Partab and ors. Vs. Nehal Singh

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Court : Allahabad

Decided On : Apr-27-1926

Reported in : AIR1926All676

Appellant : Partab and ors.

Respondent : Nehal Singh

Judgement :

Kanhaiya Lal, J.

1. The suit out of which this appeal arises was brought by the plaintiff-respondent for the recovery of a one-fourth share of the mortgage money due under a mortgage effected by Hira, Naubat and Bakhtawar, sons of Jawahir, and by Makhan, Manphul and Tohi Ram, sons of Nathu, in favour of Sandai, Phulkhan, Azam Ali and Chandi, on the 10th February 1909. The mortgage was effected for a sum of Rs. 3,000, out of which, according to the specification contained in the mortgage deed, three fourths was advanced by Sandal Khan, Phul Khan and Azam Ali, and the remaining one-fourth by Chandi. The mortgagors had agreed to deliver possession of the mortgaged property, but it is admitted that they did not do so. The mortgage-deed contained a condition that if the mortgagees were not given possession over the mortgaged property they would be entitled to recover the mortgage money with interest thereon at 12 per cent, per annum by the sale of the mortgaged property. There was a further condition that the mortgagees would

have a right to recover the mortgage money at any time they liked irrespective of that condition.

2. The mortgagors subsequently sold the entire mortgaged property to the defendant-appellants who paid 3/4ths of the mortgage money to three of the mortgagees. The plaintiff is the purchaser of the right of Chandi, the remaining mortgages. He sued for the recovery of his one-fourth share of the mortgage money from the entire property mortgaged, and he was met by the plea that he could recover it only from a corresponding share of the mortgaged property The trial Court found that the plaintiff could only recover his share of the mortgage money from a corresponding portion of the mortgaged property, namely a one-fourth share; but the lower appellate Court held that the burden of the entire debt was on every part of the mortgaged property given as security, and the mere fact that three of the mortgagees had taken their proportionate share of the mortgage money without obtaining the consent of the fourth did not operate to destroy the integrity of the mortgage or deprive the remaining mortgagee of his right to proceed against the entire property.

3. The lower appellate Court seems, however, to have omitted to consider that the defendant-appellants had after their purchase of the equity of redemption from the original mortgagors, redeemed a 3/4 the share of the same from three of the mortgagees, and had thus acquired the rights of the mortgagees as against the remaining co-mortgagee who is now represented by the plaintiff. The mortgage-deed specifically provided that the three mortgagee, to whose rights they were subrogated, were entitled to a 3/4ths share of the mortgage money and the predecessor-in-interest of the plaintiff was entitled to the remaining one-fourth share. Section 45 of the transfer of Property Act provides that where immovable property is transferred for consideration to two or more persons, the persons in whose favour the transfer is made are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the funds out of which the consideration was paid. Where such consideration is paid out of separate funds belonging to them separately, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the

shares of the consideration which they respectively advanced. Ordinarily a mortgage is treated as indivisible as between a mortgagor and a mortgagee or the parsons who represent their rights, but as between the co-mortgagees themselves or their successors-in-interest their rights are determined by and correspond to such specification of interests as may be contained in the mortgage deed. Here the interests of Chandi were specified in the mortgage deed; and as between him and his co-mortgagees his interest in the property mortgaged must follow the specification and be identical with the interest possessed by him in the consideration money. The defendants appellants possessed both the rights of the mortgagors and of the mortgagees to whom they had paid 3/4 of the mortgage money. The plaintiff admitted in the plaint that the mortgage had been split up by reason of three of the mortgagees having separately realized the amount of their share. If the mortgage was split up the plaintiff cannot recover his remaining share of the mortgage money except from a proportionate part of the mortgaged property. The decisions to which the learned Counsel for the plaintiff respondent has referred are not applicable, because no question of any right between the mortgagor and mortgagee is here in question. The appeal is, therefore, allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs here and in the lower appellate Court including fees in this Court on the higher scale.

Ashworth, J.

4. I concur in allowing this appeal. There were four co-mortgagees. Three of them accepted from the mortgagor their share of the mortgage money. This is a suit by the fourth mortgagee for his share. He was entitled to sue for the whole mortgage money on the ground that the mortgagor could not redeem a portion only of the mortgage. But if he had done so his co-mortgagees would have been entitled to recover from him their share of the mortgage money. He only claims, however, his share of the mortgage money. This being so he can only sue for recovery of his share out of the proportionate share of the mortgaged property. Once he ratifies the payment of three fourths of the mortgage money to his co-mortgagees he must be deemed to have assented to a pro tanto redemption of the property. Apart from this the present mortgagors, by their payment to the co-mortgagees of the plaintiff

of their share of the mortgage money, have acquired the rights of those co-mortgagees against the present plaintiff. Consequently under Section 45 of the Transfer of Property Act they can maintain that the interest of the plaintiff is restricted to one fourth only of the mortgaged property.