

(1909) 01 AHC CK 0025
In the Allahabad High Court

Sat Narain Tewari and after his death his sons and Another APPELLANT
Vs

Ganga Parshad alias Baban Tewari and after his death his son RESPONDENT
Shiam Prasad Tewari

Date of Decision : 30-01-1909

Acts Referred:

Citation : 1 Ind. Cas. 117

Hon'ble Judges : John Stanley, C.J.; Banerji, J

Bench : Division Bench

Judgement

1. The suit which has given rise to this appeal was brought under the following circumstances. The appellants Sat Narain and Jag Narain are the sons of one Sri Kishen who had a brother Guptar. Guptar's son was Jokhu. Jokhu, Sat Narain and Jag Narain formed a joint family. On the 19th of May 1893, Lachmi Upadhia, defendant, executed a simple mortgage for Rs. 744, the property hypothecated being a 6 pie share. The mortgage deed was in favour of Sat Narain alone but the consideration for the mortgage was money which belonged to the joint family and was advanced by Sat Narain on behalf of the joint family as the managing member of it. As Jokhu had a half share in the amount advanced his interest in the mortgage was to the extent of one half. On the 14th of May 1900, Lachmi Upadhia executed two mortgages in lieu of the amount due upon mortgage of the 19th of May 1893, one of which was a usufructuary mortgage and the other a simple mortgage. Both these mortgages were also executed in favour of Sat Narain alone. Jokhu assigned his rights under the mortgage of 1893 and the mortgages of the 14th May 1900 to the plaintiff Ganga Prasad. The suit out of which this appeal has arisen was brought by Ganga Prasad upon the simple mortgage of the 14th of May 1900. It appears that before the two mortgages of the 14th of May 1900 were executed a separation of the family had taken place but it has been found that the mortgage of the 19th of May 1883 remained joint and although Zamindari property was partitioned the mortgage debt remained the property of Jokhu, Sat Narain and Jag Narain. Sat Narain and Jag Narain resisted the claim on the ground that as the simple mortgage of the 14th of May

1900 was executed in favour of Sat Narain alone, the plaintiff had no right to sue on the basis of it, that all that he could claim was Jokhu's share in the money which formed the consideration for that mortgage and that he was entitled to recover that money if at all from Sat Narain alone. This contention was repelled by the Lower Appellate Court which decreed the plaintiff's claim. In our judgment the view taken by the learned Judge is right. He observes It is true that Sat Narain and Jokhu are no longer joint and that they have been litigating with each other but I fail to see that that makes any difference in the equity of the case. If in place of the old security for a debt due to all the mortgagees, Sat Narain accepted fresh security, this latter must enure for the benefit of all the mortgagees and they have a right to enforce it. The debt due on the mortgage I in suit is due to the plaintiff in proportion to his share and he has a right to sue on the mortgage. The mortgage debt is not due to Sat Narain alone." We agree with the learned Judge in holding that as the amount for which the mortgage of the 14th of May 1900 was executed was due not only to Sat Narain but also to Jokhu and Jokhu had a half share in that money, the mortgage substituted for the original mortgage of 1893 must be deemed to be a mortgage executed in favour of Sat Narain, not only for himself but for Jokhu also and in this view the plaintiff standing in the shoes of Jokhu, is entitled to one-half of the amount secured by that mortgage, and the claim brought by the plaintiff was in our judgment maintainable. As, however, the plaintiff was entitled to only a half share of the money due under that mortgage, he could not recover more than one-half of the said amount although he was bound to bring a suit for sale of the mortgaged property for the realisation of the whole amount of the mortgage. The Courts below, in so far as they have decreed to the plaintiff the whole amount of the mortgage, are in error. Although they are right in decreeing a sale of the mortgaged property for the realisation of the whole amount of the mortgage, the decree ought to have declared that out of the mortgage money realized the plaintiff would be entitled to one half only and not to the whole. If the attention of the Court below had been drawn to this the decree would have been prepared accordingly. The plaintiff in his claim only asked for a declaration of his title to a half share and did not seek to recover the whole amount of the mortgage. We may observe that the mortgagor has taken no exception to the plaintiff's claim and to the decree passed in the plaintiff's favour. However the interests of the appellants, Sat Narain and Jag Narain, ought to have been safeguarded in the manner indicated above. We, therefore, vary the decree to this extent that we direct that in the event of the mortgaged property being sold, the plaintiff should be awarded only one-half of the mortgage money that may be realized by the auction sale, the other mortgagees receiving their moiety of the mortgage money. As the appeal has substantially failed, we direct that the appellants do bear the costs of the respondent.