
(1929) 11 AHC CK 0054
In the Allahabad High Court

Sheikh Ahmad Husain

APPELLANT

Vs

Hakim Syed Ibrar Husain and Lala Babu Ram

RESPONDENT

Date of Decision : 11-11-1929

Acts Referred:

Citation : 123 Ind. Cas. 687

Hon'ble Judges : Niamatullah, J; Bennet, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The suit, out of which this appeal has arisen, was brought by plaintiff respondent No. 2 for recovery of Rs. 2,180 principal and interest on foot of a usufructuary mortgage deed dated the 21st of February, 1929, executed by Abrar Husain, defendant No 1, for a sum of Rs. 2,500 in favour of the plaintiff. It appears that the mortgagor had executed a prior simple mortgage deed in favour of one Sethani Chander Kuer in respect of which a sum of Rs. 1,605 was due at the date of the second mortgage, The second mortgagee was accordingly directed to pay off the prior incumbrances, and out of the consideration of the second mortgage a sum equal to that amount was left with the second mortgagee for the purpose. Toe balance of Rs. 895 was paid in cash. The second mortgagee, the plaintiff, was entitled to possession in terms of the mortgage deed in his favour, but it is not disputed now that the mortgagor did not deliver possession to him. The second mortgagee did not pay off the prior mortgagee with the result that the principal amount advanced under the second mortgage should be "considered to be the sum of Rs. 895. Another stipulation contained in the second mortgage deed is that in case the mortgagor failed to deliver possession, the mortgagee would be entitled to interest at the rate of 2 per cent. per mensem. The plaintiff's claim for Rs. 2,180 includes principal and interest at that rate.

2. On the 8th October, 1919, defendant No. 1 sold the property in question to Ahmad Husain, defendant No. 2, for a sum of Rs. 3,500. The sale-deed recites

that the vendor had received the entire consideration, namely, Rs. 3,500, of which Rs. 1,672 was left with the vendee for payment to Sethani Chandar Kuar the prior mortgagee, and another sum of Rs. 900 was left with him for payment to the plaintiff-respondent, and of the balance a sum of Rs. 65 had been received before execution and the remaining sum of Rs. 863 was paid before the Sub-Registrar. The vendee paid off the prior mortgagee but failed to discharge the mortgage held by the plaintiff respondent.

3. The Court of first instance decreed the plaintiff's claim against the defendant No. 1 personally, holding that the mortgage-deed in suit had not been duly proved. It should be mentioned that the defendant No. 2, the purchaser of the mortgaged property, did not enter an appearance and allowed the proceedings to be taken against him ex parte. The defendant No. 2 appealed to the lower Appellate Court, challenging the simple money decree which had been passed against him by the Court of first instance and insisting on a decree for sale of the mortgaged property being passed in case the plaintiff's claim was found to be established. The lower Appellate Court allowed formal evidence to be given in proof of the mortgage deed in suit and held it to be duly proved. Accordingly it decreed the plaintiff's claim for sale of the mortgaged property exempting the defendant No. 1 (the appellant before the lower Appellate Court) from personal liability. The present second appeal has been preferred by the defendant No 2 the vendee, who, it should be noted, did not enter appearance before the lower Appellate Court also. It has been contended by his learned Counsel before us that the mortgage-deed in suit should not be considered to have been duly proved against him in so far as he had no notice of any intention on the part of the plaintiff-respondent to adduce fresh evidence before the lower Appellate Court, and that any evidence taken behind his back should not be considered to be binding on him. He contends, therefore, that the mortgage-deed in suit is still without formal proof so far as he is concerned. We are unable to give effect to this contention. A copy of the grounds of appeal before the lower Appellate Court was duly served upon the defendant No. 2 (appellant before this Court), Ground No. 4 in explicit terms demands a decree for sale of the mortgaged property, and if it was the intention of the defendant No. 2 to contest that relief being granted to the plaintiff, it was his duty to enter appearance before the lower Appellate Court and oppose the application made on his behalf for further evidence. Having allowed the appeal to be heard ex parte, he must abide by the proceedings which could be legitimately taken by other parties to the appeal and allowed by the lower Appellate Court. We are clearly of opinion that the mortgage-deed duly proved by evidence adduced before the lower Appellate Court should be considered to be properly proved against all parties including the appellant.

4. Another contention put forward on behalf of the defendant No. 2 is that he should be allowed to set up the prior incumbrance paid off by him to Sethani Chandar Kuar as a shield, so that sale in execution of any decree which may be passed in favour of the plaintiff respondent should be subject to a prior charge in favour of the defendant No. 2 to that extent. This question was not raised

before the Court of first instance, nor before the lower Appellate Court. It has been taken for the first time in second appeal before us. Apart from this the question is concluded by the Full Bench case of Muhammad Sadiq v. Ghaus Muhammad 7 Ind. Cas. 200 : 33 A. 101 : 7 A.L.J. 914 which has been followed in a subsequent case reported in Makhan Lal v. Natthi 74 Ind. Cas. 640 : 21 A.L.J. 382 : AIR 1923 All. 509. The facts of the Full Bench case and those before us are to identical that it is not possible to distinguish the two cases on any ground. There, as here, a purchaser had been directed to pay off two incumbrances existing on the property sold; the vendor admitted receipt of the consideration and directed prior incumbrances to be paid by the vendee out of funds left with him for the purpose; the vendee discharged one incumbrance and failed to discharge the other. It was held by the Full Bench that these circumstances indicated an intention on the part of the parties to the sale-deed that the incumbrances when paid off by the vendee should be considered to be extinguished, and that the same cannot be subsequently set up as a shield by the vendee. We have already indicated the material terms of the sale-deed in this case, and there is nothing in evidence or in the surrounding circumstances to suggest that it was the intention of the vendee to keep alive the charge arising out of the prior mortgage paid off by him. Under these circumstances, we hold that the appellant is not entitled to set up the prior charge as a shield against the plaintiff-respondent. For reasons given above, we dismiss the appeal with costs.

5. The defendant No. 1 has filed cross-objections, impugning the order of the lower Appellate Court as regards costs. For reasons given in its judgment parties have been made to pay their own costs in the lower Appellate Court. Costs are always in the discretion of the Court, and we cannot see that the discretion was improperly exercised by the lower Appellate Court. We must, therefore, dismiss the cross-objections.