

(1911) 06 AHC CK 0003
In the Allahabad High Court
Case No : Second Appeal No. 712 of 1910

Mithu Lal and Another

APPELLANT

Vs

Muhammad Muzamil-ullah Khan and Chokhey Singh and
Others

RESPONDENT

Date of Decision : 17-06-1911

Acts Referred:

Citation : (1911) 06 AHC CK 0003

Final Decision : Allowed

Judgement

Richards, C.J.—This appeal arises out of a suit to enforce a mortgage, dated the 21st of July, 1886. The mortgage comprised property in a village called Kamrahwa and also in a village called Abhaipur Rampur. The mortgage was made by one Padam Singh, who was a member of a joint Hindu family. In the year 1888, the same Padam Singh sold the village of Kamrahwa to the defendant appellant. Padam Singh is long since dead. His sons and grandsons are in possession of the village of Abhaipur, while the defendants have ever since the sale of Kamrahwa, been in possession of the same. When the suit was instituted, the plaintiffs sought to sell both villages; but, it having been found that there was no legal necessity for the mortgage, the plaintiffs abandoned their claim against Abhaipur and sought to realize the amount of their mortgage entirely out of the village of Kamrahwa. The court of first instance dismissed the suit. The lower appellate court decreed the suit against the village of Kamrahwa. It has to be admitted, having regard to the authorities, that Padam Singh, as a member of the joint Hindu family and in the absence of necessity, was incompetent to make the mortgage of the 21st of July, 1886, in favour of the plaintiffs. It is, however, contended on behalf of the plaintiffs that the defendants' title has the same flaw, and that they ought not to be allowed to set up the fact that Padam Singh was incapable of making the mortgage. It seems to me that the point is concluded by authority. In the case of (1893) L.R. 20 I.A. 116 (Privy Council) the facts were in principle very similar. A son who, just as in the present case, was a member of a joint Hindu family, mortgaged his undivided interest. Subsequently simple money

decrees were obtained against him. His interest was put up for sale on foot of these simple money decrees and purchased by the father. It was held in a suit to enforce the mortgage that the father was entitled to set up the defence that the mortgage was invalid, notwithstanding that he himself was the purchaser at the auction sale of the son's interest. At page 351 of the report their Lordships say:--"In the present case the interest has passed to Naunidh (the father) not by survivorship but by purchases at sales in execution of decrees. Although it is not the same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of the mortgage deed." It must be remembered in considering the present case that, although originally the defendants acquired their estate by virtue of a deed of sale from Padam Singh, they have long since by limitation acquired title not only against Padam Singh but against the rest of the joint family. In other words the defendants now represent not only the interest of Padam Singh in the village of Kamrahwa but also the interests of the rest of the joint family. The case is in principle just the same as if the sale to the defendants had not been by Padam Singh alone but by the whole joint family. See *Brijbasi Lal v. Gopal Das* Weekly Notes 1908 200. I would allow the appeal.

Banerji, J.

2. This appeal arises in a suit brought by the plaintiffs respondents for sale upon a mortgage executed in 1886 by Padam Singh, deceased, in respect of shares in two villages, namely, Kamrahwa and Abhaipur Rampur. The village Kamrahwa was sold by him to the defendant appellant in 1888. The defendants to the suit were the son and grandsons of Padam Singh and the subsequent transferee of Kamrahwa. The son and grandsons of Padam Singh contended that the mortgage was not made for family necessity. The court of first instance found that there was no necessity for the mortgage of the family property and totally dismissed the suit. The plaintiffs appealed, but in the lower appellate court they abandoned their claim in respect of the village Abhaipur Rampur and pressed it in respect of the village Kamrahwa only. The learned Judge held that so far as that property was concerned the question of legal necessity did not arise, and accordingly passed a decree for sale of the village Kamrahwa. From this decree the present appeal was preferred. It has been found by the lower appellate court on an issue referred to it that there was no family necessity for the loan. The question we have to determine is whether it is open to the transferee from the mortgagor to question the validity of the mortgage on the ground that it was not made for family necessity.

