
(1914) 05 AHC CK 0066
In the Allahabad High Court

Shiam Sunder Lal and Others

APPELLANT

Vs

Buddhu Lal and Others

RESPONDENT

Date of Decision : 12-05-1914

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : 24 Ind. Cas. 252

Hon'ble Judges : P.C. Banerji, J;Chamier, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit brought by the plaintiff to enforce a mortgage of the 21st of May 1893 executed by one Ram Narayan. He is dead. The first three defendants are his sons and grandsons. The mortgage was in favour of Brij Kishore and Rup Kishore and the other defendants are the aforesaid Brij Kishore and the legal representatives of Rup Kishore. The plaintiff alleged that Brij Kishore and Rup Kishore were only benamidars for him and that he was the real owner of the bond.

2. This has been found in the plaintiff's favour and it must be taken that he is entitled to maintain the suit. The property mortgaged was acquired in 1873 in the name of Ram Narain. The plaintiff alleged that the property belonged exclusively to Ram Narain and that he was entitled to enforce his mortgage as against it. The defendant's contention was that the property was ancestral property and that Ram Narain was not competent to mortgage it, that there was no family necessity for the loan, that the property belonged to the joint family of which Ram Narain and his brother Durga Prasad were members and that as the sons of Durga Prasad were not made parties to the suit, there was the defect of non-joinder of parties in the suit. The Court of first instance found that the property was acquired by Durga Prasad for himself and Ram Narain and that Ram Narain had a half share in the property. It accordingly made a decree for the sale of a half share. On appeal the learned Judge made a decree for the sale of the

whole of the property. Two appeals were preferred to the Court below, one by the plaintiff and the other by the defendant. Hence two appeals have been preferred to this Court viz., the present Appeal No. 257 of 1913 and the connected Appeal No. 352 of 1913. It is contended on behalf of the defendants that the Court below was wrong in making a decree for the sale of the property mortgaged and in overruling the contention that there was a non-joinder of parties. In our opinion the appellants' contentions are well-founded. The learned Judge found that "the mortgaged property, though purchased with money earned by Durga Prasad, was purchased for himself and his father and brother and, became and was treated as their joint property and is still the joint property of their family, there never having been any partition. It is not the self-acquisition of Ram Narain." Upon this finding the property must be deemed to have been the property of the joint family of which Durga Prasad, Ram Narain and their father Debi Prasad as well as the other members of the family who were born at the time were members. The learned Judge says that as the defendants-appellants are the sons of Ram Narain, it does not lie in them to contend that the mortgaged property did not belong to him. This conclusion of the learned Judge is, in our opinion, erroneous. If, as he found, Debi Prasad had an interest in the property, his grandsons by their birth acquired an interest in the portion of the property which belonged to Debi Prasad and, therefore, they did not in this suit derive their title from Ram Narain alone but are also interested in the property as the grandsons of Debi Prasad. They are consequently not estopped from urging that the property did not belong to Ram Narain alone. The learned Judge has also referred to Section 41 of the Transfer of Property Act. That section has, in our opinion, no application to the case, inasmuch as the plaintiff apparently knew all about the family and cannot be deemed to have been a mortgagee without notice from an ostensible owner. As according to the finding of the learned Judge the property belonged to the joint family, Durga Prasad's sons have an interest in it and they were necessary parties to the suit. Their omission from the array of defendants is a fatal defect in the suit. Lastly, it was contended on behalf of the respondent that a decree might be made in respect of the interest of Ram Narain in the property. But, as according to the finding, the property was joint family property, it could not be said of any definite portion of it that it belonged to any particular member of the family. We are accordingly of opinion that the plaintiff's suit failed and ought to have been dismissed. We allow the appeal, set aside the decrees of the Courts below and dismiss the suit with costs in all Courts including in this Court fees on the higher scale. The objections filed by the respondents under Order XLI, Rule 22, necessarily fail and are dismissed with costs.