous case.

26. The Learned Counsel for the Respondents argued that this plea of res judicata had originally been taken and an issue framed upon it but that it was

subsequently not pressed and there was no ground of appeal based upon it before the District Judge. He, therefore, urged that it should not be allowed to be taken in second appeal. It is quite true that pleas which are taken and then given up cannot be resuscitated in second appeal. In the present case, however, I do not find that the plea was ever given up. The plea was embodied in an issue and it was only at the time of the arguments that the Counsel for the Plaintiff stated that he could not substantiate the plea since the two suits had been tried in Courts of differing jurisdiction. He did not, however, give up the plea and all the evidence required to substantiate the plea was on the record. In the lower appellate Court, also it is true that the plea taken was not of res judicata but nevertheless it was urged that the previous decision was binding. In the grounds of appeal to this Court the plea is clearly taken. All this hesitation seems to have been due to the fact that before the decision in *Maqsood Ali v. H. Hunter* 1943 O.A. 158 : O.W.N. 280 (F.B.) was given it was the generally accepted opinion in Oudh that a Munsif's decision could not be res judicata if the subsequent suit was filed in the Court of the Civil Judge. In that very case, even in the Chief Court, the Appellant did not plead the bar of Section 11 of the CPC but only pleaded that the "principle of res judicata." applied. The Full Bench, however, held that Section 11 of the CPC applied to such a case also. There was thus good reason for the hesitation of the Plaintiff's Counsel and he should not be debarred from raising this point in second appeal. An issue was framed on the point and both the parties had the fullest opportunity of leading evidence upon it. In the grounds of appeal to this Court due notice was given to the Respondents that this plea would be taken. They are thus not prejudiced in any way by allowing this plea to be taken. The question of interest is not involved in this appeal.

27. In the result I allow this appeal, modify the decree of the Courts below and decree the Plaintiffs' suit for a sum of Rs. 1,635 with interest on the amount decreed at the rate of 3 1/4 percent from the date of the decree of the trial Court to the date of realization. The Appellants will get proportionate costs in both the lower Courts and full costs of this appeal. Should the money due not be paid, the Appellants will be entitled to realize it by a sale of village Aumau upon which the decretal amount is a charge.