

(1910) 05 AHC CK 0052
In the Allahabad High Court

Jai Narain

APPELLANT

Vs

Mitthu Lal and Others

RESPONDENT

Date of Decision : 03-05-1910

Acts Referred:

Citation : 6 Ind. Cas. 375

Hon'ble Judges : Tudball, J;Richards, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit brought on the basis of a mortgage dated the 30th August 1880. This mortgage was created by one Deo Sukh in favour of one Gokul Chand whose sons are now the plaintiffs-respondents. In 1887 Deo Sukh created a second mortgage of the same property in favour of one Bhola Math. The latter brought a suit on his mortgage in 1894 impleading only the mortgagor. The prior mortgagee, however, applied to the Court to be made a party to the suit and was so impleaded. The puisne mortgagee put him to the proof of his mortgage and an issue was framed and tried as to whether the prior mortgage was for consideration and also whether or not it had been paid off. The mortgagor himself did not contest the validity of the prior mortgage in any way. The Court held that the prior mortgage was a good one for consideration and had not been paid off and under the law, as it was then understood in these provinces", it ordered the puisne mortgagee Bhola Nath to redeem the prior mortgage, on which condition he was then to bring to sale the property for the joint amount of the two debts. Bhola Nath failed to redeem and the property remained unsold. The heirs of the prior mortgagee have now brought the present suit on the basis of their mortgage making parties the heirs of Deo Sukh the Original mortgagor, one Jai Narain a transferee from those heirs and also Bhola Nath the subsequent mortgagee. The defendant Jai Narain among other defences pleaded that the mortgage was without consideration. The lower Court has held that the point is res judicata by reason of the decision in the former suit and it is

not open to Jai Narain, a transferee from the mortgagor, to raise the point in the present suit. In our opinion the decision of the lower Court is quite correct. It was open to the mortgagor in the former suit to raise this point and moreover it is a defence which he ought to have raised if he had wished to contest the prior mortgage. If Bhola Nath had fulfilled the condition of his decree and had paid off the sum due on the prior mortgage, he could, under his decree, have brought the property to sale in satisfaction of the debt due on both the mortgages and to that sale the mortgagor could have taken no exception whatsoever. Even as the law now stands, if the prior mortgagee were impleaded on the ground of his prior mortgage, the property would then be sold subject to the prior mortgage and would consequently fetch a considerably lower price at the sale in execution. It would be open to the mortgagor to show that the prior mortgage was an invalid one and that there had been no consideration so that his property might be sold free of the prior charge. In our opinion all the parties in the prior suit being before the Court, the mortgagor in the former suit ought, if he wished to contest the prior mortgage, to have put forward the defence, which Jai Narain has now put forward. The mortgagor having failed to do so, it is no longer open to Jai Narain to raise this point in the present suit. This is the only point which arises in this appeal which is, therefore, dismissed with costs including in this Court fees on the higher scale.