3. In view of the authorities and of the circumstances of this case the question should, I think, be answered in the affirmative. It was held by a majority of the Full Bench in *Mata Prasad and Another Vs. Chandradeo Singh and Sheo Babu Singh and Another* that the father in a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property except for family necessity or to meet an antecedent debt, and the mortgage is invalid even in respect of the father's share in the family property. See also *Kali Shankar v.*

Nawab Singh (1900) I.L.R., 31 All., 507. In (1893) L.R. 20 I.A. 116 (Privy Council) their Lordships of the Privy Council held that the mortgage by a coparcener in joint family property of his undivided share without the consent of his co-sharers is invalid and that the invalidity of the mortgage could be set up by the purchaser at auction of the mortgagor's interests. Following this ruling, it was held in Bhagirathi Misr Vs. Sheobhik and Others, that a purchaser from one co-sharer in joint family property was entitled to contest the validity of the mortgage made by another co-sharer of his undivided share. In Brijbasi Lal v. Gopal Das Weekly Notes 1906 200 a mortgage was made by a member of a joint family of a portion of the family property. It was found that the mortgage was not made for the benefit of the family, and that it was made without the consent of the coparceners. It was held that a purchaser from the coparcenary body was not precluded from questioning the validity of the mortgage. This decision was upheld in appeal under the Letters Patent (L.P.A. No. 74 of 1908, decided on the 26th March, 1909). These cases are authorities for the proposition that a transferee of joint family property is entitled to contest the validity of a transfer made by one of the members of the family. In the present case it has been found that the mortgage made by Padam Singh was not made for family necessity, that his son did not assent to it and that it is invalid as against his son and grandsons. No question arises in this case as to whether the mortgage by Padam Singh was void or voidable, inasmuch as it was not a mortgage of his undivided share of the family property. It, being a mortgage without family necessity, is invalid according to the ruling of the Full Bench in Chandradeo Singh v. Mata Prasad, referred to above. In view of the authorities mentioned above, it is open to a transferee of the property to question the validity of such a mortgage. We have now to consider whether a transferee from the mortgagor himself can do so. Ordinarily he cannot. A mortgagor cannot be allowed to question the validity of his own mortgage and thereby derogate from his own grant. A transferee from him who stands in his shoes has no higher right. In the present case, however, the appellant must be deemed to be a transferee not only from Padam Singh but from the whole of the joint family. The transfer to him was made more than twelve years ago and he has been allowed to remain in possession. It must, therefore, be presumed that the sale to him was for family necessity and with the assent of the other members. It is, therefore, a valid sale, and the appellant represents the other members of the family also. As such, he can set up the invalidity of the plaintiff's mortgage and is not estopped from doing so. For the above reasons I agree in allowing the appeal.

Chamier, J.

4. The plaintiffs in the suit out of which this appeal arises having abandoned their claim against the village Abhaipur Rampur, the facts may be stated thus:--

Padam Singh, who with his son and grandson constituted a joint Hindu family, mortgaged a village called Kamrahwa belonging to the family to the plaintiffs. Two years later he sold the village to the defendant appellant. In the present suit

the plaintiffs seek to enforce the mortgage against the village. The defendant appellant pleads that the mortgage is invalid as it was not made for family necessity. On an issue remitted to the lower appellate court, it has been found that there was no family necessity for the mortgage. The question for decision is whether it is open to the defendant appellant to challenge the validity of the mortgage on the ground stated. None of the cases cited seems to me to be exactly in point. In (1893) L.R. 20 I.A. 116 (Privy Council) a son in a joint family mortgaged his share in the family property. Subsequently the son's interest in the property was put up for sale in execution of a money decree obtained against him and was purchased by the father, the only other member of the joint family. It was found that the father had no notice of the mortgage at the time of his purchase. Their Lordships of the Privy Council held that the interest acquired by the father was sufficient to enable him to set up the invalidity of the mortgage. There is a clear distinction between that case and the one before us. There the father who challenged the mortgage had acquired the rights of the only other member of the family by a purchase which was open to no objection, for it is settled law that the undivided interest of a member of a joint family in the family property can be sold, and the purchaser can, if necessary, work out his rights by partition. Moreover, the father had no notice of the mortgage. In the present case the question whether the defendant appellant had notice of the mortgage at the date of his purchase, has not been gone into, but, apart from that, it is to be noticed that he claims under a transfer which seems to be invalid for the same reason that the mortgage to the plaintiff is invalid.

