

Prag and ors. Vs. Ram Niranjana and ors.

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Court : Allahabad

Decided On : Dec-03-1912

Reported in : 17Ind.Cas.734

Judge : Chamier, J.

Appellant : Prag and ors.

Respondent : Ram Niranjana and ors.

Judgement :

Chamier, J.

1. The facts found by the lower Appellate Court are as follows

2. In April 1887, Akbar Ahir mortgaged his share in a fixed-rate holding to the respondent, Ram Niranjana, for Rs. 40. In May 1892, he mortgaged the same property to one Bhagwan Das. In June 1893, he mortgaged the same property along with a house, trees etc., to Ram Niranjana for Rs. 150, out of which the sum of Rs. 61-8-0 was due upon the mortgage of 1887. In 1899, the heirs of Bhagwan Das sued upon the mortgage of 1892 and obtained a decree for sale in execution of which they themselves bought the holding in August 1901. In that suit, they impleaded Ram Niranjana as a puisne mortgagee. Ram Niranjana had at the time a minor son, Bhagwan Prasad, who was joint with him and was interested in the mortgage. The decree shows that Ram Niranjana did not defend the suit. It is said

that he was in Jail and that he sent a petition from Jail claiming to be a prior mortgagee of the property. The fact that he was in Jail was admitted before me but there is no such petition on the record. By deeds dated 1904 and 1909, the heirs of Bhagwan Das sold the plots of land to the grandsons of the original mortgagor Akbar and it has been found that the real purchaser was Akbar himself.

3. Ram Niranjana and his sons (two were born after the previous suit) have now sued upon the mortgage of 1893. The Munsif dismissed the suit but the Additional Judge on appeal held that the mortgage of 1893 was originally binding upon Akbar's family to the extent of the sum due upon the first mortgage of 1887 and that it could to that extent be enforced against the property in the hands of Akbar and his family, notwithstanding the suit of 1899 and subsequent proceedings. His view was that the sons of Ram Niranjana, not having been impleaded in the previous suit, were not bound by the decree obtained therein and that as the property had got back to the mortgagor, the latter could not be allowed to hold it free of the mortgage which had not been paid off.

4. If the decree of 1899 was binding upon the sons of Ram Niranjana, then it seems clear that the auction-purchasers held the land free of all encumbrances created by the mortgagors and it follows that when Akbar bought the land years afterwards from the auction-purchasers, he also obtained it free from encumbrances.

5. Thus the question for decision is whether the decree was binding upon the eldest son of Ram Niranjana who was not impleaded in the suit (the other sons were born later and may be disregarded). There is no evidence that the plaintiffs in the former suit were aware of the existence of Ram Niranjana's son but they would, no doubt, have discovered his existence if they had made inquiries. They were content to implead the person who appeared to have advanced the money.

6. Reference has been made to cases in which it has been held that a son cannot avoid a decree passed upon a mortgage made by his father merely on the ground that he was not a party to the suit but that he must show that the mortgagee had notice of his interest and that after a sale has taken place in execution, he cannot avoid the sale except upon showing that he was not bound to pay the debt secured by the mortgage.

7. Those cases have little bearing upon the present case. Here the family consisting of Ram Niranjana and his son Bhagwan Prasad were in the position of first mortgagees as regards part of the amount due to them. All that they had to do was to plead and prove the first mortgage, a mere formality, for the existence of the first mortgage was disclosed by the mortgage of 1893, which was admitted by the plaintiffs in that suit. Had they done so, the plaintiffs in that suit would have been required to pay the amount due on the mortgage of 1887. It is the amount now due on that mortgage which has been decreed to them in the present suit. Ram Niranjana was not sued as manager of the family property and being at the time in Jail, he was not in fact in a position to manage that property. The question is whether Ram Niranjana's son was effectively represented in the suit. In my opinion, he was not. In many cases, it is possible to presume that a father represented his sons in previous litigation but in the present case, on the facts no such presumption arises. It appears to me that Ram Niranjana's eldest son was not bound by the decree obtained against his father and, therefore, could have enforced the mortgage of 1887 against the auction-purchasers and that the present defendants-respondents are in no better position. The appeal is dismissed with costs including fees on the higher scale.