
(1918) 11 AHC CK 0013
In the Allahabad High Court

Ram Singh and Others

APPELLANT

Vs

Baij Nath and Others

RESPONDENT

Date of Decision : 20-11-1918

Acts Referred:

Transfer of Property Act, 1882 — Section 60

Citation : AIR 1919 All 126 : 49 Ind. Cas. 353

Hon'ble Judges : Rafique, J;Piggott, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

1. The two Appeals Nos. 1548 and 1549 of 1916 are connected and arise out of one decree passed by the learned Judge of the lower Appellate Court on the 14th of August 1916.

2. The relevant facts are as follows : Paran Singh, Mohan Singh and Jhanda Singh executed a deed of mortgage on the 17th of September 1852 in favour of Natbu Singh and others in lieu of Rs. 1,600 in respect of ten biswas of Tarapur and ten biswas of Mukam. The mortgage was by way of conditional sale and the term was up to the end of October 1862. Both the mortgagors and the mortgagees are dead and the present litigation is between their descendants and certain transferees from some of the heirs of the mortgagees. The suit out of which these two appeals have arisen was instituted by the heirs of Paran Singh, one of the mortgagors on the 3rd of August 1914, in the Court of the Subordinate Judge of Moradnagar for redemption of the Mortgage of 1862. Among the defendants were impleaded the heirs of the original mortgagees, the transferees from the latter, and the heirs of Mohan Singh and Jhanda Singh, the two other original mortgagors. The plaintiffs claimed to redeem the mortgage on the payment of Rs. 1,600. The separate sets of defendants raised various defences, some of which were common to all. It may be noted here that the pro forma defendant, namely, the heirs of Mohan Singh and Jhanda Singh, put in no defense.; The Court of first instance decreed the claim of the plaintiffs. Two

appeals were preferred from its decree by separate defendants. The learned District Judge disagreed with the Court of first instance on the question whether the mortgage in suit subsisted at the time that the claim was brought. One of the pleas in defence was that there was no mortgage executed by the ancestors of the plaintiffs, as alleged in the plaint, but a conditional sale and that after the expiry of the term fixed in the deed the sale had become absolute. Moreover, the act of the original mortgagors themselves had extinguished the mortgage of 1862 and the original mortgagees and after them their descendants had been in possession of the property sought to be redeemed as owners. The learned Judge in considering this plea came to the conclusion that the notices issued by the Tahsildar, one in 1882 at the instance of Paran Singh and the other in 1862 at the instance of Jwala Singh, one, of the mortgages, as also the entries in the revenue papers subsequent to the issue of these notices, showed that the mortgagors had by their, own act extinguished the mortgage. He, therefore, held that there was no subsisting mortgage which the plaintiffs could redeem. The decree of the first Court was accordingly reversed and the claim of the plaintiffs dismissed. Because there were two appeals before the learned Judge from separate, sets of defendants, two decrees were made against the plaintiffs and hence they have preferred two appeals here. Practically there is one appeal and the point at issue between the parties is one and the same.

3. It has been contended and contended very strenuously on behalf of the plaintiffs appellants that there is no evidence on the record in support of the view of the learned Judge that the mortgagors had by any act of their, own extinguished the mortgage of 1862." Moreover, the learned Judge did not quite appreciate the principle of law which he refers to by quoting Section 60 "of Act IV of 1882. We have, therefore, to consider two points in the appeals, namely, first, whether there is any evidence to show that the original mortgagors by their act extinguished the mortgage of 1862 and whether that act of theirs under the law amounts to an extinguishment of the mortgage. The notice of 1862 was issued at the instance of Paran Singh asking for the mutation of names in favour of the mortgagees as owners on the ground of sale. There is nothing in the notice to show what sale it was and whether it was a sale independent of the conditional sale of the 17th of September 1862. There is no evidence on the record" to show that the mortgagors subsequent to the mortgage sold their equity of redemption to the mortgagees prior to the notice issued by the Tahsildar on the 13th of December 1862. In fact there could not have been any, as no mention of it is made in any of the written statements of the contesting defendants. Presumably the sale referred to in the notice is the conditional sale of the 17th of September 1862. The period fixed in the deed having expired at the end of October 1892, the parties inferred that the sale had become absolute. The notice of 1868 was, as we have already said, issued at the instance of one of the mortgagees. In that notice mutation of names is asked in favour of the mortgagees in the column ~ of owners on the basis of possession. No mention of sale is made in it. After the issue of the two notices no doubt the names of the

mortgagees were entered as owners and no objection was taken on behalf of the mortgagors. But a mere admission by a mortgagor or an understanding between him and the mortgagee." that the mortgagee has become the owner cannot extinguish the mortgage or destroy the right of redemption of the mortgagor. In our opinion there is no evidence on the record to show that the mortgagors had by their act extinguished the mortgage of 1862. As to what act would amount to the extinguishment of a mortgage has been well illustrated in several rulings. We would refer here to two. of them, namely, Abdul Rahim v. Madhavrav Apaji 14 B. 78 : 7 Ind. Dec. (N.S.) 509 and Kanhayalal Bhikaram v. Narhar Laxmanshet Vani 27 B. 297 : 5 Bom.L.R. 140, It was laid down in the latter case that it was open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But it must not be part and parcel of the original loan or mortgage bargain. In other words, the act of the parties Chat is referred to in Section 60 of Act IV of 1882 and which is relied upon by the learned. Judge must be one which is independent of the mortgage transaction and is not a part and parcel of it. In the present case all that we can find from the evidence is that the acts relied upon by the defendants were merely those which recognised the conditional sale to have, become absolute and virtually done to enforce the clause in the deed according to which the conditional sale was to become absolute after the expiry of the term. We, therefore, find, that no acts of the mortgagors have been proved to show that they had parted with their equity of redemption or that they had extinguished the mortgage of 1862. This finding, however, does not dispose of all the pleas raised in the case before the learned Judge. He has virtually disposed; of the appeal on a preliminary point. We, therefore, allow the appeal, set aside the decree of the lower Appellate Court and remand the case to it for trial of the other" issues raised before him according to law. Costs of this appeal will abide the event.