5. The case of *Brijbasi Lal v. Gopal Das* Weekly Notes 1903 200 is also distinguishable, for the person who set up the invalidity of the mortgage in that case was a person who had acquired title by means of a transfer made by all the members of the family. He was in as good a position as the father in the case of *Balgobind v. Narain Lal*. In the case of *Bhagirathi Misr Vs. Sheobhik and Others*, the plaintiff claimed title under a sale of family property made by a father in a joint family and under a purchase at auction made in execution of a decree passed on a mortgage made by the father. The defendant claimed under a mortgage of the property made by the son, the only other member of the joint family. It seems to have been assumed that the sale and mortgage made by the father were good. If that assumption was correct, the plaintiff was no doubt entitled to a declaration that the mortgage made by the son was invalid.

6. In the first and second cases, and in the third also, if the assumption made was correct, the persons who set up the invalidity of the mortgage claimed the property under a valid transfer, To use the words of their Lordships of the Privy Council, they had acquired an interest in the property sufficient, to enable them to challenge the mortgage. If the mortgages in question in these cases were absolutely void, there was no necessity to consider whether the persons who challenged them and who were in possession of the property had acquired a sufficient interest or not. A person in possession of property can always resist a claim against the property on the ground that no right or title has passed to the

claimant or that an assignment to the claimant was made to defraud the person in possession or was illegal or void or opposed to public policy, but where an assignment is sufficient in law to pass title to the claimant and is only voidable at the instance of a third party, the person in possession cannot, as a rule, challenge the validity of the assignment unless a trial of its validity is necessary for his protection against the claim of another person. If the mortgage to the plaintiffs in the present case was not void altogether, but only voidable at the instance of the son and grandsons, it seems to me extremely doubtful whether the defendant appellant, claiming under a sale by the father alone, which was apparently in itself voidable, if not void, can setup the invalidity of the mortgage. The language used by their Lordships of the Privy Council in the case of *Balgobind v. Narain Lal*, suggests that in their opinion the mortgage by the son was voidable only and not absolutely void. In that view it seems to me doubtful whether the defendant appellant who claims under the father alone is entitled to set up the invalidity of the mortgage. He may possibly be regarded as occupying a stronger position than that of a transferee from the father alone because he has held possession of the property adversely to the whole family since 1888. I need not consider this point, for I feel bound to hold that the appeal should be allowed on another ground. The majority of the Full Bench in the case of *Mata Prasad and Another Vs. Chandradeo Singh and Sheo Babu Singh and Another* seem to have held that a father in a joint Hindu family governed by the Mitakshara cannot execute a mortgage of the joint family property except for family necessity or to meet an antecedent debt, and that the mortgage is in any other circumstances invalid even in respect of the father's share. I prefer the opinion of the minority in that case. The question is, I understand, being taken up to the Privy Council in another case. Meanwhile we are bound by the opinion of the majority, and in accordance therewith I feel bound to hold that the mortgage to the plaintiffs conferred no title upon them. If that is so, it follows that the defendant appellant is entitled to resist the plaintiffs' suit on the ground that the mortgage is invalid. For this reason I agree with the order proposed by the learned Chief Justice.

By the Court--The order of the Court is that the appeal is allowed, the decree of the lower appellate court is set aside, and the decree of the court of first instance restored with costs.