
(1886) 11 AHC CK 0003
In the Allahabad High Court

Parsotam Saran, by his guardian Chiranji	APPELLANT
Vs	
Mulu and Others	RESPONDENT

Date of Decision : 22-11-1886

Acts Referred:

Citation : (1887) ILR (All) 68

Hon'ble Judges : Tyrrell, J;Straight, J;Oldfield, J;John Edge, J;Brodhurst, J

Bench : Full Bench

Final Decision : Allowed

Judgement

John Edge, Kt., C.J.—In this case all the material facts appear to be set forth in the order of reference. There are three questions which are raised by that order, and they are stated in its last three paragraphs.

2. One of these questions is--"Whether the plaintiff has acquired any such rights as would entitle him to maintain the present suit, either in respect of the whole or part of the mortgage-charge." Now one part of this question is really involved in the last paragraph but one of the referring order. In order to answer it properly, I must explain what appears to me to be the rights which the plaintiff has acquired. For this purpose the second paragraph of the referring order must be looked at. I find there that it is found as a fact by the Courts below that Amani Begam did not consent to the agreement with Zia Khan, either on her own behalf or on behalf of her daughters. The fact that Zia Khan professed to sell the whole interest which his father had--that is, his own interest and the interests of his mother and sisters--could not give his assignee rights greater than he himself possessed. Upon this point the findings of the Courts below are conclusive, namely, that Amani Begam did not consent to the agreement which the plaintiff alleged that he had entered into. Under these circumstances, I come to the conclusion that the plaintiff acquired, under the deed of sale, only the interest which Zia Khan took on his father's death, .i.e., 14/32 of his father's estate. This being so, the question is, whether the plaintiff can maintain the present suit in respect of either the whole or a part of the mortgage-charge.

3. In the first place, I am of opinion that he cannot maintain the suit in respect of the whole of the mortgage-charge. He is only the representative of the son of the mortgagee. He does not represent even the interest of one of two or more joint mortgagees. He represents only a part of the interest of a sole mortgagee which has been split up on the sole mortgagee's death. He could not give the mortgagor a good discharge for the whole mortgage-debt, and therefore he could not maintain a suit in respect of the whole of the mortgage-charge. That, I think, is substantially what was pointed out in *Bishan Dial v. Manni Ram* I. L. R. All. 297. The head-note to the report of that case is as follows: "Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person entitled only to one moiety of the debt foreclosed the mortgage as to that moiety and sued the. different mortgagors for possession--held, that the foreclosure was invalid and the suits were not maintainable." At p. 300 of the report the learned Judges say: "A common objection was urged in the Courts below and in this Court that the foreclosure was invalid, in that a person entitled to one moiety of a mortgage-debt cannot require the mortgagees to pay off one moiety of the mortgage-debt or to stand foreclosed of one moiety of the mortgage-money. We must allow the validity of this plea. The whole of the mortgage-debt is due to the persons claiming under the original mortgagees jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid mortgage-debt, except under circumstances which do not exist in this case." I agree in the broad principle that the mortgagors would be entitled to a joint receipt--that is, in cases where this law applies, and it is not apparent that a different state of things was intended here.

4. The case which I have just quoted appears to me an authority on both points, and to show that a person in the plaintiff's position cannot sue for foreclosure or sale either in respect of the whole of the mortgage-charge or in respect of his particular share. The ruling in *Bhora Roy v. Abilack Roy* 10 W. R. 476 is to the same effect. The material portion of the head-note in that case is as follows: "Where several parties have an interest in a mortgage, it is not competent, for one of them to foreclose in respect of his fractional share." In the 4th paragraph of the judgment the following observations occur: "In the first place, it appears that there has been no foreclosure of the mortgaged property as required by law. The plaintiff, as he alleges, was one of certain parties having an interest in the mortgage. We are not aware of any authority to show that any one of such parties is at liberty to foreclose in respect of his fractional share. That is all the plaintiff has done in the present case, and it seems to us, therefore, that, no valid foreclosure having taken place, he is not entitled to sue for possession." There the plaintiff had actually foreclosed, and it was subsequently held that, being only the owner of a fractional share, he could not sue for possession even of that particular share.

5. Again, in the case of *Bedar Bakht Muhammad Ali v. Khurram Bakht Yahya Ali*

Khan, 19 W. R. 315 mentioned in the order of reference, the Lords of the Privy Council laid down this broad proposition: "It cannot be contended that a debtor to a Muhammadan estate is liable to be vexed by a separate suit by every co-sharer in that estate for his share of the debt." Practically, if in this case we allowed the representatives of the different shares into which the mortgagee's interest split up at his death to maintain separate suits for foreclosure or sale, we should be ruling what their Lordships of the Privy Council say could not be contended for.

6. For these reasons I come to the conclusion upon the authorities, so far as they go, that the plaintiff is not entitled, in respect of his own share, to maintain this suit for sale against the whole property, the other parties interested not having been joined. I am also of opinion that he is not entitled to succeed, even in an amended action, in claiming sale of a portion of the property in respect of his own share. I am justified in this view by the manner in which the subject of the mortgagee's rights was considered at the time when the Transfer of Property Act was passed. In that Act one series of sections deals with the rights of the mortgagor and another series with the rights of the mortgagee. Section 67, which is the first section of the latter series, contains the following provision: "Nothing in this section shall be deemed....(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests; under the mortgage." This provision, so far as I can see, merely lays down that such a person shall not be authorized to do under the Act what he could not have done under the law previously in force, and this view appears to be borne out by Sub-sections (a), (b) and (c) of the same section.

7. I am therefore of opinion that the answer to the reference upon this point should be that the suit is not maintainable. Upon another question raised by the order of reference relating to the effect of Section 2 of Act XXVII of 1860, as to which no argument has been addressed to us, holding the views I have above expressed, it is not necessary for me to make any observations.

Straight, Oldfield, Brodhurst, and Tyrrell, JJ., concurred.