(1919) 05 AHC CK 0014

In the Allahabad High Court

Jauhari Singh APPELLANT

Vs

Ganga Sahai and Another RESPONDENT

Date of Decision : 14-05-1919

Acts Referred:
Transfer of Property Act, 1882 — Section 67

Citation : AIR 1919 All 275 : (1919) ILR (All) 631 : 51 Ind. Cas. 107

Hon'ble Judges : George Knox, Acting C.J.;Pramada Charan Banerji, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

George Knox, Acting C.J. and Pramada Charan Banerji, J.—This and the connected appeal No. 89 of 1917 arise out of two suits brought by the plaintiff appellant on the basis of two mortgages. One of these mortgages was executed on the 3rd of February 1902 by Kashi Ram in favour of the plaintiff, Jauhari Singh and his brother, Balwant Singh. The other mortgage is dated the 12th of April, 1902, and was executed by Ganga Sahai, the brother of Kashi Ram, in favour of the same mortgagees. On the 80th of June, 1913, Balwant Singh alone took a usufructuary mortgage from the two mortgagors in respect of the whole of the property mortgaged by them and the consideration for the usufructuary mortgage was the amount of the two simple mortgages of 1902, mentioned above. Jauhari Singh alleged that he had a half share in the two mortgages and he brought those suits to recover his half share of the mortgage money He made parties to the suit the mortgagors and his own brother Balwant Singh. Balwant Singh''s defence was that the amount of the two mortgages had been advanced by him alone and that Jauhari Singh had no interest in the mortgages. The court of first instance accepted this contention and on that ground, amongst others, dismissed the suit. The lower appellate court on the other hand, found that the mortgages were made in favour of Jauhari Singh and Balwant Singh and that both of them owned the two mortgages and the share of Jauhari Singh was one half in each of the two mortgages. But the learned Judge upheld the decree of the court of first instance on the ground that one of two mortgagees could not bring a suit for his share of the mortgage money. This decree of the lower appellate court has been affirmed by a learned Judge of this Court. We are unable to agree with the learned Judge of this Court. When Balwant Singh took a usufructuary mortgage of the property of the mortgagors from both mortgagors in lieu of the amounts of the two mortgages, be gave them a discharge for the two mortgages. As Jauhari Singh has been found to have owned a half share in the two mortgages, that discharge could only operate in respect of the half share of Balwant Singh himself. The two mortgages were, therefore, in law discharged to the extent of one half and as they were discharged to that extent only, the portion of the mortgages which remained undischarged was the half share which belonged to Jauhari Singh This Jauhari Singh is entitled to recover. Section 67 of the Transfer of Property Act, no doubt, provides that one of several mortgagees cannot seek to enforce the mortgage unless there has been a severance of the interests of the mortgagees. This provision in the section was clearly enacted for the benefit of the mortgagor. Balwant Singh can no longer put forward any claim against the mortgagors, and so far as his interests are concerned, there has been a severance of interests of the mortgagees and this has been effected with the consent of the mortgagors. It is true that the mortgagors in this case consented to obtain a full discharge from Balwant Singh; but the legal effect of that discharge was that it operated in respect of Balwant Singh''s own share only. So that in law the act of the mortgagors and Balwant Singh amounted to a severance, with the consent of the mortgagors, of the interest of the mortgagees. The case of Gobind Ram v. Sundar Singh Weekly Notes, 1892, p. 246, has been relied on by the respondents and by the learned Judge of this Court. The facts of that case are not similar to those of the present. We have referred to the paper book in that case and find that what was alleged there was that one of the mortgagees, in collusion with the mortgagors, had given back the mortgage deed to the mortgagor. It was not asserted that a discharge had been given to the mortgagors by one of the mortgagees. We think that that case is no authority as against the appellant in the circumstances of the case before us. The result is that we allow the appeal, set aside the decrees of this Court and of the courts below and decree the plaintiff''s claim with costs in all courts. The mortgagors will have six months from this date to pay off the amount of the decree. Interest will be paid at the contractual rate-up to the date fixed, for payment and thereafter at 6 per cent per annum.

